Case Nos. 504696 and 504626

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

ADIRONDACK PARK AGENCY,

Appellant,

-against-

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

Respondents.

Essex County
Index Nos. 498-07, 315-08 and 332-08

RESPONDENT'S MEMORANDUM OF LAW IN OPPOSITION TO APPELLANT'S MOTION FOR AN INJUNCTION

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PRELIMINARY STATEMENT

Appellant Adirondack Park Agency ("Appellant" or "Board") now comes before this Court seeking equitable relief in the form of an injunction against the development of Respondents' farm.[1] The Appellant's bold and belated motion against Respondent Lewis Family Farm, Inc., Barbara Lewis and Sandy Lewis, ("Respondent") comes in the wake of the Agency's complete defeat in the court below. The lower court carefully weighed the Appellant Board's punitive order against the body of New York Agricultural Law establishing Respondent's right to farm. The lower court concluded that Appellant committed a grave error of law in attempting to assert jurisdiction over Respondent's farm employee housing. The lower court annulled the Appellant Board's erroneous March 25, 2008 administrative decision ("Administrative Decision"). The lower court's well-reasoned opinion is reported at Lewis Family Farm, Inc. v. Adirondack Park Agency, 868 N.Y.S.2d 481; 2008 N.Y. Slip Op 28455; 2008 N.Y. Misc. LEXIS 6738 (Sup. Ct. Essex County 2008).

New York's entire agriculture community has opposed and condemned the Appellant Agency's error of law and punitive approach to Respondent, from the Commissioner of Agriculture and Markets to the 30,000 member New York Farm Bureau. The Agency now seeks to exacerbate its error of law with an unprecedented order of this Court that will rob the Respondent farm of the 2009 growing season. Such an injunction is unjustified on this record.

Appellant's belated motion for an injunction should be denied because Appellant has failed to carry its heavy burden as to each prong of the established tripartite test: likelihood of success, balance of equities and irreparable harm. Indeed, this Court has already found that

[1] Appellant wrongly styles their request for relief as a "Motion for a Stay or Injunction." This is procedurally incorrect. There is no administrative or judicial order to stay. The punitive order by Appellant's Board was vacated in its entirety. (App. 40). When an order is vacated, nothing exists that can be stayed, rendering mootness as the Trial Court held on November 21, 2008. (App. 43-44).

Respondent—not Appellant—is likely to prevail on the merits. In addition, the grant of Appellant's motion ***will inflict*** irreparable harm, not the reverse. Finally, the balance of equities surely does not favor Appellant under the circumstances of this case.

Appellant's meritless motion is punitive in nature and will inflict substantial economic harm upon the productivity of Respondent's farm during this growing season, if granted. Appellant's legal position on the merits is unquestionably mistaken. Yet, Appellant asks this Court to compound the Agency's error by enjoining the development of Respondent Farm. Appellant's motion seeks only to crush the farm; without the farm employee houses, the farm cannot recruit, much less hire, quality employees for the impending 2009 growing season. Appellant's untenable legal theory cannot support the economic devastation of Respondent's loss of another crop year. For these reasons, the Appellant's motion should be denied.

BACKGROUND FACTS

Respondent Lewis Family Farm, Inc. is a USDA Certified Organic Farm located in the Town of Essex, Essex County in American Heritage Farmland within the historic Champlain Valley. The farm is managed by Dr. Marco Turco. The Lewis Family Farm encompasses approximately 1,200 acres and includes 826 cultivated acres, pastures, a sugar bush and a deciduous and conifer forest. The farm produces certified organic beef animals and raises cows, bulls, heifers and steer. Additionally, the farm produces a range of crops, which have included hard winter wheat; soy beans; alfalfa, mixed, cool season grasses; corn; spelt and triticale. The farm is located within Essex County Agricultural District No. 4, a County-adopted, State-certified agricultural district. (App. 63).[2] The farm has been unable to recruit employees and

[2] This opposition is accompanied by the Affidavit of John J. Privitera in Opposition to Appellant's Motion for an Injunction, sworn to February 13, 2009. The exhibits thereto, which have been Bates stamped and attached hereto as the "Appendix", are referenced throughout this Memorandum of Law as "(App. ___)".

without full-time employee houses since the Agency's illegal administrative actions began two years ago.

PROCEEDINGS BELOW

A. The Remand Order (August 17, 2007)

In June 2007, Respondent prematurely commenced an action against Appellant soon after the Agency demanded a penalty, but before the Board had made a final enforcement decision against Respondent. The lower court promptly remanded the matter to the Appellant since no final determination had yet been made regarding Respondent's farm employee houses. (App. 33). A cease and desist order, that was later issued by Appellant's staff, was not passed upon in the Remand Order.[3]

B. Appellant's Administrative Decision (March 25, 2008)

The Appellant's overbearing and illegal Administrative Decision directed Respondent to:

(1) Apply for a permit for the three new farm dwellings and a 4-lot subdivision into sites (including the retained "lot") by April 14, 2008, by submitting the appropriate major project application to the Appellant;

(2) Submit the following to the Appellant by April 28, 2008:

  (a) a detailed description of the use of each dwelling and connection to the Respondent's agricultural operations; and

  (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 the NYS Department of Health and Appellant's standards and guidelines;

(3) Reply to any addition information request within 30 days of receipt;

(4) Forego the right to challenge Appellant's jurisdiction;

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[3] Appellant's continued and repeated references to the Remand Order, as if it were helpful in resolving the merits of this appeal, is an immaterial distraction. The Remand Order did not reach the merits. The order acknowledges that the court had no juridical power to decide the matter prior to a final decision by the Appellant Board. (App. 33). Dicta in the remand order concerning the Act and the Rivers Act is clearly an error law, and was treated as such by Hon. Richard B. Meyer in the court below. (See App. 33).

(5) Refrain from occupying the three new farm dwellings unless and until the civil penalty is paid and Appellant issues a permit; and

(6) Pay a civil penalty of $50,000 to the Respondent by April 28, 2008.

(App. 13).

C. The Lower Court Granted a Partial Stay (April 11, 2008)

Appellant Agency's overbearing and punitive Administrative Decision compelled Respondent to commence an Article 78 proceeding almost immediately after the Administrative Decision in order to protect its rights.

On April 11, 2008, the lower court promptly issued a Decision and Order in which it granted Respondent a stay of most of the Administrative Determination. (App. 16-20). Specifically, the lower court applied the traditional tripartite test for injunctive relief and found that Respondent "has established a likelihood of success on the merits on at least some issues raised in the petition, and a balancing of the equities in its favor." (App. 20).

