

STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

LEWIS FAMILY FARM, INC.,

Petitioner,

v.

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Respondent.

NOTICE OF CROSS - MOTION
TO STRIKE

Hon. Richard B. Meyer

INDEX No. 315-08

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

LEWIS FAMILY FARM, INC.,
SALIM B. LEWIS and BARBARA LEWIS,

Defendants.

INDEX No. 332-08

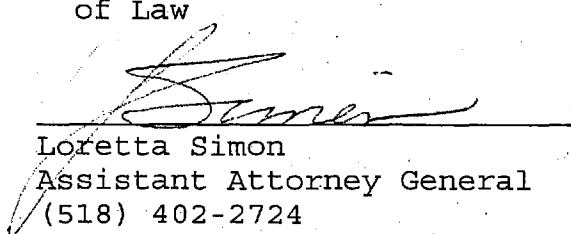
PLEASE TAKE NOTICE that upon the Affirmation of Assistant Attorney General Loretta Simon, dated October 9, 2009, and exhibits attached thereto, in support of its cross-motion to strike certain documents submitted on reply by Lewis Family Farm, Inc. ("Lewis Farm") which are outside the administrative record and may not be considered pursuant to CPLR § 8601(a); the Adirondack Park Agency (the "APA") will move this Court at a Special Term thereof, to be held at the Essex County Courthouse, 7559 Court Street, Elizabethtown, New York 12932, on October 29, 2009, at 10:30 a.m., for an order pursuant to CPLR § 2214:

1) striking petitioner Lewis Farm's submission of new matters on reply and documents outside the Agency's administrative record; and, therefore, not relevant to petitioner's fee application or, in the alternative; 2) if the motion to strike is denied, considering the Agency's motion papers as a sur-reply to address the new matters raised by petitioner; and 3) for such other and further relief as this Court may deem just and equitable. Demand is hereby made for answering papers, if any, to be served at least seven days before October 29, 2009, pursuant to CPLR § 2214(b).

Dated: October 9, 2009
Albany, New York

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for Adirondack Park Agency
Adirondack Park Agency
New York State Department
of Law

By


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Simon Aff.

STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

LEWIS FAMILY FARM, INC.,

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NEW YORK STATE ADIRONDACK
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ADIRONDACK PARK AGENCY,

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LEWIS FAMILY FARM, INC.,
SALIM B. LEWIS and BARBARA LEWIS,

Defendants.

AFFIRMATION OF
LORETTA SIMON
IN SUPPORT OF APA'S
CROSS - MOTION TO STRIKE

Hon. Richard B. Meyer

INDEX No. 315-08

INDEX No. 332-08

LORETTA SIMON, an attorney admitted to practice before the courts of the State of New York, duly affirms under penalty of perjury that:

1. I am an Assistant Attorney General, of counsel to Andrew M. Cuomo, Attorney General of the State of New York, attorney for the Adirondack Park Agency ("APA") in the above-captioned matters. I am familiar with the facts of these cases, in addition, I represented the APA in the 2007 declaratory

judgment action brought by Lewis Family Farm Inc., ("Lewis Farm") against the APA in 2007 (Lewis Family Farm, Inc., v. APA, Essex Co. Sup. Ct., Index No. 498-07, RJI No. 15-1-2007-0153, Hon. Kevin K. Ryan ["Lewis Farm 1"])).

2. I make this affirmation pursuant to C.P.L.R. § 2214(b) in support of the APA's cross-motion to strike sworn statements, documents and new issues submitted for the first time in Lewis Farm's reply papers on its motion for attorney fees under the New York State Equal Access to Justice Act ("EAJA"), CPLR Article 86. The APA moves to strike all new affidavits, affirmations, documents and issues in petitioner's reply on the grounds that these new submissions: 1) are being raised or submitted for the first time in a reply; and/or 2) are outside the Agency's administrative record underlying its March 25, 2008 determination and cannot be considered on a motion for attorney fees.

3. In the event the Court allows any of these newly submitted sworn statements, documents or issues, the APA requests that the Court also allow this APA cross-motion and supporting papers to be admitted as a sur-reply.

4. Specifically, the APA moves to strike the following: Affirmation of Ronald J. Briggs ("Briggs Aff.") undated; Affidavit of Jorge Valero ("Valero Aff.") dated September 17, 2009 and Exhibits A-D thereto; Affidavit of Howard Aubin ("Aubin Aff.") dated September 21, 2009; Affirmation of John J. Privitera

("Privitera Aff.") dated September 23, 2009, to the extent it discusses new issues or issues outside the record, and Exhibits A-G attached thereto.

5. New issues of law, new sworn statements, and new documents raised for the first time in petitioner's reply papers are not appropriately before this Court. None of these issues or documents are part of the record considered by the APA in its challenged determination, thus they may not be considered in petitioner's motion for attorney fees. Moreover, they are plainly prejudicial to the APA. See CPLR 8601(a); see also State Farm Fire & Cas. Co. v. LiMauro, 103 A.D.2d 514, 521-522 (2d Dep't, 1984), aff'd., 65 N.Y.2d 369 (1985) (new substantive issue of law for the first time in a reply brief is improper); Ardolino v. Reinhardt 128 A.D. 339 (1st Dep't 1908) (where new issue is raised in reply brief respondent is placed at a great disadvantage, and applications for removal of the file from consideration will be entertained).

6. The Court's review of an application for attorney fees requires an examination of whether the State's position was substantially justified, and is limited to the administrative record on which the position or decision was made. See C.P.L.R. 8601(a) ("Whether the position of the State was substantially justified shall be determined *solely on the basis of the record before the agency*" (emphasis added); see also Matter of

Scibilia v. Regan, 199 A.D.2d 736, 737 (3d Dep't 1993) (attorney fees award reversed because State's position was substantially justified, based solely on the record before the agency).

7. Here, the Agency certified its administrative record, and its Return and Record was submitted to this Court pursuant to C.P.L.R. § 7804. See Certification of Barbara Rottier dated June 13, 2008 (submitted with the Agency's Answer in Part, Record and Objections in Point of Law dated June 13, 2008). None of the papers in petitioner's reply appear in the Agency administrative record. See Return and Record, Item 1, APA Determination (attached herein as Exhibit A; see pages R. 000858 - 00059 of Record on Appeal).

Newly Submitted Sworn Statements, Issues and Exhibits
Regarding Appropriate Fee Rates

8. Petitioner has the burden of showing by satisfactory evidence (in addition to the attorney's own affidavits) that the requested hourly fees are consistent with the prevailing market rates. See Farbotko v. Clinton County, 433 F.3d 204, 209 (2d Cir. 2005) (attorney fee award pursuant to 42 U.S.C. § 1988 vacated and remanded to determine reasonable hourly rate and recalculation of an award). Lewis Farm did not submit such evidence with its motion. Its submission of purported evidence on reply is patently improper and precludes the State from a proper opportunity to respond.

9. Petitioner in its reply offers the affirmation of a

Affirmation of Loretta Simon
dated October 9, 2009

Lake Placid attorney Ronald Briggs in support of its application for attorney fees. However, Mr. Briggs is not a disinterested, objective affiant, as he readily attests that Lewis Farm is a client of his in real estate matters. See Briggs Aff., ¶ 3; see also Freedman v. Town of Fairfield, 312 Fed. Appx 422, 2009 WL 485158 (2d Cir. Conn. 2009) ("fee applicants should include . . . an expert affidavit by a *disinterested* local practitioner stating the prevailing market rates in the area." (emphasis added) (citations omitted)). Notably, the Briggs affirmation fails to attest to the prevailing market rate, fails to state the affiant's own hourly rate, and simply asserts, without support, that the rate of \$300 per hour is "reasonable." See Briggs Aff., ¶ 8. This is Mr. Briggs' opinion, not evidence, and as such is insufficient. See Farbotko v. Clinton, 433 F.3d 204, 205, 209-210 (findings of fact and evaluation of evidence submitted by the applicant considered necessary in determining prevailing market rate). Accordingly, because attorney Briggs is not a disinterested party, and fails to provide any facts regarding actual hourly rates, his affirmation does not meet evidentiary standards and should be stricken.

10. In its reply papers, petitioner also submits for the first time an affidavit of an administrator with the McNamee law firm who asserts that the requested hourly fee of \$300 for Mr. Privitera is reasonable. See Valero Aff., ¶ 11. Like Mr.

