

**McNAMEE, LOCHNER, TITUS &
WILLIAMS, P.C.**
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : THIRD DEPARTMENT

IN THE MATTER OF LEWIS FAMILY FARM, INC.,

Appellant,

v.

Case Nos. 504626,
504696

NEW YORK STATE ADIRONDACK PARK AGENCY,

(Case No. 1)

Respondent.

IN THE MATTER OF LEWIS FAMILY FARM, INC.,

Respondent.

v.

ADIRONDACK PARK AGENCY,

(Case No. 2)

Appellant.

ADIRONDACK PARK AGENCY,

Appellant,

v.

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

(Case No. 3)

Respondents.

STATEMENT PURSUANT TO CPLR § 5531

Appellant Adirondack Park Agency, as and for its statement pursuant to CPLR § 5531,

states as follows:

1. The Index numbers of these consolidated actions before the Supreme Court, County of Essex were: 498-07 (Lewis Family Farm, Inc. v. New York State Adirondack Park Agency, Case No. 1); 315-08 (Lewis Family Farm, Inc. v. Adirondack Park Agency, Case No. 2); and 332-08 (Adirondack Park Agency v. Lewis Family Farm, Inc., Salim B. Lewis and Barbara Lewis, Case No. 3).

2. The full names of the original parties were as follows: LEWIS FAMILY FARM, INC., SALIM B. LEWIS, BARBARA LEWIS and the NEW YORK STATE ADIRONDACK PARK AGENCY.
3. All three cases were commenced in Supreme Court, Essex County.
4. Lewis Family Farm, Inc. filed a declaratory judgment action (Case No. 1) in Supreme Court, Essex County on June 26, 2007 with service on or about June 28, 2007. An amended complaint was filed on or about July 3, 2007 with service on or about July 20, 2007. Lewis Family Farm, Inc.'s Article 78 proceeding (Case No. 2) was commenced by Order to Show Cause and Petition filed and served on April 8, 2008. An amended petition was filed on April 15, 2008 and served on April 17, 2008. The New York State Adirondack Park Agency's summons and complaint for its enforcement action (Case No. 3) was filed on April 11, 2008. Service to all defendants was complete as of April 25, 2008. An amended complaint was filed and served May 15, 2008. Case No. 2 and Case No. 3 were consolidated by Supreme Court order dated June 10, 2008.
5. The Article 78 proceeding brought by Lewis Family Farm, Inc. sought to annul a determination of the Adirondack Park Agency which found Lewis Family Farm Inc., in violation of the Adirondack Park Agency Act ("APA Act") (Executive Law § 801 et seq.) and the Wild, Scenic and Recreational Rivers Act ("Rivers Act") (Environmental Conservation Law § 15- 2701 et seq.), for construction of three single-family dwellings in protected areas without an APA permit. The action brought by the Adirondack Park Agency sought enforcement of the APA Act, the Rivers Act, and the APA determination.
6. The appeals in Case No. 2 and Case No. 3 are from a Decision and Order dated and filed on July 2, 2008 and a Decision and Order dated and filed November 19, 2008, and entered as a Judgment on November 21, 2008, both of Acting Supreme Court Justice Honorable Richard B. Meyer.
7. This Court consolidated the appeals in Case No. 1, Case No. 2 and Case No. 3 by Order dated January 15, 2009. These consolidated appeals are on a full printed record. Volume I of the record was prepared by Lewis Family Farm, Inc., with the cover page prepared by the Office of the Attorney General. Volume I contains the record for Case No. 1. Volumes II and III of the record were prepared by the Office of the Attorney General on behalf of the Adirondack Park Agency and contain the record for Case No. 2 and Case No. 3.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ESSEX**

LEWIS FAMILY FARM, INC.,

Petitioner,

v.

**NEW YORK STATE ADIRONDACK
PARK AGENCY,**

Respondent.

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

NOTICE OF APPEAL

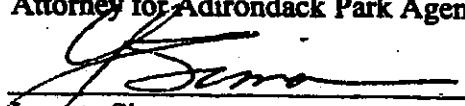
**Essex County
Index No. 315-08**

**Essex County
Index No. 332-08**

PLEASE TAKE NOTICE, that the Adirondack Park Agency appeals to the Appellate Division, Third Department from the "Decision and Order" of the Supreme Court, Essex County (Meyer, R., Acting J.S.C.) dated November 19, 2008 and entered in the Office of the Essex County Clerk on or about November 19, 2008, and from the subsequent "Judgment" dated and entered on or about November 21, 2008.

Dated: Albany, New York
December 17, 2008

ANDREW M. CUOMO
Attorney General of the State of New York
Attorney for Adirondack Park Agency

By: 

Loretta Simon
Assistant Attorney General
The Capitol
Albany, New York 12224
Telephone: (518) 402-2724

ELIZABETH TOWN, NY 12932
08 DEC 18 PM 12:40

ENTERED AND FILED
ESSEX COUNTY, NY
12 DEC 18 PM 12:40

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ESSEX**

LEWIS FAMILY FARM, INC.,

Petitioner,

v.

**NEW YORK STATE ADIRONDACK
PARK AGENCY,**

Respondent.

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

State of New York)

: ss.:

County of Albany)

Linda Ayotte being duly sworn, deposes and says:

I am over eighteen years of age and an employee in the Office of Andrew M. Cuomo,
Attorney General of the State of New York, attorney for Adirondack Park Agency.

On December 18, 2008, I mailed the Notice of Appeal, dated December 17, 2008 for
Adirondack Park Agency upon the attorneys named below by depositing one true copy thereof,
properly enclosed in a sealed, post-paid wrapper, in the Office of the Attorney General's mail
facility in the City of Albany, New York, a depository under the exclusive care and custody of
the United States Postal Service, directed to the said attorneys at the address as follows:

AFFIDAVIT OF SERVICE

**Essex County
Index No. 315-08**

**Essex County
Index No. 332-08**

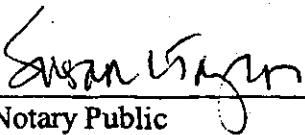
08 OCT 22 AM 9:46
ELIZABETH

John J. Privitera, Esq.
Jacob Lamme, Esq.
McNamee, Lochner, Titus & Williams, P.C.
677 Broadway
Albany, New York 12207


LINDA AYOTTE

Sworn to before me this

18th day of December, 2008.


Notary Public

SUSAN L. TAYLOR
Notary Public, State of New York
No. 02TA6020240
Qualified in Rensselaer County
Commission Expires March 1, 2011

PRESENT: Hon. Richard B. Meyer, Acting J.S.C.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ADIRONDACK PARK AGENCY,

Respondent.

JUDGMENT

ACTION NO. 1

Index No. 315-08

RJI No.: 15-1-2008-0109

Hon. Richard B. Meyer

ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

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

Defendants.

ACTION No. 2

Index No.: 332-08

RJI No.: 15-1-2008-0117

Hon. Richard B. Meyer

Upon the Notice of Petition, dated April 7, 2008 and Amended Petition filed in this Article 78 proceeding in the office of the Clerk of Essex County on or about April 14, 2008 (Index No. 315-08), and all proceedings thereon;

And upon the Amended Summons and Amended Verified Complaint filed in this action in the office of the Clerk of the Essex County on or about May 14, 2008 (Index No. 332-08), and all proceedings thereon;

NOW, ON MOTION OF McNAMEE, LOCHNER, TITUS & WILLIAMS, P.C., attorneys for Petitioner-Defendant Lewis Family Farm, Inc., and in accordance with the Decision and Order executed by the Honorable Richard B. Meyer, J.S.C. on November 19, 2008, it is

FILED 03/03

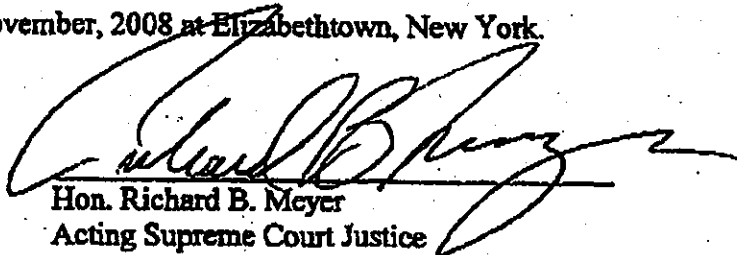
ORDERED, ADJUDGED AND DECREED, that the Amended Petition is hereby granted without costs and that the determination rendered by Respondent Adirondack Park Agency against Petitioner Lewis Family Farm, Inc. on March 25, 2008 is hereby annulled in its entirety pursuant to CPLR § 7806 on the ground that said determination is affected by an error of law, and it is further

ORDERED, ADJUDGED AND DECREED, that the Amended Verified Complaint of Plaintiff Adirondack Park Agency is hereby dismissed in its entirety, and that each and every cause of action stated therein against Defendant Lewis Family Farm, Inc. is hereby dismissed, with prejudice and without costs, and it is further

ORDERED, ADJUDGED AND DECREED, that the Decision and Order of this Court, dated April 11, 2008, as modified by the Appellate Division on April 28, 2008 and May 19, 2008, which granted a partial stay to Petitioner Lewis Family Farm, Inc. pursuant to CPLR § 7805 is hereby vacated as moot, and therefore there is no basis upon which the Essex County Treasurer may continue to hold the \$50,000 paid in to the Court and Trust Fund of the Essex County Treasurer by the Lewis Family Farm, Inc.

JUDGMENT signed this 21st day of November, 2008 at Elizabethtown, New York.

ENTER


Hon. Richard B. Meyer
Acting Supreme Court Justice

ELIZABETHTOWN JUDGE 12932

NOV 21 AM 11:05

NOV 21 2008

STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ADIRONDACK PARK AGENCY,

Respondent.

NOTICE OF ENTRY

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

ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

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

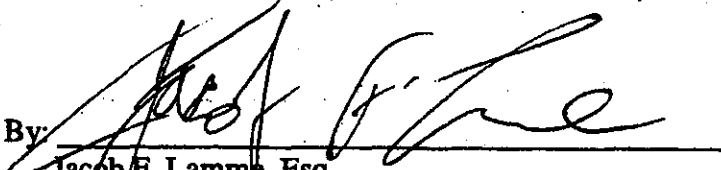
Defendants.

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

PLEASE TAKE NOTICE that the within is a true copy of the final judgment executed
by the Hon. Richard B. Meyer, Acting Supreme Court Justice, Essex County Supreme Court,
dated and entered by the Essex County Clerk on November 21, 2008.

Dated: Albany, New York
November 26, 2008

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

By: 

Jacob F. Lamm, Esq.

Attorneys for Lewis Family Farm, Inc.

677 Broadway

Albany, New York 12207

(518) 447-3200

TO: Loretta Simon, Esq.
Assistant Attorney General
State of New York
Office of the Attorney General
The Capitol
Albany, New York 12224

Cynthia Feathers, Esq.
48 Union Avenue, Suite 2
Saratoga Springs, New York 12866

Supreme Court of the State of New York
For the County of Essex

Submitted August 22, 2008

Decided November 19, 2008

Index No.: 315-08 – RJI No.: 15-1-2008-0109

Index No.: 332-08 – RJI No.: 15-1-2008-0117

LEWIS FAMILY FARM, INC.

Petitioner,

v.

ADIRONDACK PARK AGENCY,

Respondent.

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

LEWIS FAMILY FARM, INC.,

Defendant.

Decision and Order

McNamee, Lochner, Titus & Williams, P.C. (*John J. Privitera, Esq.*,
and *Jacob F. Lamme, Esq.* of counsel), Albany, New York, attorneys
for Lewis Family Farm, Inc.

08 NOV 19 AM 9:58
ELIZABETH T. COLEMAN 12032

LEWIS FAMILY FARM v. ADIRONDACK PARK AGENCY

Decision and Order

Andrew M. Cuomo, Esq., New York State Attorney General (*Loretta Simon, Esq., Assistant Attorney General*), Albany, New York, attorney for the Adirondack Park Agency.

Arroyo Copland & Associates, PLLC (*Cynthia Feathers, Esq.*, of counsel) and *Elizabeth Corron Dribusch, Esq.*, General Counsel, Albany, New York, for the New York Farm Bureau, Inc., as *amicus curiae*, supporting Lewis Family Farm, Inc.

Consolidated proceeding pursuant to CPLR Article 78 challenging a determination by the Respondent Adirondack Park Agency (Agency) dated March 25, 2008 which, *inter alia*, directed Petitioner Lewis Family Farm, Inc. (LFF) to apply to the Agency for a permit for three new single-family dwellings and a four-lot subdivision, pay a \$50,000 civil penalty, and not to occupy the dwellings until a permit was issued, and an action by the Agency to enforce the determination and enjoin LFF from working on or using the dwellings and further violating the Executive Law.

I. Factual Background

The essential facts are, for the most part, not in dispute. LFF owns and operates an eleven hundred acre organic farm in the Town of Essex, Essex County, New York designated as a single parcel of land on the official county tax maps and town tax rolls. The property lies wholly within the Adirondack Park and within Essex County Agricultural District No. 4. The subject parcel is classified on the Adirondack Park Land Use and Development Plan Map as resource management, rural use and hamlet. In or about November 2006, LFF commenced construction of three single family dwelling units, to be used by employees working on the farm, on a portion of its property classified as resource management, one of which would replace an adjacent pre-existing dwelling scheduled for removal upon completion of the new homes. The dwellings are arranged in a cluster at a site located immediately north and east of the intersection of the Whallons Bay Road and Christian Road, and approximately eight hundred feet (but less than one quarter of a mile) from the Boquet a/k/a Bouquet River, a designated recreational river (*ECL §15-2714[3](e)*) under the

Decision and Order

Wild, Scenic and Recreational Rivers Act (the "Rivers Act") (*ECL §15-2701 et seq.*).

Subsequently, on March 14, 2007, LFF submitted an application to the Agency seeking a permit to construct "three single family dwellings in a farm compound to be used by farm employees exclusively." The next day, the Agency issued a notice of incomplete application and requested additional information. Over the next three months, the parties and their representatives engaged in unsuccessful negotiations over disputed issues, including the Agency's threatened enforcement action and a proposed settlement agreement (*9 NYCRR §581-2.5*) which called for LFF to apply for after-the-fact permits for the subdivision and the single family dwellings, as well as pay a \$10,000 civil penalty. On June 27, 2007 the Agency's acting executive director issued a cease and desist order (*9 NYCRR §581-2.4*) to LFF prohibiting "any and all land use and development related to the construction of the single family dwellings . . . until this matter is resolved and the enforcement case is concluded." The following day, LFF commenced a declaratory judgment action against the Agency challenging jurisdiction.

After LFF filed an amended complaint and applied for a temporary restraining order, the parties exchanged motions to dismiss under CPLR 3211. LFF claimed the Agency lacked jurisdiction over its farm worker housing project because the structures were "agricultural use structures" (*Executive Law §802[8]*) in a "resource management area" (*Executive Law §805[3][g]*), and also that any assertion of jurisdiction by the Agency violated Agriculture and Markets Law §305-a. The Agency, citing CPLR §7801(1), moved to convert the action to an Article 78 proceeding and for dismissal on the grounds that the action was "premature and not ripe for judicial review because the State defendant has not issued a final determination", and for failing to state a cause of action "because Agriculture and Markets Law §305-a does not preclude the APA from requiring a permit for subdivision of land and construction of single family dwellings". On August 16, 2007, Supreme Court (*Ryan, J.*) dismissed the proceeding as premature and not ripe for judicial intervention, and also held that Agriculture & Markets Law §305-a did not apply to a state agency. LFF filed a notice of appeal, and the appeal is pending.

Following dismissal of the converted Article 78 proceeding, LFF continued to construct the single family dwellings. One of the Agency's associate attorneys

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served a letter on LFF's counsel on August 31, 2007 advising that the previous cease and desist order remained in effect. On or about September 2, 2007, the Agency's acting executive director issued a notice of apparent violation (9 NYCRR §581-2.3), thereby initiating an enforcement proceeding before the Agency's enforcement committee (9 NYCRR §581-2.6[b]).

The enforcement committee, consisting of six of the Agency's eleven members (*Executive Law §803*), convened on March 13, 2008 to "hear an oral presentation or argument by the agency's staff and by the respondent and deliberate in executive session and subsequently make a determination as provided in" (Record Document #2, pg. 2) 9 NYCRR §581-2.6(d). Also in attendance were the remaining five members of the Agency. In that hearing, Agency staff conceded that LFF was "clearly using the land for agricultural use purposes", and that "[t]he agricultural use of resource management lands is listed by law as a primary compatible use and does not require an agency permit" (*Id.*, pg. 6). Staff argued, however, that a "single family dwelling" could not be an "agricultural use structure" under the Adirondack Park Agency Act (the "APA Act") (*Executive Law Article 27*) (Record Document #2, pgs. 8, 13), and that therefore permits for the three single family dwellings on land classified as resource management, as well as for subdivision of that land, were required under the APA Act and the Rivers Act (*Id.*, pgs. 7-11). In so concluding, Agency staff contended that statutory construction favored specific over general definitions, and that the APA Act's definition of a "single family dwelling" was specific, while that of "agricultural use structure" was general (*Id.*, pg. 10). Staff also asserted that because the APA Act's definition of "principal building" included reference to both agricultural use structures and single family dwellings, the Legislature intended them to be "separate and different types of structures for purposes of agency jurisdiction" (*Id.*, pg 11). Counsel for LFF argued that the language of the APA Act supported a conclusion that a single family dwelling used for agricultural purposes could be an agricultural use structure and exempt from Agency jurisdiction. Moreover, no subdivision permit would be required since the three dwellings would constitute a single principal building under the APA Act.