The lower court held that Respondent was not required to immediately submit to the jurisdiction and development control authority of Appellant; and, that Respondent need not immediately apply for an Agency permit for her three farm employee houses pending judicial review. The lower court also correctly determined that Respondent would suffer an actual and immediate irreparable injury unless any obligation to comply with the Administrative Determination was stayed during the pendency of proceeding below. (See id.). As such the lower court issued a stay as to Paragraphs (1) through (4) above.

However, the lower court denied a stay as to Paragraphs (5) and (6), which prohibited Respondent from occupying the three farm employee dwellings until the Appellant issues a permit and required Respondent to pay a civil penalty of $50,000 to the Appellant, because the

lower court found that the Appellant made an insufficient showing of irreparable harm as to those Paragraphs.

D. This Court Modified the Lower Court's Stay to Allow Respondent to Use One of the Farm Dwellings (May 19, 2008)

On April 28, 2008, Hon. Leslie E. Stein, Associate Justice, signed an Order to Show Cause that (1) enjoined Appellant from enforcing the Administrative Decision requiring payment of a $50,000 civil penalty into Appellants' coffers on the condition that the money be paid into escrow, held by the Essex County Treasurer's Office; (2) enjoined Appellant from enforcing the Administrative Decision with regard to the occupancy of Respondent's farm employee house known as the "Dormitory" on the condition that Respondent provide Appellant with (i) an as-built plan for the building's septic system, and (ii) an evaluation by a NYS licensed professional engineer as to whether the septic system for the Dormitory complies with the NYS Department of Health and Appellant's standards and guidelines. (App. 22-23).

On May 5, 2008, Respondent submitted the requisite as-built plan and licensed engineer's Certification of Compliance to Appellant's counsel. (See App. 13, 23). Thereafter, Appellant filed affidavits in opposition to the Respondent's motion to modify the lower court's stay, which weakly questioned the sufficiency of the Respondent's May 5th Certificate of Compliance, but provided nothing material.

This Court denied Appellant's challenge. On May 19, 2008, this Court issued a Decision and Order granting Respondent's motion to modify the lower court's stay, which allows Respondent to use the Dormitory during the pendency of this case. (App. 25). Importantly, this Court's Decision also (i) rejected the Appellant's argument challenging the sufficiency of the Respondent's May 5, 2008 Certificate of Compliance; and (ii) necessarily found—like the lower court—that Appellant has established a likelihood of success on the merits.

Status quo for the last nine months has included Respondent's use of the Dormitory farm employee house.

E. Lower Court Annulled the Administrative Decision and Granted Complete Victory to Respondent (November 19, 2008)

On November 19, 2008, the lower court issued a Decision and Order that granted complete victory to Respondent by "annulling the Agency's March 25, 2008 determination on the ground that it was affected by an error of law, as well as [granting] summary judgment dismissing the Agency's amended complaint dated May 14, 2008 and all causes of action therein. Also, this Court's April 11, 2008 order granting a partial stay is vacated as moot." Lewis Family Farm, Inc. v. Adirondack Park Agency, 868 N.Y.S.2d 481, 494 (Sup. Ct. Essex County 2008) (Meyer, J.). (App. 27-40).

Several days later, the lower court signed a final Judgment, which ended the consolidated cases below. (App. 43-44). The Judgment reiterated that the lower court's stay of April 11, 2008—as modified by this Court on May 19, 2008—is vacated as moot. (See id.).

Accordingly, pursuant to the trial court's final order of annulment, on November 21, 2008, Respondent retrieved its $50,000, plus interest, that had been held in escrow with the Essex County Treasurer's Office and became free to finish building and use all three farm employee houses (instead of just the Dormitory).

F. Appellant Waited Thirty Days to Appeal the Final Judgment

Appellant served a Notice of Appeal on or about December 18, 2008, waiting nearly thirty days after it received Notice of Entry of the final Judgment of Annulment. (See Affirmation of Loretta Simon, dated January 2, 2009, ¶ 12).

G. Appellant Delayed Its Application for an Injunction for Six Weeks After Filing the Notice of Appeal

Appellant waited an additional six (6) weeks after filing its Notice of Appeal—and nearly three (3) months after the Board's illegal order was annulled—to make the motion for an injunction now pending before this Court. (See generally Appellant's motion papers). The final Judgment, which was entered nearly ninety (90) days ago, annulled the balance of Appellant's illegal Administrative Decision, thereby permitting Respondent to finish constructing the two unoccupied farm employee houses in the three house cluster by the barns on Respondent's farm. These vacant farm buildings have stood as hollow shells for nearly two years under the thumb of the Board's illegal Order.

While Respondent prepared for the 2009 growing season, reasonably anticipating necessary occupancy of all three farm employee houses, Appellant has sat on its hands. Accordingly, Appellant should not be allowed to convert its resounding defeat below into a sword, wielded only to harm a third consecutive growing season for a New York farm.

For the reasons set forth herein, the Appellant's motion for an injunction that reinstates the Board's annulled Administrative Decision pending the appeal should be denied.

ARGUMENT

POINT I

RESPONDENT'S CONSTITUTIONAL RIGHT TO FARM WILL BE IMPAIRED BY ANY INJUNCTION

Appellant's motion for an injunction asks this Court to do what no other court has ever done before in New York jurisprudence – prohibit farm development, a right that exists under the New York State Constitution. Appellant's staff led its Board down a dangerous, untrodden and unmarked path that is far beyond the furthest edges of Appellant's narrow statutory jurisdiction.

The court below found that the Board committed an error of law by issuing the Administrative Decision, which sought to regulate farm development in derogation of the Constitution and fundamental principles of statutory construction. Because farm employee houses (just like barns, silos and other farm structures) are constitutionally protected against all land use regulation, any injunction by this Court preventing further development, as Appellant now requests, will impair Respondent's constitutional right to farm.

In 1969, Article 14 of the New York State Constitution was adopted by the People of New York State to protect the State's natural resources and agricultural lands. Specifically, Section 4 of Article 14 states as follows:

> The policy of the state shall be to conserve and protect its natural resources and scenic beauty and ***encourage the development and improvement of its agricultural lands*** for the production of food and other agricultural products.

N.Y. CONSTITUTION, Article 14, § 4 (McKinney 2006) (emphasis supplied).

This section of the New York State Constitution, which was adopted as part of the "Conservation Bill of Rights", imposes a mandatory duty upon the Appellant to encourage improvement of farms, not penalize farm development. It also specifies that the development of agricultural lands is a matter "of particular importance for action by the legislature." Proceedings of the Constitutional Convention of the State of New York, Vol. XI, Document No. 53, pg. 5 (1967). In fact, Section 4 of Article 14 further directs the legislature "to provide for the exercise of various governmental powers to encourage the maintenance of lands in their agricultural state." Id.