Briggs, Mr. Valero is not a disinterested party, as he is employed by the McNamee firm and could benefit from any fee award. Appended to the Valero affidavit is a document entitled "Survey of Law Firm Economics, 2009 Edition, Custom Report for Firm 4000," which appears to have been prepared for a specific law firm, presumably the McNamee law firm. Absent disclosure of methodology, legends, a key or a summary of the survey, it is impossible to verify the survey's objectivity and applicability, or its sufficiency as evidence in petitioner's fee application. Moreover, the excerpts of the survey contain no examples of reasonable hourly rates for an Article 78 proceeding in Essex County, New York, or even in the larger Adirondack Region. Two of the tables list average rates for New York State as a whole for national law firms with 10 or more offices employing 100 to 250 lawyers. See Valero Aff., Exhibits B and D. However, these national firms are not similarly situated in size or practice to McNamee which, according to its website (www.mltw.com), has approximately 30 attorneys. Nor do the rates in the survey reflect regional differences within New York State, i.e. rates for the Adirondack North Country as opposed to rates for New York City. Equally problematic is Exhibit C to the Valero affidavit, which lists rates for a number of national law firms with branches in Albany, New York. Predictably, rates for firms headquartered in large metropolitan areas (Los Angeles, Atlanta,

Boston) are on average higher than \$300 per hour, and the table wholly fails to indicate what rates are actually paid in the Albany area.

11. The Valero affidavit also questions the 2004 New York State Bar Association ("NYSBA") report submitted by the APA as evidence of prevailing attorney fee rates in the region. See Valero Aff., ¶ 5; see also Affirmation of Loretta Simon dated August 28, 2009 ("8/28/09 Simon Aff."), Exhibit H. However, the NYSBA report - its most recent edition - is specific to New York State and lists rates by regions within the State, unlike the more generalized national data submitted in the Valero affidavit. For instance, rates for New York City, Long Island and Westchester are higher than rates in other areas of the State, which are on average under \$200 per hour. See 8/28/09 Simon Aff., Exhibit H, Figure 9b. While the report is several years old, this Court, in its discretion, may also consider the impact of the global economic downturn on attorney fees. In fact, one of the resources referenced in the Valero affidavit, "Incisive Legal Intelligence," reported on September 14, 2009, that "U.S. law firms saw drops in virtually all key financial performance metrics last year," and equity partners and associates saw decreased earnings of 5.7% and 3.2 % respectively". See Exhibit B.

12. In further support of its fee application, petitioner

submits an affidavit of Howard Aubin for the first time in its reply. Mr. Aubin does not claim to be an attorney and does not provide any evidence regarding prevailing attorney fee rates. Mr. Aubin fails to disclose his occupation, instead referring to himself as "self-employed" and indicates he is "self-taught" regarding "authority of the Adirondack Park Agency." See ¶¶ 1, 4. Like Mr. Briggs, Mr. Aubin is not a disinterested party. He admits to a dispute with a prior member of the APA board and repeatedly references the APA in a negative light. See Aubin Aff., ¶¶ 7-9. Upon information and belief, Mr. Aubin is the "Howard Aubin" who unsuccessfully sued the State of New York (including the APA) over State acquisition of forest lands and conservation easements in the Adirondack Park. See Aubin v. State of New York, 282 A.D.2d 919 (3d Dep't, 2001); appeal denied, 97 N.Y.2d 606 (2001). Mr. Aubin has also sued other agencies involved in protection and management of the Adirondack Park. See e.g., Exhibit C, Town of Black Brook v. New York State, Index No. 07-605 (Sup. Ct., Clinton Co., December 23, 2008, and April 21, 2008) (dispute over the State's authority to acquire lands and conservation easements). As for "substance," Mr. Aubin's affidavit is an ad hominem attack on the APA's responsibility to administer and enforce its statutory responsibilities conferred in the APA Act. See Aubin Aff., ¶¶ 5, 6, 7, 8 (including accusing the APA of "wrongly imposing arduous

conditions upon land use" and "a culture of intimidation fostered by the Adirondack Park Agency"). As a non-attorney, he has no qualifications to comment on an appropriate prevailing rate for attorney fees in Essex County. His prejudicial affidavit is not germane and should be stricken.

13. The Privitera affirmation also raises issues for the first time on reply. Counsel argues that the APA could have avoided the underlying litigation if it had redrawn its land use and development plan map in the area of the Hamlet of Whallonsburg, and attaches a purported petition to obtain such action. See Privitera Aff., Exhibit G. This argument was never presented to the APA during the underlying administrative proceeding leading to its determination, nor are the petition and accompanying memo listed in the documents considered by the Agency. In fact, there are signatures on the petition dated on the date of and after the APA's March 25, 2008 determination. See Privitera Aff., Exhibit G. Accordingly, this new issue and related documents cannot be considered in assessing whether the position of the APA was substantially justified. See C.P.L.R. § 8601(a).

Publicity and Advocacy Website Fees Are Outside the Scope of Article 86

14. Petitioner also asks this Court to award attorney fees for publicity and maintaining its advocacy website. See Privitera Aff. ¶¶ 7, 12. However, petitioner fails to cite any

legal precedent under EAJA - State or Federal - in support of the notion that taxpayers should reimburse a petitioner for publicity expenses or to establish and manage an advocacy website. As a fundamental matter, the statutory language of EAJA does not authorize such expenses, but rather allows: "reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, consultation with experts, and like expenses" See C.P.L.R. § 8602(b).

15. Nonetheless, petitioner's counsel characterizes his publicity expenses as reasonable because he allegedly spoke with the press when he worked for the State, and such activities are reasonable for an attorney "because of the pattern and practice I am aware of within the Department of Law." See Privitera Aff. ¶¶ 8-9. Counsel continues by referencing conversations with State co-workers some twenty years ago, and alludes to policies of the Attorney General at that time regarding press inquiries, in support of the notion that attorney fees should include work on publicity. Counsel's anecdotes are wholly irrelevant here. The issue is not whether attorneys who worked for the Attorney General some 20 years ago (whose policies were likely amended by four subsequent Attorneys General) were allowed to speak to the press. Counsel's activities twenty years ago are completely irrelevant to the adequacy of petitioner's fee application today. The issue is whether Article 86 authorizes petitioner to collect

publicity expenses from the State. It does not.

16. Further, petitioner's request for reimbursement for publicity activities is contrary to the sound public policy of EAJA, which allows fee awards in limited circumstances to a prevailing party for reasonable expenses related to bringing its case to a court of law, not to the court of public opinion. It is simply offensive to ask taxpayers to reimburse a private citizen for private opinions, particularly when those opinions are derogatory toward the State and its employees who are acting in good faith on the State's behalf. See e.g. Exhibit D (August 21, 2009 Plattsburgh Press Republican article). While this "press conference" is not currently included in petitioner's fee application, counsel has asked to supplement the fee application to add additional costs related to the State's opposition. See 8/12/09 Privitera Aff., ¶ 17.

17. Likewise, this Court should not award fees to petitioner for work related to its advocacy website. As with publicity expenses, such fees are not part of the cost of presenting petitioner's case to a court of law, and State taxpayers should not be asked to pay for private websites. Moreover, this Court can take notice that the website for which petitioner seeks fees has posted inflammatory language criticizing government, individual government employees and other private citizens, including listings in a "Hall of Shame" (See

e.g. Exhibit E [www.sblewis.com]) and an apparently unauthorized audio recording of the Appellate Court argument in these cases. See Exhibit F. To the extent petitioner's counsel seeks reimbursement for "uploading" documents to the website, so that he was better able to "dispatch with journalists" and hold down his fees, such arguments are unavailing. Even if the Court determines a fee award for legal work is justified here, hours spent on "tasks that did not require an attorney's attention . . . are not compensable at a reasonable attorney's rate," and are otherwise ineligible for compensation. See Fine v. Sullivan, 1993 US Dist LEXIS 11706 (SDNY) (where government was not substantially justified, EAJA fee award for SSI benefits granted but reduced).

Excessive Fee Request

18. Finally, petitioner's fee application is excessive when compared to other fee awards made in New York. Petitioner seeks \$208,770.06 in fees, plus "any additional fees incurred if the State of New York opposes this motion." See 8/12/09 Privitera Aff., ¶ 17. Petitioner's fee request is greater than the combined total of all EAJA fees awarded in New York State last year, as reported in a 2009 report to the Governor from the State Comptroller. See Exhibit G (Summary of Awards Made Pursuant to Article 86). In fiscal year 2008, the total of all EAJA awards combined (four Article 78 proceedings) was \$197,330.35.

According to the report, three Article 78 petitioners were awarded fees of \$15,000 or less each, and one, a case that was heard by the Court of Appeals and was litigated by an attorney in New York City, resulted in an award of just over \$162,000. Accordingly, petitioner's request here is plainly excessive and unwarranted.

Conclusion

19. Accordingly, the APA requests that this Court grant its cross-motion to strike the affidavits and affirmations of Briggs, Valero, Aubin and all the exhibits thereto, and strike all the exhibits to the Privitera affirmation, and any new matters raised therein, as well as in petitioner's memorandum of law.

Alternatively, should the Court allow these submissions, the APA requests that its cross-motion and supporting papers to be admitted as a sur-reply.

