STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ADIRONDACK PARK AGENCY,

Respondent.

ACTION NO. 1

Index No. 315-08
RJI No.: 15-1-2008-0109
Hon. Richard B. Meyer

ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

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

Defendants.

ACTION NO. 2 / COUNTERCLAIM

Index No.: 332-08
RJI No.: 15-1-2008-0117
Hon. Richard B. Meyer

LEWIS FAMILY FARM'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR COUNSEL FEES AND EXPENSES PURSUANT TO ARTICLE 86 OF THE CPLR

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PRELIMINARY STATEMENT

Petitioner Lewis Family Farm, Inc. ("Lewis Family Farm") submits this memorandum of law in support of its motion for counsel fees and expenses pursuant to CPLR Article 86. The Lewis Family Farm is unquestionably the "prevailing party" because the Appellate Division, Third Department, unanimously affirmed this Court's judgment, which annulled the punitive administrative determination of the Adirondack Park Agency ("Agency") because it was founded upon a clear error of law. As set forth more fully below, the Agency's position throughout this litigation was not justified—let alone "substantially justified". Since the beginning of this dispute, the Agency has been aware that New York's entire agriculture community opposed and condemned the Agency's error of law and punitive treatment of the Lewis Family Farm; yet the Agency remained wed to its untenable and unjustifiable position, which ignored clear statutory language and the New York State Constitution. Therefore, the Lewis Family Farm is entitled to recover its reasonable counsel fees and expenses.

HISTORY OF DISPUTE

The dispute between the Agency and Lewis Family Farm was highly contentious. Throughout this entire matter, the Agency exhibited unwavering adherence to its illegal interpretation of the clear statutory language of the Adirondack Park Agency Act ("Park Act") and the Wild, Scenic and Recreational Rivers System Act ("Rivers Act"), which was admonished by both this Court and the Appellate Division.

A timeline of the dispute between the Lewis Family Farm and the Agency is set forth below:

- In November 2006, the Lewis Family Farm commenced an employee housing project involving four new houses on the farm, after receiving all necessary

permits from the Town of Essex in accordance with Town of Lysander v. Hafner, 96 N.Y.2d 558, 563 (2001). (R. 328-330).[1]

- Construction proceeded until mid-March 2007, when the Lewis Family Farm voluntarily halted construction after speaking with Agency staff in order to clear up any misunderstandings about the agricultural nature of the project. (R. 331).

- In May 2007, Agency staff proposed a "settlement agreement" demanding that the Lewis Family Farm (i) treat the farm worker houses as a residential subdivision rather than as farm buildings; (ii) waive the right to challenge Agency jurisdiction to regulate farming; (iii) allow Agency review of all future farm buildings; and (iv) pay a $10,000 fine. (R. 124-27; 331-32).

- On June 26, 2007, the Lewis Family Farm commenced a declaratory judgment action against the Agency, which was converted to an Article 78 proceeding and promptly remanded since the Agency had yet to issue a final determination regarding Respondent's farm employee houses. (Essex County Index No. 498-07).

- On June 27, 2007, the Agency issued an illegal cease and desist order prohibiting the Lewis Family Farm from finishing the farm worker houses or otherwise using the agricultural use structures. (R. 200-01).

- On June 29, 2007, the Department of Agriculture contacted the Agency and, referencing the Agency's dealings with the Lewis Family Farm, expressed concern over the Agency's interpretation of the Park Act with regard to its application to farming. (R. 518-19).

- On September 5, 2007, the Agency commenced an administrative enforcement action by serving a Notice of Apparent Violation on the Lewis Family Farm. (R. 79-86).

- On November 26, 2007, the Department of Agriculture contacted the Agency to express support for the Lewis Family Farm's effort to provide modern, energy efficient housing for its workers and to seek an open dialogue with the Agency on the issue of farm worker housing. (R. 510-12).

- On December 4, 2007, the Agency responded to the Department of Agriculture, stating that the Lewis Family Farm has resisted jurisdiction and that its farm worker houses are not "agricultural use structures". (R. 507-08).