The Constitutional directive to "encourage the development and improvement" of farm lands is contained in the very same Article of the New York State Constitution as the highly regarded and well-known "forever wild" clause. See N.Y. CONSTITUTION, Article 14, § 1

(McKinney 2006).[4] (New York's "Conservation Article"). Accordingly, the "pro-farm development clause" is no less important than the "forever wild" clause, and it must be equally honored and obeyed.

The Conservation Article of New York's Constitution states our promise to stand vigilant in conserving our forests and our farm soils. Just as all constitutional rights must be exercised, agricultural soils must be farmed to be conserved.

Since this milestone amendment to New York's Constitution was created by the People, New York has carved a wide statutory sanctuary to fully express and support soil conservation rights and provide a safe harbor for all sound agricultural practices against any land use regulation by any department, board or agency. This statutory protection, built upon the firm foundation of the Conservation Article of the Constitution, is called the Right to Farm Law. See N.Y. Agric. & Markets Law § 301, et seq.

No court has ever enjoined the development of a farm. Appellant's request that this Court order two on-farm employee houses to remain unbuilt and unoccupied is unprecedented. This Court cannot countenance an order against farm development at the request of a defeated land use board without fundamentally impairing Respondent Farm's constitutional right to farm.

POINT II

APPELLANT HAS FAILED TO DEMONSTRATE ITS ENTITLEMENT TO AN INJUNCTION

The well-established elements for an injunction are: (1) likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) balance of the equities tipping in the moving party's favor. Aetna Ins. Co. v. Capasso, 75

[4] Section 1 of Article 14 of the New York State Constitution provides, in pertinent part, as follows: "The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands."

N.Y.2d 860, 862 (1990); Doe v. Axelrod, 73 N.Y.2d 748, 750, 536 N.Y.S.2d 44, 45, 532 N.E.2d 1272 (1988). Moreover, this Court deems an injunction as a "drastic remedy that should be used sparingly." Welcher v. Sobol, 222 A.D.2d 1001, 1002 (3d Dep't 1995).

A. Appellant Completely Fails to Show Likelihood of Success on the Merits

Appellant has failed to show that it is likely to prevail on the merits, a necessary first step to getting an injunction. Indeed, Appellant's motion papers do not acknowledge the law of this case, wherein this Court has already found that Appellant is not likely to prevail on the merits.[5] (App. 25). Moreover, Appellant does not even attempt to find flaw with the lower court's well-reasoned decision below. Instead, Appellant merely attaches a portion of a memorandum of law submitted below. These weak contentions were wholly rejected by the lower court.

1. The Law of the Case is that Respondent—Not Appellant— is Likely to Succeed on the Merits

Appellant's Administrative Decision has been progressively stayed and ultimately annulled. Indeed, Appellant's request for an injunction now is contrary to the established law of the case. Upon commencing the Article 78 proceeding to challenge the Appellant's erroneous Administrative Decision, Respondent received a partial stay of the Administrative Decision. (App. 16-20). The lower court applied the same tripartite test that Appellant seeks this Court to implement on this motion and concluded that Respondent "ha[d] established a likelihood of success on the merits on at least some issues raised in the petition." (App. 20). Respondent appealed to this Court several days later to obtain a broader stay of the Administrative Decision. On May 19, 2008, this Court issued a Decision and Order in which the lower court's stay of the Administrative Decision was broadened to allow Respondent to use the Dormitory building for

[5] Appellant seeks to have this Court revisit the merits before Appellant has compiled and submitted the Record, thus requiring Respondent to defend a meritless motion by the incurrence of expenses to produce portions of the Record so this Court may evaluate the issue. Costs should be awarded to Respondent.

its farm employees. (App. 25). As such, this Court—like the lower court—necessarily decided that Respondent had established a likelihood of success on the merits. Now, Appellant asks this Court to reverse itself and grant an injunction against Respondent's right to farm activities.

As the established law of this case for the last ten (10) months, Respondent has been permitted to house a number of student intern farm employees in the Dormitory, the middle farmhouse, since this Court's April 28, 2008 Order to Show Cause. (App. 22-23). This is the *status quo* and the law of this case.

This Court's holding, that Appellant is likely to lose, was not appealed nor is it challenged here upon Appellant's belated motion for an injunction. Thus, Appellant's motion is irrational on its face because it accepts the law of the case that allows the use of one of the farm employee houses, but seeks an order of vacancy for the other two.

2. Appellant Has Failed to Articulate Why It Has a Likelihood of Success in Overturning the Sound Decision Below

Appellant fails to articulate any reasons whatsoever that it has a likelihood of success on the merits. The trial court correctly concluded that the Legislature intended single family dwellings inside the Adirondack Park that are "directly and customarily associated with agricultural use" to be exempt from Agency jurisdiction in resource management areas. Lewis Family Farm, Inc., 868 N.Y.S.2d at 492. (App. 38-39). In reasoning that this fundamentally correct point of statutory construction was also consistent with the entire fabric of New York Agriculture Law, the trial court noted:

> Though not controlling here, farm residential buildings have been held to constitute 'farm operations' exempt from town zoning regulations under Agriculture and Markets Law § 305-a (Town of Lysander v. Hafner, 96 N.Y.2d 558, 562, 733 N.Y.S.2d 358, 359, 759 N.E.2d 356, 357). In so holding, the court in *Lysander* relied upon the Legislature's recognition that residential buildings on a farm "contribute to the production, preparation and marketing of crops,

livestock and livestock products as a commercial enterprise" (Agriculture and Markets Law § 301[11]) (Id.).

Lewis Family Farm, Inc., 868 N.Y.S.2d at 492. (App. 39).

As the New York Farm Bureau demonstrated in its *amicus curiae* brief to the lower court, the Legislature defined "farm building" and "agricultural use structure" the same way. (App. 98-101). Thus, the lower court correctly found that there is no reason to conclude that the Legislature intended different treatment of farmers inside the Adirondack Park. Id.

Moreover, the lower court applied fundamental principles of statutory construction and held that "[a] statute must be read and given effect as it is written by the Legislature, not as the court may think it should or would have been written if the Legislature had envisaged all the problems and complications which might arise in the course of its administration" (Lawrence Const. Corporation v. State, 293 N.Y. 634, 639, 59 N.E.2d 630, 632). Lewis Family Farm, Inc., 868 N.Y.S.2d at 492-93. (App. 39).

The lower court correctly held that the Adirondack Park Agency Act (the "Act") contains the following definitions:

1. "Agricultural use structure" means "any barn, stable, shed, silo, garage, fruit and vegetable stand or other building or structure directly and customarily associated with agricultural use" (Executive Law § 802[8]a).

