THE ORAL ARGUMENT
(Case No. 504626 / 504696 – May 27, 2009, 1:30 p.m.)

COURT:

Lewis Family Farm v. Adirondack Park. Ms. Sheridan?

SHERIDAN:

Good Afternoon, Your Honors. I have to ask for two minutes to be reserved for a rebuttal.

COURT:

Yes.

SHERIDAN:

The issue in these three consolidated cases involves the enforcement of a permit requirement in the APA Act and the Wild Scenic and Recreational Rivers District Act. Those Acts state in very plain language that a private land owner has to obtain a permit under the APA before commencing to construct a single family dwelling in land that like the land here is classified as resource management land or in a recreational river area. This is a fundamental aspect of the APA's jurisdiction. But Lewis Farm argues, and the court below held, that until a landowner intends to use these new single family dwellings to house farm workers, it doesn't have to apply for a permit because in that case, these single family dwellings are agricultural use structures, which generally are exempt from the permit requirement in the Act. That's the wrong conclusion for two main reasons. Number one, single family dwellings and agricultural use structures are mutually exclusive definitions. They are separately defined. There is no overlap. And secondly, creating this exception to the general permit requirement for single family dwellings if farm workers live in them will give rise to a whole host of loopholes that will threaten the....they will undermine the law and will threaten and hamper enforcement of the Act. Beginning with the statutory regulating language of the APA Act and the Rivers Act, Agricultural use structure and

single family dwelling is _____ agriculture under a single family dwelling is defined in Section of law 802(5)(a) and in fact building a one _____ They house people and it doesn't matter if it is for farmers or not. If a structure falls within the statutory definition of single family dwelling, it keeps that classification regardless of who lives there. Agricultural use structure is also statutorily defined in 802(8) _____ it's a barn, a stable, a shed, a silo, or any other building or structure directly or customarily associated with agricultural use. _____ separately defined and there is no overlap. I want to talk for a minute about the principal building concept.

COURT:

Isn't that what we have here is a building or structure that is directly or customarily associated with agricultural use?

SHERIDAN:

Well, the court below actually found that this is kind of an unprecedented use of a single family dwelling -- that it is not customary for single family dwellings to be used to house farm workers. But, that aside, in our position, it is just not a reasonable interpretation of that language when we have a specific definition of single family dwellings and this structure more precisely fits into that dwelling…into that definition.

COURT:

That's not what the Court of Appeals said when asked to interpret—what I believe is an identical term—in the Agriculture and Markets Law, correct?

SHERIDAN:

No, I'm sorry Your Honor it is not an identical term. That is important to realize. *Lysander* is not controlling here.

COURT:

I understand is not controlling. But reasoning seems to be that it has relevancy here with the issue which we have to decide.

SHERIDAN:

I ___. In my plan for courtroom interpreting a very different _____. The company that does farm operations in the Ag & Markets Law. That is not interepreted here _____ and that term is expressly defined in the Ag & Markets law to include on-farm buildings that contribute to the production of crops.

COURT:

These farm worker…dwellings are used…there isn't any dispute that for housing for people who are going to be working on the farm, advancing the harvest or whatever they have to do in terms of the products is get the _____ product ____ farm. Is that correct?

SHERIDAN:

I don't know how they aim is or how they are going to be used but it was represented that the houses were built some to house employees, some to house students from the nearby university for learning about farming, some to host some Nepalese farmers who are visiting to learn about the methods organic farming. All not necessarily employees, mind you, but that was what was represented as the proposed use of these single family dwellings.

COURT:

Is this a matter of pure statutory construction?

SHERIDAN:

Um, to the extent that the language is clear, and we think it is in this case, yes, it is a matter of statutory construction. Because the language is so clear you needn't rely on any kind of

deference, but I would submit that to the extent that there are environmental concerns at play here, that is within the scope of the APA's expertise to the extent of those concerns are implicated in this case and maybe some deference that should afforded to their information in this case.

COURT:

(inaudible)

SHERIDAN:

A dormitory type of structure would probably fall in the definition of multiple family dwelling. It would require a permit. That would require a permit in respect to 810(2)(b)(6) as a Class B project because it is not listed as a primary or secondary compatible use management at all. It is not listed as primary or secondary it automatically a Class B project requiring a permit. So a multiple family dwelling would indeed require a permit just like _____ as would a mobile home, as would a single family dwelling, Your Honor. I want to discuss for a minute the concept of principal building. To clear up some confusion by the Court below and is the basis of Lewis Farm's argument here. Principal building is defined in the Act to determine whether a proposed use and development of land comports with density guidelines. How many structures per square acre or per square mile. The density guidelines differ in different areas of the Park. Resource management area. In these resource management land area, we've got 15 principal buildings per square mile. That's about one principal building per 43 acres, and principal building is defined as a single family dwelling, a mobile home, you can have one single family dwelling for every 43 acres of resource management. But the APA Act in Section 802(50)(g) provides a special exception when it comes to farms and agricultural uses. It says that all agricultural use structures and single family dwellings that are occupied by the farmer or his