On March 25, 2008, the Agency's Enforcement Committee, made up of a quorum of the Agency (*Executive Law §803*), issued a unanimous determination (the "Agency's determination") that LFF violated the APA Act by failing to obtain a subdivision permit and a permit authorizing construction of two of the dwelling units. Since the determination was approved by the "affirmative vote by a

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majority of the members of the agency" (*Executive Law §803*), it constitutes an action by the Agency (*Id.*; see also *General Construction Law §41*; *Rockland Woods, Inc. v. Incorporated Village of Suffern*, 40 AD2d 385, 340 NYS2d 513). In arriving at its determination, the Agency held that "farm worker dwellings are 'single family dwellings' (or possibly 'multiple family dwellings' or 'mobile homes,' depending upon the type of dwelling structure), and not 'agricultural use structures'" under the APA Act (Record Document #1, pg. 8). The Agency also determined that the APA Act's definition of " 'agricultural use structures' does not include, and was not intended to include, the farm owners' or farm workers' dwellings", was only "intended to include other structures of an accessory nature" (*Id.*, pg. 9), and that single family dwellings and agricultural use structures "are treated as separate and distinct uses under the . . . [APA] Act" (*Id.*). Based upon its finding of violations, the Agency directed LFF to pay a \$50,000.00 civil penalty, apply for a permit for three new dwellings and a four-lot subdivision no later than April 14, 2008 by submitting a major project application and reply to requests for additional information within thirty days of receipt. Additionally, LFF was directed to submit to the Agency no later than April 28, 2008 a detailed description of the use of each dwelling and its connection to agricultural operations plus as-built plans for the septic system and an evaluation by a state-licensed professional engineer regarding whether the installed septic system shared by the three dwellings complied with state Department of Health and Agency standards and guidelines. Finally, the Agency's determination provided that LFF relinquished its right to challenge Agency jurisdiction but retained the limited right to appeal the project review process, and prohibited LFF from occupying the three new buildings until permits were issued and the penalty paid.

II. Procedural History

LFF commenced this Article 78 proceeding on April 8, 2008, and sought a stay of enforcement of the Agency's determination. Following oral argument, this court granted a partial stay on April 11, 2008. Specifically, a stay was granted as to enforcement of the Agency's determination except for the prohibition against occupying the dwellings and payment of the civil penalty. That same day, the Agency commenced the enforcement action by filing a summons and complaint. LFF served an amended petition on April 14, 2008. It also moved to consolidate the two cases, which motion was granted without opposition on April 24, 2008. An order of consolidation was issued on June 10, 2008. Meanwhile, LFF paid the civil penalty into court (*CPLR §2601*) and the Agency served an amended

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complaint for enforcement on May 14, 2008.

The parties thereafter filed motions addressed to the pleadings. The Agency sought dismissal of at least some of LFF's Article 78 claims on the grounds of, among other things, collateral estoppel. LFF moved to dismiss the Agency's causes of action against certain individual defendants. By decision and order dated July 2, 2008 (20 Misc.3d 1114(A), 2008 WL 2653236 [Table] [NY Sup], 2008 NY Slip Op 51348[U]), this court dismissed two of LFF's causes of action but denied all other relief sought by the Agency. As to LFF's motion, the court dismissed the Agency's causes of action against the individual defendants, thereby removing them from the case.

The Agency then filed an answer and return (*CPLR §7804[e]*) in response to LFF's Article 78 claims. The parties also each filed motions for summary judgment relative to the Agency's causes of action for enforcement of the Agency's determination.

III. Scope of Review

Judicial review of the determination of an administrative agency under CPLR Article 78 is limited to whether the challenged decision "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (*CPLR §7803[3]*). Such review is further restricted "solely to the grounds invoked by the agency, and if those grounds are insufficient or improper, the court is powerless to sanction the determination by substituting what it deems a more appropriate or proper basis (*Matter of Montauk Improvement v. Proccacino*, 41 NY2d 913, 394 NYS2d 619, 363 NE2d 344; *Matter of Barry v. O'Connell*, 303 NY 46, 100 NE2d 127; see, also, *Securities Comm. v. Chenery Corp.*, 332 US 194, 67 Sct 1575, 91 LEd 1995)" (*Trump-Equitable Fifth Ave. Co. v. Gliedman*, 57 NY2d 588, 593, 457 NYS2d 466, 468, 443 NE2d 940, 942; see also *Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educational Services*, 77 NY2d 753, 570 NYS2d 474, 573 NE2d 562; *Aronsky v. Board of Educ., Community School Dist. No. 22 of City of New York*, 75 NY2d 997, 557 NYS2d 267, 556 NE2d 1074; *Parkmed Associates v. New York State Tax Commission*, 60 NY2d 935, 471 NYS2d 44, 459 NE2d 153. LFF's Article 78 claims rest upon the interpretation of certain statutory provisions in the APA Act, and therefore only involve questions of law for determination by this Court.

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With regard to the parties' respective motions for summary judgment directed to the Agency's enforcement claims, it is well-settled that summary judgment "is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (*Millerton Agway Co-op. v. Briarcliff Farms*, 17 NY2d 57, 268 NYS2d 18, 215 NE2d 341)" (*Andre v. Pomeroy*, 35 NY2d 361, 364, 362 NYS2d 131, 133, 320 NE2d 853, 854). In order for a party to be entitled to summary judgment, "it must clearly appear that no material and triable issue of fact is presented (*Di Menna & Sons v. City of New York*, 301 NY 118, 92 NE2d 918)" (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, 165 NYS2d 498, 505, 144 NE2d 387, 392). "To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd. (b)), and he must do so by tender of evidentiary proof in admissible form" (*Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.* 46 NY2d 1065, 1067, 416 NYS2d 790, 791-792, 390 NE2d 298, 299). "Accordingly, if the movant does not submit sufficient evidence on a particular issue or cause of action to justify judgment as a matter of law, the burden never shifts to the adversary to submit evidence sufficient to raise a triable issue of fact (*see Alvarez v. Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572) . . . [e]ven where there is no opposition" (*Zecca v. Riccardelli*, 293 AD2d 31, 34, 742 NYS2d 76, 78). Based upon all of the papers and proof submitted there are no issues of fact requiring trial, and judgment as a matter of law in favor of a party is warranted (CPLR §3212[b]) relative to the Agency's causes of action to enforce its March 25, 2008 determination.

IV. The Adirondack Park Agency Act

The APA Act establishes a comprehensive scheme for land use and development of all lands, but particularly those privately owned, lying within the six million acre Adirondack Park (*Executive Law §801, §802[1]*). All lands within the Adirondack Park are classified into one of six distinct land use categories – hamlet, moderate intensity use, low intensity use, rural use, resource management, and industrial use (*Executive Law §805[3][a]-[h]*). The lands in each land use classification are designated on the Official Adirondack Park Land Use and Development Plan Map (the "Map") approved by the State Legislature in 1973 (*L. 1973, c. 348; Executive Law §805[2][b]*). The Adirondack Land Use and Development Plan (the "Plan") sets forth the specific "compatible uses", consisting of primary and secondary uses, and "overall intensity guidelines" for

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each land use area (*Executive Law §805[3][a]-[h]*). The Agency has exclusive "jurisdiction to review and approve all class A regional projects, including those proposed to be located in a land use area governed by an approved local land use program, and all class B regional projects in any land use area governed by an approved local land use program" (*Executive Law §809[1]*). Class A and class B regional projects for each of the six types of land use areas are specified by statute (*Executive Law §810*). "Any person proposing to undertake" such a project must "make application to the agency for approval of such project and receive an agency permit therefor prior to undertaking the project" (*Executive Law §809[2][a]*).

The APA Act defines an "agricultural use structure" as "any barn, stable, shed, silo, garage, fruit and vegetable stand or other building or structure directly and customarily associated with agricultural use" (*Executive Law §802[8]a*). A "structure" is defined to include "single family dwellings" (*Executive Law §802[62]*). A "single family dwelling" is "any detached building containing one dwelling unit, not including a mobile home" (*Executive Law §802[58]*). "Agricultural use" means any management of any land for agriculture; raising of cows, horses, pigs, poultry and other livestock; horticulture or orchards; including the sale of products grown or raised directly on such land, and including the construction, alteration or maintenance of fences, agricultural roads, agricultural drainage systems and farm ponds" (*Executive Law §802[7]*).

Under the statutory scheme, "[a]gricultural uses" and "[a]gricultural use structures" in resource management areas do not require a permit from the Agency (*Executive Law §805[3][g][4][1]-[2]*) because they are primary compatible uses which are neither class A nor B regional projects (*Executive Law §810[1][e], [2][d]*; see also 9 NYCRR §577.4[b][3][ii], §577.6[b][3] - no permit required for agricultural use structures in recreational river areas unless located "inside the mean high water mark of the river or within 150 feet of the mean high water mark"). However, a "single family dwelling" in a resource management area requires a permit from the Agency as a class B regional project (*Executive Law §810[2][d][1]*) provided there is no approved local land use program, which in the case at bar there is not.

The Plan also designates as class A regional projects in a resource management area, subject to exclusive Agency review and approval, "all subdivisions of land located . . . within one-quarter mile of rivers navigable by

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boat designated to be studied as . . . recreational” under the Rivers Act, and “[a]ll subdivisions of land (and all land uses and development related thereto) involving two or more lots, parcels or sites” (*Executive Law §810[1][e][1][a]*, *[1][e][3]*). A “subdivision” under the APA Act is defined as “any division of land into two or more lots, parcels or sites, whether adjoining or not, for the purpose of sale, lease, license or any form of separate ownership or occupancy (including any grading, road construction, installation of utilities or other improvements or any other land use and development preparatory or incidental to any such division)” (*Executive Law §802[63]*). Under the Agency’s regulations, a subdivision into sites occurs, “whether or not a legal conveyance has or will be executed . . . where one or more new dwelling(s) or other principal building(s) is to be constructed on a parcel already containing at least one existing dwelling or other principal building, and regardless of whether the existing building is proposed to be removed after completion of the new building(s)” (*9 NYCRR §570.3[ah][3][ii]*). Although a single family dwelling generally constitutes one principal building (*Executive Law §802[50][a]*), the APA Act provides that “all agricultural use structures and single family dwellings or mobile homes occupied by a farmer of land in agricultural use, his employees engaged in such use and members of their respective immediate families, will together constitute and count as a single principal building” (*Executive Law §802[50][g]*).

Resolution of the parties’ competing claims thus centers on whether the three single family dwellings serving as farm worker housing constitute “agricultural use structure[s]” (*Executive Law §802[8]*) under the APA Act. Thus, if a “single family dwelling” can be an “agricultural use structure” under the APA Act, LFF’s three-dwelling farm worker housing project represents exempt “agricultural use structures” (*Executive Law §810[1][e]*, *[2][d]*; *9 NYCRR §577.4[b][3][ii]* and *§577.6[b][3]*) not subject to Agency jurisdiction, and together with the dwelling to be removed “constitute and count as a single principal building” such that no subdivision requiring an Agency permit has or will occur as a result of their construction.

V. Construction of the APA Act

“It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature” (*Patrolmen's Benevolent Assn. v. City of New York*, 41 NY2d 205, 208, 391 NYS2d 544, 359 NE2d 1338; see also, *Riley v. County of Broome*, 95 NY2d 455, 463, 719 NYS2d 623, 742 NE2d 98; *Longines-*

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Wittnauer v. Barnes & Reinecke, 15 NY2d 443, 453, 261 NYS2d 8, 209 NE2d 68). "As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." (Majewski v. Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 583, 673 NYS2d 966, 968, 696 NE2d 978, 980). "[I]f the language of a statute is plain and unambiguous, there is neither need nor warrant to look elsewhere for its meaning. See, e.g., Meltzer v. Koenigsberg, 302 NY 523, 525, 99 NE2d 679, 680; Town of Putnam Valley v. Slutzky, 283 NY 334, 343, 28 NE2d 860, 864; McCluskey v. Cromwell, 11 NY 593, 601-602" (Roosevelt Raceway, Inc. v. Monaghan, 9 NY2d 293, 304, 213 NYS2d 729, 735, 174 NE2d 71, 75). "In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning" (Tompkins v. Hunter, 149 NY 117, 122-123, 43 NE 532; see also, Matter of Raritan Dev. Corp. v. Silva, 91 NY2d 98, 667 NYS2d 327, 689 NE2d 1373). "Under the doctrine of separation of powers, courts may not legislate (Bright Homes v. Wright, 8 NY2d 157, 162, 203 NYS2d 67, 70, 168 NE2d 515, 517; Matter of Metropolitan Life Ins. Co. v. Boland, 281 NY 357, 361, 23 NE2d 532, 533), or rewrite (Matter of Chase Nat. Bank v. Guardian Realities, 283 NY 350, 360, 28 NE2d 868, 871; Matter of Tormey v. LaGuardia, 278 NY 450, 451, 17 NE2d 126, 127), or extend legislation (People ex rel. Newman v. Foster, 297 NY 27, 31, 74 NE2d 224, 225; Matter of Hogan v. Supreme Ct., 281 NY 572, 576, 24 NE2d 472, 473)" (In re Adoption of Malpica-Orsini, 36 NY2d 568, 571, 370 NYS2d 511, 514-515, 331 NE2d 486, 488).

In enacting the APA Act, the Legislature created a comprehensive and integrated statutory scheme to protect and preserve the natural resources of Adirondack Park (Executive Law §801). In so doing, the Legislature specifically defined sixty-three different words and phrases (Executive Law §805) commonly used throughout the APA Act, with the obvious purpose and intent that those definitions consistently and unvaryingly be applied in the administration and enforcement of the entire APA Act. Thus, in construing any one statutory definition resort must necessarily be made to any other statutorily defined term or phrase contained within that definition. "A court must consider a statute as a whole, reading and construing all parts of an act together to determine legislative intent (see McKinney's Cons. Laws of N.Y., Book 1, Statutes § 97), and, where possible, should 'harmonize[] [all parts of a statute] with each other ... and

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[give] effect and meaning ... to the entire statute and every part and word thereof (*id.* § 98; *see also* *People v. Mobil Oil Corp.*, 48 NY2d 192, 199, 422 NYS2d 33, 397 NE2d 724 (1979)) (*Friedman v. Connecticut General Life Ins. Co.*, 9 NY3d 105, 115, 846 NYS2d 64, 69-70, 877 NE2d 281, 286-287).

Inapplicable here is the general rule that "a court should defer to the interpretation given a statute by the agency charged with its enforcement if the interpretation is neither irrational, unreasonable, nor inconsistent with the governing statute (*Matter of Fineway Supermarkets v. State Liq. Auth.*, 48 NY2d 464, 423 NYS2d 649, 399 NE2d 536; *Matter of Sigety v. Ingraham*, 29 NY2d 110, 324 NYS2d 10, 272 NE2d 524)" (*Trump-Equitable Fifth Ave. Co. v. Gliedman*, 57 NY2d 588, 597, 457 NYS2d 466, 470, 443 NE2d 940, 944). No deference is accorded to an agency's determination where a court "is faced with the interpretation of statutes and pure questions of law" (*Madison-Oneida Bd. of Co-op. Educational Services v. Mills*, 4 NY3d 51, 59, 790 NYS2d 619, 623, 823 NE2d 1265). "Where . . . the words of the statute are clear and the question simply involves the proper application of the provision 'there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations', especially when the interpretation . . . directly contravenes the plain words of the statute (*Kurcsics v. Merchants Mut. Ins. Co.*, 49 NY2d 451, 459, 426 NYS2d 454, 403 NE2d 159)" (*Trump-Equitable Fifth Ave. Co. v. Gliedman*, *supra*; *see also* *Sweeney v. Dennison*, 52 AD3d 882, 858 NYS2d 845).

Contrary to the Agency's determination, the statutory language cannot be interpreted or construed to evidence a legislative intent that the word "structure" in the definition of "agricultural use structure" (*Executive Law §802[8]*) means an "accessory structure". The Legislature enacted a separate definition of "accessory structure" (*Executive Law §802[5]*) - "any structure or a portion of a main structure customarily incidental and subordinate to a principal land use or development and that customarily accompanies or is associated with such principal land use or development, including a guest cottage not for rent or hire that is incidental and subordinate to and associated with a single family dwelling". Yet, the Legislature chose not to use that more limited term in its definition of "agricultural use structure" (*Executive Law §802[8]*). A "court should not ignore the words of a statute, clear on its face, to reach a contrary result through judicial interpretation (*McKinney's Cons. Law of N.Y., Book 1, Statutes, § 76; Matter of Kleefeld*, 55 NY2d 253, 259, 448 NYS2d 456, 433 NE2d 521)" (*Trump-Equitable Fifth Ave. Co. v. Gliedman*, *supra*). To accept the

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Agency's interpretation that the term "structure" in the definition of "agricultural use structure" should be read to mean "accessory structure" renders the term "structure" "superfluous and redundant in the statute . . . [and] would deprive the term of its own separate meaning" (*SIN, Inc. v. Department of Finance of City of New York*, 71 NY2d 616, 621, 528 NYS2d 524, 527, 523 NE2d 811, 814). "The failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended" (*Pajak v. Pajak*, 56 NY2d 394, 397, 452 NYS2d 381, 437 NE2d 1138, *citing McKinney's Cons.Laws of NY, Book 1, Statutes §74*) (*People v. Tychanski*, 78 NY2d 909, 911-912, 573 NYS2d 454, 456, 577 NE2d 1046, 1048). Clearly, had the Legislature intended to limit "agricultural use structures" to "accessory structures" and preclude a single family dwelling from qualifying as an "agricultural use structure", it would have done so by inserting appropriate language readily at hand, including using its own definition.

