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STATE OF NEW YORK SUPREME COURT
COUNTY OF ESSEX
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LEWIS FAMILY FARM, INC.,)
Petitioner,))
))
- v -) Index No.: 315-2008
) RJI No.: 15-1-2008-0109
ADIRONDACK PARK AGENCY,)
Respondent.))
-----*

Court proceedings held in the above-entitled matter in Essex County Supreme Court, Elizabethtown, New York, before the Honorable Richard B. Meyer on October 30, 2009.

Appearances:
McNAMEE, LOCHNER, TITUS & WILLIAMS, P.C.
Appearing for the Petitioner
677 Broadway
Albany, NY 12207-2503
By: JOHN PRIVITERA, ESQUIRE

ANDREW M. CUOMO, Attorney General
of the State of New York
Appearing for the Respondent
By: LORETTA SIMON, Assistant Attorney General

Court Clerk: Lise Johnson

ELLEN D. CHASE
Court Reporter
Franklin County Courthouse
Malone, New York 12953

1 (Court was called to order on Thursday,
2 October 29, 2009, by the Hon. Richard
3 B. Meyer at 10:43 a.m.)

4 THE COURT: This is the matter of the
5 Lewis Family Farm against New York State
6 Adirondack Park Agency. We'll get the
7 appearances, we'll start with Mr. Privitera.

8 MR. PRIVITERA: Good morning, your Honor,
9 John Privitera on behalf of the Lewis Family
10 Farm, the application on this motion. I am
11 at counsel table here with my associate Jacob
12 Lamme and two officers of the applicant,
13 Sandy Lewis and Barbara Lewis.

14 MS. SIMON: Good morning, your Honor,
15 Loretta Simon for the New York State Office
16 of the Attorney General and I have with me
17 Paul Van Cott with the Adirondack Park
18 Agency.

19 THE COURT: Thank you. All right. Mr.
20 Privitera, this is your application, why
21 don't you start.

22 MR. PRIVITERA: Thank you, your Honor.
23 Good morning and thank you for making the
24 time in your busy schedule to hear oral
25 argument on this matter. When your Honor

1 first took this case under advisement, the
2 Court posed a legal question to the
3 Adirondack Park Agency in this very room.
4 You said since the statutory definition of
5 structure includes housing, why isn't farm
6 worker housing an exempt agricultural use
7 structure? The Agency was unable to answer
8 the question, so this Court annulled the
9 Agency's decision which was based on a
10 mistake of law. The Appellate Division
11 unanimously affirmed that decision by your
12 Honor and found that every aspect of your
13 Honor's decision was correct.

14 The Court further found, the Appellate
15 Division further found unanimously that
16 nothing in the Adirondack Park Act or the
17 Rivers Act suggests anything in support of
18 the Agency's misconstruction of the statute.

19 THE COURT: What about the fact that the
20 -- your predecessor before you became
21 involved in the case and brought a proceeding
22 before Justice Ryan who issued a decision
23 that seemed to favor the position taken by
24 the Park Agency? Doesn't that provide them
25 with a substantial justification for

1 proceeding with the enforcement committee?

2 MR. PRIVITERA: Well, your Honor, I don't
3 think so because as the Appellate Division
4 found the answer lies in the text of the
5 statute itself, first of all. Second of all,
6 as your Honor found, the decision, let's call
7 it the remand Order, the remand Order by that
8 Court did not reach the merits as this Court
9 found and the Appellate Division found that
10 that decision was academic in the face of
11 their determination of these merits.

12 Further, your Honor, the Agency had
13 already gone down the path of this legal
14 mistake, had entered a cease and desist Order
15 against the Agency, and I think that they
16 carved out their mistaken legal position well
17 before that remand Order was entered. I
18 don't think any reasonable person can read
19 that decision, your Honor has read it, your
20 Honor didn't give it any credit on the
21 merits, but if you read that decision it has
22 a number of significant mistakes in it, legal
23 mistakes in it including a rash finding that
24 someone could build a pig pen next to a river
25 which is not what the Rivers Act provides.

1 So I don't think a reasonable person,
2 particularly a lawyer such as those who run
3 the Agency or the Enforcement Committee could
4 have read that decision as providing any
5 justification.

6 Further, the primary decision in this
7 area, your Honor, is *Pierce against*
8 *Underwood*. That is a Supreme Court decision
9 decided in 1988. It is cited by both sides
10 on this motion.

11 THE COURT: And then that sets forth the
12 standard of substantial --

13 MR. PRIVITERA: It clarifies what
14 substantial justification means, your Honor.
15 It also finds that the decision by your Honor
16 is subject to an abuse of discretion
17 standard, but most importantly, your Honor,
18 and this is buried in the nuances of that
19 Supreme Court Decision. In that Decision the
20 Court affirmed the award of attorney fees. I
21 think it remanded for a consideration as to
22 the amount but affirmed the award because
23 there was a legal mistake by the government
24 in that case.

25 And in that case the government sought to

1 justify their decision by arguing that an
2 Appellate Division decision -- I'm sorry, a
3 Federal Circuit Court decision gave some
4 credence to their -- actually the decision
5 was *Pennsylvania against Lynn, 163*
6 *U.S.App.D.C. 288*. They said that they
7 thought their position was justified based
8 upon some decision in the Pennsylvania case.
9 The Court of Appeals said, your Honor,
10 "Obviously the fact that one other court
11 agreed or disagreed with the government does
12 not establish whether its position was
13 substantially justified."

14 Obviously, and that is because this
15 position has to be justified on the merits
16 itself. In that case the Court, the Supreme
17 Court of the United States went through an
18 argument, looked at the *Pennsylvania against*
19 *Lynn* case and still found that because the
20 government was wrong as a matter of law,
21 their position was not substantially
22 justified.

23 THE COURT: Does it make any difference
24 that this was -- I think everybody admits in
25 their papers this is a case of first

1 impression?

2 MR. PRIVITERA: It was a case of first
3 impression when it reached your Honor, but
4 that doesn't mean that you can take a legal
5 position that violates the, if I could quote
6 the Appellate Division again, "clear and
7 unambiguous terms of the statute." It
8 doesn't mean that you're substantially
9 unjustified taking a run at the heart of the
10 statute just because it's the first case.

11 I suppose it would be the first case too
12 if they took the position that a building
13 that is under 40 feet tall in a hamlet is
14 jurisdictional. That's a case of first
15 impression. They have never tried to
16 misconstrue the statute that badly. That
17 doesn't mean that that position would be
18 substantially justified because there, as
19 here, the statute provides no jurisdiction
20 over agricultural use structures.

21 THE COURT: Well, what about, you have
22 this Decision from Justice Ryan which he does
23 say at one point that one of the reasons he's
24 dismissing your proceeding, not yours but
25 your client's proceeding, was because it

1 appeared that the Agency had jurisdiction
2 under the Rivers Act and of the APA Act that
3 if that decision was appealed but that appeal
4 was never perfected or pursued, even until I
5 got the case.

6 MR. PRIVITERA: That is not correct, your
7 Honor. The appeal was not briefed on the
8 Appellate Division until we got there.

9 THE COURT: On my decision?

10 MR. PRIVITERA: Yes, it was all
11 consolidated, all three cases were
12 consolidated.

13 THE COURT: But couldn't that case have
14 been prosecuted on appeal in a more timely
15 fashion and been resolved by the Appellate
16 Division before it even reached the
17 Enforcement Committee? I mean the
18 Enforcement Committee didn't deal with this
19 until the end of March 2008, and Judge Ryan's
20 Decision was at the end of August 2007.

21 MR. PRIVITERA: That's because, your
22 Honor, under my advice, and by the way we're
23 not seeking attorney fees for that skirmish
24 before Judge Ryan.

25 THE COURT: I understand that.

1 MR. PRIVITERA: That under my advice and
2 as this Court found so much of Judge Ryan's
3 Decision as remanded it for decision by the
4 Agency was correct. And as to the dicta in
5 that case -- so we waited for the Agency to
6 make a determination on the merits. At that
7 time the Agency was able to and fully looked
8 at the full scope of the statute. We fully
9 briefed it before the agency. It was a case
10 of first impression when it got here, but
11 before them it was briefed the same way it
12 was briefed before this Court and it was
13 clear at that time that Judge Ryan's dicta,
14 which does not analyze the statute the way
15 any court had because all it did on the
16 merits was remand for consideration by the
17 full agency.