2. "Structure" is defined to include "single family dwellings" (Executive Law § 802[62]).

3. "Single family dwelling" means "any detached building containing one dwelling unit, not including a mobile home" (Executive Law § 802[58]).

4. "Agricultural use" means "any management of any land for agriculture; raising of cows, horses, pigs, poultry and other livestock; horticulture or orchards; including the sale of products grown or raised directly on such land, and including the construction, alteration or maintenance of fences, agricultural roads, agricultural drainage systems and farm ponds" (Executive Law § 802[7]).

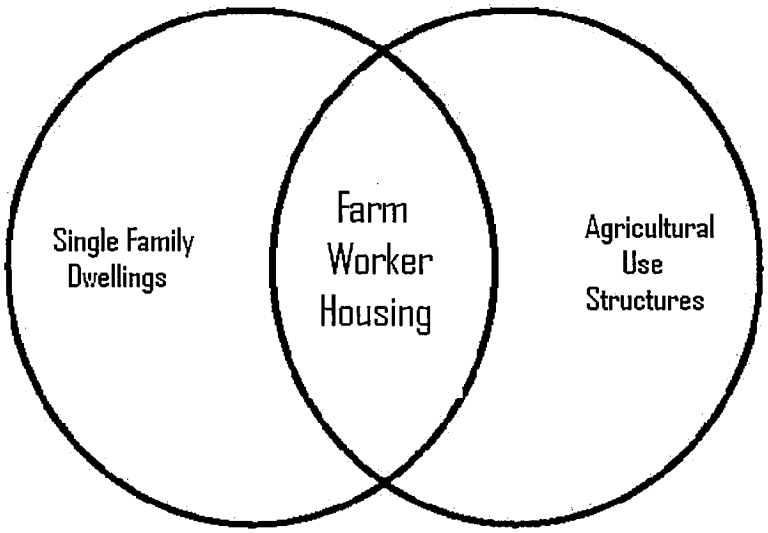
5. "Accessory structure" means "any structure or a portion of a main structure customarily incidental and subordinate to a principal land use or development and that customarily accompanies or is associated with such principal land use or development, including a guest cottage not for rent or hire that is incidental and subordinate to and associated with a single family dwelling" (Executive Law § 802[5]).

Lewis Family Farm, Inc., 868 N.Y.S.2d at 488-89, 491. (App. 36, 38).

Further, under the Act's statutory scheme, "[a]gricultural uses" and "[a]gricultural use structures" in resource management areas do not require a permit from the Agency (Executive Law § 805[3][g][4][1]-[2]) because they are primary compatible uses which are neither class A nor B regional projects (Executive Law § 810[1][e], [2][d]; see also 9 NYCRR § 577.4[b][3][ii], § 577.6[b][3]; no permit required for agricultural use structures in recreational river areas unless located "inside the mean high water mark of the river or within 150 feet of the mean high water mark"). Lewis Family Farm, Inc., 868 N.Y.S.2d at 489. (App. 36). Thus, the lower court necessarily concluded that if a single family dwelling can be classified as an "agricultural use structure" under the Act's plain definitions, then Appellant lacks jurisdiction over Respondent's farm worker houses.

The lower court correctly concluded that, contrary to the Board's erroneous Administrative Decision, the Act's statutory language cannot be interpreted or construed to evidence a legislative intent that the word "structure" in the definition of "agricultural use structure" (Executive Law § 802[8]) means an "accessory structure". Lewis Family Farm, Inc., 868 N.Y.S.2d at 489. (App. 36). The Legislature defined "accessory structure" separately, yet chose not to use that more limited term in its definition of "agricultural use structure" (Executive Law § 802[8]). Rather, the definition of "agricultural use structure" expressly includes the term "structure", which is separately defined to include "single family dwelling". Lewis Family Farm, Inc., 868 N.Y.S.2d at 491. (App. 38). Thus, the lower court recognized that the Legislature

necessarily provided for some overlap in these definitions, fairly illustrated in the following Venn diagram:



Appellant continues to have no response to this basic truth, which is revealed in any fair and rational interpretation of the operative definitions in the Act.

The lower court aptly cautioned that "court[s] should not ignore the words of a statute, clear on its face, to reach a contrary result through judicial interpretation (McKinney's Cons. Law of NY, Book 1, Statutes, § 76; Kleefeld, 55 N.Y.2d 253, 259, 448 N.Y.S.2d 456, 433 N.E.2d 521)" (Trump-Equitable Fifth Ave. Co. v. Gliedman, *supra*). To accept the Agency's fundamentally incorrect reading of the Act, that the term 'structure' in the definition of 'agricultural use structure' should be read to mean 'accessory structure' renders the term 'structure' 'superfluous and redundant in the statute . . . [and] would deprive the term of its own separate meaning' (SIN, Inc. v. Dep't of Fin. of City of New York, 71 N.Y.2d 616, 621, 528 N.Y.S.2d 524, 527, 523 N.E.2d 811, 814)." Lewis Family Farm, Inc., 868 N.Y.S.2d at 491. (App. 38). It is incorrect to ignore a portion of a statute as surplus. The lower court went on to state that the Legislature's exclusion of agricultural use structures from all Agency regulation under the Act is

an indication that its exclusion was intended. Lewis Family Farm, Inc., 868 N.Y.S.2d at 491 (citing Pajak v. Pajak, 56 N.Y.2d 394, 397, 452 N.Y.S.2d 381, 437 N.E.2d 1138, McKinney's Cons. Laws of NY, Book 1, Statutes § 74; People v. Tychanski, 78 N.Y.2d 909, 911-912, 573 N.Y.S.2d 454, 456, 577 N.E.2d 1046, 1048). (App. 38).

"Clearly, had the Legislature intended to limit 'agricultural use structures' to 'accessory structures' and preclude a single family dwelling from qualifying as an 'agricultural use structure', it would have done so by inserting appropriate language readily at hand, including using its own definition." Lewis Family Farm, Inc., 868 N.Y.S.2d at 491. (App. 38).

Respondent's farm is nearly crushed now at the hands of the Agency Board's illegal Order. Respondent fully complied with local law by securing building permits from the Town of Essex prior to constructing the farm's three exempt farm employee houses. Construction began in 2006. (App. 65-67). On farm employee housing is essential for a self-sustaining farm in the Adirondack Park. Id. The Appellant Agency interfered with the construction and demanded a penalty nearly two years ago and later served a cease and desist order on the farm. (App. 68-70). Due to the complexities of organic farming, any successful organic farm requires skilled professional employees that produce crops and animal products that will meet strict organic standards. (App. 75). Such employees need to be housed on site so that the can properly monitor and survey the farm and provide around the clock surveillance. (Id.). Due to their high levels of education and training, such employees require proper on site housing. These facts are well established in the record, unchallenged by Appellant, as provided through the testimony of Klaas Martens, one of the most successful organic farmers in New York State. (App. 73-76). Finally, the Commissioner of Agriculture and Markets of New York State, Patrick Hooker, made a formal determination under New York State's Right to Farm law that the Lewis Family Farm

employee housing was an agricultural land use and officially corroborated Klaas Marten's findings that the on site farm employee housing is a necessary part of modern farm operations. (App. 59-61).