The Agency's reliance upon the rule of *ejusdem generis* – that general language in a statute is limited by the specific phrases which precede it (*McKinney's Statutes §239[b]*; *Barsh v. Town of Union, Broome County*, 126 AD2d 311, 313, 513 NYS2d 875, 876) – is misplaced. As a rule of statutory construction, resort to the rule is to be made only where the language is unclear and ambiguous. "Where the language is definite and has a precise meaning, it must be presumed to declare the intent of the legislature, and it is not allowable to go elsewhere in search of conjecture to restrict or extend the meaning . . . and courts cannot go beyond or outside of it under pretext of interpretation to cure any supposed blunder of the legislature" (*Johnson v. Hudson River R. Co.*, 49 NY 455, 462). This is particularly true where the terms have specific, definite meanings – such as the terms here – for in such a case "there is no room for construction and courts have no right to add to or take away from that meaning" (*Tompkins v. Hunter*, 149 NY 117, 123; *see also People v. Torres*, 184 Misc2d 429, 432, 708 NYS2d 578, 580).

Moreover, "[t]he rule of *ejusdem generis* is only a rule of construction that must yield to the evident purpose of the Legislature in enacting . . . statutes, for that rule of construction is controlled by another rule that statutes should be construed to carry out the objects sought to be accomplished by them. *People v. Kaye*, 160 AppDiv 644, 647, 146 NYS 398, 401, *affirmed* 212 NY 407, 411, 106 NE 122, 124, *motion for reargument denied* 213 NY 648, 107 NE 1083" (*Blatnick v. Ciancimino*, 1 AD2d 383, 388, 151 NYS2d 267, 272, *affirmed* 2 NY2d 943, 162

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NYS2d 38, 142 NE2d 211; see also Mark v. Colgate University, 53 AD2d 884, 385 NYS2d 621). It is rational to conclude that the Legislature intended single family dwellings "directly and customarily associated with agricultural use" to be exempt from Agency jurisdiction in resource management areas. Though not controlling here, farm residential buildings have been held to constitute "farm operations" exempt from town zoning regulations under Agriculture and Markets Law §305-a (Town of Lysander v. Hafner, 96 NY2d 558, 562, 733 NYS2d 358, 359, 759 NE2d 356, 357). In so holding, the court in Lysander relied upon the Legislature's recognition that residential buildings on a farm "contribute to the production, preparation and marketing of crops, livestock and livestock products as a commercial enterprise" (Agriculture and Markets Law §301(11)) (*Id.*). There is no reason to conclude that the Legislature intended anything different inside the Adirondack Park.

The Legislature's stated purposes, policies and objectives of resource management areas include encouraging "proper and economic management of . . . agricultural . . . resources" and allowing "for residential development on substantial acreage or in small clusters on carefully selected and well designed sites" (Executive Law §805[g](2)). These goals are consistent with "[t]he policy of the state . . . to . . . encourage the development and improvement of its agricultural lands for the production of food and other agricultural products" (NY Constitution, Article 14, §4). Also, the purpose and objective of "residential development . . . in small clusters" provides the rationale for the Legislature's decision that "all agricultural use structures and single family dwellings or mobile homes occupied by a farmer of land in agricultural use, his employees engaged in such use and members of their respective immediate families, will together constitute and count as a single principal building" (Executive Law §802[50][g]) so that Agency jurisdiction over "subdivisions" is not invoked by such a development.

While LFF's farm worker housing project represents a unique and unprecedented effort to provide agricultural workers with quality housing and may not have been foreseen by the Legislature, "[a] statute must be read and given effect as it is written by the Legislature, not as the court may think it should or would have been written if the Legislature had envisaged all the problems and complications which might arise in the course of its administration" (Lawrence Const. Corporation v. State, 293 NY 634, 639, 59 NE2d 630, 632). To the extent that LFF's project is an unforeseen event, any change in interpretation

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or application of the APA Act "is a matter of policy to be determined by the Legislature rather than by the courts under the guise of construction. *People v. Friedman*, 302 NY 75, 79, 96 NE2d 184, 185" (*Buduson v. Curtis*, 285 AD 517, 520, 139 NYS2d 392, 396, *affirmed* 309 NY 879, 131 NE2d 290). "[O]missions in a statute . . . cannot be supplied by construction" (*Eastern Paralyzed Veterans Ass'n, Inc. v. Metropolitan Transp. Authority*, 79 AD2d 516, 517, 433 NYS2d 461, 462, *appeal dismissed* 52 NY2d 895, 437 NYS2d 305, 418 NE2d 1324) and may only "be remedied by the Legislature, and not by the courts" (*McKinney's Statutes §363*).

Also without merit is the Agency's determination that single family dwellings and agricultural use structures "are treated as separate and distinct uses under the . . . [APA] Act"; in other words, the two terms are mutually exclusive. Certainly, under the APA Act not all "agricultural use structures" are "single family dwellings", and not all "single family dwellings" are "agricultural use structures". The definition of "agricultural use structure" is much broader in scope, ranging from a "barn, stable, shed, silo, [and] garage" to a "fruit and vegetable stand" to any "other building or structure directly and customarily associated with agricultural use" (*Executive Law §802(8)*). There is nothing in the APA Act which precludes a "single family dwelling" "directly and customarily associated with agricultural use" (*Executive Law §802(8)*) from qualifying as an "agricultural use structure". "Statutes . . . should be read and understood . . . without resorting to subtle and forced construction for the purpose of either limiting or extending their operation. Courts cannot correct supposed errors, omissions or defects in legislation . . . The office of interpretation is to bring sense out of the words used, and not bring a sense into them" (*McCluskey v. Cromwell*, 11 NY 593, 601-602). It is because the Legislature recognized that "agricultural use structures" covered a wide range of structures, that single family dwellings would qualify as an agricultural use structure only on rare occasions, and that farm worker housing would appear most often in the form of temporary buildings such as mobile homes – a residential unit specifically excluded from the definition of "single family dwelling" (*Executive Law §802(58)*) – that it separately listed both "single family dwellings" and "agricultural use structures" as primary and secondary compatible uses in moderate intensity use, low intensity use, rural use, and resource management areas in the Plan (see *Executive Law §805, subds. [3][d][4], [3][e][4], [3][f][4], and [3][g][4]*). For the same reasons, the Legislature treated "agricultural use structures" and "single family dwellings" separately in designating class A and B regional projects subject to Agency jurisdiction

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(*Executive Law*), and exempted the former from Agency jurisdiction triggered solely by the structure being "in excess of forty feet in height" in all but industrial use areas (*Executive Law §810, subds. [a][4], [b][4], [c][5], [d][5], and [e][8]*). Clearly, not all lands classified as resource management under the APA Act are used for agricultural purposes (see *Executive Law §805[3][g]*), and a project involving a single family dwelling on non-agricultural land would not qualify as an "agricultural use structure" and therefore would be subject to Agency jurisdiction perhaps as a class A project (*Executive Law §810[1][e]*) or as a class B project in the absence of an approved local land use program (*Executive Law §810[2][d]*). Such projects would be far more prevalent, necessitating separate references to "agricultural use structures" and "single family dwellings" throughout the APA Act to insure Agency jurisdiction over the latter. Finally, by determining that "all agricultural use structures and single family dwellings or mobile homes occupied by a farmer of land in agricultural use, his employees engaged in such use and members of their respective immediate families, will together constitute and count as a single principal building" (*Executive Law §802[50][g]*), the Legislature recognized an exception for farm land from the general statutory rule that each "single family dwelling" or "mobile home" "constitutes one principal building" (*Executive Law §802[50][a]-[b]*). By specifically designating all "agricultural use structures", "single family dwellings" and "mobile homes" on farm property as "one principal building", the Legislature made clear its intent that all such structures situate on agricultural lands be treated as one and the same under the APA Act.

For the foregoing reasons, Lewis Family Farm, Inc. is entitled to judgment pursuant to CPLR §7806 annulling the Agency's March 25, 2008 determination on the ground that it was affected by an error of law, as well as to summary judgment dismissing the Agency's amended complaint dated May 14, 2008 and all causes of action therein. Also, this Court's April 11, 2008 order granting a partial stay is vacated as moot. Counsel for Lewis Family Farm, Inc. to submit a single judgment on notice.

IT IS SO ORDERED

ENTER


Richard B. Meyer
J. S. C.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ADIRONDACK PARK AGENCY,

Respondent.

NOTICE OF ENTRY

Index No. 315-08

RJI No. 15-1-2008-0109

Hon. Richard B. Meyer

ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

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

Defendants.

Index No. 332-08

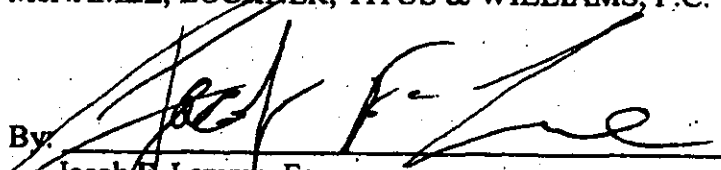
RJI No. 15-1-2008-0117

Hon. Richard B. Meyer

PLEASE TAKE NOTICE that the within is a true copy of the Decision and Order of
Hon. Richard B. Meyer, Acting Supreme Court Justice, Essex County Supreme Court, dated and
entered by the Essex County Clerk on November 19, 2008.

Dated: Albany, New York
November 19, 2008

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

By: 

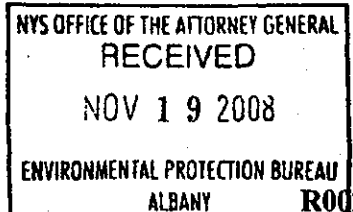
Jacob F. Lamme, Esq.

Attorneys for Lewis Family Farm, Inc.

677 Broadway

Albany, New York 12207

(518) 447-3200



TO: Loretta Simon, Esq.
Assistant Attorney General
State of New York
Office of the Attorney General
The Capitol
Albany, New York 12224

Cynthia Feathers, Esq.
Arroyo Copland & Associates, PLLC
Great Oaks Office Park
219 Great Oaks Blvd.
Albany, New York 12203

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ESSEX**

LEWIS FAMILY FARM, INC.,

Petitioner,

v.

**NEW YORK STATE ADIRONDACK
PARK AGENCY,**

Respondent.

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

NOTICE OF APPEAL

**Essex County
Index No. 315-08**

**Essex County
Index No. 332-08**

ENTERED AND FILED
ESSEX COUNTY CLERK
08 AUG - 1 PM 4:01
ELIZABETHTOWN, NY 12932

PLEASE TAKE NOTICE, that the Adirondack Park Agency, appeals to the Appellate Division, Third Department from the Decision and Order of the Supreme Court, Essex County (Meyer, R., Acting J.S.C.) dated on July 2, 2008 and entered in the Office of the Essex County Clerk on or about July 2, 2008.

Dated: Albany, New York
July 31, 2008

ANDREW M. CUOMO
Attorney General of the State of New York
Attorney for Adirondack Park Agency

By: 

LORETTA SIMON
Assistant Attorney General
The Capitol
Albany, New York 12224
Telephone: (518) 402-2724

To: John J. Privitera, Esq.
Jacob Lamme
McNamee, Lochner, Titus & Williams, P.C.
677 Broadway
Albany, New York 12207

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

AFFIDAVIT OF SERVICE

Petitioner,

v.

Essex County

Index No. 315-08

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Respondent.

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

Essex County

Index No. 332-08

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

Defendants.

STATE OF NEW YORK)

) ss.:

COUNTY OF ALBANY)

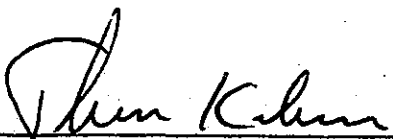
THOMAS KEHRER, being duly sworn, deposes and says:

That I am over 18 years of age and am employed as a Legal Assistant in the Environmental Protection Bureau of the Office of Andrew M. Cuomo, Attorney General of the State of New York, attorney for the Adirondack Park Agency.

On August 4, 2008 I served upon Lewis Family Farm, Inc., and Salim and Barbara Lewis, regarding the above captioned matter, a Notice of Appeal dated July 31, 2008, by personal delivery of said documents to attorney Jacob Lamme, at McNamee, Lochner,

RECEIVED
APP. DIV.
3RD DEPT.
2008 AUG -4 AM 11:19

Titus and Williams, P.C., 677 Broadway, 5th floor, Albany, NY.,
at 10:19am and there leaving said papers with Mr. Lamme himself,
who indicated that he was authorized to accept papers on behalf
of Lewis Family Farm and Mr. and Mrs. Lewis.


THOMAS KEHRER

Sworn to before me this
4th day of August, 2008.


Notary Public

SUSAN L. TAYLOR
Notary Public, State of New York
No. 02TA6020240
Qualified in Rensselaer County
Commission Expires March 1, 2011

Supreme Court of the State of New York
FOR THE COUNTY OF ESSEX

Argued June 19, 2008

Decided July 2, 2008

Index No.: 315-08 - RJI No.: 15-1-2008-0109

Index No.: 332-08 - RJI No.: 15-1-2008-0117

LEWIS FAMILY FARM, INC.

Petitioner,

v.

ADIRONDACK PARK AGENCY,

Respondent.

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

LEWIS FAMILY FARM, INC.,

SALIM B. LEWIS, and BARBARA LEWIS

Defendants.

*Decision and Order on Motions to Dismiss
Pursuant to CPLR Rule 3211*

McNamee, Lochner, Titus & Williams, P.C. (John J. Privitera, Esq., of counsel), Albany, New York, attorneys for the Petitioner and the Defendants.

Andrew M. Cuomo, Esq., New York State Attorney General

LEWIS FAMILY FARM, INC. v. ADIRONDACK PARK AGENCY

Decision and Order

(*Loretta Simon, Esq., Assistant Attorney General*), Albany, New York, attorney for the Respondent/Plaintiff Adirondack Park Agency.

Arroyo Copland & Associates, PLLC (*Cynthia Feathers, Esq., of counsel*) and *Elizabeth Corron Dribusch, Esq.*, General Counsel, Albany, New York, for New York Farm Bureau, Inc., as *amicus curiae*, supporting the Petitioner/Defendant Lewis Family Farm, Inc.

In this consolidated Article 78 proceeding commenced by Lewis Family Farm, Inc. (Lewis Farm) on April 8, 2008, and action by the Adirondack Park Agency (Agency) to enforce the March 25, 2008 determination of the Agency's enforcement committee, the Agency moves¹ to dismiss eight of the sixteen causes of action in the amended petition pursuant to CPLR 3211(a)(5) and (7). Specifically, the Agency claims that the fourth and eleventh causes of action each fail to state a cause of action, and that Lewis Farm is collaterally estopped from asserting the claims alleged in the third, fifth, sixth, seventh, eighth, ninth, and tenth causes of action due to dismissal of a 2007 declaratory judgment action by Lewis Farm against the Agency which was converted to an Article 78 proceeding on consent. Lewis Farm, and the defendants Salim B. Lewis and Barbara Lewis, move² pursuant to CPLR 32311 to dismiss the Agency's

The court has reviewed the following papers in support of the Agency's motion: notice of motion dated June 13, 2008; affirmation of Loretta Simon dated June 13 with exhibits A through N; affidavit of Paul Van Cott dated June 13, 2008 with exhibits A through C; affidavit of John F. Rusnica dated June 13, 2008 with exhibit A; answer in part, record and objections in point of law verified June 13, 2008. In opposition to the motion, the court has considered the affirmation of John J. Privitera, Esq. dated June 17, 2008 regarding the record, with exhibits A through C. The Court has also considered the parties' respective memoranda of law.

The court has reviewed the following papers in support of the motion by Lewis Farm: notice of motion dated June 9, 2008; affirmation of John J. Privitera, Esq. dated June 3, 2008. In opposition, the Court has considered the reply affirmation of Loretta Simon, Esq. dated June 18, 2008. The Court has also considered the parties' respective memoranda of law.

Decision and Order

enforcement action as duplicative of the Agency's administrative enforcement proceeding, and also to dismiss all claims against defendants Salim B. Lewis and Barbara Lewis, individually, since neither was a party to the enforcement proceeding which culminated in the March 25, 2008 determination challenged in the Article 78 proceeding.

Lewis Farm owns and operates an eleven hundred acre organic farm designated as a single parcel of land on the official county tax maps and town tax rolls, located in the Town of Essex, Essex County. The property lies wholly within the Adirondack Park and within Essex County Agricultural District No. 4. The subject parcel is classified on the Adirondack Park Land Use and Development Plan Map as resource management, rural use and hamlet. It is undisputed that the portion of the property involved here is classified as resource management.

In or about November 2006, Lewis Farm commenced construction of certain single family dwelling units, to be used by employees working on the farm, on a portion of its property classified as resource management. A permit application³, signed by defendant Barbara Lewis, both as "project sponsor" and representative of the corporation, was filed with the Agency on March 14, 2007 seeking authorization to construct "three single family dwellings in a farm compound to be used by farm employees exclusively." By notice dated the following day⁴, Agency staff advised the applicants that the application was incomplete and requested additional information. A dispute arose between the parties, and following discussions between the parties and their representatives the Agency's staff sent a proposed settlement agreement⁵ to Lewis Farm which called for Lewis Farm to apply for an after-the-fact permit and pay a \$10,000 civil penalty. On June 27, 2007 the Agency's acting executive director issued a cease and desist order⁶ to Lewis Farm, binding upon "its agents, successors and assigns", prohibiting "any and all land use and development related to the construction of the single family dwellings . . . until this matter is resolved

³ Exhibit B to 06-18-08 Simon reply affirmation.