18 At that time the Agency should have
19 followed the clear and unambiguous terms of
20 the statute. The crush of Judge Ryan's dicta
21 does not justify what they did here.
22 Frankly, your Honor, what we're seeking --
23 perhaps it could be analyzed this way. The
24 Court of Appeals has said that we can't seek
25 attorney fees for the administrative process,

1 so all of the dispute before the Agency is
2 not before this Court with respect to the
3 amount of time we spent on that. After the
4 Agency made a decision is when we incurred
5 the attorneys' fees that are part of the
6 current application.

7 THE COURT: I understand that but your
8 application for attorney fees is dependent
9 upon there being no substantial justification
10 by the Agency for their action from March of
11 2008, correct?

12 MR. PRIVITERA: Correct.

13 THE COURT: And the fact that the decision
14 of Justice Ryan was out there and had not
15 been addressed by the Appellate Division,
16 that doesn't form a basis for it?

17 MR. PRIVITERA: No, your Honor, because
18 first of all it was pure dicta, it was not
19 part of the remand order that was effective;
20 and, secondly, at the time they made the
21 administrative determination they had the
22 full scope of the statute properly briefed in
23 front of them. The merits hadn't been fully
24 briefed before Judge Ryan such that he
25 addressed them and he didn't have

1 jurisdiction to address the merits.

2 And, therefore, your Honor, what should
3 have happened here is is that the farm should
4 not have had to incur attorney fees at all
5 when the administrative determination was
6 made and it went to the Attorney General's
7 office. The Attorney General's office should
8 have recognized that it violated the clear
9 terms of the statute and the case should have
10 ended then. That's the point. That's what
11 the Equal Access to Justice Act is all about.
12 Why did we have to litigate that when it
13 violated the clear and unambiguous terms of
14 the statute? It doesn't matter that it was a
15 case of first impression any more than a case
16 that's less than 40 feet tall in a hamlet.

17 THE COURT: Are you saying the fault lies
18 with the Attorney General's office?

19 MR. PRIVITERA: I'm saying the case should
20 have been resolved right then like a lot of
21 administrative decisions were and have been
22 because it clearly violated the statute.

23 Instead, your Honor, not only did the Agency
24 make the mistake of law, the Agency ordered
25 the farm to submit to it's jurisdiction,

1 ordered the farm to apply for a permit for a
2 three-home subdivision and ordered that it
3 happen in thirty days. We asked for a stay
4 and they refused it. So we had to litigate
5 from day one to get a court to look at the
6 clear and unambiguous terms of the statute.

7 Your Honor, it is not any more proper for
8 this Agency to rely on the dicta of Judge
9 Ryan than it was for the Secretary of Housing
10 and Urban Development to rely upon a case
11 that was properly decided on the merits that
12 they already provided some justification.
13 As I said, the Supreme Court has said the
14 fact that another court has agreed or
15 disagreed does not establish whether the
16 position was substantially justified. That's
17 what the Supreme Court says. The issue lies
18 in whether or not the position was
19 reasonable, whether it can be justified now
20 before this Court to a degree that would
21 satisfy a reasonable person that there was a
22 sound basis in fact and law.

23 No jurist who has looked at the merits of
24 this has found a sound basis in law. In fact
25 the Appellate Division specifically found

1 that it violated the Agency's position,
2 violated the explicit instructions of the
3 Legislature, and that the Agency's position
4 violated the core intent of the statute in
5 promoting agriculture. So there's no solace
6 in even a comma of the Appellate Division
7 decision and your Honor can fairly look at
8 the fact that the state declined to even
9 appeal that decision.

10 Isn't that the best evidence that they
11 didn't think they could even put a brief
12 together? That they couldn't even rationally
13 argue that their position had any basis in
14 law at all?

15 THE COURT: Appeal to the Court of
16 Appeals, is that what you're saying?

17 MR. PRIVITERA: Yes, they didn't apply for
18 permission for leave. I think that says --
19 and the Supreme Court has said, because it's
20 interesting and the fact pattern of *Pierce*
21 *against Underwood*, the case was settled and
22 then they litigated the attorneys' fees? And
23 the Supreme Court said specifically that a
24 failure to appeal from an adverse judgment
25 was a strong consideration as to whether or

1 not the case had any merit or could pass the
2 substantial justification test.

3 I think it's fair based on that reading by
4 the Supreme Court to conclude, your Honor,
5 that when they forego an argument that could
6 be made to the state's highest court, it can
7 be construed against them that they cannot
8 make an argument and could not have made an
9 argument that their interpretation of the
10 statute was reasonable.

11 THE COURT: Are you citing the *Pierce* case
12 for that?

13 MR. PRIVITERA: Yes, your Honor. And,
14 again, as the Appellate Division stated, the
15 Agency's position violated the "clear and
16 unambiguous statutory terms of the law", and
17 so it's over reaching and frankly brutal
18 prosecution of the Lewis Family Farm in
19 setting a \$50,000 fine and demanding
20 immediate jurisdiction and refusing to accept
21 a stay forced this matter to be heard by the
22 Court.

23 Your Honor, there is no case that we have
24 found and no case cited by the government
25 where a lack of subject matter jurisdiction

1 or a clear mistake of law was found to be
2 substantially justified. There's about four
3 cases that apply here, *Perez*, Third
4 Department case. Third Department holds that
5 when the Agency lacks subject matter
6 jurisdiction it cannot be considered
7 substantially justified. Here that's what
8 the Appellate Division found. They found
9 that the Agency lacked jurisdiction over
10 these structures; and, therefore, your Honor,
11 *Perez* holds and I think *Perez* has to follow,
12 it has to be followed.

13 In *Simpkins*, another Third Department
14 case, the Third Department held that the
15 Department of Corrections failed to follow
16 their own regulations in the way they went
17 about a drug test. And the Third Department
18 found that when an agency violates its own
19 regulations it cannot be considered
20 substantial justification.

21 These cases draw upon a couple of federal
22 cases that hold the same thing, *Meinhold* and
23 *Mendenhall*. As a matter of fact, your Honor,
24 I might say *Meinhold* says that when the law
25 is violated by an agency, it would be an

1 abuse of discretion to deny attorney fees.
2 That's in the face of a broad body of law,
3 state and federal, that says everything here
4 is submitted, is submitted to your Honor's
5 sound discretion.

6 What that means, your Honor, as you know,
7 is that your decision on this matter is going
8 to be deferred to by the Appellate Division.
9 There is no exception to the juris prudence
10 on that. Everything is committed to your
11 Honor's sound discretion. That's one of the
12 teachings of *Pierce* that is followed in the
13 state and federal courts and, therefore, your
14 Honor, your discretion applies here except
15 perhaps as bounded by what I just said with
16 respect to *Mendenhall*.

17 Your Honor, the Equal Access to Justice
18 Act was specifically designed to assure
19 impoverished individuals and small businesses
20 that they have the same access to justice and
21 the same and equal path to judicial review as
22 is provided to wealthy corporations. When a
23 prevailing party, such as the farm here,
24 achieves that justice the law grants that
25 access by compensating the prevailing party

1 for the cost of achieving that justice, for
2 itself and frankly for the people of the
3 state.

4 Your Honor's decision and the affirmance
5 by the Appellate Division is justice but it's
6 not complete until the Equal Access to
7 Justice Act is followed because it's a
8 remedial statute and it has laudable goals,
9 and your Honor's decision will impact other
10 matters, impoverished people and those who
11 dare to stand against the state and win.

12 THE COURT: Well, it's not my function
13 here to send a message, is it?

14 MR. PRIVITERA: No, your Honor.

15 THE COURT: I'm just deciding this one
16 case.

17 MR. PRIVITERA: That is correct, your
18 Honor. But like your last decision and many
19 of the decisions that you write, it will be
20 part of the juris prudence of this state and
21 it does affect the scope of the statute to
22 the extent that it is in, at least, this
23 jurisdiction.

24 Your Honor, there can be no doubt that a
25 just result requires an award here and we ask

1 that it be granted in all respects. Thank
2 you.