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[1] "(R. ____)" is a citation to the administrative record that was originally before this Court. On June 13, 2008, the Agency filed the administrative record pursuant to CPLR § 7804(e). On August 1, 2008, the Lewis Family Farm submitted a Bates Stamped version of the record in support of its motion for summary judgment, to which the "(R. ____)" designation refers.

- On January 22, 2008, the Lewis Family Farm submitted to the Agency an extensive memorandum of law entitled *The Right to Farm in the Champlain Valley of New York: The Matter of Housing at the Lewis Family Farm*, which thoroughly explained that the Agency's misinterpretation of the clear language of the Park Act violated the Right-to-Farm Law and the New York State Constitution. (R. 277-324).

- On February 1, 2008, the Department of Agriculture issued a formal determination pursuant to Section 308(4) of the Agriculture & Markets Law finding that the Lewis Family Farm's on-farm employee housing is an integral part of a "farm operation" as defined in New York State's Right-to-Farm Law. The Agency ignored this binding determination. (R. 541-43).

- On February 21, 2008, New York Farm Bureau, Inc., a non-profit organization comprised of over 30,000 farm families, issued a letter to then Governor Spitzer and the Agency supporting the Department of Agriculture's formal opinion. (R. 575-76). The Agency ignored the New York Farm Bureau.

- On March 5, 2008, the Adirondack Park Local Government Review Board passed a resolution finding that the Agency's enforcement proceeding against the Lewis Family Farm conflicted with the terms of the Park Act, which provides that farm buildings are non-jurisdictional. (R. 580-81). The Agency ignored the resolution.

- On March 25, 2008, the Agency issued an administrative determination that improperly asserted jurisdiction over the Lewis Family Farm and determined that three of the four farm employee houses violate the Park Act and Rivers Act, and directed the Lewis Family Farm to (i) forego any right to challenge the Agency's jurisdiction; (ii) apply for a permit for a four-lot residential subdivision; (iii) pay a $50,000 fine; and (iv) refrain from occupying the farm buildings until a permit was issued and the fine was paid. (R. 10-22).

- On March 28, 2008, counsel for the Lewis Family Farm requested that the Agency voluntarily stay its administrative determination pending judicial review. The Agency refused.

- On April 7, 2008, the Lewis Family Farm commenced the above-captioned Article 78 proceeding (Index No. 315-08) to seek judicial review of the Agency's punitive and incorrect administrative determination.

- On April 11, 2008, this Court found that the Lewis Family Farm was likely to succeed on the merits and granted a stay of most of the administrative determination.

- On April 14, 2008, the Agency commenced a duplicative, punitive and unnecessary civil action (Index No. 332-08), seeking to enforce the administrative

determination that was then under judicial review. The Agency named the Lewis Family Farm and its officers as defendants.

- On April 21, 2008, the Agency responded to the Lewis Family Farm's motion to consolidate the Article 78 proceeding with the Agency's duplicative enforcement action by filing a cross-motion seeking to transfer the matters to Hon. Kevin K. Ryan, Acting Supreme Court Justice.

- On April 25, 2008, this Court granted the Lewis Family Farm's motion to consolidate the above-captioned actions and denied the Agency's motion to transfer the cases to another judge.

- On May 19, 2008, the Appellate Division, Third Department issued an order modifying this Court's stay to allow the Lewis Family Farm to use one of the agricultural use structures during the pendency of this case.

- On June 13, 2008, this Court issued an order granting the New York Farm Bureau, Inc. permission to submit an *amicus curiae* brief and participate in oral argument.

- On July 2, 2008, this Court issued an order determining that the Lewis Family Farm was not collaterally estopped from challenging the Agency's jurisdiction and dismissed the Agency's duplicative enforcement action as against the Lewis Family Farm's officers. Lewis Family Farm, Inc. v. Adirondack Park Agency, 20 Misc.3d 1114A, 867 N.Y.S.2d 375, 494 (Sup. Ct. Essex County 2008).

- On November 19, 2008, this Court issued a Decision and Order that granted complete victory to the Lewis Family Farm 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." Lewis Family Farm, Inc. v. Adirondack Park Agency, 22 Misc.3d 568, 868 N.Y.S.2d 481, 494 (Sup. Ct. Essex County 2008).