⁴ Exhibit D to Agency's amended complaint.

⁵ Exhibit E to Agency's amended complaint.

⁶ Exhibit F to Agency's amended complaint.

and the enforcement case is concluded." The next day, Lewis Farm commenced a declaratory judgment action⁷ against the Agency challenging jurisdiction.

An amended complaint was filed on July 3, 2007, and Lewis Farm also applied for a temporary restraining order⁸. Lewis Farm alleged that its farm worker housing project was outside of the Agency's jurisdiction since the structures were "agricultural use structures" (Executive Law §802[8]) in a "resource management area" (Executive Law §805[3][g]), and thus exempt from Agency jurisdiction, and that any assertion of jurisdiction by the Agency violated Agriculture and Markets Law §305-a. In opposing the application, the Agency moved to convert the action to an Article 78 proceeding and dismiss the same for lack of subject matter jurisdiction, "as premature and not ripe for judicial review because the State defendant has not issued a final determination", citing CPLR §7801(1), and for failing to state a cause of action "because Agriculture and Markets Law §305-a does not preclude the APA from requiring a permit for subdivision of land and construction of single family dwellings"⁹.

At oral argument, Lewis Farm consented to convert the action to an Article 78 proceeding. Counsel for Lewis Farm argued that although a final determination is a prerequisite to judicial review "under normal circumstances"¹⁰, the "crux" of the amended complaint was the staff's requirement of an application for an after-the-fact permit and payment of the \$10,000 civil penalty¹¹ as a prerequisite to Agency review, and also Lewis Farm's concern that it has no ability to obtain a refund of the penalty should it ultimately prevail. The Agency asserted that Lewis Farm

⁷ Exhibit A to 06-13-08 Simon affirmation.

⁸ Exhibit B to 06-13-08 Simon affirmation.

⁹ The Court takes judicial notice of the 2007 proceeding, including the Agency's notice of motion dated August 1, 2007, the affirmations/affidavits of Sarah Reynolds (with exhibits A-D), Douglas Quinn (with exhibits A-C) dated July 20, 2007, John L. Quinn (with exhibits A-I), and John Banta dated July 23, 2007.

¹⁰ Exhibit C to 06-13-08 Simon affirmation, at page 3, line 19.

¹¹ *id.*, from page 3, line 17 to page 4, line 25.

Decision and Order

had the ability to present its case to the Agency's enforcement committee, comprised of five Agency commissioners, or to the full Agency, at a hearing and then challenge the committee's determination in court if it is still dissatisfied¹²:

"THE COURT: Suppose they don't want to lose that money, they don't want to pay?

MS. SIMON: They should ask for a hearing and/or await for the process to take them there and say to the staff, we're not interested in this settlement offer you made to us, we want to go to the full agency, we want a hearing, and then challenge that hearing decision if the don't agree with it.

THE COURT: And then they can go into Supreme Court.

MS. SIMON: Absolutely."

Time and again, the Agency's counsel stated to the court that there was no final determination and that Lewis Farm had to await such a determination before it could properly seek judicial review¹³.

By decision and order (Ryan, J.) dated August 16, 2007 the proceeding was dismissed, and the application for temporary relief denied. In its decision dismissing the proceeding, the court stated that the farm worker dwellings did not constitute "agricultural use structures" under the Agency's statutory scheme and therefore were within the permit jurisdiction of the Agency, and also that Agriculture & Markets Law §305-a did not apply to a state agency. Lewis Farm filed a notice of appeal, but the appeal has not been perfected. The Agency now claims that the dismissal of this prior proceeding as premature precludes Lewis Farm from now challenging the Agency's jurisdiction on the same grounds which it had asserted in that proceeding.

¹² Exhibit C to 06-13-05 Simon affirmation, at pages 5-7.

¹³ *Id.*, at pages 14-15, 26.

LEWIS FAMILY FARM, INC. v. ADIRONDACK PARK AGENCY
Decision and Order

A.

Collateral estoppel "precludes a party from relitigating 'an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point' (*Gilberg v. Barbieri*, 53 NY2d 285, 291, 441 NYS2d 49, 423 NE2d 807; see, *Schwartz v. Public Administrator*, 24 NY2d 65, 69, 298 NYS2d 955, 246 NE2d 725)" (*Kaufman v. Eli Lilly and Co.*, 65 NY2d 449, 455, 492 NYS2d 584, 588, 482 NE2d 63, 67), because "it is not fair to permit a party to relitigate an issue that has already been decided against it" (*Id.*). However, its application is limited to "issues of ultimate fact . . . determined by a valid and final judgment" (*McGrath v. Gold*, 36 NY2d 406, 411, 369 NYS2d 62, 65, 330 NE2d 35, 37). For the doctrine of collateral estoppel to be invoked, the party seeking it must establish that

- (1) the factual issue decided in the prior action was "material to the first action or proceeding and essential to the decision rendered therein (*Silberstein v. Silberstein*, 218 NY 525, 528, 113 NE 495; see, also, *Hinchey v. Sellers*, *supra*; *Ripley v. Storer*, *supra*; *Ward v. Boyce*, 152 NY 191, 46 NE 180)" (*Ryan v. New York Telephone Co.* 62 NY2d 494, 500, 467 NE2d 487, 490-490, 478 NYS2d 823, 826 (N.Y., 1984), and
- (2) the factual issue is identical to "the point actually to be determined in the second action or proceeding such that 'a different judgment in the second would destroy or impair rights or interests established by the first' (*Schuykill Fuel Corp. v. Nieberg Realty Corp.*, *supra*, 250 NY at p. 307, 165 NE 456 [Cardozo, Ch. J.]; see, also, *S.T. Grand, Inc. v. City of New York*, 32 NY2d 300, 304-305, 344 NYS2d 938, 298 NE2d 105)" (*Id.*), and
- (3) "the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination (*Gilberg v. Barbieri*, 53 NY2d 285, 291, 441 NYS2d 49, 423 NE2d 807; see also *Schwartz v. Public Administrator*, *supra*, 24 NY2d at

Decision and Order

p. 71, 298 NYS2d 955, 246 NE2d 725; *Koch v. Consolidated Edison Co.*, 62 NY2d 548, 554-555, 479 NYS2d 163, 468 NE2d 1, cert. denied 469 US 1210, 105 SCt 1177, 84 LEd2d 326; *Ryan v. New York Tel. Co.*, 62 NY2d 494, 500-501, 478 NYS2d 823, 467 NE2d 487" (*Kaufman v. Eli Lilly and Co.*, supra.).

An Article 78 proceeding "shall not be used to challenge a determination . . . which is not final or can be adequately reviewed by appeal to a court or to some other body or officer . . ." (*CPLR §7801(1)*). "[P]rohibition may be availed of only to proscribe a clear legal wrong . . . [and] even as to a clearly *ultra vires* act, prohibition does not lie against an administrative agency if another avenue of judicial review is available, absent a demonstration of irreparable injury to the applicant if he is relegated to such other course" (*City of Newburgh v. Public Employment Relations Bd.*, 63 NY2d 793, 795, 481 NYS2d 327, 328, 471 NE2d 140, 141). "Prohibition is an extraordinary remedy to be invoked only where a clear right to relief is established, and the action taken or threatened is clearly without jurisdiction or in excess of jurisdiction (*Matter of Bloom v. Clyne*, 69 AD2d 956, 415 NYS2d 712)" (*Rainka v. Whalen*, 73 AD2d 731, 732, 423 NYS2d 292, 293, affirmed 51 NY2d 973, 435 NYS2d 721, 416 NE2d 1056; see also *Ashe v. Enlarged City School Dist. of Troy*, 233 AD2d 571, 571, 649 NYS2d 97, 98). In cases where there is or appears to be an act in excess of jurisdiction, "prohibition will not lie if there is available an adequate remedy at law which may bar the extraordinary remedy (*Matter of State of NY v. King*, 36 NY2d 59, 62, 364 NYS 879, 881, 324 NE2d 351, 353)" (*Id.*), and even in the absence of such a remedy prohibition "does not issue as a matter of right, but only in the sound discretion of the court in cases of supreme necessity" (*People ex rel. Hummel v. Trial Term. Part 1 (Criminal Branch) of Supreme Court for New York County*, 184 NY 30, 32, 76 NE 732; see also *Holtzman v. Goldman*, 71 NY2d 564, 566, 528 NYS2d 21, 23, 523 NE2d 297, 298; *Matter of Greenwald v. Scheinman*, 94 AD2d 842, 844, 463 NYS2d 303, leave to appeal denied 60 NY2d 551, 467 NYS2d 1025, 454 NE2d 126).

Also, "one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law (e. g., *Young Men's Christian Assn. v. Rochester Pure Waters Dist.*, 37 N.Y.2d 371, 375, 372 N.Y.S.2d 633, 635, 334 N.E.2d

586, 588)" (*Watergate II Apartments v. Buffalo Sewer Authority*, 46 NY2d 52, 57, 412 NYS2d 821, 824, 385 NE2d 560, 563) in order to "[relieve] the courts of the burden of deciding questions entrusted to an agency (see 1 NY Jur, *Administrative Law*, §5, pp. 303-304), [prevent] premature judicial interference with the administrators' efforts to develop, even by some trial and error, a co-ordinated, consistent and legally enforceable scheme of regulation and [afford] the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its 'expertise and judgment' (*Matter of Fisher [Levine]*, 36 NY2d 146, 150, 365 NYS2d 828, 832, 325 NE2d 151, 153; see, also, 24 *Carmody-Wait 2d*, NY Prac, §145:346)" (*Id.*).

Here, the issues before the motion court in the prior proceeding were issues of law – whether the amended complaint stated a cause of action for prohibition, namely to prohibit the Agency from exercising jurisdiction over the farm worker housing project, and for a violation of and Agriculture and Markets Law §305-a – not of fact. No final determination had yet been made by the Agency. Moreover the proposed requirement that Lewis Farm apply for an after-the-fact permit and pay a \$10,000 penalty, as well as the cease and desist order, were indisputably subject to review by the Agency's enforcement committee and full board of commissioners (see 9 NYCRR Part 581), and thereafter by judicial review in an Article 78 proceeding. It is not only clear that Lewis Farm had not exhausted its administrative remedies, but also that the Agency had not had an opportunity to "decide questions entrusted to" and "prepare a record reflective of its 'expertise and judgment' " (*Id.*).

To the extent that the motion court addressed whether the project involved "agricultural use structures", a "single family dwelling" and "subdivision"¹⁴ (*Executive Law* §802[8], [58], [63]), such was only to indicate that Lewis Farm had not established a "clear legal wrong" (*City of Newburgh v. Public Employment Relations Bd.*, *supra*; see also *Town of Huntington v. New York State Div. of Human Rights*, 82 NY2d 783, 604 NYS2d 541, 624 NE2d 678) or that the Agency was acting in excess of its jurisdiction (see *Cortland Glass Co., Inc. v. Angello*, 300 AD2d 891, 752 NYS2d 741). None of the court's determinations on those issues were

¹⁴ Exhibit D to 06-13-08 Simon affirmation, at pages 4-5.

essential to its ultimate decision to dismiss the proceeding as "not ripe for judicial intervention"¹⁵. Significantly, the court indicated that its decision did not preclude Lewis Farm from subsequent judicial review after the Agency performed its administrative functions:

"The Commissioners of the APA have the authority to review this situation under Executive Law §809. If, after receiving a determination from the Commissioners, the plaintiff is still dissatisfied, they are free to file an Article 78 proceeding at which time this Court may review the actions of the APA. Until that time, this matter constitutes an internal matter in which the Court will not interfere."¹⁶

Furthermore, Lewis Farm did not have a full and fair opportunity to litigate those, or any other factual, issues since on "a motion by the defendant to dismiss the complaint on the ground of its insufficiency made before service of an answer, allegations of fact contained in the complaint are not in issue, and the court can determine only the question of law whether the pleading is sufficient to withstand challenge by demurrer or by its statutory modern substitute motion to dismiss" (*Rockland Power & Light Co. v. City of New York*, 289 NY 45, 51, 43 NE2d 803, 806).

The Agency has failed to establish the any of the required elements for collateral estoppel to be applied here, and its motion to dismiss the third, fifth, sixth, seventh, eighth, ninth, and tenth causes of action on collateral estoppel grounds is denied. However, the doctrine of *res judicata* bars Lewis Farm from asserting a violation of Agriculture and Markets Law §305-a in the third cause of action, but not for dismissal of the entire cause of action¹⁷. "Under the doctrine of *res judicata*, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter" (*In re Hunter*, 4 NY3d 260, 269, 794 NYS2d 286, 291, 827 NE2d 269, 274). The

¹⁵ Exhibit D to 06-13-08 Simon affirmation, page 6.

¹⁶ Exhibit D to 06-13-08 Simon affirmation, page 7.

¹⁷ The third cause of action in Lewis Farm's amended petition alleges both a violation of Agriculture and Markets Law §305-a and the legal precedents stated in *Town of Lvsander v. Hafner*, 96 NY2d 558, 733 NYS2d 358, 759 NE2d 356.

Decision and Order

Agency's motion to dismiss the third cause of action is partially granted to the extent that Lewis Farm's claims under §305-a are dismissed.

The Agency's motion to dismiss the fourth cause of action is, however, granted as a matter of law since there is no legal requirement that the Agency defer to an opinion of the Commissioner of Agriculture and Markets when interpreting the Agency's own statutory scheme. The motion to dismiss the eleventh cause of action, alleging that the Agency failed to consider the recommendations of, and consult with, the Adirondack Park Local Government Review Board as provided in Executive Law §803-a and §805, is denied as an issue of fact is presented that cannot be determined from the four corners of the amended petition and without resort to the record.

B.

As to the motion to dismiss by Lewis Farm, Salim B. Lewis and Barbara Lewis, the motion is granted as to the individual defendants, but otherwise denied. The Agency is statutorily empowered, through the Attorney General, to "institute in the name of the agency any appropriate action or proceeding to prevent, restrain, enjoin, correct or abate any violation of, or to enforce, . . . the terms or conditions of any order or permit issued by the agency pursuant to this Article" (*Executive Law §813(2)*). The notice of apparent violation which initiated the administrative enforcement proceeding before the Agency's enforcement committee (9 NYCRR §581-2.6) named only Lewis Farm as a respondent, and its March 25, 2008 determination refers only to Lewis Farm. To the extent that the determination is an "order" (*see 9 NYCRR §581-1.2*), enforcement proceedings through the Attorney General are limited by Executive Law §813(2) solely to Lewis Farm.

The motion by defendants Salim B. Lewis and Barbara Lewis to dismiss the Agency's amended complaint seeking enforcement of the March 25, 2008 determination of the Agency's enforcement committee is granted, with costs including \$100 motion costs for each defendant, and the Clerk of the Court is hereby directed to enter judgment accordingly.

LEWIS FAMILY FARM, INC. v. ADIRONDACK PARK AGENCY

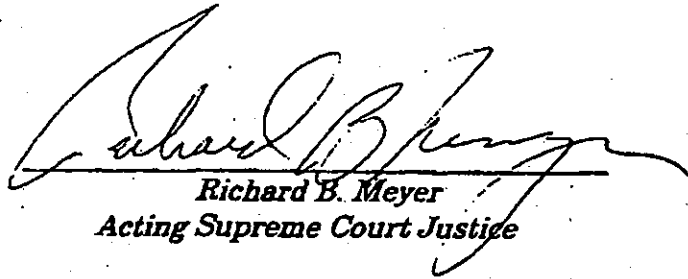
Decision and Order

C.

Within twenty (20) days of the date of this decision and order with notice of entry hereof, the Agency shall serve and file its answer to the amended petition and any additional record, as well as any affidavits or other evidentiary proof establishing the need for a trial of any issue of fact (*CPLR §7804[e], [f]*), and Lewis Farm shall serve and file its answer to the amended complaint (*CPLR §3012[a]*). Any motion for summary judgment by Lewis Farm must be served and filed within ten (10) days thereafter.

IT IS SO ORDERED.

ENTER


Richard B. Meyer
Acting Supreme Court Justice

ENTERED


JOSEPH A. PROVOUNCHA
ESSEX COUNTY CLERK

DATED: 7/2/08

ENTERED AND FILED
ESSEX COUNTY CLERK
08 JUL -2 PM 12:31
ELIZABETHTOWN, NY 12932

STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ADIRONDACK PARK AGENCY,

Respondent.

NOTICE OF ENTRY

Index No. 315-08

RJI No. 15-1-2008-0109

Hon. Richard B. Meyer

ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

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

Defendants.

Index No. 332-08

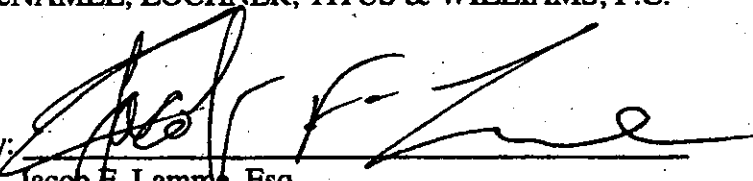
RJI No. 15-1-2008-0117

Hon. Richard B. Meyer

PLEASE TAKE NOTICE that the within is a true copy of the Decision and Order of
Hon. Richard B. Meyer, Acting Supreme Court Justice, Essex County Supreme Court, dated and
entered by the Essex County Clerk on July 2, 2008.

Dated: Albany, New York
July 3, 2008

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

By: 

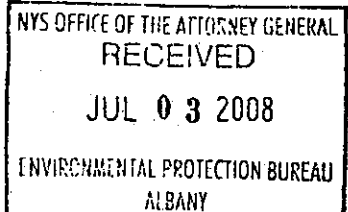
Jacob F. Lamme, Esq.