Thus, as the lower court necessarily found, there can be no doubt that Respondent's farm employee houses are "agricultural use structures" that are just as important to a farming operation as a barn, a silo or a fence. As such, they are exempt from Appellant's jurisdiction under the clear terms of the Act.

3. Appellant Has Not Shown That It is Likely to Succeed on Its Failed Claim Under the "Rivers Act"

The Wild, Scenic and Recreational River System Act (the "Rivers Act") was enacted pursuant to a legislative finding that rivers possess outstanding natural, scenic, historic, ecological and recreational values that ought to be protected consistent with law. N.Y. Envtl. Conserv. Law § 15-2701(1). The primary purpose of the Rivers Act is to preserve the free flowing condition of the rivers for recreational uses. N.Y. Envtl. Conserv. Law § 15-2701(3).

Except for a few select areas where wild rivers are found, the Legislature made clear that the right to farm, as bolstered by the Constitution and New York's Agriculture and Markets Law, ought to be fortified with respect to the regulation of development near scenic and recreational rivers. Thus, the Rivers Act specifically provides as follows:

> In recreational river areas, ***the lands may be developed for the full range of agricultural uses***, forest management pursuant to forest management standards duly promulgated by regulations, stream improvement structures for fishery management purposes, ***and may include small communities as well as disbursed or cluster residential areas.***

N.Y. Envtl. Conserv. Law § 15-2709(2)(c) (emphasis supplied).

Appellant, the agency responsible for administering the Rivers Act, followed through with this legislative directive and promulgated the following regulation designed to implement the Rivers Act:

> The following ***may be undertaken without a permit*** if in compliance with the restrictions and standards set forth in Section 577.6 of this Part:
> In recreational river areas:
> Agricultural uses, agricultural use structures, open space recreation uses, game preserves and private parks . . .

9 NYCRR § 577.4(b)(3)(ii) (emphasis supplied).

Moreover, Appellant's regulations provide that "agricultural use structures" may be constructed in a river area without a permit as long as the structures are located at least 150 feet from the mean high water mark of the river. See 9 NYCRR § 577.6(b)(3). Thus, a farm building may be constructed without a permit so long as it is more than 150 feet from the mean high water mark of a protected river.

Here, the lower court found that Respondent's farm employee buildings are located several hundred feet from the Boquet River. (App. 66). Having already concluded that Respondent's farm employee houses are "agricultural use structures", the lower court correctly determined that the buildings are not subject to Rivers Act jurisdiction and dismissed Appellant's claims suggesting otherwise. (App. 39-40).

4. Appellant Has Failed to Show Likelihood of Success on Its Distorted And Failed '*De Jure*' Subdivision Claim

The lower court correctly held that Respondent is not required to obtain a permit from Appellant prior to constructing farm buildings. Thus, the lower court correctly dismissed Appellant's attempt to craft a "backdoor" violation of the Act by claiming that an illegal subdivision of land occurred by the construction of on-farm exempt buildings.

The Act defines "subdivision of land" as a "division of land into two or more lots, parcels or sites" for "separate ownership or occupancy". N.Y. Exec. Law § 802(63) (emphasis supplied). Similarly, the Agency's regulations implementing the Rivers Act define "subdivision" as "any division of land into two or more lots." 9 NYCRR § 570.3(ah)(1) (emphasis supplied).

The lower court correctly found that Executive Law § 802(50)(g) provides that a farm—no matter how many buildings it has upon it—counts as only one building under Appellant's intensity guidelines. (App. 36). Thus, when a farmer constructs housing for her employees on lands of her own, no land is divided, no new lots are created and, indeed, the employee houses are not even counted as "principal buildings" in the density analysis under the Act's Land Use Plan (the "Plan"). (App. 39-40).

Specifically, farm growth does not impact the intensity guidelines sought to be fostered by the structure of the Plan administered under the Act because the Legislature prohibited the Agency from counting agricultural use structures as "principal buildings" within the intensity guidelines. (See Executive Law § 802(50)(g)). Thus, Appellant's regulations clarify that the construction of farm employee housing does not automatically create a subdivision because "subdivision into sites" only occurs when an additional principal building is constructed. See 9 NYCRR § 570.3(ah)(3).

Since the very definition of "principal building" that is relied upon in the definition of "subdivision" in Appellant's own regulations demands that farm employee housing not be counted as a "principal building", the subdivision statute and regulations are not triggered such that the Agency gains subdivision jurisdiction. Farm employee housing is never an additional "principal building". See N.Y. Exec. Law § 802(50)(g). Since the land is not divided and no principal buildings are built, farm employee housing is never an automatic subdivision over

which Appellant can skirt around legislative intent and assert jurisdiction.[6] Thus, Appellant's transparently false reading of the Act is clearly revealed by this stark irrationality. Appellant claims regulatory jurisdiction over buildings that are specifically defined as invisible to the Plan that the Agency administers, its sole mission.

5. Appellant's Bare Declaration That It Has Likelihood of Success on the Merits is Contradicted by Material Findings in the Record

In addition to the compelling and well-reasoned judgment of the lower court that Appellant committed an error of law in seeking to regulate farm buildings, three other powerful legal opinions and directives are perfectly harmonious with the lower court's November 19, 2008 Decision and Order, which protected the right to farm. The New York State Court of Appeals, the Commissioner of Agriculture and Markets and the New York State Farm Bureau all read the fabric of New York Agricultural Law consistent with the sound decision below. As long as a farm building is safe according to the local code enforcement officer, as the Respondent's farm employee houses surely are, no administrative body may regulate it. (See e.g., Town of Lysander v. Hafner, 96 N.Y.2d 558 (2001); November 26, 2007 Letter of the Commissioner of the New York State Department of Agriculture and Markets (the "Commissioner") to the Chairman of the Appellant's Board (App. 46-58); February 1, 2008 Determination of the Commissioner regarding Respondents' farm pursuant to Section 308(4) of the Right-to-Farm Law (App. 59-61); and Brief of *Amicus Curiae* of New York Farm Bureau, Inc., dated May 29, 2008, submitted in support of Respondent in the lower court (App. 78-103)).