- On December 18, 2008, the Agency filed a notice of appeal from the final judgment in these consolidated actions.

- On February 2, 2009, the Agency moved the Appellate Division for a stay of this Court's final judgment pending its appeal. The stay was granted on March 20, 2009, and the Lewis Family Farm was permitted to continue its use of only one of the agricultural use structures.

- On May 27, 2009, the Appellate Division, Third Judicial Department, heard oral argument on the Agency's appeal of this Court's final judgment.

- On July 16, 2009, the Appellate Division, Third Judicial Department, issued a Memorandum and Order, affirming this Court's November 19, 2008 Order and found that the Agency's interpretation of the Park Act ignores clear statutory language and violates New York's strong pro-farming policy. Lewis Family Farm, Inc. v. Adirondack Park Agency, 2009 N.Y. Slip Op. (3d Dep't July 16, 2009).

Now, having secured an unqualified, resounding victory against the Agency before this Court and the Appellate Division, Third Judicial Department, the Lewis Family Farm seeks reimbursement of its reasonable counsel fees and expenses pursuant to Article 86 of the CPLR.

ARGUMENT

LEWIS FAMILY FARM IS ENTITLED TO AN AWARD OF ITS COUNSEL FEES AND EXPENSES

In 1989, the Legislature enacted the New York State Equal Access to Justice Act ("EAJA") in order to allow a prevailing party to recovery its counsel fees and expenses in certain actions against the State of New York. CPLR § 8600; Greer v. Wing, 95 N.Y.2d 676, 679 (2001). The EAJA is modeled after 28 U.S.C. § 2412(d) and the federal case law that has evolved under that provision. Id.

The EAJA provides that "a court ***shall*** award to a prevailing party, other than the State, fees and other expenses incurred by such party in any civil action brought against the State, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust." CPLR § 8601(a) (emphasis supplied).

A. The Lewis Family Farm is a "Prevailing Party" Entitled to Recover its Counsel Fees and Expenses

The EAJA defines "party" to include "any owner of an unincorporated business or any partnership, corporation, association, real estate developer or organization which had no more than one hundred employees at the time the civil action was filed". CPLR § 8602(d)(ii). Similarly, "prevailing party" is defined as a plaintiff or petitioner who prevails in whole or in

substantial part in an action or proceeding against the State or any of its agencies. CPLR § 8602(a), (f), (g). According to the Court of Appeals, "a party has 'prevailed' within the meaning of the State EAJA if it has succeeded in acquiring a substantial part of the relief sought in the lawsuit." NYS Clinical Lab. Ass'n v. Kaladjian, 85 N.Y.2d 346, 355 (1995).

Here, the Lewis Family Farm qualifies as a "party" eligible to recover its counsel fees and expenses under the EAJA because it is a corporation that employed fewer than one hundred (100) employees at the time the civil action was filed. See Affidavit of Salim B. Lewis, sworn to August 13, 2009, ¶ 5. Moreover, it is beyond dispute that the Lewis Family Farm is the "prevailing party" in this action because this Court granted the Lewis Family Farm exactly what it sought in this action—annulment of the Agency's punitive administrative determination. See Lewis Family Farm, Inc. v. Adirondack Park Agency, 22 Misc.3d 568, 868 N.Y.S.2d 481, 494 (Sup. Ct. Essex County 2008). The Appellate Division unanimously affirmed this Court's decision. Lewis Family Farm, Inc. v. Adirondack Park Agency, 2009 N.Y. Slip Op., pg. 7 (3d Dep't July 16, 2009) (attached as Ex. A to Privitera Aff.).

B. The State Cannot Carry its Burden of Establishing that its Position was Substantially Justified

The State cannot justify—let alone substantially justify—its position in this action. The State bears the extraordinarily heavy burden to make a "*strong showing*" that its position was "substantially justified" in order to defeat this motion. Giordano v. Secretary of Health & Human Svcs., 599 F. Supp. 178, 179 (M.D. Pa. 1984) (citing NRDC v. EPA, 703 F.2d 700, 712 (3d Cir.1983)). The determination as to whether the State's position was "substantially justified" must be made "solely on the basis of the record before the agency or official whose act, acts, or failure to act gave rise to the civil action." CPLR § 8601(a).