Attorneys for Lewis Family Farm, Inc.

677 Broadway

Albany, New York 12207

(518) 447-3200



TO: Loretta Simon, Esq.
Assistant Attorney General
State of New York
Office of the Attorney General
The Capitol
Albany, New York 12224

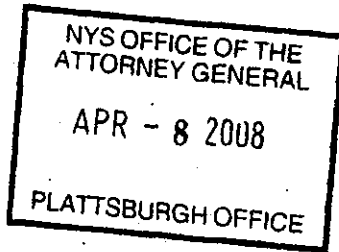
Cynthia Feathers, Esq.
Arroyo Copland & Associates, PLLC
Great Oaks Office Park
219 Great Oaks Blvd.
Albany, New York 12203

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Personally served
2:05 p.m

Ex parte Order to Show Cause of Supreme Court
dated 4/8/08

pp. 248-249



At a Special Term of the Supreme Court of the State of New York, held in and for the County of Essex, at the Essex County Courthouse, in Elizabethtown, New York, on the 8th day of April, 2008.

PRESENT: Hon. RICHARD B. MEYER

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

ORDER TO SHOW CAUSE

Petitioner,

-against-

Index No. 315-08

ADIRONDACK PARK AGENCY,

RJI No.

Respondent.

Upon reading and filing the annexed affidavits of Barbara A. Lewis and John J. Privitera, sworn to April 7, 2008, the papers thereto attached and the papers therein referred to, and on motion of McNamee, Lochner, Titus & Williams, P.C., attorneys for Petitioner, it is

ORDERED, that Respondent or his attorney show cause at an Individual Assignment Term of the court to be held in and for the County of Essex, at the county Court House in Elizabethtown, New York, on April 11, 2008, at 1:30 o'clock in the ~~forenoon~~ ^{AFTER} noon of that day, or as soon thereafter as counsel can be heard, why an order should not be granted staying the Respondent's Enforcement Committee Decision of March 25, 2008, which is being challenged in the Article 78 proceeding herein, until the determination of the appeal from said decision, and it is further

ORDERED, that in the meantime and until the hearing and determination of this order to show cause, all proceedings on the part of the petitioner in the above cause be stayed.

Let service of a copy of this Order and a copy of the papers upon which it was granted, by personal / facsimile service upon Respondent at:

Adirondack Park Agency
1133 NYS Route 86
Ray Brook, NY 12977
Fax: 518-891-3938

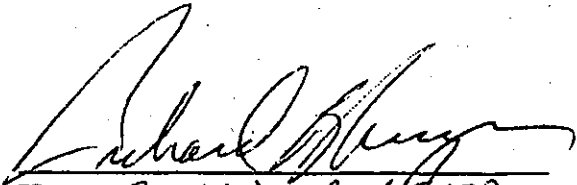
NYS Office of the Attorney General
Plattsburgh Regional Office
43 Durkee Street, Suite 700
Plattsburgh, NY 12901
Fax: 518-562-3294

(RBM) on or before April 8, 2008, ^{AT 5:00 PM} be deemed good and sufficient service upon Respondent.

Papers in opposition to this motion, if any, are to be served upon Petitioner's counsel so as to be received by April 11, 2008, ^{BY 10:00 A.M.} and filed with the Court on the same date, and *(RBM)*

~~Reply papers, if any, shall be served upon counsel for defendants and filed with the Court, no later than April _____, 2008.~~

Dated: April 8, 2008
ELIZABETHTOWN, New York


Hon. RICHARD B. MEYER
Supreme Court Justice (ACTING)

ENTER:

At Chambers of the Supreme Court of the State of New York, held in and for the County of Essex at the Courthouse in Elizabethtown, New York the 9th day of April, 2008.

PRESENT: HON. RICHARD B. MEYER, J.S.C. (Acting)

**STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX**

LEWIS FAMILY FARM, INC.

Petitioner,

- against -

ADIRONDACK PARK AGENCY,

Respondent.

**AMENDED
ORDER TO SHOW CAUSE**

Index No. 315-08
RJI No. 15-1-2008-0109

Upon reading and filing the affidavits of Barbara A. Lewis and John J. Privitera, sworn to April 7, 2008, and the exhibits and papers thereto annexed, and on motion of McNamee, Lochner, Titus & Williams, P.C., attorneys for Petitions, it is hereby

ORDERED that the Respondent or its attorneys show cause before this Court at a motion term thereof to be held in and for the County of Essex at the Courthouse in Elizabethtown, New York on the 11th day of April, 2008 at 1:30 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, why an order should not be granted staying the Respondent's Enforcement Committee decision of March 25, 2008, which is being challenged in the Article 78 proceeding herein, until the determination

of the determination of the appeal from said decision; and it is further

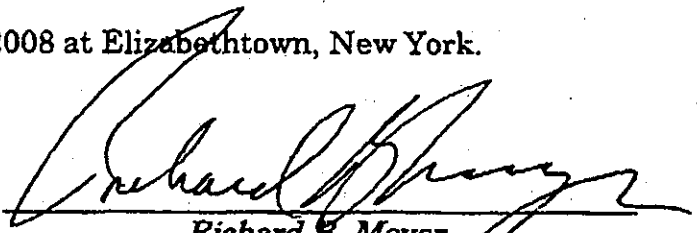
ORDERED that answering papers, if any, are required to be filed with the Clerk of this Court, with proof of due service of a copy thereof upon Petitioner's counsel, on or before 10:00 a.m. on April 11, 2008; and it is further

ORDERED that the order to show cause issued by this Court on April 8, 2008 be and the same hereby is replaced by this amended order, and any stay or temporary restraining order therein is vacated *ab initio*; and it is further

ORDERED that service of a copy of this order via facsimile transmission to the office of the attorney for Petitioner and to the New York State Attorney General on or before April 10, 2008 shall be deemed good and sufficient service hereof.

Order signed this 9th day of April, 2008 at Elizabethtown, New York.

ENTER



Richard B. Meyer
Acting Supreme Court Justice

Supreme Court of the State of New York
For the County of Essex

Argued April 11, 2008

Decided April 11, 2008

Index No.: 315-08 - RJI No.: 15-1-2008-0109

LEWIS FAMILY FARM, INC.

Petitioner,

v.

ADIRONDACK PARK AGENCY,

Respondent.

*Decision and Order on Motion for Stay
of Enforcement Pursuant to CPLR §7805*

McNamee, Lochner, Titus & Williams, P.C. (John J. Privitera, Esq., of counsel), Albany, New York, attorneys for the Petitioner.

Andrew M. Cuomo, Esq., New York State Attorney General (Loretta Simon, Esq., Assistant Attorney General), Albany, New York, attorney for the Respondent.

Motion by Petitioner pursuant to CPLR §7805 for a stay of enforcement of a determination made by Respondent's enforcement committee (9 NYCRR Part 581) dated March 25, 2008 which, *inter alia*, directed Petitioner to apply to the Respondent for a permit for three new dwellings and a four-lot subdivision on or before April 14, 2008, imposed a \$50,000 civil penalty, directed that the dwellings remain unoccupied until

LEWIS FAMILY FARM v. ADIRONDACK PARK AGENCY**Decision and Order**

a permit was issued, and required Petitioner to forego "the right to challenge Agency jurisdiction and the review clocks otherwise applicable".

Petitioner is the owner of a 1,100 acre organic farm designated as a single parcel of land on the official county tax maps and town tax rolls, located in the Town of Essex, Essex County. The property lies wholly within the Adirondack Park and within Essex County Agricultural District No. 4. The subject parcel is classified on the Adirondack Park Land Use and Development Plan Map as Resource Management, Rural Use and Hamlet.

In or about November 2006, Petitioner commenced construction of certain single family dwelling units on that portion of the property classified as Resource Management, to be used by Petitioner's employees who work on the farm. Petitioner thereafter filed an application with the Respondent for a permit authorizing construction of "three single family dwellings in a farm compound to be used by farm employees exclusively." Thereafter, a dispute arose between the parties, which resulted in a proposed settlement agreement sent to Petitioner on May 14, 2007 providing for the Petitioner to apply for an after-the-fact permit and pay \$10,000 civil penalty. Petitioner rejected the settlement agreement, and on June 28, 2007 commenced an action against the Agency challenging jurisdiction, as well as seeking a temporary restraining order. That proceeding was dismissed, and the application for temporary relief denied, by a decision and order (Ryan, J.) dated August 16, 2007. Petitioner filed a notice of appeal, but the appeal has not yet been perfected.

Despite dismissal of its declaratory judgment action, Petitioner continued with construction of the dwelling units. Respondent commenced an enforcement proceeding, resulting in its March 25, 2008 determination that the Petitioner violated the Adirondack Park Agency Act (Executive Law Article 27) (the "Act") by failing to obtain from the Respondent a subdivision permit and a permit authorizing construction of the dwelling units. In determining such violations, the Respondent's enforcement committee directed the Petitioner to comply with the following requirements:

- "(1) Lewis Farm will apply for a permit for the three new dwellings and the four-lot subdivision into sites

LEWIS FAMILY FARM v. ADIRONDACK PARK AGENCY

Decision and Order

(including retained "lot") by April 14, 2008, by submitting the appropriate major project application.

- (2) By April 28, 2008, Lewis Farm will also submit the following to the Agency:
 - (a) a detailed description of the use of each dwelling and connection to the Lewis Farm agricultural operations,
 - (b) an as-built plan for the septic system and an evaluation by a NYS licensed professional engineer as to whether the installed septic system for the three dwellings complies with NYS Department of Health and Agency standards and guidelines;
- (3) Lewis Farm will reply to any additional information requests within thirty (30) days of receipt.
- (4) Lewis Farm will retain all rights of appeal in the project review process, but foregoes the right to challenge agency jurisdiction and the review clocks otherwise applicable.
- (5) Lewis Farm or its employees shall not occupy the three new dwellings located on the corner of Whallons Bay Road and Christian Road unless and until an Agency permit is issued and the civil penalty paid.
- (6) By April 28, 2008 Lewis Farm will pay a civil penalty of \$50,000 to the Agency.
- (7) Agency staff is directed to review the application for the three dwellings and the subdivisions promptly, towards the goal of issuing the after-the-fact permit in time for farm worker occupancy of the dwellings for the 2008 growing season. However that can only happen if the Respondent responds immediately and favorably to this determination and submits the required information and penalty. The Agency will

LEWIS FAMILY FARM v. ADIRONDACK PARK AGENCY

Decision and Order

not proceed with review of the application unless and until the civil penalty is paid, the information requested above is submitted, and the dwellings remain vacant until approval is issued."

Petitioner commenced the instant proceeding pursuant to CPLR Article 78 by the filing of a Notice of Petition and Petition on April 8, 2008. Simultaneously with such filing, Petitioner duly moved by Order to Show Cause for a stay pursuant to CPLR 7805. The motion is supported by affidavits of Petitioner's counsel and Barbara A. Lewis, an officer of Petitioner, both sworn to April 7, 2008. Respondent opposes the motion, submitting affirmations from an associate attorney for the Respondent and from an Assistant Attorney General, both dated April 10, 2008, alleging that the August 2007 decision and order dismissing Petitioners declaratory judgment action has already resolved many of the issues now before this Court in favor of the Respondent, and because Petitioners have failed to establish sufficient grounds to warrant issuance of a stay.

The purpose of a stay is to maintain the *status quo* (see State v. Town of Haverstraw, 219 AD2d 84, 641 NYS2d 879). Temporary or preliminary injunctive relief may be granted "when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor" (Doe v. Axelrod, 73 NY2d 748, 750, 536 NYS2d 44, 45, 532 NE2d 1272). There is no substantive difference between a temporary restraining order or preliminary injunction under CPLR §6301 and a stay pursuant to CPLR §7805, and nothing in the later statute, or in case law, relieves a party seeking a stay from establishing all three elements. Petitioner's reliance on Matter of Stewart v. Parker, 41 AD2d 785, 341 NYS2d 149) to support its claim that only irreparable injury need be shown for relief to be granted under CPLR §7805 is misplaced as the Court there dealt only with the issue of irreparable injury. Indeed the Court there stated "[w]hether it was an order incident to the article 78 proceeding or a preliminary injunction under CPLR 6301, makes little difference (*Id.*, at 786, 341 NYS2d at 192).

Under the circumstances here, Petitioner has minimally met the requisite elements, at least for an award of partial temporary relief. This proceeding involves novel issues of law relating to the interplay of various

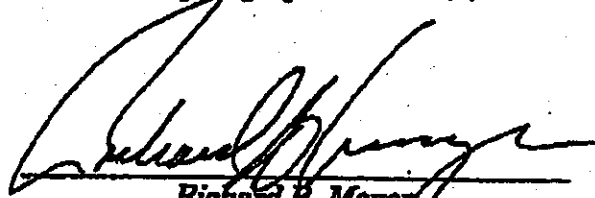
LEWIS FAMILY FARM v. ADIRONDACK PARK AGENCY**Decision and Order**

statutory definitions contained in the Act, the Respondent's jurisdiction over "agricultural use structures" (*Executive Law §809(8)*), whether a single family dwelling is or can under certain circumstances be such a structure under the Act, whether the Petitioner's project constitutes a "subdivision" (*Executive Law §802(63)*), and the potential impact (if any) of Article 14, §4 of the New York Constitution. Moreover, the unexplained failure of the Respondent to timely refer the Petitioner's noncompliance with the Act to the Attorney General (*Executive Law §813(2)*) over a period spanning almost one year, and more than six months following dismissal of the declaratory judgment action, while Respondent was aware that Petitioner continued to construct the dwelling units at considerable cost, cannot be discounted. To the extent now determinable, the Petitioner has established a likelihood of success on the merits on at least some issues raised in the petition, and a balancing of the equities in its favor.

As to irreparable injury, an insufficient showing has been made to establish that irreparable harm will occur to the Petitioner if the stay is not granted as to certain aspects of the challenged determination, specifically the prohibition against the dwellings being occupied or the payment of the civil penalty. Petitioner conceded at oral argument that the dwelling units are not occupied. No allegation has been made that Petitioner lacks sufficient financial resources to pay the penalty, and should Petitioner ultimately prevail in this proceeding the penalty would have to be reimbursed in full to Petitioner. However, because the instant proceeding challenges the Agency's subject matter jurisdiction, and since the challenged determination requires Petitioner to forego its right to challenge the Respondent's jurisdiction here if it proceeds to apply for the after-the-fact permit(s), it is the determination of this Court that a stay should be, and is, granted as to the remaining enforcement determinations in the March 25, 2008 determination, namely paragraphs (1) through (4), and (7). Petitioner's motion is denied as to paragraphs (5) and (6).

IT IS SO ORDERED.

ENTER


Richard B. Meyer
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ADIRONDACK PARK AGENCY,

Respondent.

NOTICE OF ENTRY

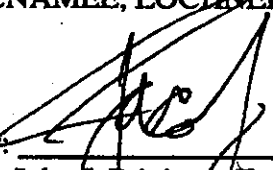
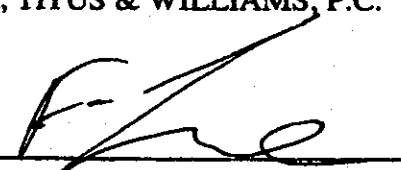
Index No.: 315-08.

Hon. Richard B. Meyer

PLEASE TAKE NOTICE that the within is a true copy of Judge Meyer's Decision and Order dated April 11, 2008, which was duly entered in the Office of the Essex County Clerk on April 14, 2008.

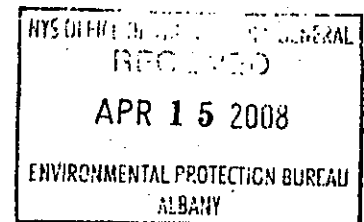
Dated: Albany, New York
April 14, 2008

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

By:  

John J. Privitera, Esq.
Jacob F. Lamme, Esq.
Attorneys for Petitioner
677 Broadway
Albany, New York 12207
(518) 447-3200

TO: Loretta Simon, Assistant Attorney General
NYS Office of the Attorney General
Environmental Protection Bureau
146 State Street, 2nd floor
Albany, New York 12224





STATE OF NEW YORK
COUNTY OF ESSEX
COUNTY, FAMILY & SURROGATE'S COURTS

RICHARD B. MEYER
JUDGE

AMY N. QUINN
COURT ATTORNEY
JILL H. DRUMMOND
SECRETARY

April 25, 2008

McNamee, Lochner, Titus & Williams, P.C.
Attn: John J. Privitera, Esq.
677 Broadway
Albany, New York 12207

New York State Attorney General
Attn: Loretta Simon, Esq.
Assistant Attorney General
The Capitol
Albany, New York 12224-0341

Re: Lewis Family Farm, Inc. v. Adirondack Park Agency
Index No.: 315-08
RJI No.: 15-1-2008-0109

Adirondack Park Agency -v- Lewis Family Farm, Inc.,
Salim B. Lewis and Barbara Lewis
Index No.: 332-08
RJI No.: 15-1-2008-0117

Counselors:

This letter constitutes the decision of this Court on the motions by Lewis Family Farm, Inc. to renew and reargue, and for consolidation, as well as on the cross-motion of the Adirondack Park Agency to transfer both cases to the Hon. Kevin K. Ryan, Acting JSC.

The Court has considered the following papers on each motion:

Motion to Reargue and Renew - Notice of Motion dated April 14, 2008 and Affirmation of John J. Privitera, Esq. dated April 14, 2008, with exhibits A-D, in support of the motion. There was no affidavit of Marco Turco sworn to April 14, 2008 included in the motion papers. Submitted in opposition were Affirmations of Assistant Attorney

Page -2-

General Loretta Simon with exhibits A-K, and Sarah Reynolds, Esq. with exhibits A-G, both dated April 22, 2008.