[6] Appellant's forced argument maintains that, even though Respondent did not subdivide her land as a matter of fact, the existence of the three on farm employee houses is a *de jure* subdivision. This is nonsense. A subdivision is an easily understood, common term in real estate law. It occurs through a public, *de facto* filing at a County Clerk's office, when a newly surveyed portion of a lot is carved out and the lot is redefined by metes and bounds as two or more lots. A subdivision is a *de facto* "division of land" as the law states. N.Y. Exec. Law § 802(63). The farm employee houses are not even subdividable from the farm. The North Family Cottage, Dormitory and South Family Cottage are arranged in a tight, U-shaped cluster with a common driveway, yard and infrastructure by the barns. (App. 66-67). The Commissioner's final determination found that the Respondent's employee housing units are not readily separated or easily subdivided due to the shared driveway and utilities. App. 61.

The resounding chord played by these four clear conclusions of law, that on-farm employee houses are sound agricultural practices and necessary farm buildings just like barns and therefore must be free from land use regulation, must be allowed to ring true. The Appellant's continued error of law, based upon a self-serving, irrational and discordant reading of the terms of the Act, cannot be sustained.

(i) The Court of Appeals Agrees With the Court Below

The Court of Appeals recognized that vigilant protection of the right to farm is necessary because "[m]any of the agricultural lands in New York State are in jeopardy of being lost for any agricultural purposes due to local land use regulations inhibiting farming." Town of Lysander, 96 N.Y.2d at 563.

Land use laws cannot be administered in a way that interferes with a farmer's right to safely house employees on her farm in a registered and delineated agricultural district. Here the Respondent farm is not only in Essex County Agricultural District No. 4, it is American Heritage Farmland.

New York's Right-to-Farm jurisprudence has firmly established that the synonymous terms "agricultural use structures" and "farm buildings" include on-farm employee houses, and that these farm structures are necessarily relied upon by New York farmers for their employees, in order to "accommodate the long work day, seasonal housing needs and to address the real shortage of rental housing in rural areas." Restrictions on their use "can significantly impair the viability of farm operations." Id. at 564 (quoting Commissioner).

(ii) The Commissioner of Agriculture and Markets Agrees With the Court Below

Patrick Hooker, Commissioner of the State of New York Department of Agriculture and Markets, pleaded with the Appellant Agency to treat on-farm employee housing as an exempt

agricultural use of land. (App. 46). The Commissioner explained that the Act is surely consistent with the Right-to-Farm Law in exempting farm employee housing, which is as integral and common to farm operations as a barn. (App. 47). The Commissioner provided the Agency with his Department's guidelines for review of such housing and the tax treatment of employee houses for farmers. (App. 49-58). The Agency refused to defer to the Commissioner's expertise.

Thereafter, the Commissioner issued a formal, final declaration under Agriculture and Markets Law § 308(4), finding that Respondent's farm employee housing is an agricultural use of the land. (App. 61). The Appellant Agency declined to even acknowledge, much less contest, this binding determination of agricultural use under New York's Right-to-Farm Law, which was served on the Agency prior to the issuance of its illegal Order.

(iii) The New York State Farm Bureau Agrees With the Court Below

The New York Farm Bureau is a non-governmental voluntary general farm organization, consisting of 30,000 farm families, formed over fifty years ago to promote, protect and represent the interests of New York farmers and to encourage the development and preservation of agricultural areas of New York consistent with the Constitution.

The New York Farm Bureau filed a well-reasoned *amicus curiae* brief below which maintained, as the trial court found, that on-farm employee housing is as integral and as closely associated with agricultural uses as a barn, shed or silo, (App. 82-85), such that it is undeniable that on-farm employee housing is "directly and customarily associated with agricultural use" within the definition of exempt structures under the Act.

The Adirondack Park Agency Act was passed contemporaneous with New York's Right-to-Farm Law set forth at Agriculture & Markets Law § 301 et seq. The Legislature, fully cognisant of the new Conservation Article of the Constitution, firmly directed the Appellant

Agency not to regulate "*bona fide* management of land for agriculture." Exec. Law § 815(4)(B). The Appellant declines to heed this unambiguous directive, even in the face of Commissioner Hooker's final determination that Respondent Farm's employee houses are bona fide agricultural land use. (App. 59-61).

The Farm Bureau noted that the Right to Farm Law unquestionably defines on-farm employee housing as agricultural use structures, and Real Property Tax Law § 483 provides an exemption from real property taxation for all farm buildings including employee housing. The broad "agricultural use structures" exemption in the Act must be construed in accordance with these existing laws. (App. 93-99).

Moreover, Agriculture Law § 3 mandates that **all** state laws concerning agriculture must be liberally construed to promote agriculture; and Agriculture & Markets Law § 305(3) commands **all** state agencies – including Appellant Agency – to encourage viable farming and to modify their regulations and procedures accordingly. There can be no doubt that the Agency committed an error of law in trying to exercise jurisdiction over Respondent's exempt farm buildings. Id.

The Appellant's fundamental error of law in treating farm employee housing as a residential subdivision cannot be upheld because it will destroy the tax structure and economic foundation of farming in the Park. Id.

Appellant refuses to relent to the truth of the agreed upon legal conclusions of the Court of Appeals, the Commissioner and the Farm Bureau regarding the express limitations upon its regulatory powers. Appellant's stubborn refusal is a frail reed upon which to enjoin farm development.

B. Appellant Cannot Show Irreparable Harm; Indeed, A Stay Would Inflict Certain Economic Harm Upon Respondent

In order to receive an injunction, Appellant must be suffering from an actual, immediate injury – not remote or speculative harm. See Golden v. Steam Heat, Inc., 216 A.D.2d 440, 442 (2d Dep't 1995).

Appellant is unable to even articulate, much less carry, its burden of demonstrating how it would be irreparably harmed if Respondent is able to complete and occupy the two farm employee houses. This is particularly so, given Appellant's decision to allow the buildings to stay where they are and its acceptance of this Court's decision that the Dormitory dwelling may be used by student intern farm employees. (App. 22-25). Indeed, Appellant seeks to actually to inflict economic harm by destroying Respondent's ability to recruit farm employees for this growing season, by depriving the potential employees of a place to be housed.

In this economy, a farm's growing season should not be destroyed unless there is some overwhelming public need to do so in the protection of public health or the environment. No such showing can be made here.[7] Upon this record there can be no doubt that the farm employee houses are absolutely necessary to a successful, organic farm operation. This is established by the uncontradicted expert opinion below of an internationally recognized organic farmer, Klaas Martens. (App. 73-76).