3 THE COURT: Thank you. Ms. Simon.

4 MS. SIMON: Thank you, your Honor. The
5 threshold question on an application for
6 attorneys' fees under the states Equal Access
7 to Justice Act is whether the Agency was
8 substantially justified in it's position, and
9 if it was there can be no award of fees.
10 It's the state's position that the state was
11 substantially justified both in fact and in
12 law and that the determination of March 2008,
13 although annulled, was substantially
14 justified and there should be no award of
15 fees here.

16 THE COURT: Is that based solely on
17 Justice Ryan's decision?

18 MS. SIMON: Oh, no, your Honor. It's a
19 number of things but that is one of them.

20 THE COURT: But isn't that what Mr. Wray
21 says in his affidavit that was --

22 MS. SIMON: That he relies heavily. He
23 says in, I believe it is paragraph 8 of his
24 affidavit, they relied heavily on Justice
25 Ryan's determination of jurisdiction, yes.

1 THE COURT: And it's the burden on the
2 state, is it not, to prove justification?

3 MS. SIMON: It is a burden on the state to
4 prove that the state was substantially
5 justified, but it is the burden on
6 petitioners to demonstrate if your Honor is
7 going to make an award that they have
8 submitted sufficient evidence of prevailing
9 rates and the burden is on them for their
10 fees, okay?

11 THE COURT: All right. I'm sure we'll get
12 to that.

13 MS. SIMON: No, I just want to clarify, we
14 both have burdens here today.

15 THE COURT: I understand.

16 MS. SIMON: There is no requirement for
17 the state to show that it was correct. There
18 is plenty of case law, and it's in my papers,
19 showing that even when the state is wrong you
20 can't automatically get attorneys' fees. You
21 have to apply and you have to consider what
22 the state considered at the time it made the
23 determination.

24 So the Adirondack Park Agency made a
25 determination based only on what was in its

1 record at the time, not on the benefit of
2 having an Appellate Division ruling already
3 telling them you do not have jurisdiction
4 here, but only what they knew at the time.
5 And at the time one factor was, one thing
6 they had going for them, if you'll say it
7 that way, is Judge Ryan's decision.

8 THE COURT: But did they really have that?
9 I mean, let's look at that decision. Didn't
10 he just really say that the APA had authority
11 to look at this and decide whether they had
12 jurisdiction? Isn't that what he really said
13 and that on its face it appeared that it
14 looked like they might have jurisdiction and
15 therefore had to go to them and be decided
16 and that was it?

17 MS. SIMON: He was a little more specific,
18 with all due respect. He specifically said
19 that these three single-family dwellings are
20 not agricultural use structures. Now that's
21 what the question boiled down to at the end
22 of the day. That is exactly what he decided.

23 THE COURT: Was that issue really before
24 him?

25 MS. SIMON: It was because in their

1 amended petition -- sorry amended complaint
2 because it was a declaratory judgment action,
3 in their complaint they specifically asked
4 for a ruling on jurisdiction so that they
5 wouldn't have to go through any further
6 agency enforcement. That was a specific
7 request and I have cited that in my brief, I
8 don't remember the exact part of the
9 complaint.

10 But they requested, they sought it, they
11 asked for an answer on jurisdiction and got
12 it. They didn't like their answer. They
13 have never liked the answer. Opposing
14 counsel always leaves Justice Ryan's decision
15 out of his time lines and out of his papers.
16 The Farm Bureau refers to Justice Ryan's
17 decision as poorly written. I mean, you can
18 malign Justice Ryan, but the bottom line was
19 he took a look at it, he gave them what they
20 wanted, a determination on jurisdiction. He
21 specifically said these are not agricultural
22 use structures.

23 THE COURT: He didn't give anybody the --
24 the only determination he gave was this was
25 premature and that is not for the Court to

1 step in and have concurrent jurisdiction with
2 the APA and decide matters that the APA
3 should decide in the first instance and the
4 farm had to exhaust it's administrative
5 remedies before the Court could exercise any
6 jurisdiction.

7 MS. SIMON: I agree that he's done all of
8 that. But he's also --

9 THE COURT: But if he said that then how
10 could any language in his decision regarding
11 whether these were agricultural use
12 structures or not, how could that have any
13 weight whatsoever? Isn't he then usurping
14 the function of the APA? Isn't that a
15 determination that the Agency had to make in
16 the first instance?

17 MS. SIMON: The APA later went on to make
18 a full determination, yes. However, for
19 better or for worse, depending on your point
20 of view, Justice Ryan made a determination
21 because Lewis Farm sought it, asked for a
22 declaration. He said this agency has
23 jurisdiction. You need to go forward in this
24 process.

25 And by the way, it wasn't a remand. The

1 word remand does not appear in his decision
2 and that had some vague connotations, so I
3 don't agree with Mr. Privitera with respect
4 to that. In any event another way to look at
5 this, your Honor, is what if Justice Ryan had
6 said there was no jurisdiction? There would
7 have been no APA determination and we
8 wouldn't be here today.

9 The APA is bound by decisions of this
10 Court. It was perfectly reasonable for them
11 to go forward with that decision. In fact
12 they were bound by that decision. How could
13 you not follow a decision of this Court in
14 good faith? They went forward in good faith
15 relying on it to whatever degree they thought
16 applied, and since Justice Ryan made specific
17 findings they relied on those findings.

18 But that is only one indicator, your
19 Honor, of substantial justification and there
20 is ample case law that says if you have a
21 prior court ruling in your favor that is
22 evidence of substantial justification. So
23 that is one condition.

24 THE COURT: But let's go back, was his
25 decision really in the Agency's favor,

1 though, because all he did was send it back
2 to the Agency to decide these issues? He
3 didn't decide whether these were agricultural
4 use structures or not under the Act.

5 MS. SIMON: He specifically addressed the
6 APA Act and the Rivers Act, both were
7 discussed in his decision.

8 THE COURT: But how about this, the flip
9 side.

10 MS. SIMON: Yes, your Honor.

11 THE COURT: The plaintiff argues that the
12 houses are agricultural use buildings which
13 the APA does not dispute. Isn't that a
14 finding in favor of the farm or was that a
15 matter that was left up to the agency?
16 That's on page 5.

17 MS. SIMON: Let me pull it out because
18 there is definitely language that says --

19 THE COURT: It's attached to Mr. Wray's
20 affidavit as Exhibit B.

21 MS. SIMON: Thank you. Exhibit B, right?
22 The Court does not agree with the plaintiff's
23 assertion that the APA has no authority over
24 this building project.

25 THE COURT: It says that but on the other

1 hand he says that the APA concedes that they
2 are agricultural use buildings.

3 MS. SIMON: Where are you looking, your
4 Honor?

5 THE COURT: Page 5.

6 MS. SIMON: Page 5.

7 THE COURT: The beginning of the first
8 full paragraph right in the middle of the
9 page.

10 MS. SIMON: First full paragraph?

11 THE COURT: The only one that starts on
12 that page.

13 MS. SIMON: The APA has authority over all
14 the structures?

15 THE COURT: It is on page 5 of the
16 decision.

17 MS. SIMON: Yes.

18 THE COURT: Judge Ryan's decision?

19 MS. SIMON: I think I'm reading from that,
20 yeah.

21 THE COURT: Mine says, "The plaintiff
22 argues that the houses are agricultural use
23 buildings." Do you see that?

24 MS. SIMON: Yes.

25 THE COURT: "Which the APA does not

1 dispute." That part?

2 MS. SIMON: Yes, okay. I see that, yes.

3 THE COURT: But he then goes on to say
4 that the section does not support the
5 plaintiff's interpretation. But is he really
6 making a finding on that?

7 MS. SIMON: Well, you know, we can --
8 hindsight is great when you win in the end
9 and you can go back and say, didn't this say
10 this and didn't this say that? In fact
11 contrary to what counsel for Lewis Farm says
12 this was where it was a case of first
13 impression, this is the first judge to look
14 at this and his first look, and let's assume
15 that he's a reasonable person, was look, I
16 think the APA has jurisdiction here and you
17 should go forward in this process and the APA
18 relied on that. Was it on the merits fully?
19 No, that came later.