Dated: Albany, New York
October 9, 2009

ANDREW M. CUOMO

Attorney General of the
State of New York
Attorney for Adirondack Park Agency

By: 

LORETTA SIMON
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-----X
In the matter of the apparent
violations of Executive Law
Section 809 and 9 NYCRR
Part 577 by:

**DETERMINATION
OF THE ENFORCEMENT COMMITTEE
Pursuant to 9 NYCRR 581-2.6**

Lewis Family Farm, Inc.

Agency File E2007-041

Respondent.
-----X

The attached substitutes for page 12 of the Enforcement
Committee's determination, striking paragraph 4 on that page, as
authorized by Chairman Stiles and Enforcement Committee Chairman
Wray on April 18, 2008.

Notice of Apparent Violation, the Agency will decline to include that particular violation in its determination of an appropriate civil penalty.

Resolution of the Matter

The Enforcement Committee makes the following determination with regard to disposition of the above violations, which will finally resolve the violations:

- (1) Lewis Farm will apply for a permit for the three new dwellings and the 4-lot subdivision into sites (including retained "lot") by April 14, 2008, by submitting the appropriate major project application.
- (2) By April 28, 2008, Lewis Farm will also submit the following to the Agency:
 - (a) a detailed description of the use of each dwelling and connection to the Lewis Farm agricultural operations;
 - (b) an as-built plan for the septic system and an evaluation by a NYS licensed professional engineer as to whether the installed septic system for the three dwellings complies with NYS Department of Health and Agency standards and guidelines;
- (3) Lewis Farm will reply to any additional information request within 30 days of receipt.
- ~~(4) Lewis Farm will retain all rights of appeal in the project review process, but forgoes the right to challenge Agency jurisdiction and the review clocks otherwise applicable.~~
- (5) Lewis Farm or its employees shall not occupy the three new dwellings located on the corner of Whallons Bay Road and Christian Road unless and until an Agency permit is issued and the civil penalty paid.
- (6) By April 28, 2008, Lewis Farm will pay a civil penalty of \$50,000 to the Agency.

**DETERMINATION OF THE
ENFORCEMENT COMMITTEE
DATED MARCH 25, 2008**



Attachment 2

-----X
In the matter of the apparent
violations of Executive Law
Section 809 and 9 NYCRR
Part 577 by:

DETERMINATION
OF THE ENFORCEMENT COMMITTEE
Pursuant to 9 NYCRR 581-2.6

Lewis Family Farm, Inc.

Agency File E2007-041

Respondent.
-----X

The Enforcement Committee of the Adirondack Park Agency conducted an Enforcement Committee Proceeding pursuant to Agency regulation §581-2.6 on March 13, 2008 regarding the above-referenced matter. The Committee heard oral argument from Agency Associate Attorney Paul Van Cott, and counsel for Lewis Family Farm ("Lewis Farm" or "Respondent") John Privitera, and considered the following documents, constituting the complete record:

- (1) Notice of Apparent Violation served September 5, 2007.
- (2) Lewis Farm's Response to the NAV dated October 4, 2007.
- (3) Staff Notice of Request for an Enforcement Committee Determination dated December 17, 2007, including the following documents and accompanying exhibits: Affirmation of Paul Van Cott dated December 13, 2007, attaching the July 23, 2007 motion of the Agency made to the Supreme Court, requesting dismissal of the Lewis Farm litigation action against the Agency (Exhibit A); the Decision and Order of Honorable Kevin Ryan, Supreme Court Judge (Exhibit B), and the Agency's Cease and Desist Order issued June 27, 2007 (Exhibit C). The Motion to the Supreme Court included the Affirmation of John Banta dated July 23, 2007, Affirmation of Sarah Reynolds dated July 20, 2007 (with its Exhibits A-D), Affidavit of John Quinn dated July 23, 2007 (with its Exhibits A-C), and Affidavit of Doug Miller dated May 20, 2007 (with its Exhibits A-I).
- (4) Affidavit of Doug Miller dated December 12, 2007.
- (5) Affidavit of John Quinn dated December 12, 2007.
- (6) Staff Memorandum of Law dated December 14, 2007.

- (7) A document entitled "The Right to Farm in the Champlain Valley of New York," dated January, 2008 and submitted by Lewis Farm on January 23, 2008. This document includes the Affidavit of Barbara Lewis dated January 17, 2008 with Exhibits A-H, the Affidavit of Klaas Martens dated January 17, 2008, and the Affidavit of John Privitera dated January 18, 2008 with Exhibits A-K.
- (8) Staff's Reply Affirmation by Paul Van Cott dated January 29, 2008, attaching the following correspondence between the Agency and the NYS Department of Agriculture and Markets ("NYS A&M"):
 - (a) Letter dated June 20, 2007 from Bill Kimball, NYS A&M, to Agency Counsel John Banta.
 - (b) Letter dated August 7, 2007 from John Banta to Bill Kimball.
 - (c) Letter dated November 26, 2007 from Patrick Hooker, Commissioner, NYS A&M, to Curtis Stiles, Chairman of the Agency.
 - (d) Letter dated December 4, 2007 from Mark Sengenberger, Interim Executive Director of the Agency, to Patrick Hooker, Commissioner, NYS A&M.
- (9) The Reply Memorandum of Law by Lewis Farm requesting dismissal of the Enforcement Proceeding, dated February 26, 2008, including the Affidavit of John Privitera dated February 26, 2008 with Exhibits A-D.
- (10) Staff's Reply Memorandum of Law by Paul Van Cott dated March 5, 2008, including the Affidavit of Doug Miller dated March 4, 2008 and Exhibit A.
- (11) Letter dated February 21, 2008 by John Lincoln, NY Farm Bureau, to Governor Spitzer, submitted by John Privitera at the March 13, 2008 Enforcement Committee Proceeding.
- (12) Undated statement of Barbara Lewis submitted by John Privitera at the March 13, 2008 Enforcement Committee Proceeding.
- (13) Letter dated March 5, 2008 to Governor Spitzer, signed by Lloyd Moore and Frederick Monroe on behalf of the Adirondack Park Local Government Review Board, submitted by John Privitera at the March 13, 2008 Enforcement Committee Proceeding.
- (14) Undated Proposed Order submitted by John Privitera at the March 13, 2008 Enforcement Committee Proceeding.
- (15) A color copy of the PowerPoint presentation made to the Agency by John Privitera on March 13, 2008.

Following the oral argument, the Enforcement Committee met in Executive Session and unanimously made the following findings and determinations as authorized by 9 NYCRR 581-2.6(d):

Findings

1. Lewis Farm owns an approximately 1,100-acre parcel designated as Tax Map Parcel 49.3-2-27, located in the Town of Essex, Essex County. The lands are classified as Resource Management, Rural Use and Hamlet on the Adirondack Park Land Use and Development Plan Map ("Official Map"). Lewis Farm states that it operates an organic farm on the 1,100-acre parcel.
2. On December 5, 2005, the Agency's Executive Director, Counsel, and Deputy Director of Regulatory Programs visited Lewis Farm at the invitation of Salim Lewis. During the course of the visit, Mr. Lewis told staff that he was planning to build farm worker dwellings, and staff advised him that construction of any new single family dwelling on the Resource Management portion of the property would require an Agency permit.
3. On March 14, 2007, the Agency received a completed application form for a minor project (Single Family Dwelling and Two Lot Subdivision) signed by Barbara Lewis. The project was described as "3 single family dwellings in a farm compound to be used by farm employees exclusively."
4. On March 15, 2007, the Agency sent Barbara and Salim Lewis, and Mark McKenna, their authorized representative, a Notice of Incomplete Permit Application - Receipt of Partial Permit Application.
5. On March 19, 2007, Barbara Lewis advised the Agency's assigned project review officer (PRO) that construction of the three single family dwellings on the Lewis Farm had begun with the installation of foundations and the on-site waste water treatment system ("WWTs"). She also stated that the foundations were located at the corner of Whallons Bay Road and Christian Road. The PRO advised Respondent that the project had been "undertaken" with the installation of foundations and the WWTs, which would constitute a violation, not to proceed with further construction until an Agency permit was obtained, and that he would be referring the matter to the Agency's enforcement division.
6. On March 28, 2007, the Agency Enforcement Officer assigned to the matter visited the Lewis Farm. He determined that the three single family dwelling foundations were installed on lands that are designated Resource Management on the Official Map and also lie within the designated river area.

of the Boquet River, a NYS designated recreational river. Staff also determined that one of these new dwellings is located in the immediate vicinity of a pre-existing dwelling which remained on the site. Lewis Farm planned to remove that dwelling after the three new dwellings were completed.