employees are counted together. They're one principal building. And Lewis Farm argues that that means that because they are treated together for density purposes they are treated the same for all purposes under the Act and that is not the case. The density requirements don't even come into play until after you have a project that requires a permit. You apply for a permit because it is a single family dwelling and then in order to determine whether the single family dwelling proposed comports with the density guidelines you look for the definition of principal dwelling. And the way the principal building definition is crafted in the statute we think _____ APA determination. And it clearly distinguishes between single family dwellings occupied by the farmer's employees and an agricultural use structure. If agricultural use structure encompassed all farmer housing there would not be any need to say it separately.

COURT:

Counsel you have a couple of minutes left. Do you want to save those?

SHERIDAN:

Yes. Thank you Your Honor.

PRIVITERA:

May it please the Court, thank you. Jacob Lamme, my associate who was on the brief, is with me this afternoon. Your Honors, yes, this is purely a question of law. In our system of justice perhaps the greatest and most honorable duty of the court is to answer questions of law, pure questions of law when proposed by the people. Here, the entire farming community of this State ask this question of the court – do farmers have the same right to farm, the same protections against land use regulations inside the Adirondack Park that they hold and cherish and are protected by *Lysander* outside the Park? The Court below, Justice Meyer, after careful scrutiny and sound analysis, assiduously avoided here by Appellant, concluded unquestionably that the

answer is yes. Farms are exempt from virtually all land use regulations inside the Park. And, I think that was conceded here today and certainly all agricultural use structures inside the Park are exempt from all regulation. That means pink barns in the middle of a field of any size, that means neon silos 108 feet tall, that means manure piles, that means fermenting silage under a white tarp with tires on it, that means every single structure or thing for use on a farm is exempt from regulation inside the Adirondack Park until the Appellant comes before this Court today and with a crabbed reading of one definition. Where is the legislative intent? In 1969 this State decided to amend our Constitution to protect and conserve farm soils and directed every agency to engage in regulation consistent with a policy that promotes the development of farms. In the wake of that, the Legislature passed the Right-to-Farm Law in the Ag & Markets law that was administered by the Commissioners here in this case, albeit ignored by the Appellant in its craft reading of the statute. Specifically, Section 308(4) of the Ag & Markets law provides, in its title Right to Farm, that the Commissioner can make findings that are final and binding as to whether or not a farmer is engaged in sound agricultural practices and whether or not the use of the land is agricultural. Here, in the record at page 1389, the Commissioner found that this use of the land by the Lewis Family Farm by Barbara and Sandy Lewis is agricultural use of the land, that is a common farm practice to house workers on the farm, that it is necessary to a successful farm, particularly given the housing shortage and the vacation market in the Adirondacks where these American Heritage farmlands are found. In the face of that Right-to-Farm finding, how can it be that the Legislature intended a contradiction on the law? How are the people to absorb this? We have a final decision under 308(4) that this is an agricultural use of the land and with a crabbed reading of agricultural use structure that ignores the flush paragraph that Your Honor pointed out, the flush phrase that says any building or structure directly or customarily associated with

agriculture is part of the definition of agricultural use structure, assiduously ignored — How can it be said that the Legislature intended this Court to ignore those words, contrary to Justice Weeks directive in the *Friedman* case that every single word be given meaning and every single word must be harmonized with the rest of the statute and rest of state law. They're not mutually exclusive definitions by any stretch.

COURT:

Can I ask you about that? As I look at the statute, it says that any barns stables sheds silos, garage, fruits and vegetable stands or other building or structure. Now we construe a statute with that type of language, doesn't the phrase "other building or structure" refer back to buildings, barn, stables, sheds, silos?

PRIVITERA:

Not here, Your Honor, because a structure of the statute, the architecture of it, is perfect. Structure is defined. Structure is a defined term under the Adirondack Park Agency Act. Structure is defined to include single family dwelling. So clearly, as the court below found, as a matter of pure statutory interpretation, any building or structure, including farm worker housing, which is included in the definition of a structure, that is directly and customarily associated with agricultural use, can be an agricultural use structure. And, the Legislature thought about farm worker housing when it wrote the Act. In the very tradition that has been cited by counsel. Where they said, okay, here is the land use plan. You must administer the Park in such a way that the resource management lands are sparsely populated. And what they said – they said except for farm worker housing.

COURT:

I want to ask you sir, if accepting your argument, is the Park Agency allowed to, in any way, regulate or confine the density. Is there any limitation at all then, if your position is upheld, that the Park Agency can minimize density.