20 THE COURT: Okay. So it was really, he
21 just sent it to the APA for the Agency to
22 determine whether there was any exemption or
23 not and if not what would be the requirements
24 for constructing this, isn't that what he
25 really did? That's all he did?

1 MS. SIMON: I think, your Honor, he made
2 a declaration of jurisdiction. He said the
3 APA has jurisdiction over the Lewis
4 structure.

5 THE COURT: So why did the Enforcement
6 Committee then make those same findings?
7 Why did they go through all of those phases
8 of finding, trying to establish that these
9 were nonexempt buildings and required a
10 permit and then go forward? Why didn't they
11 just impose a penalty? Why did they do all
12 of the other stuff?

13 MS. SIMON: Because Lewis Family Farm
14 applied for a permit and they cannot process
15 a permit if there's an outstanding violation.
16 They need to resolve the violation. That was
17 the purpose of the Enforcement Committee's
18 proceeding.

19 THE COURT: I mean, under your argument
20 doesn't Judge Ryan's decision constitute a
21 judicial finding of a violation? He's
22 saying that they have jurisdiction, then the
23 farm was obviously in violation, all the
24 Enforcement Committee had to do was enforce a
25 penalty. Isn't that all they had to do?

1 MS. SIMON: You could argue that. I
2 wouldn't disagree.

3 THE COURT: But the Enforcement Committee
4 didn't do that, did they?

5 MS. SIMON: They made a determination I
6 think -- the question is, is their
7 determination reasonable and did they rely on
8 Judge Ryan, and I think the answer is clear
9 that they did and Mr. Wray affirms, swears to
10 this Court that they did and they relied
11 heavily. We can now look back at Judge
12 Ryan's decision and see and the Appellate
13 Division has told us there is no jurisdiction
14 here. You know, hindsight is great. But the
15 APA read it. It said to them and it says in
16 the language of his decision you have got
17 jurisdiction, go forward.

18 THE COURT: What was the substantial
19 justification for the Enforcement Committee
20 not relying on the old statutory language in
21 the Act? Structure, agricultural use
22 structure and accessory structure, what was
23 the substantial justification for that?

24 MS. SIMON: They read the statute
25 consistent with how they read it since the

1 Act was passed, your Honor, and that is 810
2 of the Adirondack Park Agency Act, 810 has a
3 provision for resource management lands and
4 for single-family dwellings. They have
5 always issued permits for single-family
6 dwellings. They read it consistently with
7 how they have applied the Act over the past
8 thirty years.

9 The difference here was single-family
10 dwellings on a farm occupied by farm workers.
11 That is where it is. That is where the
12 Appellate Division said, yes, these are
13 single-family dwellings under that section of
14 the Act, but they are also ag use,
15 agricultural use structures. They didn't
16 read the Act the same way. Their decision
17 was affected by error of law. I am not
18 arguing otherwise.

19 THE COURT: I know. But how can they be
20 substantially justified in that determination
21 when the term structure under their very Act
22 includes the word -- includes a single-family
23 dwelling and that a definition of
24 agricultural use structure includes the word
25 structure, which is defined under the Act to

1 include a single family dwelling, and there
2 is a separate definition for accessory stuff?

3 How do they justify treating these --
4 having somehow read into the statute that an
5 agricultural use structure is only an
6 accessory structure? How did they get to
7 that?

8 MS. SIMON: I would rely on their own
9 determination and their own words, and I
10 would also say, your Honor, that in the
11 definition of agricultural use structures all
12 of the examples given only include buildings
13 that house animals and crops. They do not
14 say residences qualify here. It was not
15 clear to them, obviously. They didn't see it
16 as you see it.

17 THE COURT: But the statute doesn't set
18 forth the only structures --

19 MS. SIMON: But if you take just the
20 definition of agricultural use structure,
21 which is how they had been interpreting it
22 all along and had never been challenged, they
23 had no case law directives, and there's no
24 legislative history, by the way, that says
25 agricultural use structures include

1 single-family dwellings. It's not in that
2 definition. You have to go to another
3 section and a decide if that applies or not.
4 They made a mistake and erred in statutory
5 construction.

6 This was not heard by any other -- one
7 Judge that looked at it said to them you have
8 jurisdiction, go forward with your process.

9 THE COURT: Well, let me ask you this. If
10 it's such a novel issue, why the \$50,000
11 penalty and why the initial requirement in
12 the determination that the farm would have to
13 forego its rights to challenge jurisdiction?
14 Why?

15 MS. SIMON: Let me answer the second one
16 first --

17 THE COURT: Okay.

18 MS. SIMON: -- if I may. They
19 acknowledged that was put in in error and in
20 the record there is an errata sheet. That
21 shouldn't have been there.

22 THE COURT: Wait, wait, wait. That only
23 came out after I raised that issue on an
24 initial application for temporary restraining
25 order and I raised serious questions as to

1 the validity of that. So --

2 MS. SIMON: And I remember arguing that
3 during the stay and saying, your Honor, I
4 don't know the answer to it.

5 THE COURT: But why, if they were so
6 certain of their jurisdiction, why would they
7 put in a provision that says you can't
8 challenge jurisdiction? Why would they do
9 that?

10 MS. SIMON: It shouldn't have been there,
11 and you know why? I think -- I'll just say
12 that now we have been through this whole
13 process and it is typical language that they
14 put in their settlement agreements and I have
15 no idea of someone cutting and pasting
16 whatever they do to draft these things, but
17 they immediately acknowledged that it was an
18 error. It should not have been there. There
19 is typical settlement language where you're
20 going to settle, you're going to agree. It
21 should not have been there.

22 THE COURT: Yeah, that wasn't a
23 settlement, though.

24 MS. SIMON: Definitely, I'm agreeing with
25 you, your Honor.

1 THE COURT: Maybe you can address why the
2 -- \$50,000, that was a pretty hefty penalty,
3 \$50,000 penalty on a case of apparent first
4 impression, why did they do that?

5 MS. SIMON: Let me say that the statute
6 authorizing fees and penalties, both in the
7 Rivers Act and the APA Act allow ranging from
8 \$500 to a thousand dollars a day for
9 violations, this is a penalty fully within
10 and much less than they could have asked for.
11 So they were, I would say the answer is the
12 statute authorizes it, both statutes
13 authorize substantial penalties.

14 THE COURT: Wasn't it extra punitive to
15 multiply it by five times what staff had
16 suggested in the initial settlement agreement
17 back in May or June of 07, before the first
18 Article 78 proceeding? I think that's what
19 it was. It was \$10,000 civil penalty and
20 then they would have to submit an
21 after-the-fact permit application. That's
22 what they had sought but why five times?

23 MS. SIMON: Because they continued to
24 build when the APA believed that this was a
25 clear statutory violation, they believed it

1 THE COURT: And what actions did the APA
2 take from August of 07 into the fall when
3 they knew that the Lewis Farm was continuing
4 to construct that they didn't do anything
5 until December when they sought to have it
6 put on the Enforcement Committee agenda? Why
7 the delay?

8 MS. SIMON: I would have to say, first of
9 all, you have to relay on what's in the
10 record. That is all we can consider here,
11 your Honor.

12 THE COURT: Right.

13 THE COURT: But there is evidence in the
14 record the APA tried to settle. They also
15 served them with papers, I believe, and I
16 don't have all of the records right in from
17 of me from 2007. Even though I was arguing
18 that case in 2007, a lot has happened since
19 then. But I -- my recollection is that there
20 were notices issued in the fall to begin the
21 proceeding and then they got delayed or there
22 were some delays and they asked for an
23 adjournment.

24 The agency continued after the Ryan
25 decision to go forward with it's

1 administrative process and they did not seek
2 any other court intervention to try and stop
3 the construction because, look, during their
4 settlement talks they had agreed with the
5 Lewises that if they went through the
6 permitting process and the septics were, you
7 know, up to snuff and everything was good
8 with the permit that they would likely be
9 issued the permit.

10 So they weren't saying you can't -- they
11 weren't saying take the houses down or you
12 can't build these structures, we want to make
13 sure the septics are appropriate and that the
14 construction and that the three houses on one
15 septic will work. So I think that they
16 continued the process but they didn't go back
17 to court in that period of time, they felt
18 that they had gotten their answer and they
19 could go forward.