Motion to Consolidate and Cross Motion to Transfer - Notice of Motion dated April 14, 2008 and Affirmation of John J. Privitera, Esq. dated April 14, 2008, with exhibits A and B. Notice of Cross Motion dated April 21, 2008 and Affirmation of Assistant Attorney General Loretta Simon dated April 21, 2008, with exhibits A-J. Affirmation of John J. Privitera, Esq. dated April 23, 2008, with exhibits A-D, in opposition to cross motion.

The motion to consolidate both proceedings is granted. Nothing in the papers submitted by counsel for the Adirondack Park Agency indicates opposition to the motion. Moreover, by seeking transfer of both cases to the Acting Supreme Court Justice who decided the prior action in 2007, the Adirondack Park Agency impliedly concedes that consolidation is proper and appropriate here.

The cross motion to transfer is denied. The prior action between the parties was finally disposed of by a Decision and Order dated August 16, 2007 and filed in the Essex County Clerk's Office on August 29, 2007. Although counsel for Lewis Family Farm stated at oral argument that this decision had been appealed, the transcript of the March 13, 2008 hearing before the Adirondack Park Agency enforcement committee indicates that no appeal had been taken (see Exhibit F to Affirmation of Sarah Reynolds, Esq. dated April 22, 2008 at page 44, line 24 through page 45, line 2). A review of the records of the Essex County Clerk regarding this prior action (Index No. 498-07) reveals that a notice of appeal was filed on October 1, 2007. Whether such was timely is unknown at this time and, if timely, jurisdiction of that action lies with the Appellate Division, Third Department. The assignment of the two pending actions now before this Court was made pursuant to the Administrative Order dated December 20, 2007 established by the Hon. Ann T. Pfau, Chief Administrative Judge of the Courts, and approved by the Hon. Anthony V. Cardona, presiding justice of the Appellate Division, Third Judicial Department. As a result, assignment to this Court of both proceedings complied in all respects with 22 NYCRR §202.3 (see also 22 NYCRR §80.1[b][2]), particularly since there is no related action now pending before the Hon. Kevin K. Ryan.

Counsel for Lewis Family Farm, Inc. is hereby directed to submit an order, on notice to Assistant Attorney General Simon, granting the motion for consolidation and denying the cross motion for transfer, all without costs.

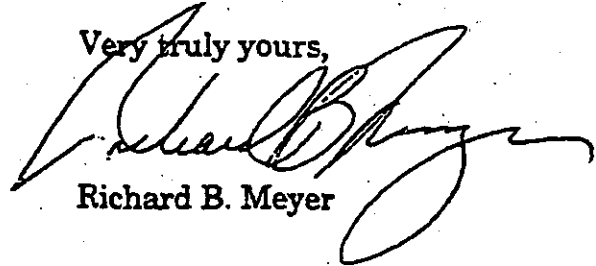
The combined motion by Lewis Family Farm, Inc. to reargue and renew (CPLR §221[f]) is granted, and upon such reargument and renewal, the decision and order of this Court dated April 11, 2008 is adhered to. The "new facts," alleged in support of a stay of the APA's prohibition against use or occupancy of the subject dwelling units,

Page -3-

were available at the time of the prior motion. Even upon considering those facts, granting a stay for the purposes requested – so that the subject dwelling units could be used and occupied pending final judgment – would go beyond the purposes of a stay, namely to maintain the *status quo* (see State -v- Town of Haverstraw, 219 AD2d 64, 641 NYS2d 879). The arguments advanced by Lewis Family Farm, Inc. in its motion to reargue in support of a stay would similarly go beyond the purpose of a stay.

The other arguments advanced by Lewis Family Farm in support of its motion to reargue, to the effect that payment of the fine would constitute a deprivation of constitutional rights since the time for challenging the March 25, 2008 determination under statute (Executive Law §818 [1]) would not have expired by the due date of payment, are without merit. Payment of the fine would not preclude Lewis Family Farm, Inc., from seeking judicial review, and does not constitute an admission or a concession to the March 25, 2008 determination now under review. No irreparable harm has been shown by Lewis Family Farm, Inc., to payment of the fine at this time. Assistant Attorney General Simon is to submit an order on notice to Mr. Privitera, without costs.

Very truly yours,



Richard B. Meyer

RBM:jhd

cc: Clerk

PRESENT: Hon. Leslie E. Stein
Associate Justice, Appellate Division, Third Department

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

In the Matter of LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ORDER TO SHOW CAUSE

ADIRONDACK PARK AGENCY,

Respondent.

Index No. 315-08

2008 APR 29 AM 9:56

RECEIVED
APP. DIV.
3RD DEPT.

Upon reading the annexed affirmation of John J. Privitera, dated April 28, 2008, the papers thereto attached and the papers therein referred to, and upon all the pleadings and proceedings had herein, it is

ORDERED, that Respondent show cause before this Court at a motion term thereof, to be held at the Justice Building, Empire State Plaza, Albany, New York, at 9:30 a.m. on May 12, 2008, or as soon thereafter as counsel can be heard, why an order should not be granted that: (1) grants Petitioner-Appellant permission to appeal the April 11, 2008 Decision and Order of the Essex County Supreme Court (Hon. Richard B. Meyer); (2) enjoins enforcement of Respondent's Enforcement Committee Decision of March 25, 2008 pending determination of a permissive appeal to this Court of Justice Meyer's decision and order; and (3) grants such other and further relief as this Court deems just and proper, and it is further

ORDERED, that pending determination by this Court on the motion brought on by this Order to Show Cause, Respondent is enjoined from enforcing its administrative determination dated March 25, 2008 as set forth in Subparagraph "6" on page 3 of the Decision and Order of Supreme Court dated April 11, 2008 on the condition that Petitioner shall pay the sum of

\$50,000 to the Essex County Treasurer's Office pursuant to CPLR 5519(a)(2) or post an undertaking therefore on or before May 5, 2008; and it is further

ORDERED, that pending determination by this Court on the motion brought on by this Order to Show Cause, Respondent is enjoined from enforcing its administrative determination dated March 25, 2008 as set forth in Subparagraph "5" on page 3 of the Decision and Order of Supreme Court dated April 11, 2008 relating to the occupancy of the dwelling known as the "Dormitory" as described in Exhibit A to the Barbara Lewis Affidavit sworn to April 7, 2008, on the condition that Petitioner shall submit to Respondent's counsel the information contained in Subparagraph "2(b)" of said April 11, 2008 Decision and Order, on or before May 5, 2008; and it is further

ORDERED, that service of a copy of this order and a copy of the papers upon which it was granted upon Respondent's counsel by personal or overnight delivery service at:

Loretta Simon, Assistant Attorney General
NYS Office of the Attorney General
Environmental Protection Bureau
146 State Street, 2nd floor
Albany, New York 12224

on or before April 29, 2008, be deemed sufficient service upon Respondent, and it is further

ORDERED that papers in opposition to this motion, if any, are to be served upon Petitioner's counsel so as to be received by May 5, 2008 and filed with this Court on the same date, and it is further

ORDERED that this motion shall be submitted and the personal appearance of the attorneys for the parties is not permitted.

Dated: April 28, 2008
Albany, New York


Hon. Leslie E. Stein
Associate Justice, Appellate Division, Third Department

State of New York
Supreme Court, Appellate
Third Judicial Department

Decision and Order of the Appellate Division entered
5/19/08, with Notice of Entry dated 5/20/08

pp. 263-264

Decided and Entered: May 19, 2008

Case # 504626

**In the Matter of LEWIS FAMILY
FARM, INC.,**

Petitioner,

v.

ADIRONDACK PARK AGENCY,
Respondent.

**DECISION AND ORDER
ON MOTION**

Motion for permission to appeal from order of Supreme Court dated April 11, 2008 and to enjoin enforcement of administrative determination dated March 25, 2008.

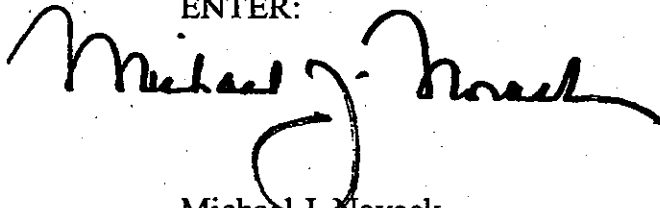
Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion for permission to appeal is referred to Justice Stein who makes the following decision: Motion granted, and it is further

ORDERED that the motion to enjoin enforcement is granted, without costs, to the extent that respondent is enjoined from enforcing its administrative determination dated March 25, 2008 as set forth in subparagraph five of Supreme Court's order relating to the occupancy of the dwelling known as the "Dormitory" and subparagraph six on page three of said order pending the appeal.

SPAIN, J.P., ROSE, LAHTINEN, KANE and STEIN, JJ., concur.

ENTER:



Michael J. Novack
Clerk of the Court

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

NOTICE OF ENTRY

ADIRONDACK PARK AGENCY,

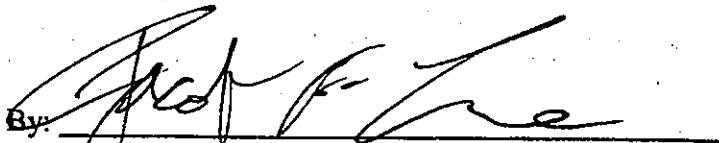
Case # 504626

Respondent.

PLEASE TAKE NOTICE that the within is a true copy of the Decision and Order on Motion of the Appellate Division, Third Department dated and entered by the Clerk on May 19, 2008.

Dated: Albany, New York
May 20, 2008

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

By: 
Jacob F. Lamme, Esq.
Attorneys for Petitioner
607 Broadway
Albany, New York 12207
(518) 447-3200

TO: Loretta Simon, Esq.
Assistant Attorney General
State of New York
Office of the Attorney General
The Capitol
Albany, New York 12224

Order of Supreme Court dated 5/30/08
with attachment

h

pp. 265-269

At a term of the Supreme Court
of the State of New York, held in
and for the County of Essex at the
Courthouse in Elizabethtown,
New York, on the 24th day of
April, 2008.

PRESENT: HON. RICHARD B. MEYER, J.S.C. (Acting)

***STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX***

LEWIS FAMILY FARM, INC.

Petitioner,

- against -

***NEW YORK STATE ADIRONDACK PARK
AGENCY,***

Respondent.

Index No. 315-08
RJI No. 15-1-2008-0109

ORDER

ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

LEWIS FAMILY FARM, INC.,

Counterclaimed Defendant,

SALIM B. LEWIS and BARBARA LEWIS,

Defendants.

Index No. 332-08
RJI No. 15-1-2008-0117

The petitioner having duly moved for an order to reargue and renew, and said

motion having regularly come on to be heard, and

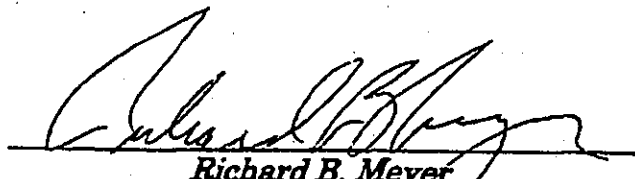
Upon reading and filing the notice of motion dated April 14, 2008, and the affirmation of John J. Privitera, Esq., attorney for petitioner, dated April 14, 2008 with exhibits A-D in support of said motion, and there being no affidavit of Marco Turco submitted therewith, and upon reading and filing the affirmations of Assistant Attorney General Loretta Simon, Esq., with exhibits A-K, and Sarah Reynolds, Esq., with exhibits A-G, both dated April 22, 2008 in opposition thereto, and due deliberation having been had thereon, and the Court having issued a letter decision dated April 25, 2008, a copy of which is annexed hereto and made a part hereof, it is hereby

ORDERED that the motion to reargue and renew be, and the same hereby is granted; and it is further

ORDERED that upon such reargument and renewal, the decision and order of this Court dated April 11, 2008 be and the same hereby is adhered to.

Order signed this 30th day of May, 2008 at Elizabethtown, New York.

ENTER


Richard B. Meyer
Acting Supreme Court Justice



STATE OF NEW YORK
COUNTY OF ESSEX
COUNTY, FAMILY & SURROGATE'S COURTS

RICHARD B. MEYER
JUDGE

AMY N. QUINN
COURT ATTORNEY
JILL H. DRUMMOND
SECRETARY

April 25, 2008

McNamee, Lochner, Titus & Williams, P.C.
Attn: John J. Privitera, Esq.
677 Broadway
Albany, New York 12207

New York State Attorney General
Attn: Loretta Simon, Esq.
Assistant Attorney General
The Capitol
Albany, New York 12224-0341

Re: Lewis Family Farm, Inc. v. Adirondack Park Agency
Index No.: 315-08
RJI No.: 15-1-2008-0109

Adirondack Park Agency -v- Lewis Family Farm, Inc.,
Salim B. Lewis and Barbara Lewis
Index No.: 332-08
RJI No.: 15-1-2008-0117

Counselors:

This letter constitutes the decision of this Court on the motions by Lewis Family Farm, Inc. to renew and reargue, and for consolidation, as well as on the cross-motion of the Adirondack Park Agency to transfer both cases to the Hon. Kevin K. Ryan, Acting JSC.

The Court has considered the following papers on each motion:

Motion to Reargue and Renew - Notice of Motion dated April 14, 2008 and Affirmation of John J. Privitera, Esq. dated April 14, 2008, with exhibits A-D, in support of the motion. There was no affidavit of Marco Turco sworn to April 14, 2008 included in the motion papers. Submitted in opposition were Affirmations of Assistant Attorney

Page -2-

General Loretta Simon with exhibits A-K, and Sarah Reynolds, Esq. with exhibits A-G, both dated April 22, 2008.

Motion to Consolidate and Cross Motion to Transfer - Notice of Motion dated April 14, 2008 and Affirmation of John J. Privitera, Esq. dated April 14, 2008, with exhibits A and B. Notice of Cross Motion dated April 21, 2008 and Affirmation of Assistant Attorney General Loretta Simon dated April 21, 2008, with exhibits A-J. Affirmation of John J. Privitera, Esq. dated April 23, 2008, with exhibits A-D, in opposition to cross motion.

The motion to consolidate both proceedings is granted. Nothing in the papers submitted by counsel for the Adirondack Park Agency indicates opposition to the motion. Moreover, by seeking transfer of both cases to the Acting Supreme Court Justice who decided the prior action in 2007, the Adirondack Park Agency impliedly concedes that consolidation is proper and appropriate here.

The cross motion to transfer is denied. The prior action between the parties was finally disposed of by a Decision and Order dated August 16, 2007 and filed in the Essex County Clerk's Office on August 29, 2007. Although counsel for Lewis Family Farm stated at oral argument that this decision had been appealed, the transcript of the March 13, 2008 hearing before the Adirondack Park Agency enforcement committee indicates that no appeal had been taken (see Exhibit F to Affirmation of Sarah Reynolds, Esq. dated April 22, 2008 at page 44, line 24 through page 45, line 2). A review of the records of the Essex County Clerk regarding this prior action (Index No. 498-07) reveals that a notice of appeal was filed on October 1, 2007. Whether such was timely is unknown at this time and, if timely, jurisdiction of that action lies with the Appellate Division, Third Department. The assignment of the two pending actions now before this Court was made pursuant to the Administrative Order dated December 20, 2007 established by the Hon. Ann T. Pfau, Chief Administrative Judge of the Courts, and approved by the Hon. Anthony V. Cardona, presiding justice of the Appellate Division, Third Judicial Department. As a result, assignment to this Court of both proceedings complied in all respects with 22 NYCRR §202.3 (see also 22 NYCRR §80.1[b][2]), particularly since there is no related action now pending before the Hon. Kevin K. Ryan.

Counsel for Lewis Family Farm, Inc. is hereby directed to submit an order, on notice to Assistant Attorney General Simon, granting the motion for consolidation and denying the cross motion for transfer, all without costs.

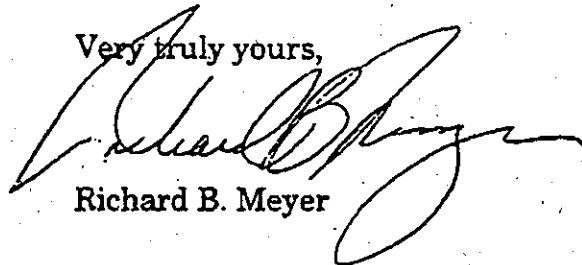
The combined motion by Lewis Family Farm, Inc. to reargue and renew (CPLR §221[f]) is granted, and upon such reargument and renewal, the decision and order of this Court dated April 11, 2008 is adhered to. The "new facts," alleged in support of a stay of the APA's prohibition against use or occupancy of the subject dwelling units,

Page -3-

were available at the time of the prior motion. Even upon considering those facts, granting a stay for the purposes requested – so that the subject dwelling units could be used and occupied pending final judgment – would go beyond the purposes of a stay, namely to maintain the *status quo* (see State-v- Town of Haverstraw, 219 AD2d 64, 641 NYS2d 879). The arguments advanced by Lewis Family Farm, Inc. in its motion to reargue in support of a stay would similarly go beyond the purpose of a stay.

The other arguments advanced by Lewis Family Farm in support of its motion to reargue, to the effect that payment of the fine would constitute a deprivation of constitutional rights since the time for challenging the March 25, 2008 determination under statute (Executive Law §818 [1]) would not have expired by the due date of payment, are without merit. Payment of the fine would not preclude Lewis Family Farm, Inc., from seeking judicial review, and does not constitute an admission or a concession to the March 25, 2008 determination now under review. No irreparable harm has been shown by Lewis Family Farm, Inc., to payment of the fine at this time. Assistant Attorney General Simon is to submit an order on notice to Mr. Privitera, without costs.