7. Respondent did not seek or obtain an Agency permit prior to the undertaking of the project to construct the three dwellings. The Town of Essex does not have an Agency-approved local program and hence would not be responsible for the review of any Class B Regional Project located within its borders.
8. Based on these facts, Agency staff concluded that the undertaking of construction of the three single family dwellings constitutes a violation of the subdivision permitting requirements of §§809(2)(a) and 810(1)(e)(3) of the Adirondack Park Agency Act, and of 9 NYCRR §577.5(c)(1) implementing the Rivers Act. In addition, staff concluded that the construction of each of the two single family dwellings not intended as replacement structures constitutes a violation of §§809(2)(a) and 810(2)(d)(1) of the Adirondack Park Agency Act and of 9 NYCRR §577.5(c)(1).
9. On May 14, 2007, Agency staff sent a proposed Settlement Agreement to Respondent, alleging the above-referenced violations. Staff offered to resolve the matter provided Lewis Farm agreed to apply after-the-fact for a permit for the three dwellings located at the corner of Whallons Bay Road and Christian Road, and provided it pay a \$10,000 civil penalty. Staff advised that it appeared likely that a permit could be written for the dwellings in the proposed location.
10. Thereafter, Lewis Farm had numerous contacts with staff, and requested staff to remove the civil penalty as part of the proposed settlement. Staff declined.
11. On June 27, 2007, the Agency received a report that Lewis Farm had resumed construction of the three single family dwellings. On that day, Agency staff issued a Cease and Desist Order requiring Respondent to cease construction of the three single family dwellings.
12. On June 28, 2007, Respondent commenced an action against the Agency in New York State Supreme Court, Essex County, seeking a declaratory judgment that the Agency has no jurisdiction over construction of farm worker housing, or

if it did, that the Agriculture and Markets Law supercedes the Adirondack Park Agency Act.

13. Staff observed the dwelling sites on July 2 and July 6 and observed that Lewis Farms was continuing construction on the three single family dwellings. Three modular houses had been placed on the foundations.
14. In a decision dated August 16, 2007, Supreme Court Acting Justice Kevin Ryan denied Respondent's motion for a restraining order and granted the Agency's motion to dismiss. The decision stated that the Agency did have jurisdiction over the dwellings and the subdivisions created by construction of the dwellings. The Court rejected Lewis Farm's argument that the structures are "agricultural use structures," stating that when read in its entirety, the Adirondack Park Agency Act and the regulations implementing the Wild, Scenic and Recreational Rivers System Act do not exempt the dwellings from Agency jurisdiction. The Court further stated that Section 305-a of the Agriculture and Markets Law did not supersede Agency authority under the Adirondack Park Agency Act or its regulations. Finally, the Court stated that the matter is not ripe for judicial intervention and referred it back to the Agency to proceed with its enforcement procedures.
15. On August 31, 2007, staff observed further construction activity, including that workers were shingling the roofs of the three dwellings. By letter of that date, Agency staff notified Lewis Farm through its enforcement counsel that the Cease and Desist Order remained in effect. Construction continued as observed by staff on September 5, and by December 7, 2007, the three dwellings appeared largely complete. Also, some time after September 5 and before December 7, 2007, the preexisting dwelling which had been located near the new dwellings was removed.
16. The Enforcement Committee takes notice that Lewis Farm has had a previous violation with the Agency, and has also had previous projects approved by the Agency. Moreover, in this case, Lewis Farm had actual notice from senior Agency staff that an Agency permit would be required prior to the construction of any new single family dwelling in the Resource Management portion of its property. It is not reasonable that Lewis Farm failed to seek a jurisdictional determination from the Agency prior to undertaking the construction of the three dwellings, an investment, according to its claim, of \$985,000.

Applicable Sections of Law

The Adirondack Park Agency Act

17. Executive Law §809(2)(a) requires individuals, corporations or any other entity to obtain a permit from the Agency prior to the undertaking of any Class A Regional Project or the undertaking of any Class B Regional Project in any town not governed by an Agency-approved local land use program in the Adirondack Park.
18. Pursuant to 9 NYCRR §570.3(ai)(1), "undertake" is defined as the "commencement of a material disturbance of land, including clearing of building sites, excavation (including excavation for the installation of foundations, footings and septic systems), or any other material disturbance of land preparatory or incidental to a proposed land use or development or subdivision."
19. Executive Law §810(1)(e) lists the Class A Regional Projects in a Resource Management land use area that require an Agency permit pursuant to Executive Law §809(2)(a). These projects include, *inter alia*, any subdivision of land (and all land uses and development related thereto) involving two or more lots, parcels or sites. (Executive Law §810(1)(e)(3))
20. Pursuant to Executive Law §802(63), a "subdivision" is "any division of land into two or more lots, parcels, or sites for the purpose of any form of separate ownership or occupancy (including any grading, road construction, installation of utilities or other improvements or any other land use and development preparatory or incidental to any such division)."
21. 9 NYCRR §570.3(ah)(3) defines a subdivision into sites as occurring where one or more new dwelling(s) or other principal building(s) is to be constructed on a parcel already containing at least one existing dwelling or other principal building, and regardless of whether the existing building is proposed to be removed after completion of the new building(s).
22. 9 NYCRR §573.6(e) states that, where an existing dwelling will not be removed until after the new dwelling is emplaced or constructed, an Agency permit is required for the subdivision into sites which would result if the subdivision is a Class A or Class B Regional Project as provided in Section 810 of the Adirondack Park Agency Act.

23. Executive Law §810(2)(d) lists the Class B Regional Projects in a Resource Management land use area that are subject to Agency review in the Town of Essex pursuant to Executive Law §809(2)(a). These projects include, inter alia, the construction of any new single family dwelling. (Executive Law §810(2)(d)(1))
24. Executive Law §802(58) defines a "single family dwelling" as "any detached building containing one dwelling unit, not including a mobile home."
25. Executive Law §802(8) defines "agricultural use structure" as "any barn, stable, shed, silo, garage, fruit and vegetable stand or other building or structure directly and customarily associated with agriculture use."
26. Executive Law §813 provides a potential civil penalty of \$500 per day for each violation for each day the violation continues.

**The Wild, Scenic, and Recreational Rivers System Act and
9 NYCRR Part 577**

27. The Wild, Scenic, and Recreational Rivers System Act (the "Rivers Act") was enacted pursuant to a legislative finding that many rivers of the state, with their immediate environs, possess outstanding natural, scenic, historic, ecological and recreational values. (ECL §15-2701(1))
28. The Rivers Act was enacted to implement a public policy that certain selected rivers of the state which, with their immediate environs, possess the aforementioned characteristics, shall be preserved in free-flowing condition and that they and their immediate environs shall be protected for the benefit and enjoyment of present and future generations. (ECL §15-2701(3))
29. Section 15-2705 of the Rivers Act states that the functions, powers and duties encompassed by this section shall be vested in the Adirondack Park Agency as to any privately owned part of a river area within the Adirondack Park as defined by law which may become part of this system. Section 15-2709(1) states that, within the Adirondack Park, the Adirondack Park Agency shall make and enforce regulations necessary for the management, protection, and enhancement of and control of land use and development in the wild, scenic and recreational river areas.

30. Pursuant to 9 NYCRR §577.4(a), no person shall undertake a rivers project without first obtaining an agency permit.
31. In recreational river areas, rivers projects include, inter alia, all subdivisions of land in Resource Management land use areas. (9 NYCRR §577.5(c)(1))
32. In recreational river areas, rivers projects include, inter alia, subdivisions and all land uses and developments classified compatible uses by the Adirondack Park Land Use and Development Plan in Resource Management land use areas. (9 NYCRR §577.5(c)(1))
33. Pursuant to §805(3)(g)(4) of the Adirondack Park Agency Act, single family dwellings constitute compatible uses in Resource Management land use areas.
34. Pursuant to 9 NYCRR §577.4(b)(3)(ii), an "agricultural use structure" would not require a rivers permit, except that any such structure must adhere to the structure setback requirements for the recreational river area (150 feet from the mean high water mark).
35. Section 15-2723 of the Environmental Conservation Law provides a potential civil penalty of \$1,000 per day for each violation for each day the violation continues.

Agriculture and Markets Law

36. Section 305-a of the Agriculture and Markets Law provides that local governments, when exercising their powers to enact and administer comprehensive plans and local laws, shall exercise these powers to further the policy and goals in Article 25AA of that law, and shall not unreasonably restrict or regulate farm operations within agricultural districts.

Determination of Violation

37. The Agency finds that under the Adirondack Park Agency Act, farm worker dwellings are "single family dwellings" (or possibly "multiple family dwellings" or "mobile homes," depending on the type of dwelling structure), and not "agricultural use structures." The types of structures specifically listed in the definition of "agricultural use structures" are accessory in nature and related to the storage of agricultural equipment, animals and products ("barn, stable, shed, silo, garage"), or the on-site

accessory use sale of farm products ("fruit and vegetable stand"). The language "...or other building or structure directly and customarily associated with agriculture use" is intended to include other structures of an accessory nature only. This is also evident from the exceptions to jurisdiction in the Adirondack Park Agency Act which often include accessory structures. The definition of "agricultural use structures" does not include, and was not intended to include, the farm owners' or farm workers' dwellings. Rather, the owners' dwelling and farm workers' dwellings (for a single family) more precisely fit under the definition of "single family dwelling" or "mobile home."