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[7] Appellant improperly submits a host of new affidavits, beyond the Record below, in violation of fundamental procedure. Appellant seeks only to establish the obvious by these improper filings: two of Respondent's three farm employee houses are incomplete and not yet up to code. This is obvious, immaterial and uncontested by Respondent. Respondent knows how to affect code compliance, as was done in the construction of the Dormitory and the farm employee house for Respondent's farm manager, Dr. Marco Turco, which was built at the same time as the three-house farm employee housing cluster by the barns, but was conspicuously not challenged by Appellant. Thus, the two completed farm worker houses that have been occupied are up to code. Respondent has a strict employee safety and compliance program; no showing can be made that the two vacant farm employee house shells will not be up to code before they are occupied. Any innuendo to the contrary is baseless, false and prejudicial. The two farm employee house shells do not even have toilets yet; when they do, should this Court allow the Respondent's farm to survive, they will meet or exceed the minimum health code, just like Dr. Turco's house and the Dormitory.

The Commissioner of Agriculture and Markets has made a specific finding in this case that Respondent's farm employee houses are a necessary, agricultural land use under New York's Right to Farm Law. (App. 59-61). Appellant did not seek judicial review of this final, binding administrative determination.

Since viable farm employee houses are a necessary condition precedent to Respondent's farm operation, Appellant's motion for an injunction seeks only to inflict economic harm upon Respondent. For these reasons, Appellant has not only failed to carry its heavy burden of demonstrating irreparable harm by the use of Respondent's farm employee houses, irreparable harm will be suffered by Respondent if an injunction is granted.

As this Court sits in equity to evaluate Appellant's extraordinary request, this economic harm should be avoided. Appellant's relentless siege upon the viability of Respondent's farming operation is directly contrary to its statutory charter. The Act states that Appellant's "policy shall recognize the major state interest in the conservation, use and development of the Park's resources and the preservation of its open space character." N.Y. Exec. Law § 801. As previously noted, Respondent's farm employee housing cluster is situated by the farm's barns in a "resource management" area as defined in the Act. In fulfilling its commitment to exempt farming practices from regulation by the Agency, the Legislature took several steps in the Act to prevent the exercise of State executive power over farming. The Legislature acknowledged that "open space uses, including forest management, agriculture and recreational activities, are found throughout" the land use designation of "resource management areas" where "Agricultural Uses" and "Agricultural Use Structures" are classified as the highest and best use of the land. The Legislature also recognized that farms achieve two of the primary goals of the overall act: (1) "protection of open space resources"; and (2) protection of farming as an economic activity in the

Park. See N.Y. Exec. Law § 805(3)(g)(1). Specifically, the Legislature acknowledged in the text of the statute that:

> Important and viable agricultural areas are included in resource management areas, with many farms exhibiting a high level of capital investment for agricultural buildings and equipment. These agricultural areas are of considerable economic importance to segments of the park and provide for a type of open space which is compatible with the park's character. Id.

Appellant refuses to perceive the importance of these values as expressed in New York law. The Board's error of law is further established by how contrary the Board's false reading is to the fundamental land use purpose of the Act, which the Legislature intended to leverage, promote, facilitate, encourage, protect and sustain agriculture in the Park. The Legislature structured the Plan around the central land use planning objective of protecting open space by encouraging sustainable uses of the Park's natural resources. This strength in the Act, properly interpreted and applied, is wielded by supporting New York's constitutional conservation principles. The lower court's reading of the law is the only way to maintain working soils and forests.

Consequently, if Respondent's farming operations fail, then all of the open space protected by Respondents' farm, if viable, will be lost. The Court of Appeals recognized this possibility of loss and sought to preclude it by interpreting the Agriculture and Markets Law to grant a broad protective reach to the jurisdictional exceptions granted to farms. Town of Lysander, 96 N.Y.2d at 563-64.

C. An Injunction is Not Justified Because the Balance of the Equities Do Not Tip in Favor of Appellant

The lower court's Decision was correct in annulling the Board's illegal Administrative Determination. Appellant committed a grave error of law in abusing Respondent's constitutional and statutory right to build farm employee housing free of development controls. Two houses have now stood as empty, incomplete shells for nearly two years during which Respondent

suffered illegal impairment. It is inequitable for Respondent's rights further to be impaired by making the farm employee houses unusable for another growing season.

Moreover, Appellant waited nearly thirty (30) days to file its Notice of Appeal and ninety (90) days to move this Court for an injunction after the final Judgment was entered below.[8] This hardly tips in Appellant's favor.

Appellant also seeks a second chance to challenge the sufficiency of Respondent's submissions regarding the farm houses' septic systems. Not only did this Court already reject Appellant's first challenge nine months ago on May 19, 2008 (App. 25), but Appellant, having lost below, is not in the position to argue that it is entitled to anything that exists only by virtue of the Administrative Determination that was annulled as an error of law. Indeed, it was the erroneous Administrative Determination—not a statute or regulation—that required Respondent to submit documentation of the septic system's health code compliance to Appellant.

1. Appellant Has No Public Health Law Powers

It is perhaps no surprise that Appellant, which committed an error of law in seeking to regulate farm development, now asks this Court to enjoin the Respondent further based on their grossly mistaken view of the adequacy of the Respondent's septic systems.

No reasonable person could glean public health powers from Appellant's limited charter. Nonetheless, the sole factual basis for the Agency's motion for an injunction is the mistaken, speculative, unauthorized and extremely belated and disingenuous Affidavit of Shaun Lalonde who states that the record of engineering certifications regarding the septic system, which has served Respondent's Dormitory housing since this Court's Order of nearly ten (10) months ago,

[8] Appellant also resisted filing its record and brief on appeal in a timely manner by February 17, 2009 and sought two additional weeks. It is now apparent that the time this Court afforded to Appellant was spent on this fruitless and vindictive motion.

may have shortcomings. Respectfully, Mr. Lalonde fails to understand the two reports in the record, stamped by independent NYS licensed professional engineers that the septic system is in compliance with New York's Public Health laws. It is not surprising that the Agency fails to understand an engineer's Certificate of Compliance because public health determinations are not part of the Appellant's limited land use mandate. In addition, Mr. Lalonde has been kept in the dark as to the law of this case. Appellant received two engineering Certificates of Compliance from Respondent pursuant to this Court's April 28, 2008 Order directing that the Dormitory septic system could be used. Indeed, Appellant attempted to challenge the sufficiency of those submissions in its opposition papers to that motion by making many of the same arguments that it does on this motion.[9] This Court swiftly dismissed the Appellant's challenges and issued the May 19, 2008 Decision and Order, which broadened the lower court's stay of the Administrative Decision.