This Court is given broad discretion to determine whether the State has carried the burden of making a strong showing that its position was "substantially justified". See Matter of Simpkins v. Riley, 193 A.D.2d 1009, 1010-11 (3d Dep't 1993); Matter of Perez v. NYS Dep't of Labor, 259 A.D.2d 161, 163 (3d Dep't 1999); Matter of Barnett v. NYS Dep't of Soc. Svcs., 212 A.D.2d 696, 697 (2d Dep't 1995). However, it is significant that "[i]f the government's position violates the Constitution, a statute, or its own regulations, a finding that the government was substantially justified would be an abuse of discretion." Meinhold v. United States DOD, 1997 U.S. App. LEXIS 35603 (9th Cir. Dec. 18, 1997) (citing Mendenhall v. Nat'l Transp. Safety Bd., 92 F.3d 871, 874 (9th Cir. 1996)). That is the case here, as this Court and the Appellate Division found.

"The phrase 'substantially justified' has been authoritatively interpreted by the United States Supreme Court as 'justified to a degree that could satisfy a reasonable person [or having a] reasonable basis ***both in law and fact.***" Simpkins, 193 A.D.2d at 1010 (citing Pierce v. Underwood, 487 U.S. 522, 565 (1988) (internal citations omitted) (emphasis supplied).

A decision annulling an agency determination for lack of subject matter jurisdiction, as here, generally establishes that the State's position is not substantially justified and an award of attorney's fees and expenses is appropriate. See Perez, 259 A.D.2d at 163;[2] see also Serio v. NYS Dep't of Corr. Svcs., 215 A.D.2d 835 (3d Dep't 1995) (holding that the State's position cannot possibly be "substantially justified" where there is "outright dismissal of all charges against [a] petitioner"); Matter of Eger Health Center, Inc. v. Chassin, 160 Misc.2d 476 (Sup. Ct. Albany County 1994) (rejecting the State's argument that its position was substantially justified

[2] Perez also wrongly held that Article 86 of the CLPR authorized an award of attorney's fees and expenses for defense of the administrative proceeding of a petitioner prior to the filing of an Article 78. This portion of the Perez holding was overruled in Greer v. Wing, 95 N.Y.2d 676, 680 n.2, 746 N.E.2d 178, 180 n.2; 723 N.Y.S.2d 123, 125 n.2 (2001). The Court of Appeals left undisturbed the Perez holding that an annulled agency determination for lack of subject matter jurisdiction cannot be substantially justified.

where the administrative determination at issue was deemed irrational by the Appellate Division); *Cf.* Moncure v. Dep't of Envt'l Conserv., 218 A.D.2d 262, 267 (3d Dep't 1996) (deferring to the trial court's discretion in denying fees where the interpretation of a lease—not an error of law based upon a lack of subject matter jurisdiction—is involved).

Here, this Court found that the Lewis Family Farm's modular farm worker housing falls squarely within the unambiguous statutory definition of an "agriculture use structure" and is therefore exempt from Agency regulation under the Park Act. The Appellate Division made the same finding. See Lewis Family Farm, Inc. v. Adirondack Park Agency, 2009 N.Y. Slip Op., pg. 7 (3d Dep't July 16, 2009).

This Court properly annulled the Agency's administrative determination that imposed a $50,000 punitive penalty upon Lewis Family Farm and directed it to submit all farm development to jurisdictional approval of the Agency, in violation of the Park Act. The Appellate Division affirmed the annulment because the Agency's position flies in the face of the clear language of the Park Act and indicated that the Agency's position was inconsistent with unambiguous constitutionally-mandated state policy to encourage farming. Id. Therefore, according to the binding precedent in Perez and Serio, and according to Meinhold, the State cannot carry the heavy burden of showing that its illegal action was "substantially justified".

In any event, the Agency's skewed and indefensible determination to penalize the Lewis Family Farm in deliberate defiance of the Right-to-Farm Law cannot be "substantially justified" for additional reasons beyond the Agency's attempt to illegally extend its jurisdiction beyond the clearly defined terms of the Park Act.

