To be submitted

504626 and #504696

NEW YORK STATE SUPREME COURT
APPELLATE DIVISION : THIRD DEPARTMENT

Matter of LEWIS FAMILY FARM, INC., Appellant.
-against-
ADIRONDACK PARK AGENCY, Respondent.
(Case No. 1)

Matter of LEWIS FAMILY FARM, INC., Respondent,
-against-
ADIRONDACK PARK AGENCY, Appellant.
(Case No. 2)

ADIRONDACK PARK AGENCY, Appellant,
-against-
LEWIS FAMILY FARM, INC., et al., Respondents.
(Case No. 3)

BRIEF OF AMICUS CURIAE NEW YORK FARM BUREAU, INC.

Date: April 1, 2009

Cynthia Feathers, Esq.
Of counsel to New York Farm Bureau, Inc.
Amicus Curiae
48 Union Avenue, Suite 2, P.O. Box 4818
Saratoga Springs, NY 12866
(518) 691-0088

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

TABLE OF AUTHORITIES

Statutes

Miscellaneous

AMICUS CURIAE'S INTEREST

Since 1953, New York Farm Bureau, Inc. ("Farm Bureau"), a non-governmental voluntary general farm organization, has promoted and protected the interests of New York farmers and encouraged the development and preservation of agricultural areas within the state. With a statewide membership of about 30,000 families in 52 counties, Farm Bureau supports legislation recognizing the unique nature of the agricultural industry and strives to ensure adherence to state policies regarding agriculture. In addition to possessing well-established competence and insights on farming and farming laws, the agency has extensive expertise in the administrative law that governs proceedings affecting many of its members. This amicus curiae brief discusses the integral role on-premises worker housing plays in farm operations and endeavors to illuminate the irrational nature of a determination of the Adirondack Park Agency that ignored state laws on farming and contravened the state policy to promote agriculture.

QUESTION PRESENTED

> Whether petitioner's farm worker dwellings should be considered agricultural use structures, since they are as "directly and customarily associated with agriculture use" as a barn, a shed or a silo; and whether the Park Agency determination to the contrary was arbitrary and capricious, where it ignored all relevant legal authority embracing the integral role of such housing in farm operations, as well as the state policy to promote farming and liberally interpret all laws on farming.

STATEMENT OF FACTS

Salient, undisputed facts are set forth in petitioner's CPLR Article 78 and Judge Meyer's challenged decision (214-215, 278-294) and are summarized briefly here. In 1978, Salim and Barbara Lewis purchased a farmstead in the County of Essex,[1] and then acquired adjacent lands and formed petitioner Lewis Family Farm, a 1,200-acre farm that is one of the state's largest USDA-certified organic farms. The Farm, which produces a variety of livestock and organic crops, sits in a state-certified Agricultural District. A large-scale operation, the Farm requires multiple farm workers, and because suitable off-farm housing is not available, worker housing on the premises is crucial to the Farm. Petitioner needed to provide high quality on-farm housing to recruit and retain employees.[2]

---

[1]In Essex County, virtually all of the land is classified as a resource management or rural use area, and of the 8,170 resource management acres, 3,525 are agricultural vacant land (productive), according to 2005 Adirondack Park Agency figures. *See* www.apa.state.ny.us. Essex County is located in the northern part of the state in the Adirondack Mountains bordering Lake Champlain. In 2003, there were 235 farms in the county, averaging 234 acres per farm, for a total of 55,000 acres in farm land – an alarming 21,000-acre decrease in farm land since 1969, according to statistics prepared by the New York Agricultural Statistics Services. *See* Essex County Farm Statistics, found www.nass.usda.gov/Statistics_by_State/New_York/County_Profiles/Essex.pdf.

[2]A farm's provision of housing is a common component of farm worker agreements and is even required for some farm worker recruitment programs. Because of the integral role of worker housing in farm operations, the Farm Labor Housing Program provides funding for construction of such housing. *See* Housing Assistance Council Report: "USDA Section 514/516 Farmworker Housing: Existing Stock and Changing Needs" (October 2006) at www.ruralhome.org. The State also has a Farm Worker Housing Program, administered by the Division of Housing and Community Renewal. *See* www.dhcr.state.ny.us. As of last year, the number of hired workers on the nation's farms reached 778,000, according to the National Agricultural Statistics Service of the U.S. Department of Agriculture. *See* www.agmkt.state.ny.us. Strict standards for farm

In November 2006, construction began on three farm worker houses in a cluster next to the barns. The land was not divided into lots. In fact, the cluster of homes shared a well, driveway, septic system, and leach field, all located around a common courtyard (214-215, 278-294).