Very truly yours,



Richard B. Meyer

RBM:jhd
cc: Clerk

At a term of the Supreme Court
of the State of New York, held in
and for the County of Essex at
the Courthouse in Elizabethtown,
New York, on the 24th day of
April, 2008.

PRESENT: HON. RICHARD B. MEYER, J.S.C. (Acting)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

PROCEEDING NO. 1

Petitioner,
- against -

Index No. 315-08
RJI No.: 15-1-2008-0109

ADIRONDACK PARK AGENCY,

Respondent.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

***ORDER
CONSOLIDATING ACTIONS***

ADIRONDACK PARK AGENCY,

ACTION NO. 2

Plaintiff,
- against -

Index No.: 332-08
RJI No.: 15-1-2008-0117

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

Defendants.

Petitioner/defendant Lewis Family Farm, Inc. having duly moved for an order
consolidating the above-entitled proceeding and action, and the respondent /plaintiff

Adirondack Park Agency having duly cross-moved for an order transferring the consolidated actions to an Acting Supreme Court Justice who previously decided an action between the parties in 2007, and said motion and cross-motion having regularly come on to be heard; and

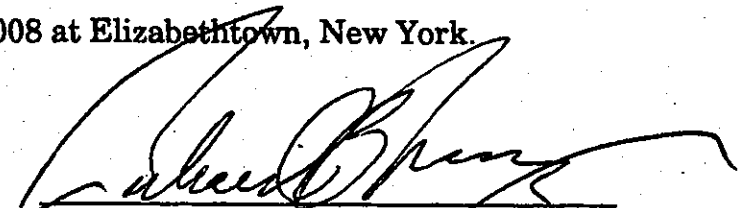
Upon reading and filing petitioner/defendant Lewis Family Farm, Inc.'s notice of motion dated April 14, 2008 and the affirmation of John J. Privitera, Esq. dated April 14, 2008, with exhibits, in support of said motion, and upon reading and filing the respondent/plaintiff Adirondack Park Agency's notice of cross-motion dated April 21, 2008 and the affirmation of Assistant Attorney General Loretta Simon dated April 21, 2008, with exhibits, in support of the cross-motion, and upon reading and filing the affirmation of John J. Privitera, Esq. dated April 23, 2008, with exhibits, in opposition to the cross-motion, and due deliberation having been had thereon, and the Court having issued a letter decision dated April 25, 2008, it is hereby

ORDERED that the said motion to consolidate Proceeding No. 1 and Action No. 2 be and the same hereby is granted without costs; and it is further

ORDERED that the cross-motion to transfer the consolidated actions to Hon. Kevin K. Ryan, Acting J.S.C., be and the same hereby is denied without costs.

Order signed this 10th day of June, 2008 at Elizabethtown, New York.

ENTER


Richard B. Meyer
Acting Supreme Court Justice

At a term of the Supreme Court
of the State of New York, held in
and for the County of Essex at
the Courthouse in Elizabethtown,
New York, on the 12th day of
June, 2008.

PRESENT: HON. RICHARD B. MEYER, J.S.C. (Acting)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

- against -

ADIRONDACK PARK AGENCY,

Respondent.

Index No. 315-08
RJI No.: 15-1-2008-0109

**ORDER AUTHORIZING
AMICUS CURIAE BRIEF**

ADIRONDACK PARK AGENCY,

Plaintiff,

- against -

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

Defendants.

Index No.: 332-08
RJI No.: 15-1-2008-0117

The New York Farm Bureau, Inc. having duly moved for an order permitting it
to submit an *amicus curiae* brief, and said motion and cross-motion having regularly
come on to be heard; and

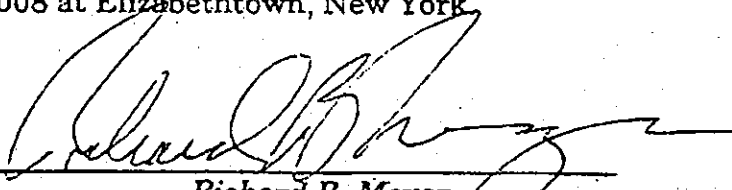
Upon reading and filing the notice of motion dated May 29, 2008 and the affirmation of Elizabeth Corron Dribusch, Esq. dated May 28, 2008, in support of said motion, and there being no opposition thereto, it is hereby

ORDERED that the said motion for permission to submit an amicus curiae brief be and the same hereby is in all respects granted; and it is further

ORDERED that counsel for the New York Farm Bureau, Inc. shall also be permitted to present oral argument on June 19, 2008 at 1:30 o'clock in the afternoon.

Order signed this 13th day of June, 2008 at Elizabethtown, New York

ENTER


Richard B. Meyer
Acting Supreme Court Justice

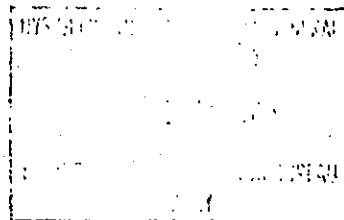
State of New York
Supreme Court, Appellate Division
Third Judicial Department

September 9, 2008

505179 - In the Matter of LEWIS
FAMILY FARM, INC.,
Petitioner,

v

ADIRONDACK PARK
AGENCY,
Respondent.



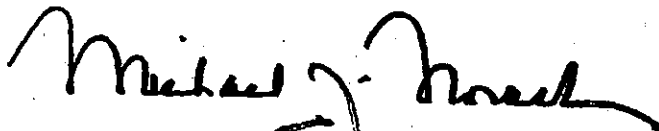
STEIN, J.

Motion for permission to appeal to this Court from order dated July 2,
2008 denied, without costs.

Park Agency, shall be filed and served on or before April 28, 2009. The reply brief, if any, in case No. 1, shall be filed and served on or before May 8, 2009.

CARDONA, P.J., MERCURE, ROSE, LAHTINEN and KANE, JJ., concur.

ENTER:

A handwritten signature in black ink, appearing to read "Michael J. Novack". The signature is fluid and cursive, with a large loop at the end.

Michael J. Novack
Clerk of the Court

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

NOTICE OF PETITION

Petitioner,

-against-

Index No.
RJI No.

ADIRONDACK PARK AGENCY,

000315-08

Respondent.

S I R S:

PLEASE TAKE NOTICE that upon the annexed petition verified on behalf of Petitioner Lewis Family Farm, Inc. on the 7th day of April 2008, and upon the Affidavits of Barbara Lewis and John Privitera, an application will be made to this Court at a Special Term, to be held at the Essex County Courthouse on June 6, 2008 at 9:30 A.M., or as soon thereafter as counsel may be heard, for a judgment pursuant to Article 78 of the CPLR, annulling and vacating the March 25, 2008 determination by the Respondent, Adirondack Park Agency, which found that Respondent has jurisdiction over Petitioner's farm employee housing structures, and granting such other and further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR 7804(c) all answer papers shall be served at least five days before the return date of this Application.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR 7804(e), Respondent is directed to file with the Clerk of the Court verified answer along with a certified record of the proceedings under consideration.

Dated: April 7, 2008
Albany, New York

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



John J. Privitera Esq.
Attorneys for Petitioner Lewis Family Farm, Inc.
677 Broadway
Albany, New York 12207
Tel. (518) 447-3200
Fax (518) 426-4260

ELIZABETH TOWN AT 12532

08 APR - 8 - 10:05

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

VERIFIED PETITION

-against-

ADIRONDACK PARK AGENCY,

Index No.

RJI No.

Respondent.

LEWIS FAMILY FARM, INC., sometimes referred to herein as Petitioner, by and through its undersigned counsel, alleges the following as and for its Verified Petition pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR):

PRELIMINARY STATEMENT

1. This Special Proceeding seeks to annul and vacate a March 25, 2008 Determination issued by Respondent, Adirondack Park Agency (the "Agency" or the "Respondent"), by and through its members. The March 25, 2008 Determination (the "March 25 Determination") sought to be annulled in this Special Proceeding is attached hereto as Exhibit "A".

2. As described more fully below, Petitioner seeks to annul the March 25 Determination insofar as it finds that the Agency has specific jurisdiction over Petitioner's farm buildings that were designed and built on the Lewis Farm for farm workers. The March 25 Determination is confusing, inconsistent, not supported by law, and Petitioner specifically seeks findings by this Court that:

a. the Agency "is proceeding or is about to proceed without or in excess of its jurisdiction" in asserting regulatory power over agricultural use structures in violation of CPLR § 7803(2);

b. the March 25 Determination was "affected by an error of law" in violation of CPLR § 7803(3) in finding that Respondent's legal authority reaches Petitioner's farm employee housing structures;

c. the March 25 Determination was entered in violation of lawful procedure for failure to be supported by an evidentiary record of an administrative hearing, in derogation of CPLR § 7803(3);

d. the March 25 Determination is not "supported by substantial evidence" in violation of CPLR § 7803(4); and

e. the March 25 Determination is an "abuse of discretion" in prescribing a penalty against Petitioner.

STATEMENT OF FACTS

3. In 1978, Salim B. Lewis and Barbara A. Lewis purchased a farmstead in the County of Essex. Over the years they acquired adjacent lands thus forming what is now a farm of approximately 1,200 acres. Their farmstead is known as The Lewis Family Farm.

4. Petitioner Lewis Family Farm, consisting of approximately 1,200 acres, is one of New York State's largest USDA Certified organic farms and a national leader in organic farming. (Lewis Aff., ¶¶ 2-3; Martens Aff., ¶ 4).

5. The Lewis Family Farm produces certified organic beef animals and raises cows, bulls, heifers and steers. Additionally, the farm produces a range of organic crops, which have

included hard white winter wheat; soy beans; alfalfa; mixed, cool-season grasses; corn; spelt and triticale.

6. The Lewis Family Farm is located within the Essex County Agricultural District No. 4, a county-adopted, state-certified agricultural district. (Privitera Reply Aff., Ex. A).

7. Over the years, the Lewis Family Farm has cleaned up its land and demolished at least fifteen (15) residences that were beyond repair. (Lewis Aff., ¶¶ 5-6; Martens Aff., ¶ 6).

8. The Lewis Family Farm also constructed at least fifteen (15) new farm buildings and other agricultural use structures, including bridges and a 60-foot grain bin, in support of the farm, all without Agency permits. (Lewis Aff., ¶ 7 and Ex. H).

9. As a successful large-scale organic farm, the Lewis Family Farm has a full-time manager, three full-time employees, and several interns and other farm workers working on the farm. (Lewis Aff., ¶¶ 8-10).

10. The Lewis Family Farm's employees require on-farm housing in order to monitor the barns, the barn yard and operate the farm. (Martens Aff., ¶ 12).

11. Suitable off-farm housing is not available for farm employees within the area of the Lewis Family Farm.

12. The Lewis Family Farm decided to provide quality housing for farm workers in an effort to recruit employees that will bring their families to the farm and become vested in the farm and the community.

13. In November 2006, the Lewis Family Farm commenced an employee housing project involving four new houses on the Farm, three of which are built in a cluster next to the barns on the footprint of buildings previously erected at the old Walker Farm. (See Lewis Aff., ¶¶ 12, 30).

14. The Lewis Family Farm obtained permits from the Town of Essex for the four farm employee houses, including the three-house cluster near the barns that is the subject of this proceeding. The Town granted local permits, determining that the buildings met all state building code requirements, had complied with all Town regulations, and that the water and septic systems were protective of human health and the environment and complied with state and local law.

15. The Lewis Family Farm's employee housing cluster, which provides easy and energy efficient access to and surveillance of the adjacent barns, was specifically designed for use by farm employees only. (Lewis Aff., ¶ 14).

16. The Lewis Family Farm did not subdivide its land to build the employee houses. (Lewis Aff., ¶ 14)

17. The three residences in the Lewis Family Farm employee housing cluster, which were specifically designed as a farmer community, share a common well, driveway, septic system and leach field located around a common courtyard. (Lewis Aff., ¶ 14).

18. The Lewis Family Farm employee housing cluster is located on the edge of *or* within the Hamlet of Whallonsburg. (Privitera Aff., ¶ 13; Privitera Reply Aff., ¶ 5, Ex. B).¹

19. The three farm worker housing structures on the Lewis Family Farm are necessary to the farm's operation.

20. Farm worker housing is an integral part of numerous farm operations. Farmers often provide on-farm housing for their farm laborers to, among other things, accommodate the long work day, meet seasonal housing needs and address the shortage of nearby rental housing in rural areas. The use of such homes for farmworker housing is a common practice. On-farm

¹ The Hamlet of Whallonsburg seems to include the old Walker Farm, where the Lewis Family Farm employee housing cluster is located. *Id.* Housing in Hamlets is non-jurisdictional.

housing provides a practical and cost effective means for farmers to meet their farm labor housing and recruitment needs.

21. Farm labor housing used for the on-farm housing of permanent and seasonal employees is part of a farm operation and is protected by the right to farm law under Section 305-a of the Agriculture and Markets Law.

22. Farm employee housing is a fundamentally sound agriculture practice that is crucial to the operation of the Lewis Family Farm. (Lewis Aff., ¶ 11; Martens Aff., 16).

23. On February 1, 2008, the Commissioner of the New York State Department of Agriculture and Markets made a formal, binding determination of fact and law under Section 305-a of the Agriculture and Markets Law, concluding that the Lewis Family Farm employee houses are agricultural buildings under the New York Right to Farm Law. The Commissioner's February 1, 2008 Determination is attached hereto as **Exhibit "B"**.

24. Thus, the Lewis Family Farm's use of its land for the three home housing cluster on the is agricultural in nature, as a matter of law.

25. Prior to the March 25 Determination, Agency staff proposed a "settlement agreement" demanding that the Lewis Family Farm waive the right to challenge Agency jurisdiction to regulate farming and submit to review by the Agency of all future farm buildings. (Lewis Aff., ¶ 22).

26. The Agency, created in the executive department by the Adirondack Park Agency Act (N.Y. Executive Law §§ 800 to 820), (the "Act"), was given responsibility for the implementation of a land use and development plan inside the Park. N.Y. Exec. Law § 825. However, the Agency was not given jurisdiction to regulate farming or farming structures.

27. The Adirondack Park Agency acknowledges in its public literature that it lacks jurisdiction to regulate "agricultural use structures". (See Privitera Aff., ¶ 12, Ex. G).

The Agency's Enforcement Proceeding Against the Lewis Family Farm

28. Notwithstanding the facts and law set forth above, on or about September 5, 2007, Petitioner was served with a Notice of Apparent Violation ("NAV") by Agency staff, alleging that the Lewis Family Farm's employee housing structures were illegal unless it received a permit from Respondent. The formal NAV, in the form of an administrative complaint, sought an order by the Agency (i) determining that the Lewis Family Farm violated N.Y. Executive Law § 809 and 9 NYCRR Part 577 and (ii) directing the Lewis Family Farm to pay a substantial fine.

29. Respondent's NAV alleged that the Lewis Family Farm committed the following violations by failing to obtain a permit:

- (i) Subdivision of Resource Management lands into sites pursuant to N.Y. Executive Law §§ 809(2)(a) and 810(1)(e)(3);
- (ii) Subdivision of Resource Management lands in a River Area into sites pursuant to 9 NYCRR § 577.5(c)(1);
- (iii) Construction of single family dwellings on Resource Management lands pursuant to N.Y. Executive Law §§ 809(2)(a) and 810(2)(d)(1); and
- (iv) Construction of single family dwellings on Resource Management lands in a River Area pursuant to 9 NYCRR § 577.5(c)(1).

30. Respondent's NAV stated that if there were facts in dispute, a hearing would be scheduled before an Administrative Law Judge to develop a record for the Agency's Enforcement Committee to consider.

31. On October 4, 2007, the Lewis Family Farm timely answered the NAV, denying that Respondent had jurisdiction over the farm employee housing structures. In addition, the

Lewis Family Farm agreed to and specifically requested a hearing before an Administrative Law Judge.

32. Even though Respondent pleaded that a hearing would be held before an Administrative Law Judge and notwithstanding the fact that Petitioner also demanded a hearing, Respondent entered the March 25 Determination without a hearing before an Administrative Law Judge, a violation of law.

33. Petitioner's answer to the NAV contested the Agency's jurisdiction over the farm buildings and specifically contested the Agency's power to impose fines to Petitioner for having constructed them without the alleged required permit.

34. The March 25 Determination makes substantial findings that are unsupported by any evidence in the record. For example, Paragraph 16 of the March 25 Determination is entirely not supported by any evidence in the record, and therefore not based on "substantial evidence" in violation of CPLR § 7803(4).

35. The March 25 Determination is inarticulate, confusing and inconsistent. The March 25 Determination is *correct* insofar as it appears to make a general determination that Respondent does not have general jurisdiction over "agricultural use structures". These findings are as follows:

...In fact, most agricultural uses do not require Agency permits. In addition [the Adirondack Park Agency Act, Rivers Act and Freshwater Wetlands Act] provide special privileges for agricultural uses, including under the Adirondack Park Agency Act an exception to the application of the overall intensity guidelines for all farm structures including farm worker housing (§802[50][g]).

(Exhibit A, Paragraph 40, pg. 10).

36. Pursuant to 9 NYCRR § 577.4(b)(3)(ii), an "agricultural use structure" would not require a Rivers' Permit, except that any such structure must adhere to the structure set back

requirements for the recreational river areas (150 feet from the mean high water mark). (Exhibit A, Paragraph 34, pg. 8).