38. Moreover, "single family dwelling" and "agricultural use structure" are treated as separate and distinct uses under the Adirondack Park Agency Act. This is evident upon inspection of §805(3) of the Act, which always lists "agricultural use structure" and "single family dwelling" as separate uses for compatibility and jurisdictional purposes under the Act. Similarly, §802(50)(g) lists these two types of uses separately for eligibility for special consideration under the Act regarding the application of the overall intensity guidelines.¹ "Single family dwelling" is a narrowly and specifically defined term and is a keystone of Agency jurisdiction. The term "agricultural use structure" is a broader term for certain agricultural structures, which for the purposes of jurisdiction does not include "single family dwelling." If the drafters of the Adirondack Park Agency Act had intended farm worker dwellings to be included within the definition of "agricultural use structure," it would not have needed to include the phrases "single family dwelling" or "mobile home" separately in either §805(3) or §802(50)(g) in addition to the phrase "agricultural use structure." While the Agency agrees that farm worker housing is important to the enhancement of farm operations, it is not an "agricultural use structure" under the Act, but either a "single family dwelling," "multiple family dwelling," or "mobile home," depending on the type of dwelling.
39. Section 305-a of the Agriculture and Markets Law, of its own terms, does not apply to the Adirondack Park Agency as the Agency is not a "local government." The laws the Agency is charged to implement are state laws enacted by

¹ Note also, that the overall intensity guidelines do not apply unless and until the Agency has jurisdiction over a project.

the legislature and these laws are of equal import to the people of the State of New York as is the Agriculture and Markets Law.

40. The Adirondack Park Agency Act, Rivers Act and Freshwater Wetlands Act, independently and as implemented by Agency regulations, all further the policy and goals in Article 25AA of the Agriculture and Markets Law in significant ways and constitute plans supportive of agricultural operations. These laws do not unreasonably restrict or regulate farm operations, including farm operations outside agricultural districts. In fact, most agricultural uses do not require Agency permits. In addition, these laws provide special privileges for agricultural uses, including under the Adirondack Park Agency Act an exception to the application of the overall intensity guidelines for all farm structures including farm worker housing (§802[50][g]). However, that section regarding application of the overall intensity guidelines cannot be read to impact Agency jurisdiction over the construction of dwellings or the subdivision of land (as defined under the Adirondack Park Agency Act and implementing regulations) when such actions constitute a Class A or B Regional Project. The Agency fully supports agricultural uses in the Park, but will administer its jurisdiction as written to ensure that there is "no undue adverse impact" on the resources of the Park.

**First Violation - Subdivision under the
Adirondack Park Agency Act**

41. Pursuant to Executive Law §§809(2)(a) and 810(1)(e)(3), a Class A Regional Project permit is required from the Agency prior to any subdivision of Resource Management lands into sites.
42. Lewis Farm violated Executive Law §§809(2)(a) and 810(1)(e)(3) by failing to obtain a permit from the Agency prior to subdividing the Lewis Farm into sites by the construction of three new single family dwellings on its property in the Town of Essex, Essex County, located at the corner of Whallons Bay Road and Christian Road.

Second Violation - Subdivision under the Rivers Act

43. Pursuant to 9 NYCRR §577.5(c)(1), a permit is required from the Agency prior to any subdivision into sites of Resource Management lands in a river area.

44. Lewis Farm violated 9 NYCRR §577.5(c)(1) by failing to obtain a permit from the Agency prior to subdividing the Lewis Farm into sites by construction of three new single family dwellings on its property in the Town of Essex, Essex County, located at the corner of Whallons Bay Road and Christian Road.

Third Violation - New Dwellings under the
Adirondack Park Agency Act

45. Pursuant to Executive Law §§809(2)(a) and 810(2)(d)(1), a permit from the Agency is required prior to the construction of a single family dwelling on Resource Management lands.
46. Respondent is committing three separate violations of §§809(2)(a) and 810(2)(d)(1) by failing to obtain a permit from the Agency prior to constructing three new single family dwellings on its property in the Town of Essex, Essex County. The pre-existing dwelling was not removed prior to construction of the three new dwellings and hence a permit was required for all three; the "replacement" non-jurisdictional option did not apply (9 NYCRR §573.6(e)). However, as staff did not include the third dwelling in its Notice of Apparent Violation, the Agency will decline to include that particular violation in its determination of an appropriate civil penalty.

Fourth Violation - New Dwellings under Rivers Act

47. Pursuant to 9 NYCRR §577.5(c)(1), a permit from the Agency is required prior to the construction of a single family dwelling on Resource Management lands in a river area.
48. Lewis Farm committed three separate violations of Executive Law 9 NYCRR §577.5(c)(1) by failing to obtain a permit from the Agency prior to constructing three new single family dwellings on its property in the Town of Essex, Essex County. In a designated river area, the replacement of a preexisting dwelling will require a permit unless the new dwelling is located "on the same foundation or same location"; it is not sufficient for the replacement structure to be in the "same immediate vicinity" (see and compare 9 NYCRR 573.6[a] with 577.7[b]). In this case, none of the three new dwellings was located "on the same foundation or same location" as the pre-existing dwelling and hence all required a permit under 9 NYCRR §577.5(c)(1). However, as staff did not include the third dwelling in its

Notice of Apparent Violation, the Agency will decline to include that particular violation in its determination of an appropriate civil penalty.

Resolution of the Matter

The Enforcement Committee makes the following determination with regard to disposition of the above violations, which will finally resolve the violations:

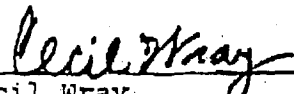
- (1) Lewis Farm will apply for a permit for the three new dwellings and the 4-lot subdivision into sites (including retained "lot") by April 14, 2008, by submitting the appropriate major project application.
- (2) By April 28, 2008, Lewis Farm will also submit the following to the Agency:
 - (a) a detailed description of the use of each dwelling and connection to the Lewis Farm agricultural operations;
 - (b) an as-built plan for the septic system and an evaluation by a NYS licensed professional engineer as to whether the installed septic system for the three dwellings complies with NYS Department of Health and Agency standards and guidelines;
- (3) Lewis Farm will reply to any additional information request within 30 days of receipt.
- (4) Lewis Farm will retain all rights of appeal in the project review process, but forgoes the right to challenge Agency jurisdiction and the review clocks otherwise applicable.
- (5) Lewis Farm or its employees shall not occupy the three new dwellings located on the corner of Whallons Bay Road and Christian Road unless and until an Agency permit is issued and the civil penalty paid.
- (6) By April 28, 2008, Lewis Farm will pay a civil penalty of \$50,000 to the Agency.

- (7) Agency staff is directed to review the application for the three dwellings and the subdivisions promptly, towards the goal of issuing the after-the-fact permit in time for farm worker occupancy of the dwellings for the 2008 growing season. However, that can only happen if the Respondent responds immediately and favorably to this determination and submits the required information and penalty. The Agency will not proceed with review of the application unless and until the civil penalty is paid, the information requested above is submitted, and the dwellings remain vacant until approval is issued.

DATED: Ray Brook, New York
March 25, 2008

ADIRONDACK PARK AGENCY

BY:


Cecil Wray

Chair, Enforcement Committee

EXHIBIT B.



REUTERS

Print | Close this window

Incisive Legal Intelligence Survey: FY 2008 Per Lawyer Revenues Drop, Reflecting Flat Billing Rates and Decline in Billed Hours

Mon Sep 14, 2009 10:25am EDT

NEW YORK--(Business Wire)--

The 2009 Survey of Law Firm Economics by Incisive Legal Intelligence, a leading source of business intelligence for the legal profession, reveals that participating U.S. law firms saw drops in virtually all key financial performance metrics last year. While average hourly billing rates for equity partners reached \$332, an increase of less than one percent over the prior year, the hours billed by the average partner decreased by two percent to 1,681. Average revenues per lawyer reported by participating firms were \$413,086, representing a decrease of 4% from the prior year. The study reports on annual financial performance; compensation; billing rates and hours; and other data, related primarily to small and mid-sized law firms (2 - 150 lawyers) in FY 2008. More than 190 law firms employing more than 12,000 lawyers participated in the survey, which has been conducted since 1972. For further information, or to purchase a copy of the survey, visit www.incisivesurveys.com.