In an earlier proceeding, petitioner sought a declaratory judgment action against the Park Agency. Supreme Court (Ryan, J.) converted the proceeding into a CPLR Article 78 proceeding (5-12). Since there was no final Park Agency determination, the proceeding was premature, and the petition was dismissed. In its August 16, 2007 decision, Supreme Court held: "[T]his situation is not ripe for judicial intervention" (10). In dictum, the court also opined that the Park Agency had jurisdiction over petitioner's "building project," or "agricultural use buildings" (9). In September 2007, the Park Agency charged that the Farm was required to obtain a permit for its alleged subdivision of lands and construction of single family dwellings (216). The Farm denied that the Park Agency had jurisdiction over its farm worker housing (216).

Agency Determination and Supreme Court Decision

In its final determination, the central question before the Agency was whether permanent on-farm worker housing is an agricultural use structure,

---

worker housing are governed by the State Department of Health State Sanitary Code and the U.S. Department of Labor Occupational Safety and Health Administration and its Employment and Health.

defined as "any barn, stable, shed, silo, garage, fruit and vegetable stand or other building or structure directly and customarily associated with agriculture use." *See* Exec Law § 802 (8). The March 25, 2008 determination concluded that farm worker housing was not an agricultural use structure outside Agency jurisdiction, but instead constituted single family dwellings it could regulate. The conclusion was based on pure statutory interpretation and two discrete rationales: agriculture use structures are purportedly "accessory in nature;" and the listing of both terms, "agricultural use structure" and "single family dwelling," in two statutory provisions means that a structure that is a single family dwelling cannot be an agricultural use structure.

The "Determination of Violation" section did not assert that interpreting the relevant statute involved any factual disputes, evaluation of factual data or application of the Agency's knowledge of operational practices or special expertise. Instead it stated:

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

> The language "...or other building or structure directly and customarily associated with agriculture use" is intended to include other structures of an accessory nature only. This is also evident from the exceptions to jurisdiction in the Adirondack Park Agency Act which often includes accessory structures.
>
> The definition of "agricultural use structures" does not include, and was not intended to include, the farm owners' or farm workers' dwellings. Rather, the owners' dwelling and farm workers' dwellings (for a single family) more precisely fit under the definition of "single family dwelling" or "mobile home" (865-866).

The determination then indicated that "single family dwelling" and "agricultural use structure" are distinct, mutually exclusive concepts, since Executive Law §§ 802 (50) (g) and 805 (3) (d) (4) list both terms (866). The Park Agency acknowledged that farm worker housing is important to the enhancement of farm operations, but concluded that it is not an agricultural use structure (866). The only policy rationale for the Agency's conclusion was a vague, generic statement that density guidelines must not impact jurisdiction over dwellings or subdivision of land in order to ensure there is "no undue adverse impact" on resources of the Park (867). There was no explanation of what type of adverse impact might result from providing shelter to farm workers, nor any indication of what Park resources might be at issue.

The first two violations set forth in the determination raised an additional rationale for the conclusion that the farm worker dwellings were subject to Park Agency jurisdiction: the Agency asserted that the structures constituted an illegal

subdivision and charged that petitioner failed to obtain a permit prior to purportedly subdividing the farm (867-868). The second two violations concerned the failure to obtain a permit before building such dwellings (868-869). The Resolution of the Matter section directed that petitioner apply for a permit for three new dwellings and a four-lot subdivision; provide a detailed description of the use of the dwellings in agricultural operations and a septic system plan; and pay a $50,000 penalty (869-870). Petitioner initiated a CPLR Article 78 proceeding to annul the final determination (278-294, 310-330). Supreme Court (Meyer, J.) found the Agency's interpretation irrational and granted petitioner's petition in a November 19, 2008 decision, as set forth below (213-227).

ARGUMENT

Petitioner's farm worker dwellings should be considered agricultural use structures, since they are as "directly and customarily associated with agriculture use" as a barn, a shed or a silo; and the Park Agency determination to the contrary was arbitrary and capricious, where it ignored all relevant legal authority embracing the integral role of such housing in farm operations, as well as the state policy to promote farming and liberally interpret all laws on farming.