20 THE COURT: All right.

21 MS. SIMON: Thank you, your Honor, if I
22 can continue. I want to cite on the issue
23 of substantial justification and there were a
24 couple of cases that I want to add. One is a
25 Court of Appeals case, *Wittlinger*, 99 NY2d

1 425, and it says the Legislature enacted
2 equal access to justice to help litigants
3 secure legal assistance to contest wrongful
4 actions of state agencies. The Legislature,
5 however, did not intend to provide every
6 plaintiff or even every prevailing plaintiff
7 with attorneys' fees. Instead, fees shall be
8 awarded only where the plaintiffs prevailed
9 and where the Agency's position was not
10 substantially justified.

11 Now, that was followed on another case
12 which I'd like to add to any citation, *Scott*
13 *v Coleman*, 20 AD3d 631, and this was an
14 example, your Honor, where there was --
15 someone was convicted of wrongfully --
16 convicted of contempt and yet the Third
17 Department said no attorneys' fees here and
18 citing the purpose of the Act they said, it's
19 to assist economically disadvantaged
20 litigants in obtaining legal assistance in
21 the prosecution of action seeking to obtain
22 redress from wrongful actions of the state.

23 THE COURT: Let me go back --

24 MS. SIMON: Okay.

25 THE COURT: -- to that because

1 interestingly in the New York statute a
2 prevailing party is defined whether it
3 includes a corporation, just to -- a
4 corporation that has less than a hundred
5 employees. There is nothing about net worth
6 or anything else. So for the farm to
7 qualify, don't they only have to have less
8 than a hundred employees?

9 MS. SIMON: Yes, your Honor.

10 THE COURT: So whether that's financially
11 solvent or flush with money makes no
12 difference, does it, as long as they have
13 less than a hundred employees?

14 MS. SIMON: Not for a determination of
15 whether they're an eligible party and I have
16 not in my papers disputed that are an
17 ineligible party. They have put in an
18 affidavit saying they have under a hundred
19 employees. That is one of the criteria. The
20 individual criteria is net worth of less than
21 fifty thousand and they are not here as
22 individuals. I have not challenged that they
23 are a party. I'm saying there's another part
24 of the statute.

25 One reason not to give fees is if it was

1 substantially justified. The other one is if
2 special circumstances make an award unjust.
3 I'm saying to this Court you can look at the
4 totality of the circumstances of this case
5 including the issue of the circumstances that
6 rise to this in both the APA's position and
7 Lewis Farm's position and that the governor
8 in signing this legislation says and intended
9 that this should be to assist lower income
10 people and corporations that could not
11 otherwise afford to litigate this case. And
12 there's case law in one of the cases that I
13 cited in my brief, *Peck*, where the Court
14 rejected fees because the litigant didn't
15 sufficiently show that they were limited in
16 their resources. And I'm not saying this is
17 a determinant factor, I'm just asking that
18 the Court in considering the totality of the
19 case that this is a factor. And the intent
20 of equal access is to provide access to
21 people who can't afford it.

22 THE COURT: Was the *Peck* case involving an
23 individual or some other entity?

24 MS. SIMON: It was an individual who --
25 and alleging that he was an -- unincorporated

1 entity, I believe it was. I'd have to look
2 back and pull the case, but it's one factor
3 that I'd like your Honor to take into
4 consideration. I am not challenging they are
5 a party to it. I just want to clarify that.

6 THE COURT: All right. Just one thing,
7 your statement that the governor is signing a
8 memorandum said what the purpose of the Act
9 was, it brings to mind the signing statements
10 that the former president used to have, are
11 you saying that the governor's memorandum can
12 modify the language of the statute?

13 MS. SIMON: No, I'm suggesting that we
14 look to the purpose and intent. Sometimes we
15 look to the purpose and intent of legislation
16 and we look to the legislative memos and the
17 governor's signature. I mean, this
18 legislation was vetoed, I think, like seven
19 years in a row because it didn't sufficiently
20 limit, among other reasons, who could be a
21 party that would benefit from this.

22 And part of the reason is in American law
23 our general laws and view is that parties pay
24 for their own litigation. So this is the
25 state of New York saying we will pay but only

1 for a party, our intent is to pay for a party
2 that couldn't otherwise afford it and that is
3 what I'm suggesting is part of the intent of
4 the legislation.

5 THE COURT: But the Legislature has the
6 opportunity to include in its definition of
7 prevailing party limitations relating to the
8 net worth of the corporation or individual or
9 anybody else, like the federal statute does
10 which has, I think, has a \$7 million net
11 worth required for a corporation, but for
12 some reason our Legislature didn't do that.

13 MS. SIMON: That is correct but they did
14 limit the size instead of five hundred
15 employees, which the federal legislation was,
16 to a hundred and the net worth is different,
17 I believe, and there are some differences,
18 but, yes, I don't disagree.

19 THE COURT: Okay.

20 MS. SIMON: Your Honor, case law says that
21 winning does not automatically entitle them
22 to fees and I wanted to run through what we
23 believe is the reasonable basis that the
24 Adirondack Park Agency had in making these
25 decisions. We covered one of them which is

1 Judge Ryan's decision, but the bottom line is
2 when they look at the APA Act and Section 810
3 and they have always required single-family
4 dwellings to get permits, and when they
5 looked at the Rivers Act and saw that if
6 you're within one-quarter of a mile of the
7 river, you need a permit first thing. That
8 was reasonable with them to look at those two
9 provisions.

10 So in the facts of this case I would argue
11 that they -- we have to show that they were
12 both factually justified and legally
13 justified. So factually, and I don't think
14 this Court found otherwise and neither did
15 the Appellate Division, it was clear that
16 geographically they were located within
17 lands that typically required permits for
18 single-family dwellings.

19 In addition there was no dispute that
20 these were actually single-family dwellings,
21 both by pictures, there's lots of
22 photographs, and by the admissions of the
23 petitioners themselves these were
24 single-family dwellings. Their application
25 said they were single-family dwellings. So

1 factually they were justified in viewing
2 these as single-family dwellings within the
3 law as they had looked at it over the past
4 thirty years.

5 Now, the law on the legal side, we have
6 talked about it a bit, your Honor, but in
7 terms of the APA Act and the Rivers Act they
8 were substantially justified, but I want to
9 address briefly also the fact that both the
10 petitioner and in this courtroom there were
11 claims made that they must -- that they must
12 be in violation, that the APA is in violation
13 of Agriculture Markets Law. Well they didn't
14 succeed on their Agriculture Markets Law
15 claim because from the APA's point of view
16 this was not a case involving Agricultural
17 Law. They are not authorized to interpret
18 the Agricultural Law. They were looking at
19 protection of the Adirondack Park lands. It
20 was consistent with their mission to say that
21 a permit is needed, so the allegations in
22 this application involving Agricultural and
23 Markets Law, not only -- I think they can be
24 considered except to the degree that they are
25 articulated in the determination.

1 THE COURT: Well, are you saying that we
2 need a hearing to determine how many hours
3 were spent on the research and the pleading
4 and everything else related to the claims
5 that were dismissed?

6 MS. SIMON: No, I'm not, your Honor. In
7 fact in terms of if an award is going to be
8 granted, which we think an award should not
9 be granted, but if it were to be granted I
10 rest on my papers and submissions in writing
11 because we went through carefully and we have
12 alleged which items we believe are
13 inappropriate and I really, I don't have a
14 lot to add to that.

15 THE COURT: All right.

16 MS. SIMON: I want to also discuss, your
17 Honor, another factor that this Court can
18 consider in substantial justification and
19 that is the case of first impression. When
20 there is a lack of controlling precedents it
21 is legally significant and it is evidence of
22 substantial justification. The APA as we
23 know and we have discussed, before the Ryan
24 decision they had no guidance in law, in case
25 law, reported case law that any of us or none

1 of us found any anyway, that's addressed this
2 issue, the definition of agricultural use
3 structure. And case law, more on the federal
4 level I will acknowledge then on state level,
5 there's a lot more federal Equal Access to
6 Justice Act.