Among the survey's other findings:

- * The average equity partner earned \$352,569 in 2008 compared to \$374,049 in 2007, a decrease of 5.7%.
- * Overhead expenses decreased by 1.8 percent from the prior year to \$167,256 per lawyer.
- * It takes the average law firm 4.6 months to receive payment after doing billable work for a client.
- * The average billing rate for associates was \$213 per hour, a decrease of 3.2% from last year's survey results.

"The Survey of Law Firm Economics is a unique resource for law firms seeking to compare their operational and financial performance on multiple levels, against comparable firms in size, geography and practice specialty," said Kevin Iredell, vice president, legal business solutions at ALM. "For 37 years, a wide variety of firms have relied on the Survey as a primary tool for performance analysis and benchmarking."

Data is presented nationally, by firm size, by geographic location, by practice area specialty, by population area size, by year admitted to bar and by years of experience. A companion study, the Small Law Firm Economic Survey, 2009 Edition, specifically for law firms with 20 or fewer lawyers, is also available. Additional information can be obtained by contacting Iredell at (212) 457-9500/kevin.iredell@incisivemedia.com, e-mailing incisivesurveys@incisivemedia.com or calling 1-(888) 782-7297.

Incisive Legal Intelligence offers detailed business information for and about the legal industry, focused on the top U.S. and international law firms. The division's online research Web service, www.incisivelegalintel.com, provides subscribers with direct, on-demand access to ILI's extensive database of surveys, rankings and lists related to law firms and the legal industry. The site also includes an online store where non-subscribers can, on an individual basis, purchase and download preformatted individual law firm reports, ILI Research reports, and selected current-year survey data. Incisive Legal Intelligence is a division of ALM.

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Peters & Feldman for ALM
Lee Feldman, 203-341-8922
lfeldman@alm.com

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Thomson Reuters journalists are subject to an Editorial Handbook which requires fair presentation and disclosure of relevant interests.

EXHIBIT C



Supreme Court and County Court of the County of Clinton
Clinton County Government Center
137 Margaret Street - Suite 317
Plattsburgh, New York 12901

TEL (518)565-4657

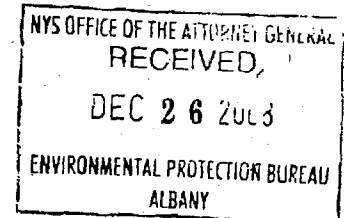
PATRICK R. MCGILL
Acting Supreme Court Judge
and County Court Judge

December 23, 2008

Jani L. Spurgeon
Principal Law Clerk

Barbara V. Maille
Secretary

James E. Morgan, Esq.
GALVIN & MORGAN
217 Delaware Avenue
Delmar, New York 12054



Re: **CLINTON COUNTY SUPREME COURT**
TOWN OF BLACK BROOK, et.al., v NEW YORK STATE, et.al.
Index #07-605
RJI #2007-0287

Dear Mr. Morgan:

Attached herewith, **for filing and service**, please find the original Decision and Order dated today with regard to the above-entitled matter. As indicated in the last paragraph on page three, all original pleadings and exhibits have been filed with the Court Clerk for filing with the County Clerk, and a courtesy copy of the decision and order has been sent to opposing counsel.

Sincerely yours,

PATRICK R. MCGILL
Acting Supreme Court Justice

PRM/bvm

cc: **Lisa M. Burianek, Esq., Assistant Attorney General**
Attorney for Defendants
Jan Lavigne, Court Clerk II (w/ all originals and copy of letter)

At a Special Term of Supreme Court of the State of New York, held in and for the County of Clinton, at the Clinton County Government Center in the City of Plattsburgh, New York, on this 23rd day of December, 2008.

P R E S E N T: HONORABLE PATRICK R. MCGILL
Acting Justice Supreme Court

**TOWN OF BLACK BROOK; RICKY NOLAN, as
TOWN SUPERVISOR; and HOWARD AUBIN,
individually and as a member of the TOWN OF
BLACK BROOK TOWN BOARD,**

Plaintiff,

-against-

**NEW YORK STATE and NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL
CONSERVATION,**

Defendant.

**DECISION
AND
ORDER**

**Index #07-605
RJI #2007-0287**

**APPEARANCES: LISA M. BURIANEK, ESQ., Assistant Attorney General
Attorney for Defendants
JAMES E. MORGAN, ESQ., Attorney for Plaintiffs**

McGILL, J.:

Before the court is a motion for summary judgment, dated August 24, 2007, brought on by the State of New York and the New York State Department of Environmental Conservation, supported by the attached affidavits of John Keating (with exhibits), Beverly Moras, Thomas D. Martin, and Eric Selin, and by a memorandum of law of Lisa M. Burianek, Esq., dated August 24, 2007; a memorandum of law in opposition dated October 31, 2007, by James E. Morgan, Esq.; and affidavit in opposition by James E. Morgan, Esq., dated November 2, 2007; a supplemental affidavit of John Keating dated November 8, 2007; a memorandum of law in further support of motion of Lisa M. Burianek, Esq., dated November 8, 2007, a second supplemental affidavit of John Keating dated

August 29, 2008; a memorandum of law in further support of motion of Lisa Burianek, Esq., dated August 29, 2008; an affidavit of Joseph J. Martens dated October 15, 2008; an affidavit in support of motion to dismiss of Dennis J. Phillips, Esq., dated October 29, 2008; and an affidavit in opposition of James E. Morgan, Esq., dated November of 2008. On April 21, 2008, this court issued a decision and order staying the above-mentioned summary judgment motion until the joinder of Lyme Adirondack Timberlands I, LLC, as a necessary party to the action.

On December 1, 2008, the court conducted a conference and heard oral argument on the issues presented by the motion. Present at the time was Lisa Burianek, Esq., Assistant Attorney General, on behalf of the defendants; and James E. Morgan, Esq., appearing by Mark V. Cowen, Esq., on behalf of the plaintiffs.

The decision and order of this court dated April 21, 2008, directed Plaintiff Town of Black Brook to join the Lyme Adirondack Timberlands I, LLC, as a party in the action within 60 days of the order or by June 21, 2008. The affidavit of Dennis J. Phillips, Esq., establishes that no action joining Lyme Adirondack Timberlands I, LLC, as a party in the action has been accomplished as required by the order.

As set forth in the order of April 21, 2008, this court cannot reach the issues presented until the necessary parties are joined so that a proper and full determination can be rendered. This court appreciates the multiple maladies suffered by counsel for the plaintiffs since the onset of this action but the many inquiries made by all concerned in moving this matter to a conclusion prevents this court from excusing such non-action for such a period of time.

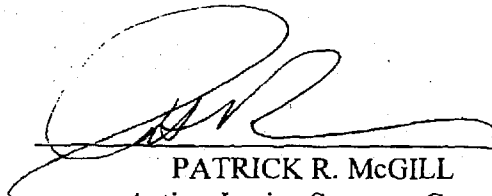
NOW, therefore, based on the above-mentioned, it is hereby

ORDERED that the action herein is **DISMISSED** without prejudice on the basis of non-joinder and failure to comply with this court's prior order; and it is further

ORDERED that this determination of dismissal is not determinative of any of the issues presented by the pleadings herein.

This is the decision and order of the court. The original of this decision and order is returned to plaintiffs' counsel who shall enter same and serve with notice of entry upon defendants' counsel. All original motion papers held by chambers have been given to the Court Clerk for filing with the Clinton County Clerk as well as all exhibits submitted. Courtesy copies of this order will be mailed by the court to all counsel.

ENTER:



PATRICK R. MCGILL
Acting Justice Supreme Court

Dated: Plattsburgh, New York
December 23, 2008



Supreme Court and County Court of the County of Clinton
Clinton County Government Center
137 Margaret Street - Suite 317
Plattsburgh, New York 12901

TEL. (518)565-4657

April 21, 2008

Jani L. Spurgeon
Principal Law Clerk

Barbara V. Maille
Secretary

PATRICK R. MCGILL
Acting Supreme Court Judge
and County Court Judge

Ms. Jan Lavigne, Chief Clerk II
Supreme Court Clerk's Office
Clinton County Government Center
137 Margaret Street
Plattsburgh, New York 12901

Re: **CLINTON COUNTY SUPREME COURT**
BLACKBROOK, et.al., v NEW YORK STATE, et.al.
Index #07-605
RJI #2007-0287

Dear Ms. Lavigne:

Attached herewith please find the original Decision and Order dated today with regard to the above-entitled matter. Copies of same have been sent to counsel indicated below.

Sincerely yours,

A handwritten signature in black ink, appearing to be "P. McGill", written over a horizontal line.

PATRICK R. MCGILL
Acting Supreme Court Justice

PRM/bvm

cc: James E. Morgan, Esq., Attorney for Plaintiffs
~~Lisa M. Bumanek, Esq., Assistant Attorney General~~

At a Special Term of Supreme Court of the State of New York, held in and for the County of Clinton, at the Clinton County Government Center in the City of Plattsburgh, New York, on this 21st day of April, 2008.