Introduction

The Park Agency's determination squarely addressed the narrow issue presented on this appeal: are farm worker houses more properly considered "agricultural use structures" beyond Agency reach or "single family dwellings"

subject to Agency jurisdiction? The only rational answer is that farm worker houses are agriculture use structures, since that result is informed by the realities of farming operations, as reflected in all relevant legal authority on the issue. The Agency has presented a construction that contravenes the legal authority on the role of worker housing in farm operations and undermines the state policy mandating promotion of agriculture. Further, it has defied three fundamental rules of administrative law: (1) an administrative agency determination involving pure statutory interpretation deserves no deference; (2) raising new rationales on appeal is forbidden; and (3) non-final determinations are not ripe for judicial review and resulting dictum is not binding.

Law Reflects Realities of Farm Life

The role of workers on farms is unique. They are an integral and intimate part of farm operations, in the same way that farm animals and farm equipment and the structures that house them are. The workers rise early and labor late into the night. In season, the demands of crops and livestock are unrelenting and arduous. Often laborers live in housing nestled near barns and sheds, a few feet away from the shelters for animals and equipment. This gives workers ready access to those other equally important elements of any seamless, successful farm operation and an ability to protect the animals and equipment. In the Adirondack Park, these truisms apply with special force, given the dearth of

affordable and conveniently located housing for workers and of transportation to bring them to the farm and take them to off-site housing. These laws on the nature of farming are also reflected in the laws of New York, which consistently emphasize the unique role of farm worker housing in farm operations and which Supreme Court properly considered in its decision (223-227).

Real Property Tax Law on Farm Worker Housing

The Real Property Tax Law exempts structures essential to the operation of agricultural lands and states that such structures include those housing employees who operate lands used for agricultural purposes. *See* RPTL § 483 (1), (2). Thus, farm worker housing is so essential to the operation of agricultural lands that land so used is exempt from real property taxes – a strong indication that the legislature finds such housing to be directly and customarily associated with agriculture use.

Agriculture and Markets Law on Farm Worker Housing

Further guidance is provided by the Agriculture and Markets Law, which states that all buildings on the farm are considered part of a "farm operation" if they contribute to the production of crops and livestock as a commercial enterprise. See AML § 301 (11). Thus, if an on-site shelter for workers is deemed to contribute to the operation of the farm as a commercial enterprise, it is part of a "farm operation." It is hard to conceive of any rational argument that

providing on-site housing for workers does not contribute to farm operations. In other words, such shelters are closely associated with agriculture use.

Commissioner of Agriculture on Farm Worker Housing

If there were any doubt that the Agriculture Law demonstrated that farm worker housing is closely associated with agriculture use, it was dispelled by a February 2008 advisory opinion rendered by the Commissioner of Agriculture in the instant case regarding the Lewis Farm, pursuant to Agriculture Law § 308 (4). The Commissioner observed that examination of the definition of "farm operation" found in Agriculture Law § 301 was helpful in determining whether a particular land use was agricultural in nature (1389-1391). Farm worker housing is an integral part of the operations of numerous farms, the Commissioner stated, noting that farmers commonly provide such housing on their farms to accommodate the long work day, meet seasonal housing needs, and address the shortage of nearby rental housing in rural areas. Such on-farm housing provides a practical, cost-effective way to meet farm labor housing and recruitment needs, the Commissioner explained (1389-1391).

The manager of the Agriculture Department's Agricultural Protection Unit visited petitioner's farm and confirmed that farm worker housing was needed; that existing residential structures had been removed, except for the home of the landowner and a guest house; and that the clustered worker houses could

not be easily separated or subdivided, due to the shared driveway, septic leach field, and electrical connection to the grid and water supply. The Commissioner's opinion concluded that the use of the land to build farm worker housing was agricultural in nature, i.e. closely associated with agriculture use (1389-1391).

Agriculture Department Guidelines on Farm Worker Housing

In a similar vein, Agriculture Department Guidelines for Review of Local Laws Affecting Farm Worker Housing explain that farm worker housing is an integral part of farm operations because of the unique and central role such housing plays in the production functions of the farm operations. As in this case, such housing is usually located on the same property that supports farm structures, and building such housing near a barn is important for ease of access and security purposes, the Guidelines note.