1. **The State's Enforcement of the Agency's Illegal Administrative Determination Cannot be Substantially Justified Because it is Inconsistent With the Park Act's Express Need to Protect Agricultural Resources and Open Space**

The Agency's position in this case was contrary to a core value of the Park Act, which seeks to protect open space by favoring economically viable farms. In affirming this Court's annulment of the Agency's illegal administrative determination, the Appellate Division found that the State's enforcement position was directly contrary to the Park Act's expressed intent to facilitate the success and development of farms. Specifically, the Appellate Division found that the State's enforcement position was contrary to:

> [T]he APA Act's proclamation that the need to 'protect, manage and enhance' agricultural resources within resource management areas is of 'paramount importance,' that such areas are of 'considerable economic importance to segments of the Park,' and that the purposes and objectives of resource management areas include 'encourag[ing] proper and economic management of . . . agricultural . . . resources.' (Executive Law § 805[g][1], [2]).

Lewis Family Farm, Inc. v. Adirondack Park Agency, 2009 N.Y. Slip Op., pg. 7 (3d Dep't July 16, 2009).

The Legislature realized that the Park Act's Land Use Plan only works with sustainable agriculture inside the Park. Indeed, the Legislature sought to encourage the creation of open space in resource management areas, where the Lewis Family Farm is located, by supporting farm development and making it clear to the Agency that all farm buildings—including farm worker housing—are not to be counted in the intensity guidelines that are the crux of the Land Use Plan. See N.Y. Exec. Law § 802(50)(g) (stating that farm employee houses do not count as principal buildings). Moreover, the Legislature recognized that farms protect the open space in the Park. See N.Y. Exec. Law § 805(3)(g)(1).

If the Lewis Family Farm was broken up into sites, as the Agency commanded, the two square mile farm in a resource management area would likely be developed with thirty (30), 42.7-acre home sites. See N.Y. Exec. Law § 805(3)(g)(3). Of course, this would have defeated the open space character in resource management areas that was envisioned by the Legislature by protecting farms from Agency regulation in the first place.

Thus, the State cannot justify its position when it is contrary to the express purposes of the Park Act, as found here.

2. The State's Enforcement of the Agency's Illegal Administrative Determination Cannot be Substantially Justified Because it was Contrary to the Explicit Instructions in the Park Act

The Appellate Division specifically found that the State's position was inconsistent with:

> "The APA Act's explicit instruction that '[the APA's] rules and regulations . . . shall exclude . . . bona fide management of lands for agriculture, livestock raising, horticultural and orchards . . . from review under this Section' (Executive Law § 815[4][b]).

Lewis Family Farm, Inc. v. Adirondack Park Agency, 2009 N.Y. Slip Op., pg. 7 (3d Dep't July 16, 2009).

Surely, violation of the specific instructions of the Legislature cannot be considered justified Agency action.

3. The State's Enforcement of the Agency's Illegal Administrative Determination Cannot be Substantially Justified Because it Deliberately Ignored the Sound Legal Advice of the Department of Agriculture & Markets Regarding Exempt Farm Buildings

Several months before the Agency issued the illegal administrative determination, the Commissioner of the Department of Agriculture and Markets wrote a letter informing the Agency that New York's agricultural laws and the "agricultural use structure" exemptions of the

Park Act indicate that the Agency lacks subject matter jurisdiction over the Lewis Family Farm's modular farm worker housing.

The Agency refused to be reasonable, ignored the advice of a State Commissioner, and plowed ahead with its indefensible reading of the Park Act. Had the Agency been reasonable, it would have realized that it lacked jurisdiction over the farm worker housing at issue here and the Lewis Family Farm would not have been forced to incur the counsel fees and expenses that are the subject of this motion. See Matter of Shvartszayd v. Dowling, 239 A.D.2d 104 (2d Dep't 1997) (awarding counsel fees under the EAJA where the agency had been notified in writing of its incorrect position prior to commencement of an Article 78 proceeding).