P R E S E N T: HONORABLE PATRICK R. MCGILL
Acting Justice Supreme Court

**TOWN OF BLACK BROOK; RICKY NOLAN, as
TOWN SUPERVISOR; and HOWARD AUBIN,
individually and as a member of the TOWN OF
BLACK BROOK TOWN BOARD,**

Plaintiff,

-against-

**NEW YORK STATE and NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL
CONSERVATION,**

Defendant.

**DECISION
AND
ORDER**

**Index #07-605
RJI #2007-0287**

McGILL, J.:

INTRODUCTION

Pending before the court is a motion for summary judgment brought by the State of New York (NYS) and the New York Department of Environmental Conservation (DEC), by notice of motion dated August 24, 2007, with supporting affidavits and exhibits; an affidavit in opposition dated November 2, 2007, of James E. Morgan, Esq., and the reply supplemental affidavit dated November 8, 2007, of John Keating. The defendants submitted a memorandum of law dated August 24, 2007; the plaintiffs submitted a memorandum of law in opposition dated October 31, 2007; and the defendants submitted a supplemental memorandum dated November 8, 2007.

The defendants request dismissal of the complaint on the basis of a lack of legal capacity, failure to join a necessary party, and lack of subject matter jurisdiction. The defendants assert that the State has authority to acquire interests in lands, both by way of fee title and by conservation easements, via various funding methods and through provisions of the Environmental Conservation Law. The funding for these acquisitions is divided among various accounts and relates to the different purposes for acquisition under the Environmental Protection Act (Act) of 1993.

LACK OF STANDING

The defendants assert that the plaintiffs lack standing, or basis, to challenge the acquisition of lands within their jurisdiction for two reasons:

1. They have failed to adequately exercise their veto rights, as set forth in Section 54-0303[5] of the ECL; and
2. Even a proper veto would have been ineffective since the project was funded by monies from sources other than the Environmental Projection Fund, thus taking the project out of the purview of Section 54-0303[5].

Clearly the project was initiated under the guidelines of the State Open Space Plan, under ECL 54-0303, "Open space land conservation projects." From the submissions, the defendants have raised an issue as to whether the Town of Black Brook effectively transmitted its veto resolution regarding the land acquisition. Assuming that the veto was properly made by the Town, the next issue is whether such a veto is ineffective if funding for the project is provided from sources other than the Environmental Projection Fund.

Assuming that the veto was properly interposed by the plaintiff, does the law allow the defendants to circumvent the clear intent of the statute by resorting to an alternative source of funding? This issue is addressed by the Keating Affidavit. There, the defendants assert, without stated authority, that a switch of the source of funding removes the effect of the town veto in stopping the acquisition. Environmental Protection Law Section 54-0303[7], however, appears to require a specific "appropriation" for "open space conservation projects." Further, the defendants have failed to respond to the arguments made by the plaintiffs and, in particular, have failed to address the effect of ECL 49-0111. It is apparent that no specific appropriation was ultimately issued for the funds used for the acquisition as they appear to be Mellon Foundation and Empire State Development Corporation funds.

First, in regard to the adequacy of the veto; the pleadings clearly show that the Town properly voted upon and vetoed the project. Thereafter the Town sent adequate notice of such veto to the defendants who were aware of and who acted upon the veto. Second, there is no law offered in support of the second proposition of the defendants, that if funding is from another source the veto is ineffective. The statute itself is entirely silent in regard to the defendants' interpretation.

JOINDER OF NECESSARY PARTY

Additionally, the defendants claim that the plaintiffs have failed to name a necessary party and, as a result, the complaint must fail. This issue is not argued by the plaintiffs except as to its effect in dismissing the complaint. It appears that the entity or entities which conveyed conservation easements or other title to lands within the Town of Black Brook to the State are parties who should

be joined. It would appear that plaintiffs have no other effective remedy in the event the case were to be dismissed for non-joinder (CPLR 1001[b][1]). Additionally, prejudice may accrue from the non-joinder to the defendants as well as to the party not joined and any judgement may be rendered ineffective in the absence of parties not joined (CPLR 1001[b][2] and [5]; *see also, Mehta v Scaretta*, 52 Misc2d 696 [Sup.Ct. Queens Cnty. 1967]).

LACK OF JURISDICTION

No motion for permission to proceed has been made to the Appellate Division Third Department by the plaintiffs to pursue the claim set forth in the third cause of action related to Article XIV of the New York State Constitution, nor has permission been granted, to the knowledge of this Court. Therefore, this Court lacks jurisdiction to determine the third cause of action.

DECISION

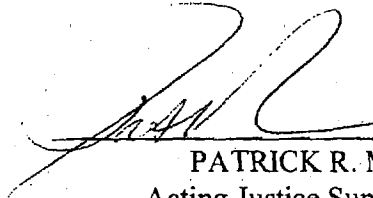
NOW, therefore, based on the above, it is

ORDERED that this proceeding is **STAYED** pending the joinder of the Lyme Adirondack Timberlands I, LLC, the title owner of the lands subject of this proceeding; and it is further

ORDERED that the plaintiffs shall complete said joinder within sixty (60) days of this order; and it is further

ORDERED that this Court lacks jurisdiction of the third cause of action based upon Article XIV of the New York State Constitution and, therefore, it is **DISMISSED**.

ENTER:

A handwritten signature in dark ink, appearing to read 'McGill', is written over a horizontal line.

PATRICK R. MCGILL
Acting Justice Supreme Court

Dated: Plattsburgh, New York
April 21, 2008

Tirade against APA

Farmer Lewis vows to recoup his legal fees

By LOHR MCKINSTRY
Staff Writer

LAKE PLACID — In a press conference punctuated with profanity and shouting, organic farmer Salim “Sandy” Lewis announced his intention Thursday to collect \$208,000 it cost in legal fees to defeat the Adirondack Park Agency in court.

The APA lost a legal action against Lewis over three farmworker houses built without agency permits at Lewis Family Farm Inc. in Essex.

Lewis contended the farm didn't need permits because State Agriculture Law exempts farm buildings.

In November 2008, State Su-

preme Court of Essex County agreed, and the decision was upheld on appeal to the Appellate Division of State Supreme Court.

Now, the farm wants its money. “It's just,” he said. “This (case) was well orchestrated and all part of the rain dance at the APA. I have never seen such a goddamn conspiratorial collection of morons in my life.”

‘ROGUE AGENCY’

His voice rising, and at times disagreeing with his attorney, John J. Privitera, who was on speaker-phone from his office in Albany, Lewis said the APA believes it can make its own laws.

“We have to know those son-

of-bitches have got the message. Somewhere, somebody's got to draw a line in the sand and say, ‘You're a rogue agency.’”

The APA was represented by State Attorney General Andrew Cuomo's office in the court case.

IMPACT DEBATED

On Thursday, APA spokesman Keith McKeever confirmed there will be no appeal to the State Court of Appeals.

“The state will not appeal the Appellate Division ruling regarding the Lewis Family Farm. The Adirondack Park

See LEWIS Page A13 ►



Staff Photo/Lohr McKinstry

Sandy Lewis gestures during a press conference Thursday in Lake Placid.

'The APA has lost its way'

► From Page A1

Agency believes the impact of the court's decision is limited because of the nature of the case. We have no further comment at this time, due to litigation related to this matter."

Privitera said he disagrees that the impact of the decision is limited.

"It's true this case is only about farm-worker houses," he said sarcastically. "It is only a case that says the agency has no legal authority to regulate farms."

"It is a clear signal the agency has to follow the law. We see it as important beyond the parameters of the case."

MOTION FOR FEES

The motion to collect legal fees was filed Aug. 13 under the State Equal Access to Justice Act, Privitera said, and the APA has until Aug. 28 to respond.

A court review is tentatively set for Sept. 4.

The legal battle began in fall 2006, when Lewis Family Farm obtained a building permit from the Town of Essex to erect three farm-worker houses but didn't apply to the APA.

The APA said it was a three-home subdivision and ordered Lewis Farm to pay \$50,000 and get a permit after the fact.

The APA Act says all structures on a farm count as one principal building lot and are exempt from density requirements and APA permits, but the agency tried to say the Lewis Farm is actually three principal buildings.

"There were many attempts to impugn the integrity of the farm (in court)," Privitera said. "These houses are down by the barns. They are not second homes, vacation homes."

SEEKS RESIGNATIONS

Privitera said he believed some APA officials held personal animosity against Lewis.

Lewis said Agency Counsel John Banta wanted him to cede full jurisdiction over his farm to the APA to settle the issue.

"You couldn't have put up a fence without approval," Lewis said.