Court of Appeals Decision on Farm Worker Housing

A seminal case, *Town of Lysander v. Hafner*, 96 NY2d 558 (2001), has profound importance here because of its penetrating exploration of the central issue here: the role of worker housing in farm operations. New York Farm Bureau appeared as amicus in that case. In *Lysander*, a municipality refused to grant a permit to install several mobile homes to house migrant workers on a farm in an Agricultural District. The Commissioner of Agriculture concluded that the mobile homes for worker residences were protected on-farm buildings. *See id.*

Farmers frequently rely on mobile homes as shelter for their laborers in order to accommodate the long work day, seasonal housing needs, and a shortage of rental housing, the Commissioner explained. Thus, restricting the use of such homes could significantly impair the viability of farm operations. *See id.*

While Supreme Court and the Appellate Division found that such use of mobile homes did not fall within the definition of farm operation, the Court of Appeals adopted the Commissioner's interpretation. His views on farming and farm worker housing were entitled to deference, given his special competence. *Lysander* resonates here, where the issue is also whether or not a governmental entity may regulate and restrict the use of farm worker housing, given that such intrusion would significantly impair the viability of farm operations. In the instant case, Supreme Court properly found that *Lysander* was relevant in interpreting the statutory provision regarding farm worker housing (225).

Park Agency Ignores Farm Life and Laws

Principles of Statutory Interpretation

In urging that farm worker housing is not similar to a barn, a shed, a silo or other agricultural use structures, the Park Agency staunchly refuses to acknowledge fundamental truths about farm life or to consider any existing legal authority on the role of worker housing in farm operations. Clearly, the Agriculture Law and the Real Property Tax Law provisions relevant to farm

worker housing should have been consulted. After all, other statutes on similar subjects are germane to determining legislative intent. *See* McKinney's Consolidated Laws of NY, Book 1, Statutes, §§ 221, 236; 97 NY Jur 2d, Statutes, § 128. When technical terms, terms of art or peculiar phrases are used, it is supposed that the legislature had in view the same use in which the term is commonly employed. *See* McKinney's, Statutes, *supra*, at § 233; NY Jur 2d, Statutes, *supra*, at § 129. Ignoring an advisory opinion of the Commissioner of a sister agency possessing the greatest expertise in the state on farming is also a lamentable approach to interpreting a law on agricultural matters.

***Impact of* Lysander**

To evade *Lysander*, the Park Agency simply claims the mantle of super agency versus mere municipality and declares that farming in the Adirondack Park is unique. Yet in determining whether a governmental action unreasonably interferes with farm operations, it makes no difference whether the entity at issue is a local planning board or a state agency. The same basic realities of farming exist. Farm worker housing plays an identical, intimate, and integral role in a successful operation, whether the farm is located inside or outside the Blue Line. The only noteworthy difference between *Lysander* and this case is that there the workers lived in mobile, not modular, homes. Nothing in the Park Act precludes a farmer from attracting the best workers by offering them the use of modular

homes. As Supreme Court stated, while petitioner's structures represent a unique effort to provide more permanent and spacious housing and may not have been foreseen by the legislature, a statute must be given effect as written, not as the agency or court may think it should have been written (225-226).

State Policy on Farming

In claiming the right to interfere with worker housing and farming operations, the Park Agency ignores state policy on the protected role of farming in New York. Its positions are based on a false, implicit premise that unregulated farm worker dwellings in the Adirondack Park could threaten resources and that in the Park, there is an irreconcilable tension between the missions of the Agriculture Department and the Park Agency. However, what is noteworthy in state law is the harmony and overlap between the state policies to promote agriculture and protect the Park. In both statutory schemes, the goal is to preserve natural resources and open spaces and to promote agriculture. The state policy provides no support for the Park Agency's stance that farming is not the same in the Park as elsewhere.

The State Constitution declares that it is the policy of the state to "protect its natural resources and scenic beauty and encourage the development and improvement of agricultural lands for the production of food and other agricultural products." *See* NY Const, Art XIV, § 4. The Constitution contains

no exception to the pro-farming policy in the Adirondack Park. Instead, relevant legislation contains emphatic declarations regarding the importance of farming throughout the entire state. The agricultural industry is basic to the life of the state, and the state must promote and encourage that industry. *See* AML § 3. All state laws concerning the agricultural industry should receive a liberal interpretation to promote agriculture. *See id.* In neither the Agriculture Law nor the Park Act is there any exception to the pro-farming policy within the Adirondack Park. Nevertheless, the Park Agency espouses a crabbed interpretation of "agriculture use structure," disconnected from the realities of farm operations and dishonoring the mandate to promote agriculture.