4. The State's Enforcement of the Agency's Illegal Administrative Determination Cannot be Substantially Justified Because it was Contrary to the New York State Constitution, as the Appellate Division Found

In 1969, two years before the Park Act was enacted, 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 Agency to encourage improvement of farms—not penalize farm development.

The Appellate Division found that the Agency's position was inconsistent with this "constitutionally-mandated state policy". Lewis Family Farm, Inc. v. Adirondack Park Agency,

2009 N.Y. Slip Op., pg. 7 (3d Dep't July 16, 2009). The Agency's unjustified enforcement position was contrary to the New York State Constitution because the Agency failed to construe its narrowly delegated powers in order to encourage the development and improvement of agricultural lands. The rejection of the Agency's unjustified position by this Court and the Appellate Division protected the Park Act from constitutional infirmity.

Thus, the Agency's unconstitutional enforcement position cannot be considered justified Agency action.

5. The State's Enforcement of the Agency's Illegal Administrative Determination Cannot be Substantially Justified Because it was Contrary to the General Directives of the Right-to-Farm Law

In the wake of the Conservation Bill of Rights, the Legislature carved a wide statutory sanctuary to 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 is called the Right-to-Farm law. See N.Y. Agric. & Markets Law § 301, et seq. The Court of Appeals has succinctly stated the purpose of this statute as follows:

> The Legislature enacted [A]rticle 25-AA of the Agriculture and Markets Law in 1971 for the stated purposes of protecting, conserving and encouraging 'the development and improvement of [this State's] agricultural lands' (L 1971, ch 479, § 1). At that time and again in 1987 (L 1987, ch 774, § 1), the Legislature specifically found that 'many 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, as well as various other deleterious side effects resulting from the extension of nonagricultural development into farm areas.

Town of Lysander v. Hafner, 96 N.Y.2d 558, 563 (2001) (citing N.Y. Agric. & Mkts. Law § 300). To facilitate this purpose, the Legislature enacted Section 305 of the Agriculture and Markets Law to require all New York State agencies—including the Agency—to create and/or modify their regulations and procedures to support the development of farming in agricultural districts as here:

> 3. Policy of state agencies. It shall be the policy of **all** state agencies to encourage the maintenance of viable farming in agricultural districts and their administrative regulations and procedures shall be modified to this end...

N.Y. Agric. & Mkts. Law § 305(3) (McKinney 2004) (emphasis supplied).

This statutory mandate, which is more focused and direct than the Conservation Article, requires the Agency to modify and interpret its regulations and procedures in order to encourage farming in agricultural districts inside the Park. Id. The Appellate Division recognized that the Park Act must be read consistent with this mandate and that the Agency's position was inconsistent with this statutory directive. Lewis Family Farm, Inc. v. Adirondack Park Agency, 2009 N.Y. Slip Op., pg. 7 (3d Dep't July 16, 2009).

Surely, violation of the specific instructions of the Legislature cannot be considered justified Agency action.

6. The State's Enforcement of the Agency's Illegal Administrative Determination Cannot be Substantially Justified Because it was Contrary to the Department of Agriculture's Binding Determination in This Case Under the Right-to-Farm Law

On February 1, 2008, the Department of Agriculture made a formal determination under New York State's Right-to-Farm Law (N.Y. Agric. & Mkts. Law § 308(4)) that the Lewis Family Farm's modular housing project is an agricultural land use. (R. 541-43). The Department of Agriculture proclaimed that:

> Farm worker housing, including mobile, modular or stick-built homes, are an integral part of numerous farm operations. Farmers often provide on-farm housing for their farm laborers to, among other things, accommodate the long work day, meet seasonal housing needs and address the shortage of nearby rental housing in rural areas. The use of such homes for farm worker housing is a common farm practice. On-farm housing provides a practical and cost effective means for farmers to meet their farm labor housing and recruitment needs.

(R. 542). This formal opinion under the Right-to-Farm Law further determined that the Lewis Family Farm's modular housing project is warranted and that the use of land for the employee

houses in this case is undoubtedly "agricultural in nature." (R. 543). This determination was binding. See generally N.Y. Agric. & Mkts. Law § 308.

Nevertheless, the Agency chose to ignore this formal opinion and proceeded to issue its illegal administrative determination that sought to punish the Lewis Family Farm.