7 THE COURT: Well, those apply to our
8 statute here, don't they?

9 MS. SIMON: Unless the Court of Appeals
10 has or our courts have said differently
11 because there are some differences in the
12 fact; but, yes, when they passed the state's
13 Equal Access to Justice Act they specifically
14 referenced *Pierce* and said we should follow
15 *Pierce*.

16 And just if I could digress on one point
17 with *Pierce*, I disagree with Mr. Privitera's
18 assertions about *Pierce* and the fact that the
19 APA did not appeal is not evidence that they
20 lacked substantial justification and I don't
21 think *Pierce* stands for that. You didn't
22 give me a page cite, but I will give you a
23 page cite from *Pierce*, at page 568 in
24 discussing the settlement terms the United
25 States Supreme Court said without -- now

1 without inquiry into the reasons for
2 settlement we cannot conclusively establish
3 the weakness of a government's position. To
4 hold otherwise would not only distort the
5 truth but penalize and therefore discourage
6 useful settlements. So you're not supposed
7 to look at whether they appealed or didn't
8 appeal or by how much they lost in the
9 Appellate Division. You're supposed to look
10 at what the agency had before it at the time
11 they made the decision. So I disagree with
12 his interpretation of *Pierce*.

13 On to the issues of first impression, I
14 think case law supports, I have cited in my
15 brief, I won't repeat any of the cases. Many
16 district courts have said a case of first
17 impression is evidence of substantial
18 justification. We have talked about Judge
19 Ryan's prior decision, but I want to say that
20 favorable prior decisions, there is also
21 larger case law and I have cited a number in
22 my brief, prior decisions in your favor and
23 if you consider them dicta, I don't care what
24 you want to call it, are an indication, they
25 are not the sole indication, but they are one

1 indication of substantial justification.

2 In this case you have to add on to that
3 that the Agency actually relied on it and
4 relied heavily on it and the APA was bound to
5 follow it. If they had done the opposite, if
6 they had not followed Judge Ryan's decision
7 we'd probably be in court with other groups
8 that would object to them going forward
9 without, you know, the proper authorization.

10 THE COURT: Are you saying that if the --
11 wait a minute, wait a minute. Are you
12 telling me that if --

13 MS. SIMON: I withdraw that. I'm just
14 saying that they had reason to go forward.

15 THE COURT: Sure they did because it's
16 their obligation to determine whether they
17 have ultimate jurisdiction or not in the
18 first instance. But I don't think you're
19 really trying to tell me that if the
20 Enforcement Committee had heard this and
21 decided they didn't have jurisdiction because
22 there are agricultural use structures, are
23 you telling me there would have been other
24 litigation?

25 MS. SIMON: No, actually what I was saying

1 and I'm going to withdraw it because I'm just
2 -- it's not worth going to and digressing.

3 THE COURT: All right.

4 MS. SIMON: But in any event I will
5 maintain my statement that they were bound to
6 follow, it was a decision of this Court and
7 they followed it in good faith and opposing
8 counsel doesn't want to acknowledge that
9 decision but it's out there.

10 And in fact, you know, if that decision
11 had gone differently this process would not
12 have gone forward. And I might also add
13 something came up in Mr. Privitera's
14 presentation that if they had perfected Judge
15 Ryan's decision in the sixty days, you know,
16 that's normally required in the statute, we
17 would never have been here with Lewis Farm in
18 two and three cases. This would have been
19 resolved, there would have been much fewer
20 litigation fees. I think that -- I don't
21 think, I know that New York State case law
22 and federal case law state in this kind of
23 instance if you prolong litigation and the
24 cost of the litigation expenses increase,
25 that that is grounds for reducing attorney

1 fees, so these expenses are in my argument
2 that they should not be collecting attorney
3 fees for that, for their four requests to the
4 Appellate Division for an extension.

5 Once we'd gotten through all of this and
6 we get to the point where we have Judge
7 Ryan's decision and we have your Honor's
8 decision, the APA was faced with a dilemma
9 from their perspective. Two decisions, one
10 indicating they have jurisdiction, yours more
11 thorough and on the merits saying no
12 jurisdiction, they wanted a resolution of the
13 jurisdictional issue so they reasonably
14 brought it to the Appellate Division. The
15 Appellate Division agreed with you and said
16 there was no jurisdiction here because these
17 single-family dwellings are also agricultural
18 use structures.

19 THE COURT: Did you appeal my July 8,
20 2008, decision denying your motion to dismiss
21 on collateral estoppel grounds?

22 MS. SIMON: Not the collateral estoppel
23 part, no. We did appeal some pieces of that
24 decision and --

25 THE COURT: But didn't I hold in that

1 decision that Judge Ryan's determination was
2 not a determination that the Agency had
3 jurisdiction, that these were not
4 agricultural use structures? Didn't I
5 determine all of that in that decision?

6 MS. SIMON: Well, one of the other things
7 that you determined in that decision which we
8 were happy about, your Honor.

9 THE COURT: I'm glad that you're happy
10 about something.

11 MS. SIMON: You said that, don't quote me
12 because you can look at your own decision,
13 I'm just going to rephrase, that their claims
14 regarding 305(a) of the Agricultural Law are
15 res judicata because of Judge Ryan's
16 decision. So you cited Judge Ryan's decision
17 to eliminate one of your claims, and you also
18 said, I'm not sure if it was in the July
19 decision or the later one that Section 305 --
20 Section 308, it is, of Agricultural Markets
21 Law does not apply to this agency because
22 it's a decision of another agency directed to
23 Lewis Farms.

24 So there were some things, I think, in
25 answer to that, you know, issues we were just

1 discussing that were -- that you refer to in
2 Judge Ryan's decision that we relied on.
3 And, you know, there's another factor here in
4 support of substantial justification and that
5 is if the Agency in the Article 78 proceeding
6 is right on even one issue, on one position,
7 that is enough to find substantial
8 justification.

9 I want to give you a case on that as well
10 and that's *Centennial versus Robert Abrams*,
11 it's a New York New York State Court of
12 Appeal, the citation is *84 NY2d 851*, and it
13 says because of the -- because one of the
14 acts comprising respondent's position in the
15 underlying Article 78 proceeding was
16 substantially justified so the petitioner is
17 precluded from recovering counsel fees and
18 other expenses under Article 86 which is the
19 Act we're discussing today.

20 So getting back to the --

21 THE COURT: Now, that's, in other words,
22 even though the other positions were not
23 substantially justified as long as they were
24 on one that's enough?

25 MS. SIMON: That case says because in this

1 case it was a lawsuit against the Attorney
2 General's office, actually in a real estate
3 financing matter where the Attorney General's
4 office made a determination and they were
5 sued on it, and one of the issues the
6 Attorney General was correct on and therefore
7 there was not substantial justification.

8 THE COURT: All right.

9 MS. SIMON: Or therefore they were
10 substantially justified.

11 THE COURT: Okay. Even though they may
12 not have been on other issues?

13 MS. SIMON: Exactly. And, you know, here
14 your Honor, if we all -- I can remember there
15 were sixteen claims against the Adirondack
16 Park Agency. They succeeded on the claims
17 regarding jurisdiction, agricultural use
18 structures, we know that. I want to say nine
19 of the claims they did not succeed on. There
20 were three due process claims, a United
21 States Constitutional due process claim and
22 there were no success on and no award. There
23 was a local government review board claim
24 there was no success on. There were the two
25 Agricultural Markets Law claims, there was a

1 New York State Article 14 constitutional
2 claim.

3 The Appellate Division and your Honor did
4 not find that the APA was in violation of any
5 of those. So at least nine out of the
6 sixteen claims they did not succeed on.
7 Again, I'm not saying that they are not a
8 prevailing party, I am saying that
9 substantial justification concludes that the
10 Agency was correct on some issues, not all
11 sixteen but.

12 Now, so the sole -- in my view the only
13 question here today is was the Agency
14 reasonable in fact and law, and factually I
15 have already discussed -- the Appellate
16 Division nor your Honor disturbed any of the
17 factual findings of the Agency and therefore
18 I think it's reasonable to say that they --
19 that is a reasonable determination.

20 The APA was also substantially justified
21 because this was a close question of law.
22 Now, I mean close question of law, what I
23 mean by that is this all boiled down to from
24 sixteen claims, all the way from the United
25 States Constitution to New York State

1 Constitution to Agricultural Markets Law, all
2 these claims boiled down to the definition of
3 three words, agricultural use structure.