The same year that the Park Act was enacted, in order to preserve agricultural land for farming, the legislature also enacted Article 25-AA of the Agriculture Law. That law provided for the creation of Agricultural Districts, such as the one in which petitioner's farm is located.[3] Nothing in the Agriculture

[3]As of 2002, there were 341 Agricultural Districts in the state containing approximately 21,500 farms and constituting about 30 percent of the State's total land area. *See* ww.agmkt.state.ny.us. The need to take action to preserve agricultural lands in the state was substantiated by a 2001 report revealing that from the 1950s to 1990s, farm land in the state shrank by more than half, from 16 million to 7 million acres. *See* December 2001 Report of the Department of Applied Economics and Management at Cornell University's College of Agriculture and Life Sciences, "Agriculture-Based Economic Development: Trends and Prospects for New York" at p. 17, fig. 14, found at www.aem.cornell.edu. Despite such shrinkage, farming remains an essential component of the economy and rural landscapes in upstate New York, including the Adirondack Park.

Law or Park Act states that agriculture deserves less protection in Agricultural Districts within the Adirondack Park than outside of it. On the contrary, in all land classified as Agricultural Districts, it shall be the policy of all state agencies to encourage viable farming and to modify administrative regulations and procedures to meet that end. *See* AML § 305 (3). Even a so-called super agency is still a state agency subject to such command.

Encouragement of farming is mandated not only in the Agriculture Law, but also in the Park Act. In furtherance of the State Constitutional provision declaring that the state forest preserve shall be "forever kept as wild forest lands" (*see* NY Const, Art XIV, § 1), the Adirondack Park Act was enacted. Its mission is to protect the Park's unique and abundant natural resources and open space character, while at the same time protecting management of land for agricultural purposes and promoting a strong economic base. *See* L 1971, c 706, § 1; L 1973, c 348, § 1; Exec Law § 801. As amended in 1973, the Park Act reaffirmed the protected role of agriculture in key ways. Agricultural use structures were deemed compatible in five of the six land area classifications and were placed beyond the Park Agency's reach. *See* Exec Law § 805 (3) (d) – (h); § 810 (1), (2). The Park Act recognized that in resource management areas – such as the area in which petitioner's farm is located – the need to protect agricultural

resources is of paramount importance. *See* Exec Law § 805 (3) (g) (1). Further, a high level of capital investment in agricultural buildings is crucial. *See id.*

Thus, the alarm the Agency expresses about petitioner's farm worker housing causing an unspecified impact to unspecified Park resources subverts the Park Act. The Agency is supposed to protect agricultural resources as an important element of the Park, not to attack such resources as a threat to other unnamed Park resources. The anomalous and irrational nature of the Agency's position is all the more striking given the location of the Lewis Farm on the most sacred of agricultural lands possible: in a state-certified Agricultural District and a resource management area of the Adirondack Park. In both such areas, protecting farming is of the highest importance. Petitioner's capital investment in modular homes for laborers on its farm should be exalted by the Park Agency, not punished as a suspect act or a nonfarming activity that the Agency can control and punish.

Supreme Court Exposes Flawed Arguments

The Park Agency relies on a facially flawed argument that: (1) the statute contains provisions listing the terms "single family dwelling" and "agricultural use structure;" (2) therefore single family dwellings can never be agricultural use structures; and (3) since the farm worker dwellings are single family dwellings, they cannot be agricultural use structures. Supreme Court

exposed the patent flaws in such analysis (226-227). As the court pointed out, nothing in the statute precludes a single family dwelling that is directly and customarily associated with agricultural use from qualifying as an agricultural use structure. After all, the latter term embraces a wide range of structures. Not all agricultural use structures are single family dwellings, and not all single family dwellings are agricultural use structures. Thus, the use of the two terms provides no support for the notion that a farm worker dwelling that happens to be a single family dwelling cannot be given its most precise and particular meaning, as an agricultural use structure.