He is calling for Banta's resignation, along with APA Chairman Curtis Stiles, Senior Attorney Ellen Egan George and Enforcement Attorney Paul Van Cott.

"This is about the hijacking of the environmental field," Lewis said. "The APA has lost its way."

He implied there's more to come.

"This is a step. I haven't got one-tenth of 1 percent done."

E-mail Lohr McKinstry at:
lmckinstry@pressrepublican.com

Hall of Fame

Barbara A. Lewis
Klaas Martens
John J. Privitera Esq., & Jacob Lamme Esq.
Cynthia Feathers Esq., Farm Bureau Counsel
Danny Hekim, The New York Times
Jessica Pasko, Associated Press
Marco & Xoliswa Turco
Hon. Justice Richard B. Meyer
County Clerk Joseph A. Provoncha
Michael E. Pratt
Ark Lemal
Anita "Nite" L. Deming, Cornell C. E.
Bob Somers PhD, Program Manager - Div. of Agricultural
Protection & Development Services - Farmland Protection
Ruth Moore Esq., Farm Bureau General Counsel
Fred Watrous
John W. Lincoln, Former President NY Farm Bureau
Patrick Hooker, Commissioner, Ag & Markets
NY State Police
Howard Aubin
New York Farm Bureau
Fredrick H. Monroe Esq., Executive Director APLGRB
Kim Smith Dedam, Press Republican
Matt Bosley, Editor, Valley News

Hall of Shame

Eliot Lawrence Spitzer Esq.
Judith Enck (1-518-473-5442)
Loretta Simon (Case Files)
Bill McKibben
Brian Ruder
Brian Houseal
James "Jamie" Phillips
Gary Randorf
Robert C. Glennon Esq.
Robert Hammenstag & Lauren Murphy
Ronald E. Jackson
Robert Rosenthal Esq.
Rocky Piaggione Esq.
Ellen Egan George Esq.
Assorted North Country counsel
Certain government officials, past & present
Advocacy groups
Greek Chorus
"Journalists" Anonymous
Other & Tribal
Bill Johnston
Scott Hurlburt
Bill Finucane

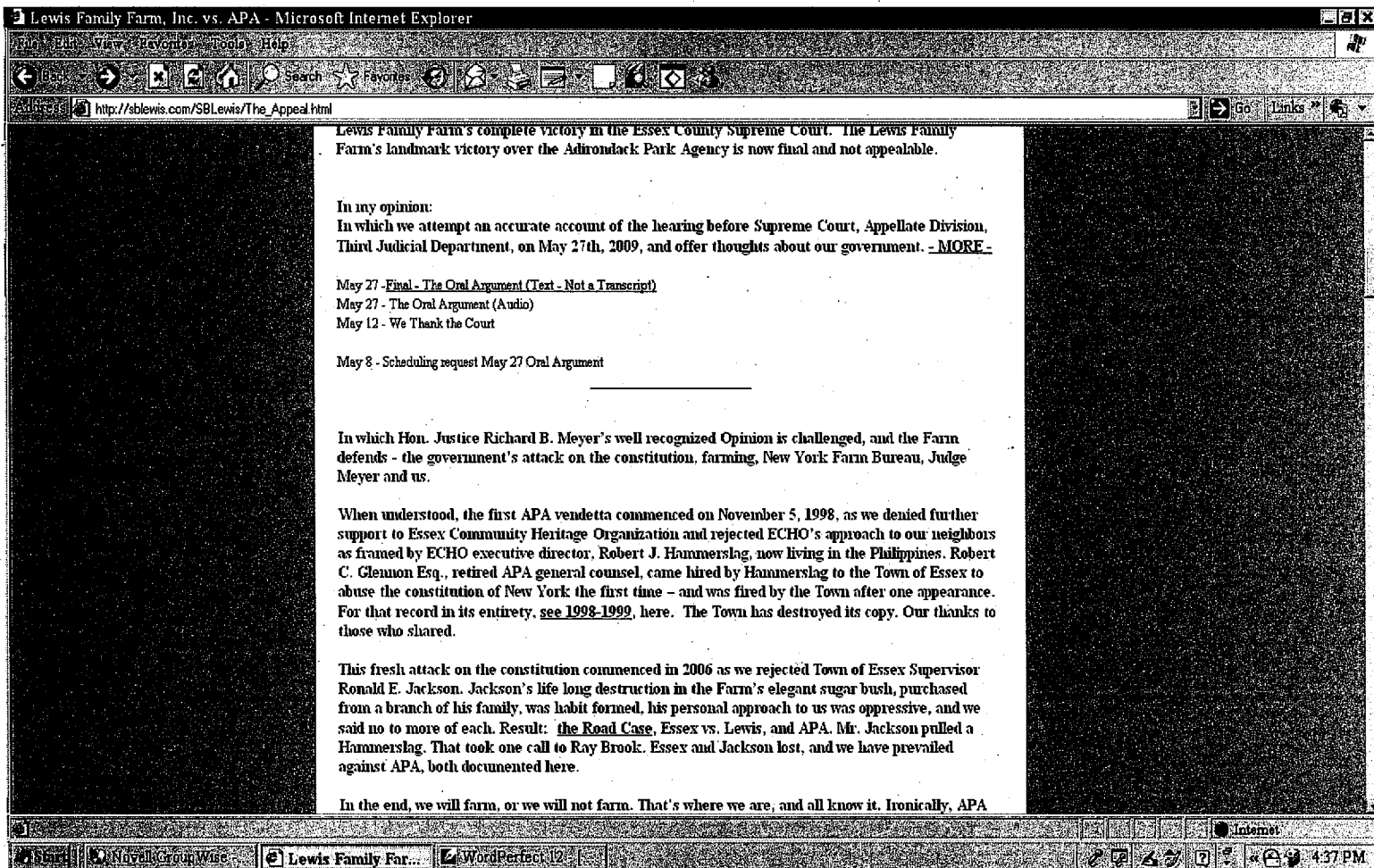


EXHIBIT G

THOMAS P. DiNAPOLI
STATE COMPTROLLER



JOAN M. SULLIVAN
EXECUTIVE DEPUTY COMPTROLLER
FOR OPERATIONS
Tel. (518) 402-4103
Fax (518) 474-2870

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER
110 STATE STREET
ALBANY, NEW YORK 12236

August 11, 2009

Honorable David A. Paterson
Governor of New York
State Capitol
Albany, NY 12224

Dear Governor Paterson:

New York State's Equal Access to Justice Act allows the recovery of counsel fees and other reasonable expenses accrued in certain actions against the State of New York. Courts can award prevailing parties, with the exception of the State, fees and other expenses incurred by such party in any civil action brought against the State. Fees are determined by prevailing market rates for the kind and quality of the services furnished. Fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings.

In accordance with Section 8604 of Article 86 of the Civil Practice Laws and Rules, the Office of the State Comptroller annually reports the nature and amount of each fee and expense award for the previous fiscal year. Exhibit A shows that the State paid \$197,330.35 of legal fees and expenses awarded to a prevailing party in fiscal year 2008-09.

If you have any questions, please telephone me at (518) 402-4103.

Sincerely,

A handwritten signature in cursive script that reads "Joan M. Sullivan".

Joan M. Sullivan
Executive Deputy Comptroller
for Operations

vmk
Enc.

Exhibit A

**Office of the State Comptroller
Summary of Awards Made Pursuant to Article 86**

April 1, 2008 – March 31, 2009

Title of Case	Date of Award	Legal Fees & Expenses	Agency Involved	Nature of Award
Matter of Melendez v. Wing	4/16/08	\$162,301.35	NYS Office of Temporary and Disability Assistance	C.P.L.R. article 78 proceeding brought to review fair hearing decision and alleging that inclusion of public assistance recipient's child's federal Supplemental Security Income benefit in the emergency shelter allowance calculation violated Social Services Law § 131-c and OTDA's regulations, 18 N.Y.C.R.R. §§ 352.3(k), 352.30.
Matter of Boatwright v. OMRDD	5/6/08	\$15,000.00	NYS Office of Mental Retardation & Developmental Disabilities	Article 78 brought to review denial of authorization for employment following a criminal history background check at an OMRDD-registered employer.
Matter of Peter Bolak -v- NYS-Dept of Health, Cayuga County DSS	6/13/08	\$12,529.00	NYS Department of Health	CPLR Article 78 challenging denial of Medicaid eligibility. Petitioner is confined to a nursing home, and wife transferred assets from his IRA to pay bills and debts; presumed to be income and reduced benefits.

Title of Case	Date of Award	Legal Fees & Expenses	Agency Involved	Nature of Award
Matter of Hollingshed v. OMRDD	7/8/08	\$7,500.00	NYS Office of Mental Retardation & Developmental Disabilities	Article 78 brought to review denial of authorization for employment following a criminal history background check at an OMRDD-registered employer.

Total \$197,330.35

Source: Department of Law