4 That's a close question and there is -- case
5 law directs that when you have a close
6 question that that is an evidence of
7 substantial justification.

8 And I want to quote from a case that's
9 already in my papers, your Honor, from the
10 Third Department, *Huggins*, and I quote, "the
11 closeness of the question, or the presence of
12 some evidence supporting the determination,
13 are fair grounds for litigation and may
14 constitute sufficient justification for
15 having taken a position that turns out to be
16 incorrect."

17 That's quoting *Huggins*. In *Huggins*,
18 attorney fees were denied, even where the
19 Court found that the Agency decision was not
20 supported by substantial evidence.

21 On this note I'd also like to add, your
22 Honor, there are a number of things the
23 Appellate Court and the Court of Appeals in
24 New York have found where even where the
25 Agency lost fees were not awarded and in some

1 cases even where the Agency's reading of a
2 regulation order or other determination was
3 irrational, even where there was an abuse of
4 discretion, even where they were arbitrary
5 and capricious, and for that and I cite *New*
6 *York Clinical*, which is in my papers, even
7 where they lacked substantial evidence the
8 state was not found to be without
9 justification.

10 *Sutherland*, a case from the Third
11 Department cited in my papers, another
12 example, and *Moncure*, where they found that
13 the Agency was irrational but no fees were
14 awarded. That's cited in my brief. And I
15 want to add, your Honor, that in *Santos*,
16 *Sutherland*, *Moncure*, and *Simpkins*, these are
17 all Third Department cases, those were
18 decisions on the merits, five to nothing,
19 just as we have here, and yet and situations
20 where there were findings of abusive
21 discretion and rationality and, you know,
22 some finding on the part of the Agency, here
23 what is the finding of your Court and the
24 Appellate Division? It's the Agency's
25 determination was affected by error of law.

1 There was no wrongdoing here. Even if there
2 were some finding of irrationality, it's not
3 an automatic granting of fees. You have to
4 look at the whole totality of the case, so I
5 wanted to point those out, your Honor.

6 At the end of the day, your Honor, and
7 I'll finish here, I want to point out that
8 this is tax payer money that is going pay for
9 fees, if any fees are awarded, and there
10 should be no fees awarded where the agency
11 acted reasonably. And I think given all of
12 the evidence and a look at the record this
13 was a reasonable determination. Perfect?
14 No, but reasonable. You don't have to be
15 perfect.

16 There was a general dispute, there's no
17 doubt about that, there was a general dispute
18 here and it was a legal dispute, but the APA
19 operated in good faith and it based its
20 determination on sort of its long-standing
21 practice of acquiring permits for
22 single-family dwellings, the determination
23 had clear factual findings, there were
24 sixteen specific findings on the facts that
25 have thorough legal reasoning. It went

1 through the APA Act, the Rivers Act,
2 Agricultural Markets Act and more. It was a
3 case of first impression, it was a close
4 question of law, they had success on more
5 than one claim, the two Agricultural Markets
6 Act claims that were dismissed, and for all
7 of those reasons they were substantially
8 justified.

9 And I want to refer to the *Pierce* case
10 just as Mr. Privitera did because it is sort
11 of a preeminent United States Supreme Court
12 case on substantial justification, and the
13 Supreme Court said in *Pierce* referring
14 specifically to the substantial justification
15 test the Court directs that it has never been
16 described as meaning justified to a high
17 degree, but rather has been said to be
18 satisfied if there is a genuine dispute.
19 There was a genuine dispute here and the APA
20 should not be compelled to pay attorney fees.
21 Thank you, your Honor.

22 THE COURT: Mr. Privitera, anything
23 further?

24 MR. PRIVITERA: Thank you.

25 THE COURT: Without repeating your

1 previous argument.

2 MR. PRIVITERA: Correct, your Honor, I
3 will not. I will rebut only. First of all
4 counsel just miscited the *Simpkins* case.
5 Attorney fees were awarded in that case and
6 they were awarded because the Agency violated
7 the law as here. There are no cases in which
8 a court has denied attorney fees when there's
9 a clear violation of law. In all of the
10 cases which were just discussed that are not
11 cited in any detail where there's a genuine
12 dispute, it's where the courts have held that
13 when there is a genuine dispute of fact it is
14 fair to take it to a trier of fact for a
15 determination, and in a close question of
16 fact it is fair to defer and not reasonable
17 and not fair to award attorney fees.

18 I won't speak to the tax payer money issue
19 because I cannot speak to how much the tax
20 payers paid for this illegal dispute which is
21 probably more material to most of the world
22 than this small application. But I will
23 discuss briefly the details of the Ryan
24 decision because the Attorney General now
25 claims that the Agency was bound by that

1 decision. That word bound was used three
2 times in his argument. Judge Ryan
3 specifically said that I can't bind you, and
4 your Honor found that's what he found. At
5 the bottom of page 4 Judge Ryan says that --
6 I'm sorry, at the bottom of page 5 the Judge
7 discusses the merits a little bit and then
8 moves off. It was also conceded here that
9 Judge Ryan did not decide the merits.

10 Finally, at the bottom of page 6 he, Judge
11 Ryan, and I'm sorry to personalize this, I
12 don't mean to do so, I'm just identifying the
13 decision, he said this Court does not have
14 concurrent jurisdiction over the situation
15 and the Court said that he would not violate
16 the separation of powers of the Constitution
17 and therefore remanded it to the Agency for a
18 determination on the facts.

19 Counsel, the AG's office, now argues that
20 we should have delayed prolonging this case
21 by appealing this decision to the Third
22 Department. Well, your Honor, that simply
23 would have prolonged it. It wouldn't have
24 ended it because Judge Ryan was right in
25 remanding it. So we would have litigated it

1 for a year and a half, and the Third
2 Department would have affirmed and sent it
3 back for a hearing before the agency
4 affirming the remand Order. I don't know
5 what they would have said about the dicta but
6 they would not have reached it. We chose not
7 to prolong the litigation.

8 THE COURT: Did you apply for extension of
9 time to perfect that appeal?

10 MR. PRIVITERA: We have several motions
11 before the Appellate Division saying look,
12 wait for Judge Meyer to decide this matter,
13 everything can be consolidated on the merits.
14 There is just a legal issue to be decided
15 here, everything should be decided at once
16 and they agreed.

17 THE COURT: Did the Attorney General's
18 office agree to that as well?

19 MR. PRIVITERA: No, not at first but after
20 the second motion to consolidate and delay,
21 yes. And by the way, your Honor, we didn't
22 lose any arguments that we made in this
23 petition and I think it's fair when a lawyer
24 is defending against a \$50 thousand fine
25 defending against an illegal reach of

1 jurisdiction that violates the clear language
2 of the statute to plead a number of things in
3 the alternative.

4 The Appellate Division did not deny relief
5 on those matters, the Appellate Division
6 found that they were academic in the last
7 line of the decision and said that they did
8 not have to be reached because of the primary
9 issue before the Court. As to the specifics
10 of this position that somehow because -- it's
11 not really a case of first impression. It's
12 a case of first impression for your Honor,
13 it's not a "case of first impression" for the
14 agency to decide to take an enforcement
15 position in this case.

16 THE COURT: How about on the issue of
17 single-family dwellings being agricultural
18 use structures?

19 MR. PRIVITERA: All they had to do is read
20 the statute, your Honor. And let me just say
21 *Russell against National Mediation Board* that
22 we cite on page 8 of our main brief, it
23 rejects the government's argument that
24 because the issue had never been decided
25 before they are therefore entitled to no

1 award of attorney fees because there the
2 Court found that the government's novel
3 interpretation was not credible. No court
4 has found on the merits that their position
5 on the law, and they still don't seem to
6 fully knowledge their mistake, was credible.
7 No court has given any credence to the
8 slightest argument that they have made with
9 respect to their distortion of the statute.

10 Your Honor, finally, it was just said, I
11 think, that the decision with respect to
12 ordering submission to jurisdiction, the
13 administrative determination that ordered
14 submission to jurisdiction, that perhaps that
15 was a mistake done by cutting and pasting
16 from a settlement agreement. Well, your
17 Honor, if that's possible perhaps we should
18 have a hearing and Cecil Wray perhaps would
19 take the stand and you could ask Mr. Wray who
20 helped him cut and paste the decision instead
21 of relying upon his summary affidavit.