7. The State's Enforcement of the Agency's Illegal Administrative Determination Cannot be Substantially Justified Because it was Contrary to the Tax Law and Would Have Destroyed the Economic Sustainability of Farming in the Champlain Valley

The Park Act recognizes that farms are of "considerable economic importance" to the Park. N.Y. Exec. Law § 805(3)(g)(1). This importance is reflected in the tax laws applicable to farmers. Under federal law, the Internal Revenue Code permits a farmer to treat the cost of boarding farm labor on the farm as a deductible labor cost.[3] There is no deduction for a farmer's personal residence. Both the Department of Agriculture and Markets[4] and New York State Board of Real Property Services[5] also adhere to this distinction.

The tax deduction makes it economically feasible for farmers to incur the cost of erecting farm housing for the benefit of farm laborers. Without this tax deduction and the ability to depreciate the cost of on-farm housing, the Lewis Family Farm would be unable to afford the cost of suitable on-farm housing. The Agency's erroneous administrative determination required the farm to file a permit application for a 4-lot residential subdivision. This jeopardized the Farm's economic sustainability because if on-farm housing is considered residential real property under local law, the farm will lose the foregoing deductions.

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[3] See IRS Publication 225 – Farmer's Tax Guide, *available at* http://www.irs.gov/pub/irs-pdf/p225.pdf (last visited August 10, 2009).

[4] See http://www.agmkt.state.ny.us/AP/agservices/guidancedocuments/305-aFarmHousing.pdf (last visited August 10 2009).

[5] See Form RP-483-Ins (providing farmers with a tax exemption for farm worker housing, but denying the exemption to the farmer's personal residence), *available at* http://www.orps.state.ny.us/ref/forms/pdf/rp483ins.pdf (last visited August 10, 2009).

Nevertheless, the Agency ignored these tax issues when it issued the illegal administrative determination. The Agency inflicted substantial economic harm upon the productivity of the Lewis Family Farm during the past three growing seasons. Without on-farm employee houses, the Farm could not recruit, much less hire, quality employees. Because the Agency ignored these important economic issues, its position cannot be substantially justified.

C. The State Cannot Demonstrate Special Circumstances that Make an Award of Counsel Fees and Expenses Unjust

There are no "special circumstances" that would make an award to the Lewis Family Farm unjust. "Special circumstances" involve situations where the Government "advanc[es] in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts." Donovan v. Miller Properties, Inc., 547 F. Supp. 785, 790 (M.D. La. 1982) (citing Congressional House Report No. 96-1418, pg.11, as set out in 1980 U.S. Code, Cong. & Admin. News, 4990). However, governments are not given free reign to be unreasonable just because a case may be one of first impression. See Russell v. Nat'l Mediation Bd., 775 F.2d 1284, 1290-91 (5th Cir. 1985) (rejecting the government's "special circumstances" argument because the government's "novel" interpretation was not credible, as here).

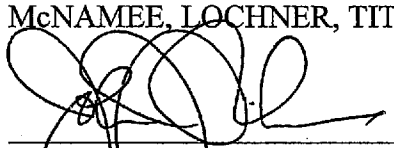
Here, the State cannot point to any "special circumstances" which would prohibit the Lewis Family Farm from recovering its reasonable counsel fees and expenses in this action. The State's position was uniformly rejected by this Court, and the Appellate Division found it inconsistent with the Park Act, the Right-to-Farm Law and the New York State Constitution. Lewis Family Farm, Inc. v. Adirondack Park Agency, 2009 N.Y. Slip Op., pg. 7 (3d Dep't July 16, 2009) On this record, the State's unreasonable position was simply not credible.

CONCLUSION

Based on the foregoing reasons, nothing is redemptive in the State's wrongful enforcement of the illegal administrative determination. Therefore, the Lewis Family Farm respectfully requests that this Court enter an order pursuant to Article 86 of the CPLR awarding the farm its reasonable counsel fees and expenses of $208,770.06, plus any additional fees incurred if the State of New York opposes this motion, and granting such other and further relief that the Court deems proper.

Dated: August 13, 2009
Albany, New York

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



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