Moreover, Supreme Court addresses the Park Agency's contention in its determination that the word "structure" in the term "agricultural use structure" means an "accessory structure" (223-224). Nothing in the statute provides any indication that the legislature meant to limit "agricultural use structures" to "accessory structures," the court explains. Further, the Park Act defines a "structure" as including buildings, sheds, single family dwellings, and mobile homes. *See* Exec Law § 802 (62). Thus, under the plain terms of the Park Act, a structure can be a single family dwelling; such single family dwelling structure can be designed for agriculture use; and in that case, it would most properly be deemed to be an "agricultural use structure."

The Park Agency also contended in its determination that petitioner illegally subdivided its land when it built farm worker dwellings. "Subdivide" means to create separate lots for separate ownership or occupancy with separate roads and utilities. *See* AML § 802 (63). In contrast, the subject houses are located in a cluster by barns, and they share a driveway, water supply, septic system, and electrical connection. Based on these realities, the Commissioner of Agriculture stated in his opinion that the housing could not be subdivided.

Park Agency Breaks the Rules

No Deference Due

The Park Agency demands automatic deference for its determination, but none is due. Where the interpretation of a statute involves specialized knowledge, an understanding of underlying operational practices or an evaluation of factual data and inferences to be drawn therein, courts should indeed generally bow to the agency's interpretation. *See Matter of Dworman v. New York State Div. of Housing and Community Renewal*, 94 NY2d 359, 371 (1999); *Kurcsics v. Merchants Mutual Ins. Co.*, 49 NY2d 451, 459 (1980). However, the Agency's instant determination did not involve any purported special competence regarding farming; it merely offered the Agency's choice of two rival interpretations of a statutory term. Where, as here, the question is one of pure statutory interpretation, there is little basis to rely on any special expertise of the agency,

and its interpretations are entitled to little weight. *See Dworman* and *Kurcsics*, *supra.* The final word on interpretation of the law resides in the courts, which may substitute their judgment for that of the agencies. *See* 97 NY Jur 2d, Statutes, §§ 162-163. Legal interpretation cannot be delegated to the agency charged with a statute's enforcement. *See Matter of Moran Towing and Transportation Co. v. New York State Tax Commission*, 72 NY2d 166, 173 (1988). After all, with pure statutory interpretation, there is no reason for judicial deference; at issue is neither an agency understanding of operational practices or evaluation of factual data involving special expertise. *See* NY Jur 2d, Statutes, *supra*, at §§ 162-163; Vol. 3A, Sutherland, Statutory Construction (5th ed.), at 711-712. If courts mechanically defer to an agency's reading of a statute based on its claim of superior working knowledge of a statute, there is a danger that self-serving, incorrect administrative determinations will be upheld, leading to tyranny by bureaucrat-technicians. *See id.* at 713, 717.

Improper New Rationale

Upon appeal, the Park Agency has departed from its initial determination and taken a new approach. The Agency strives to create the illusion that there were material disputes requiring a factual evaluation by the Park Agency and drawing upon its special competence. The Agency now indicates that perhaps the subject structures were not farm worker dwellings and claims that it is concerned

about sewage. However, the Agency's final determination makes it clear that there was no factual dispute about whether the subject housing constituted farm worker dwellings. Further, it made no findings about sewage (but merely directed petitioner to submit a septic system plan). Inventing unsupported concerns upon appeal has never been a sanctioned approach to shield administrative determinations from judicial review. *See Matter of Eastern Pork Products Co. v. New York State Div. of Housing and Community Renewal*, 187 AD2d 320 (1st Dept 1992) (agency previously assumed truth of owner's submissions regarding extent of renovations and, for the first time on appeal, improperly claimed that extent of work done was less than claimed).

Further, the Park Agency has also changed its statutory interpretation argument, by abandoning two pillars of its determination – on "accessory in nature" and subdivisions. While it is understandable that the Agency now seeks to distance itself from the fallacious positions, such arguments were integral to its determination.

Moreover, agency determinations may not be upheld unless they are sustainable based solely on the agency's findings and the reasons stated for such findings in the determination. *See* Vol. 3, Davis, Administrative Law Treatise (2nd ed), § 14.29. Reviewing courts are required to reject appellate counsel's post-hoc rationalizations for agency action. *See id.* If the grounds invoked in a

determination are inadequate and improper, the court is powerless to affirm the administrative action by substituting what it considers a more adequate and proper basis. *See Securities and Exchange Commission v. Chenery Corp.*, 332 US 194 (1947); *Matter of Scherbyn v. Wayne-Finger Lakes BOCES*, 77 NY2d 753, 757 (1991); *Matter of Trump-Equitable Fifth Ave. Co. v. Gliedman*, 57 NY2d 588 (1982); *Matter of Tarasek (Commissioner)*, 44 AD3d 1204 (3rd Dept 2007); *Matter of Berchielli v. Zoning Board of Appeals of Town of Westerlo*, 202 AD2d 733 (3rd Dept 1994), *lv den* 83 NY2d 757 (1994).