This Court should not be burdened with deciding the same issue twice. Appellant had more than enough time last April to challenge the Certificate of Compliance regarding the Respondents' farm house septic system. Of course, none could be had. Appellant cannot now lead this Court into fundamental error by raising the false alarm of concern regarding a sanitary system that has been in use for ten (10) months. Even if it could muster reliable facts, the Appellant is barred by the doctrine of laches. See Tri-Star Pictures, Inc. v. Leisure Time Prod., B.V., 17 F.3d 38 (2d Cir. 1993), cert. denied, 513 U.S. 987 (1994) (noting that laches is an

[9] Mr. Lalonde completely fails to understand the relationship between the New York State Department of Health regulation of household waste treatment facilities set forth at 10 NYCRR Appendix 75-a and the readily ascertainable standards of Appendix Q-4 that Lalonde references as Exhibit B. Engineer Buckley's May 9, 2008 submission to this Court specifically addressed Mr. Lalonde's misunderstanding of Appendix Q-4, as expressed by Mr. Lalonde on May 6, 2008 and determined compliance based on publicly available geologic information. The Appellant did not contest it, as it is beyond reproach. This Court entered an Order that the septic system could be used. Mr. Lalonde's January 29, 2009 Affidavit before this Court raises no new facts and simply rehashes his uninformed concern on May 6, 2008 that were addressed by Mark Buckley, P.E., in his stamped Certificate of Compliance on May 9, 2008 upon which this Court relied in allowing use of the Dormitory.

equitable defense which bars injunctive relief when the moving party has unreasonably delayed); Ivy Mar Co. v. C.R. Seasons Ltd., 907 F. Supp. 547 (E.D.N.Y. 1995) (holding that a 10-month delay in seeking injunctive relief was unreasonable).

2. Appellant's Description of the Vacant Farm Employee Houses Cannot Form the Basis for Further Harm to the Farm

Respondent Farm agrees with one statement in Appellant's Motion for an Injunction: two of Respondent Farm's employee houses, those designed for the backbone of the farm operation in providing four family farm jobs, do not have certificates of occupancy.[10] The North Family Cottage and the South Family Cottage have been empty, unoccupied shells, without water, sanitary or electrical systems, for two full years because of the Agency's illegal interference with Respondent Farm's development. (App. 68-71). The family homes are unoccupied shells, as they have been since this litigation began. The dormitory, designed for students, interns, agriculture researchers and visiting farmers does not allow the Respondent farm to be productive. A 1,200 acre organic farm does not run on student interns. (App. 75). Respondent Farm's four permanent full-time jobs do not exist today because the Agency illegally enjoined the Respondent Farm against completing the construction of the homes upon which these jobs depend. The lower court vacated this illegal order. Now, Appellant deliberately seeks to continue preventing the farm from recruiting to provide these four full time jobs to the community. The reason the Commissioner of Agriculture and Markets found on farm employee houses to be a sound agricultural practice and an agricultural land use as a matter of law is because the farm houses upon which Respondents jobs are based are no different from barns and silos.

[10] Douglas Miller's vacuous inadmissible hearsay Affidavit of January 29, 2009, concluding that the Dormitory building received a certificate of occupancy on February 19, 2008 from the Town of Essex and that the South Cottage and the North Cottage in the three house farm employee housing cluster lack such certificates according to the Town of Essex, the sole arbiter of code compliance in this matter, happens to be accurate.

Respondent has already suffered immeasurably, because the Board's illegal Administrative Decision robbed Respondent during the 2007 and 2008 growing seasons. Respondent Farm does not have the necessary buildings to operate because the Appellant enjoined their construction. Appellant now seeks to exacerbate this harm by destroying the farm's hopes for the 2009 growing season. No New York Farm can survive three seasons without productivity. This harm must be avoided.[11]

Appellant's papers are irrational and punitive on their face because, even if Appellant wins, which this Court has said is unlikely, the farm houses can be completed, occupied and used as farm houses where they are. That is, Appellant fails to acknowledge that its own administrative decision has already made a determination that Respondent's farm employee houses may be used as is and where is. (App. 13). Not only is there no threat to public health or the environment by the completion of the farm employee houses, but Appellant's own findings established that they are fine where they are. Therefore, Appellant gains no public equity and there is nothing to weigh in its favor since Appellant is seeking to achieve nothing other than to prolong the vacancy of the employee's homes and guarantee the failure of the 2009 growing season.

For this reason, Appellant Agency has failed to carry its burden of demonstrating that the balance of equities tips in its favor in ordering the two farm employee houses vacant for another growing season. This is particularly so where, as here, Appellant does not challenge, and has never challenged this Court's full panel judgment that the middle farm employee house, which is completed, may be occupied by student intern farm employees during the pendency of this case.

[11] If Appellant's goal is to intimidate all investment in Respondent Farm to force its failure, its mission is nearly complete. Appellant's illegal Administrative Decision, now annulled, directed Respondent to cease construction of the farm buildings. This illegality has cost four jobs for two growing seasons already. This cannot continue.

Moreover, an injunction that prevents completion of the two vacant farm employee houses is not justified because it would substantially disrupt the *status quo*. The lower court's final judgment below, entered a few months ago, made it crystal clear that Respondent could complete construction of the vacant houses. (App. 43-44). This has been the law of this case for nearly ninety (90) days. Now, Appellant, having sat on its hands, seeks to disrupt the *status quo* and halt the completion of construction and occupancy of the houses by this season's farm employees. An injunction should only be issued to maintain the *status quo*. The relief requested by Appellant would only disturb the *status quo*, not preserve it. Indeed, Appellant seeks the issuance of an injunction that can be wielded as a punitive sword, which should not be countenanced by this Court.

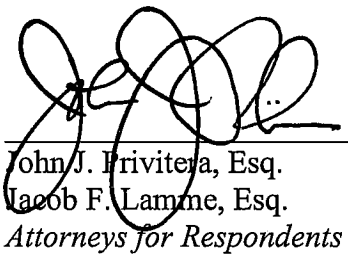
CONCLUSION

Based on the foregoing, this Court should deny Appellant's motion for injunctive relief because Appellant failed to carry its burden as to the traditional tripartite test necessary for an injunction: likelihood of success on the merits; balance of equities in its favor; and, irreparable harm. Moreover, Appellant's request fails to demonstrate the incorrectness of the lower court's Decision below in any respect and fails to acknowledge that this Court has already adjudged that Appellant is not likely to prevail on the merits.

For all of the foregoing reasons, Appellant's motion should be denied with costs and attorneys fees awarded Respondent, and this Court should grant any further relief to Respondent that it feels is just and proper.

Dated: February 17, 2009
Albany, New York

McNAMEE, LOCHNER, TITUS & WILLIAMS, P.C.



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