PRIVITERA:

No Your Honor, there is absolutely no limitation whatsoever, given our constitution, given the right to farm and given the purpose of managing the resource management land to maintain open space. What the Legislature said was, we're not going to count the farm worker housing no matter how big they get, no matter how successful that farm is, let him go, let him build because that protects open space. So there is not restriction on that and it was purposeful. As the Court said in *Lysander*, when you have a broad statutory exception as here for all agricultural use structures, as I pointed out, that exception is to be read broadly unless the Legislature specifically said that a particular thing is excluded from that broad safe harbor. If you look at the *Town of Lysander* case, just before the court decided that matter, the Legislature changed the definition of farm building and took farm worker housing out of the definition. The Court held that even though it had been taken out because of the broad language of the definition of farm building is essentially the same as agricultural structure, we can't expect the Legislature to have been inconsistent in that regard. When you have that broad exception, unless the Legislature specifically says except farm worker housing, you have to include it within the safe harbor. That's how you read the statute, that's how you harmonize it, that's how you breathe life into the exception. And therefore, here the proper reading was as it was read below by His Honor, Justice Meyer. I have to ask, you know, this Court has a strong tradition of paying respect to the considered judgment of the trial bench. One fair and resourceful approach to answering this pure

legal question before this Court is to read that decision that is now published. Is there a single flaw in it? Is there any reasoning that is in error? Not that is pointed out in the Appellant's brief. Instead they go back to the original effort to maintain mutual exclusivity between two definitions that clearly overlap.

COURT:

Okay. I have to take you back a little bit. One of the things that I can't find anywhere in the record is that, while your client may have gone to the Town of Essex zoning officer and asked about a permit, and in that conversation asked whether or not any permit of APA was required. And as I understand it, he apparently he said no. Why not go to the APA directly and ask them whether or not there was a permitting process in place?

PRIVITERA:

Ultimately there was a discussion with the APA.

COURT:

After construction had started?

PRIVITERA:

After construction had started. There was no reason to suspect that there was jurisdiction based on what the Town code enforcement officer had said. And every single town in this state, when town enforcement officers go to zoning seminars, they're taught about *Lysander*. He thought he was right, and he was.

COURT:

Mr. Privitera, you have about 30 seconds.

PRIVITERA:

I would ask also that in parking the process, I would ask also that you look at the formidable brief provided by the Farm Bureau and submitted to this Court as a friend of the Court. And there also, the Farm Bureau representing 30,000 farmers throughout the state, found that this is a fair and reasonable reading of the statute. We ask this Court to answer the question before you – Yes. The sound and careful approach of the Court below is correct – Yes. In accordance with the approach in *Lysander*, we must include farm worker housing, and the answer is yes to save the Park Act and the Rivers Act from constitutional infirmity. The Court below didn't have to reach the constitutional issue because as she pointed out is strictly in the statute, clearly includes farm worker housing. Thank you.

COURT:

Thank you. Ms. Sheridan?

SHERIDAN:

Your Honors, the Lewises were well aware that the APA has jurisdiction over the project. They had prior dealings with the APA. They had previously been found in violation of the Act for wetlands violations. And, in fact, the APA had visited the farm at the invitation of Mr. Lewis and told him that if he plans to build single family dwellings that it would require a permit. He claims he does not recall the conversation but it is what it is. And if the Lewises weren't sure if they needed a permit like John noted, they had a lot of ways to find out. There were very simple ways to find out. There is a four page jurisdictional inquiry form available on the website. Use the website. You check boxes, you submit it and about a week or two turn around time and it produces a legal binding opinion as to whether or not a proposed project requires a permit. The Lewises didn't pursue that option. In fact, they submitted a permit application to the APA, it just

wasn't complete. When the APA asked them to complete it…(inaudible)…the information wasn't forthcoming.

COURT:

Ms. Sheridan, can you claim any legal error in the opinion of the court below?

SHERIDAN:

Yes. In that it holds that a single family dwelling occupied by a farm worker is an agricultural use structure.

COURT:

Your position is that the court skewed the statutory construction improperly?

SHERIDAN:

Misconstrued the statute, yes. And there is nothing arbitrary and capricious about the determination of the APA. So the entire decision should be reversed.

COURT:

Am I correct…You said something about a preliminary permit application being made, are you referring to the application dated March 14, 2007 entitled "minor permit application"?

SHERIDAN:

Yes, I'm not sure that was the exact date. But yes. They did submit a minor permit application.

COURT:

This is submitted by the Lewises to APA?

SHERIDAN:

It was signed, I believe by Barbara Lewis, to the APA and identified the proposed project as the construction of three new single family homes. Now, it is identified by her as a minor project, um, which is a statutory term.

COURT:

Does the record reveal why the application was not fully submitted after it was determined that the information…

SHERIDAN:

(interposing) I can't answer that question Your Honor. All I know is the APA asked for additional information that was never provided.

COURT:

Thank you, counsel. Thank you both.