Dictum is not Binding

The Park Agency's extensive discussion of Judge Ryan's decision dismissing the premature CPLR Article 78 proceeding misleadingly fails to acknowledge that his statements regarding the nature of farm worker housing are obiter dictum with no force or relevance. Since that decision properly found that the matter was not ripe for judicial review, any discussion about statutory interpretation was unnecessary to reaching the decision. Thus, it is not binding, under well-established principles of collateral estoppel and law of the case. *See e.g. Matter of Atlantic Mutual Ins. Co. v. Lauria*, 291 AD2d 492 (2nd Dept 2002); *233233 Company v. City of NY*, 171 AD2d 492 (1st Dept 1991).

Such principles apply with special force where, as here, judicial review of a preliminary administrative agency determination is improperly sought.

Under traditional doctrines of administrative law, a determination must be final before the petitioner may seek judicial relief. *See* CPLR 7801 (1). Just as the requirement of exhausting administrative remedies, the finality rule prevents premature judicial interference and allows for a determination reflective of the agency's final judgment. *See Watergate II Apts. v. Buffalo Sewer Auth.*, 46 NY2d 52, 57 (1978). Preliminary steps in an agency's decision-making process are not ripe for judicial review; premature CPLR Article 78 petitions challenging such nonfinal determinations must be dismissed; and no binding finding on dispositive issues can be made until there exists a full record and a final determination. *See e.g. Matter of Sour Mt. Realty, Inc. v. New York State Dept. of Environmental Conservation*, 260 AD2d 920 (3rd Dept 1999), *lv den* 93 NY2d 815 (1999); *Matter of Livingston Associates v. New York State Div. of Housing and Community Renewal*, 220 AD2d 504 (2nd Dept 1995); *Matter of Incorporated Village of Hempstead v. Public Employment Relations Board*, 137 AD2d 378 (3rd Dept 1988), *lv den* 72 NY2d 808 (1988).

Conclusion

The Park Agency's disregard of all relevant authority on the primacy of farming in New York and core concepts of administrative law shows how far it will go in its bid for power. This troubling disregard of the law also shows how important judicial review is to protecting farming and preventing overreaching. If

the Park Agency can prevail even in a situation as egregious as this – where the petitioner has made such a vital contribution to agriculture and the Agency has boldly defied logic and the law – then no farmer will have any hope of being able to farm in peace in the Park. In the last 30 years, Essex County, which is engulfed by the Park, has lost approximately 28 percent of its farmland.[4] The amicus curiae believes strongly that this disturbing trend will increase if the Park Agency is victorious in sustaining its arbitrary intrusion on farming in this case.

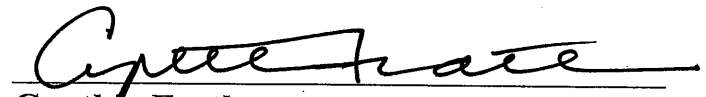
Even a super agency in the High Peaks cannot stand above the law. Instead, it should revere the law, show humility, and defer to those who possess expertise it lacks. The legislature, Commissioner of Agriculture, and Court of Appeals have declared that farm worker housing is essential to farm operations. The interpretation of the statute at issue must harmonize with the state policy to promote farming. The Park Agency's dissonant determination must not be sustained; Supreme Court's analysis is unassailable and should be affirmed. At stake is not only whether farming will be thwarted or encouraged within the Blue Line. Also at issue is whether an arbitrary agency action will be condoned or condemned. "Forever wild" should capture the essence of the Park, not the

[4] *See* Essex County Farm Statistics prepared by New York Agricultural Statistics Service: www.nass.usda.gov/Statistics_by_State/New_York/County_Profiles/Essex.pdf.

Agency entrusted with enforcing laws to protect forests and farms there for the benefit of all New Yorkers.

Dated: April 1, 2009
Saratoga Springs, NY

Respectfully submitted,



Cynthia Feathers
Of counsel to amicus curiae
New York Farm Bureau, Inc.