22 Who wrote it if it was cut and pasted from
23 a settlement position, cut and pasted from a
24 settlement agreement which is not binding but
25 perhaps is the pattern of the Agency in

1 reaching for jurisdiction so that every time
2 they get a settlement agreement they can say,
3 oh, you agreed that we have jurisdiction?

4 Is that what's going on in the Agency?
5 That when they improperly extract and think
6 that their jurisdiction goes beyond what the
7 Legislature says they stretch it and get the
8 party to agree that that jurisdiction is
9 beyond what the law says? Well, your Honor,
10 if the cutting and pasting is to be
11 considered, we would be more than happy to
12 have a hearing on the basis of this decision.

13 Your Honor, the Ryan decision was
14 discussed before the administrative agency.
15 After that decision was made we talked about
16 it in the administrative decision. I was
17 there. Your Honor, we presented to the
18 agency about eight reasons why the
19 interpretation that they were making on the
20 merits for the first time was improper and
21 not supported by the law.

22 We pointed to all of the things that the
23 Appellate Division pointed out, that it
24 violated the open space plan of the statute,
25 that they weren't stepping back and looking

1 at the over-all purpose of the statute in
2 exempting agricultural use structures. We
3 pointed to a determination by the
4 Commissioner of the Department of Agriculture
5 making a final and binding decision under the
6 Right to Farm Law that is now in the record
7 before your Honor and was in the
8 administrative record before and therefore
9 may be considered in which the Commissioner
10 of Ag and Markets found that it was an
11 agricultural use of the land, and now today
12 to stand before you and say this is not an
13 agricultural case?

14 That is not credible. This was an
15 agricultural case from day one. I don't --
16 it's not credible to even suggest that but
17 it's on the record. It was just said. This
18 is about the scope of the agricultural
19 exemptions that are embedded in the statute
20 and just as your Honor said, where is there
21 any indication that the Legislature intended
22 that farmers inside the Adirondack Park be
23 treated differently than those outside? Why
24 aren't the teachings of *Lysander* compelling
25 here? Well, the Appellate Division said the

1 same thing. They said there's no indication,
2 there's no reason, there's no way you can
3 read the statute and see that the Legislature
4 intended a different result inside the
5 Adirondack Park.

6 And so, your Honor, yes, there are cases
7 that say when there are close factual
8 questions it's fair to take it to a finder of
9 fact, but there's no case where a violation
10 of a statutory scheme as here has been found
11 to be substantially justified and that is why
12 an award of attorney fees is reasonable here.

13 We stood before the Agency, we cited the
14 findings of the Department of Ag and Markets,
15 we pointed to how about the part of the
16 Appellate Division's decision that says that
17 the Agency's reading of the statute, the
18 Agency's reading of the statute was a
19 violation of a clear legislative direction by
20 the Legislature to not regulate farming.
21 That is what the Appellate Division said.
22 They filed -- they violated the face of the
23 statute in commencing this punitive, highly
24 punitive case and, your Honor, it could have
25 been avoided.

1 The easiest avoidance, your Honor, this
2 corner, Walker Farm is right on the edge of
3 what the agency now calls the Hamlet of
4 Whallonsburg. In the record now before you
5 is a petition that says Agency, why don't you
6 just avoid this fight and redraw the edge of
7 this little hamlet to include these three
8 houses and it's nonjurisdictional. You can
9 avoid this case of first impression.

10 THE COURT: Isn't that really beyond the
11 scope?

12 MR. PRIVITERA: It's beyond the scope of
13 the administrative record but the point is,
14 your Honor, they persisted in seeking to
15 stretch their jurisdiction here, and when I
16 asked the Agency for a stay so that we could
17 reasonably litigate this case before your
18 Honor, they said no. They said we expect you
19 to obey the Order immediately.

20 The whole purpose here, your Honor, was to
21 bludgeon their farm into submission
22 compliance and to stretch the jurisdiction in
23 a way that would have distorted the statute.
24 And, your Honor, there is not a single case
25 that suggests that that sort of over reaching

1 is fair or reasonable.

2 There's some suggestion here that the *Peck*
3 case ought to be followed and some
4 suggestion, this is way beyond the record,
5 that perhaps the Lewis Family Farm could have
6 afforded this litigation and therefore they
7 should not be compensated in a way that
8 allows them to pay for attorneys' fees.

9 THE COURT: I don't think that point was
10 made. I didn't get that point.

11 MS. SIMON: I'm sorry?

12 MR. PRIVITERA: Well what was the point of
13 raising *Peck* from the Second Department, your
14 Honor? *Peck*, from the Second Department
15 which is not binding here, suggests there may
16 be an overlay in which you look at the net
17 worth of the corporation. That's not in the
18 law.

19 THE COURT: I think I'm the one that
20 raised that issue about the prevailing party
21 and all that. I don't think it was raised,
22 by the state.

23 MR. PRIVITERA: Yes, *Peck* has been raised
24 by the state and it was just argued and at
25 least 10 minutes was spent on an argument

1 that the purpose of the statute is not to
2 compensate corporations like the Lewis Family
3 Farm because we haven't shown that we're
4 poor, like in *Peck*. But before your Honor is
5 an affidavit of Sandy Lewis which makes very
6 clear that the farm doesn't have any money to
7 pay for this pending application for fees
8 and, your Honor, I don't think it's material
9 to the determination, but if your Honor is
10 going to go there there's no basis to suggest
11 an ward is inappropriate based on a finding
12 of ability to pay.

13 And on that, your Honor, and given that
14 there's simply no justification in this
15 record, there is no justification in the
16 precedent, there's no justification in any of
17 the determinations by this Court or the
18 Appellate Division in support of this unfair
19 reading of the law. On that, your Honor, we
20 ask for an award.

21 THE COURT: Thank you.

22 THE COURT: Ms. Simon, last word.

23 MS. SIMON: Thank you, your Honor, and I
24 will be really brief and I want to say Mr.
25 Privitera may actually be correct on

1 *Simpkins*, I think there were no fees awarded.
2 I acknowledge that, but every other case I
3 cited I believe I was correct on. I wanted
4 to also say, I forgot to mention this
5 earlier, the Perez case that he cited, it was
6 substantially overturned by *Greer*, if I am
7 correct on that.

8 And regarding cut and paste, I would ask
9 your Honor to please take my analogy as just
10 that. I was not attesting to how the APA
11 made its determination. I was trying to make
12 a point and by the way of example, and I ask
13 that the Court look only at the actual sworn
14 statements of the Agency in the record,
15 including Mr. Wray, and included in that
16 record is the correction sheet and I don't
17 know how it came about. I was just
18 suggesting that that is, I think, how they --
19 the language that they used in settlement
20 agreements. I have no first-hand knowledge
21 of that. Cut and paste is kind of an old way
22 of doing things anyway with the modern
23 computer era.

24 So I have nothing further unless your
25 Honor has any questions.

1 THE COURT: I think I pretty much raised
2 them during the arguments. All right. I'm
3 going to reserve decision on the motion and
4 cross-motion. And does anybody want to
5 submit anything else? Mr. Privitera?

6 MR. PRIVITERA: No, I think the record is
7 complete. I would point out that we
8 discussed what survives of *Perez* in footnote
9 2 of our opening brief, only the part that
10 says you can't get fees for an administrative
11 part of the dispute is what was overturned.
12 The merits of *Perez* survives.

13 THE COURT: Ms. Simon, anything else?

14 MS. SIMON: No, nothing further, your
15 Honor.

16 THE COURT: All right. Thank you very
17 much.

18 (Court was adjourned at 12 p.m.)
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C E R T I F I C A T E

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4 I, Ellen D. Chase, court reporter of the Essex
5 County Supreme Court, do hereby certify that the
6 foregoing pages numbered 2 through 69, inclusive,
7 comprise a full, true and correct transcript to the
8 best of my ability of the proceedings held before me on
9 October 29, 2009, as to which a transcript was duly
10 ordered and transcribed by me.
11

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14 Ellen D. Chase, Court Reporter
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