37. However, the March 25 Determination is contradictory arbitrary, capricious, contrary to law and reaches beyond the Respondent's jurisdiction in making the following unlawful determinations:

37. 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 structure), and not "agricultural use structures." The types of structures specifically listed in the 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 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 include 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' dwelling (for a single family) more precisely fit under the definition of "single family dwelling" or "mobile home."

38. Moreover, "single family dwelling" and "agricultural use structure" are treated as separate and distinct uses under the Adirondack Park Agency Act. This is evident upon inspection of §805(3) of the Act, which always lists "agricultural use structure" and "single family dwelling" as separate uses for compatibility and jurisdictional purposes under the Act. Similarly, §802(50)(g) lists these two types of uses separately for eligibility for special consideration under the Act regarding the application of the overall intensity guidelines.¹ "Single family dwelling: is a narrowly and specifically defined term and is a keystone of Agency jurisdiction. The term "agricultural use structure" is a broader term for certain agricultural structures, which for the purposes of jurisdiction does not include "single family dwelling." If the drafters of the Adirondack Park Agency had intended farm worker dwellings to be included within the definition of "agricultural use structure," it would not have needed to include the phrases "single family dwelling" or "mobile home" separately in either §805(3) or §802(50)(g) in addition to the phrase "agricultural use structure." While the Agency agrees that farm worker housing is important to the enhancement of farm operations, it is not an "agricultural use structure" under the Act, but either a "single family dwelling," "multiple family dwelling," or "mobile home," depending on the type of dwelling.

38. The Agency's March 25 Determination is arbitrary, capricious, an error of law and in exceedance of the Agency's jurisdiction because it finds that the Agency can regulate farm employee housing structures as "single family dwellings" rather than treating them as "agricultural use structures."

The Agency Lacks Jurisdiction Over The Farm Employee Housing Under the Act

39. The Act defines "agricultural use structure" to include "any barn, stable, shed, silo, garage, fruit and vegetable stand or other building *or structure directly and customarily associated with agricultural use.*" N.Y. Exec. Law § 802(8) (emphasis supplied).

40. Since the term "structure" is defined separately in the Act, its definition must necessarily be incorporated into the definition of "agricultural use structure" by reference. See Friedman v. Connecticut Gen. Life Ins. Co., 9 N.Y.3d 105, 115 (2007) ("A court must consider a statute as a whole, reading and construing all parts of an act together to determine legislative intent, and...[give] effect and meaning...to the entire statute and every part and word thereof") (internal citations omitted).

41. The Act defines "structure" to include "...buildings, sheds, single family dwellings, mobile homes, signs, tanks, fences and poles and any fixtures, additions and alterations thereto." N.Y. Exec. Law § 802(62) (emphasis supplied).

42. Therefore, a "single family dwelling" that is directly or customarily associated with agricultural use, such as a farm worker's house, is necessarily an "agricultural use structure" under the Act. See N.Y. Exec. Law § 802(8).

43. The Lewis Family Farm conclusively established by uncontested affidavits that (i) the buildings at issue in this proceeding are farm employee houses; and (ii) on-farm employee housing is a sound agricultural practice directly and customarily associated with agricultural use

that provides the foundation for any self-sustaining farm. (See Lewis Aff., ¶¶ 11-12; Martens Aff., ¶ 16; Privitera Aff. ¶¶ 5-6, Ex. C and D).

44. Moreover, the Commissioner of the New York State Department of Agriculture & Markets investigated the Lewis Family Farm employee housing and issued a formal opinion under New York State's Right to Farm Law that the farm employee houses at issue in this proceeding are agricultural use structures as a matter of law.

45. On February 1, 2008, the Commissioner of the New York State Department of Agriculture and Markets issued a written opinion pursuant to Section 308(4) of the Agriculture and Markets Law, whereby he proclaimed that:

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

(See Ex. B, Commissioner Hooker's February 1, 2008 Opinion, pg. 2)

46. After reviewing the facts in this case, the Commissioner issued this formal opinion under the Right to Farm Law, finding that farm worker housing is warranted at the Lewis Family Farm, and that the use of land for the employee houses in this case is undoubtedly "agricultural in nature." (Id. at 3) (emphasis added).

47. Although Commissioner Hooker's formal opinion was in the record, the Agency intentionally ignored it and made no reference to it in its determination.

48. Thus, the Agency improperly determined that the Lewis Family Farm employee houses are not structures that are "directly and customarily associated with agricultural use," which would render them non-jurisdictional "agricultural use structures."

The Agency Also Lacks Jurisdiction Because Petitioner Did Not Subdivide Its Land

49. The Act defines "subdivision of land" as a "division of land into two or more lots, parcels or sites" for "separate ownership or occupancy". N.Y. Exec. Law § 802(63).

50. The Lewis Family Farm constructed housing for its employees without changing the use or description of its land in real property terms.

51. The Lewis Family Farm did not divide its land, create lots, or impose new ownerships or leaseholds. The Lewis Family Farm owns and occupies each building on the farm.

52. Indeed, the farm employee housing cluster cannot be divided since it was specifically designed as a farmer community. The agricultural use structures share a common well, driveway, septic system and leach field located around a common courtyard. (Lewis Aff., ¶ 14).

53. Moreover, the Agency's regulations clarify that the construction of farm employee housing does not automatically create a subdivision because "subdivision into sites" only occurs when an additional principal building is constructed. 9 NYCRR § 570.3(ah)(3).

54. The Agency counts the number of principal buildings for intensity purposes as follows:

[A]ll agricultural use structures and single family dwellings or mobile homes occupied by a farmer of land in agricultural use, his employees engaged in such use and members of their respective immediate families, will together constitute and count as a *single principal building*.

N.Y. Exec. Law § 802(50)(g) (emphasis supplied).

55. Thus, the Agency erroneously determined that the Lewis Family Farm subdivided its land when it did not actually subdivide the land and did not construct any additional principal buildings, as that term is defined and used under the Act.

The Agency Has Failed To Discharge Its Constitutional And Statutory Duties

56. Article 14 of the New York State Constitution, which was adopted as part of the "Conservation Bill of Rights", imposes a mandatory duty upon the Agency to encourage improvement of farms, not penalize farm development. Specifically, Section 4 of Article 14 states as follows:

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

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

57. The Agency does not have an agriculture policy at all.

58. The Agency has violated its constitutional duty in this enforcement case by seeking to penalize the Lewis Family Farm for constructing locally permitted, statutorily-exempt farm buildings.

59. New York State's Constitution is unquestionably the supreme law of the State. See Dalton v. Pataki, 5 N.Y.3d 243, 296 (2005). Thus, the Agency failed to obey the New York State Constitution by developing a policy of encouraging the development and improvement of agricultural lands. Accordingly, the Agency's determination, which unduly attempts to regulate the Lewis Family Farm without the Agency having a written pro-farm development policy, is unconstitutional and clearly "affected by an error of law".

60. Moreover, Section 305 of the New York State Agriculture and Markets Law requires all New York State agencies (including the Respondent) to create and/or modify policy to support the development of farming within the State:

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

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

61. The Lewis Family Farm is located in such an agricultural district, so it is entitled to the benefit of this statutory protection.

62. The Agency has yet to implement these statutorily-mandated regulation and procedure modifications, which is evident since the Agency has issued a determination attempting to penalize the Lewis Family Farm for constructing locally permitted, statutorily-exempt farm buildings.

63. On March 4, 2008, the Adirondack Park Local Government Review Board, which was created under the Adirondack Park Agency Act to advise and assist the Agency in carrying out its functions, powers and duties (see N.Y. Exec. Law § 803-a), issued a Resolution declaring:

"WHEREAS, the Board finds that the pending enforcement proceeding by the Agency against the Lewis Family Farm, Agency File E2007-041, is in conflict with the terms of the Plan, which provide that agricultural use structures are non-jurisdictional; and

WHEREAS, the Board finds that the Agency has constitutional and statutory duties to develop and implement a farm policy that encourages farming in the Adirondack Park; and

WHEREAS, the Board finds that the Agency has not discharged its constitutional duty or its statutory duty to develop a farm policy."

(Adirondack Park Local Government Review Board's March 4, 2008 Resolution, attached hereto as Exhibit "C".)

64. The Agency failed to consider the March 4, 2008 Resolution in making its March 25 Determination.

65. For these foregoing reasons, the Agency lacks regulatory power over farm employee housing structures under the Rivers Act or the Adirondack Park Agency Act.

AS AND FOR A FIRST CAUSE OF ACTION

66. Petitioner repeats and realleges each and every allegation set forth in Paragraphs 1 through 65 above, with the same force and effect as if set forth in full herein.

67. Respondent's determination in Paragraphs 37 and 38 of its March 25 Determination, expressing statutory power over the Lewis Family Farm's employee housing structures, is without and in excess of Respondent's jurisdiction.

AS AND FOR A SECOND CAUSE OF ACTION

68. Petitioner repeats and realleges each and every allegation set forth in Paragraphs 1 through 67 above, with the same force and effect as if set forth in full herein.

69. Respondent's determination in Paragraphs 37 and 38 of its March 25 Determination, is affected by an error of law in finding Agency jurisdiction over farm employee housing structures.

AS AND FOR A THIRD CAUSE OF ACTION

70. Petitioner repeats and realleges each and every allegation set forth in Paragraphs 1 through 69 above, with the same force and effect as if set forth in full herein.

71. Respondent's March 25 Determination is affected by an error of law in finding that the Lewis Family Farm's construction of farm worker housing effected a subdivision of land..

AS AND FOR A FOURTH CAUSE OF ACTION

72. Petitioner repeats and realleges each and every allegation set forth in Paragraphs 1 through 71 above, with the same force and effect as if set forth in full herein.

73. Respondent's determination in Paragraphs 37 and 38 of its March 25 Determination, is without and in excess of Respondent's jurisdiction in finding Agency jurisdiction over farm employee housing structures under the Rivers Act.

AS AND FOR A FIFTH CAUSE OF ACTION

74. Petitioner repeats and realleges each and every allegation set forth in Paragraphs 1 through 73 above, with the same force and effect as if set forth in full herein.

75. Respondent's March 25 Determination is affected by an error of law because it failed to consider the formal and binding February 1, 2008 determination of the Commissioner of the Department of Agriculture and Markets.

AS AND FOR A SIXTH CAUSE OF ACTION

76. Petitioner repeats and realleges each and every allegation set forth in Paragraphs 1 through 75 above, with the same force and effect as if set forth in full herein.

77. Respondent's March 25 Determination is affected by an error of law because it was made without the Agency having discharged its constitutional duty to encourage the development and improvement of agricultural lands.

AS AND FOR A SEVENTH CAUSE OF ACTION

78. Petitioner repeats and realleges each and every allegation set forth in Paragraphs 1 through 77 above, with the same force and effect as if set forth in full herein.

79. Respondent's March 25 Determination is affected by an error of law because it was made without the Agency having discharged its statutory duty to modify its administrative regulations and procedures to encourage the maintenance of viable farming in agricultural districts pursuant to Section 305 of the Agriculture and Markets Law.

AS AND FOR A EIGHTH CAUSE OF ACTION

80. Petitioner repeats and realleges each and every allegation set forth in Paragraphs 1 through 79 above, with the same force and effect as if set forth in full herein.

81. Respondent's March 25 Determination is affected by an error of law because it failed to consider the March 4, 2008 Resolution of the Adirondack Park Local Government Review Board.

AS AND FOR A NINTH CAUSE OF ACTION

82. Petitioner repeats and realleges each and every allegation set forth in Paragraphs 1 through 81 above, with the same force and effect as if set forth in full herein.

83. Respondent's March 25 Determination was entered in violation of lawful procedure by failing to be supported by substantial evidence.

AS AND FOR A TENTH CAUSE OF ACTION

84. Petitioner repeats and realleges each and every allegation set forth in Paragraphs 1 through 83 above, with the same force and effect as if set forth in full herein.

85. Respondent's March 25 Determination was entered in violation of lawful procedure by failing to hold a hearing before an Administrative Law Judge.

[REMAINDER OF PAGE LEFT BLANK INTENTIONALLY]

WHEREFORE, Petitioner Lewis Family Farm, Inc. respectfully prays that an Order of this Court be entered vacating and annulling the March 25, 2008 Decision of Respondent Adirondack Park Agency because:

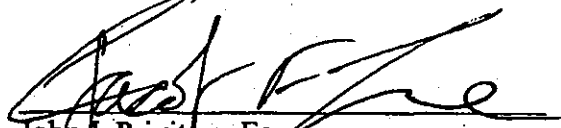
- a. the Agency "is proceeding or is about to proceed without or in excess of its jurisdiction" in asserting regulatory power over farm worker housing in violation of CPLR § 7803(2);
- b. the March 25 Determination was "affected by an error of law" in violation of CPLR § 7803(3) in finding that Respondent's legal authority reaches farm employee housing structures.
- c. the March 25 Determination was entered in violation of lawful procedure for failure to be supported by a record of an administrative hearing, in derogation of CPLR § 7803(3);
- d. the March 25 Determination is not "supported by substantial evidence" in violation of CPLR § 7803(4); and
- e. the March 25 Determination is an "abuse of discretion" in prescribing a penalty against Petitioner.

And for costs of this special proceeding and for further relief as the Court may deem just and appropriate.

Dated: April 7, 2008
Albany, New York

Respectfully submitted,

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

By: 

John J. Privitera, Esq.

Jacob F. Lamme, Esq.

Attorneys for Petitioner

677 Broadway

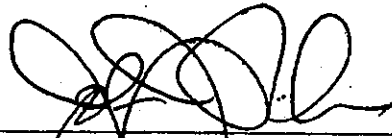
Albany, New York 12207-2503

Telephone: (518) 447-3200

VERIFICATION

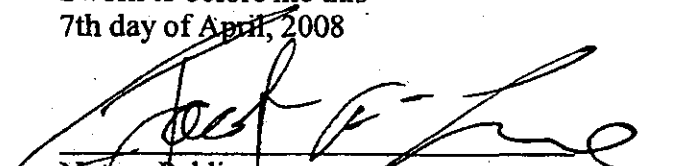
STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

JOHN J. PRIVITERA, being duly sworn, states that he is the attorney for petitioner, LEWIS FAMILY FARM, INC., in this action; that he believes the matters set forth herein to be true; and that the reason why this verification is not made by petitioner is that petitioner does not have an office in the County of Albany wherein your deponent maintains his office.



John J. Privitera

Sworn to before me this
7th day of April, 2008



Notary Public

JACOB F. LAMME
Notary Public, State of New York
Qualified in Albany County
No. 02LA6150759
Commission Expires Aug. 7, 2010

**Petition, Exhibit A - Determination of the APA
Enforcement Committee dated March 25, 2008
[Reproduced at pp. 855-870]**

Petition, Exhibit B - Letter dated February 1, 2008

[Reproduced at pp. 1389-1391]

Petition, Exhibit C - Letter dated 3/5/08

[Reproduced at pp. 1428-1429]

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

**AFFIDAVIT IN
SUPPORT OF STAY**

ADIRONDACK PARK AGENCY,

Respondent.

Index No. 315-08
RJI No.

STATE OF NEW YORK)
) ss.:
COUNTY OF ESSEX)

BARBARA A. LEWIS, being sworn, deposes and says:

1. I am an officer of Lewis Family Farm, Inc., the Petitioner in this matter. I make this affidavit in support of the Lewis Family Farm's motion to stay the enforcement of Respondent Adirondack Park Agency's ("Agency") March 25, 2008 Determination.

2. In 1978, my husband, Salim B. Lewis, and I purchased a farmstead in the County of Essex. Over the years we acquired adjacent lands thus forming what is now a farm of approximately 1,200 acres. Our farmstead, now known as The Lewis Family Farm, is one of New York State's largest USDA Certified organic farms. Our farm is located within Essex County Agricultural District No. 4, a County adopted, state certified agricultural district.

3. By operating its lands as a farm, the Lewis Family Farm is currently entitled to receive various federal, state, and local tax incentives, which are crucial to the farm's operation. The Lewis Family Farm would cease to operate without these tax

incentives. If I am compelled to file an application for a 3-home subdivision as opposed to treating the farm worker housing as agricultural structures, the financial viability of the Lewis Family Farm is destroyed.

4. As a successful large-scale organic farm, the Lewis Family Farm employs a full-time manager, three full-time employees, as well as several interns and other farm workers. Farm worker housing on the farm is necessary for the farm to sustain itself.

5. The Lewis Family Farm did not subdivide its land or create any new lots in building the farm worker housing cluster that is the subject of this proceeding. Indeed, the three homes were built as agricultural use structures on Lewis Family Farm land, adjacent to the barns, as is a customary farm practice. The housing cluster of three buildings uses a common driveway, a common septic system and a common well. The buildings are situated in a horseshoe shape, fronting each other rather than any road. As built, the three homes are not subdividable into lots, because they are integrally related to each other so separate lots cannot be created. The homes are situated as set forth in Exhibit "A".

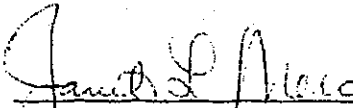
6. The Agency's Determination, which directs me to file a three-home subdivision, will destroy the financial structure of the farm. In addition, the homes are physically incapable of being subdivided as a matter of fact. A stay of the Agency's Determination allows the Court to review this matter without putting the Lewis Family Farm in an impossible situation that would destroy the financial viability of the farm.

7. The farm employee housing at issue in this proceeding must be utilized by these workers for the 2008 growing season, which has nearly arrived. Not having farm employees on the premises will cause unquantifiable damage to farm operations.

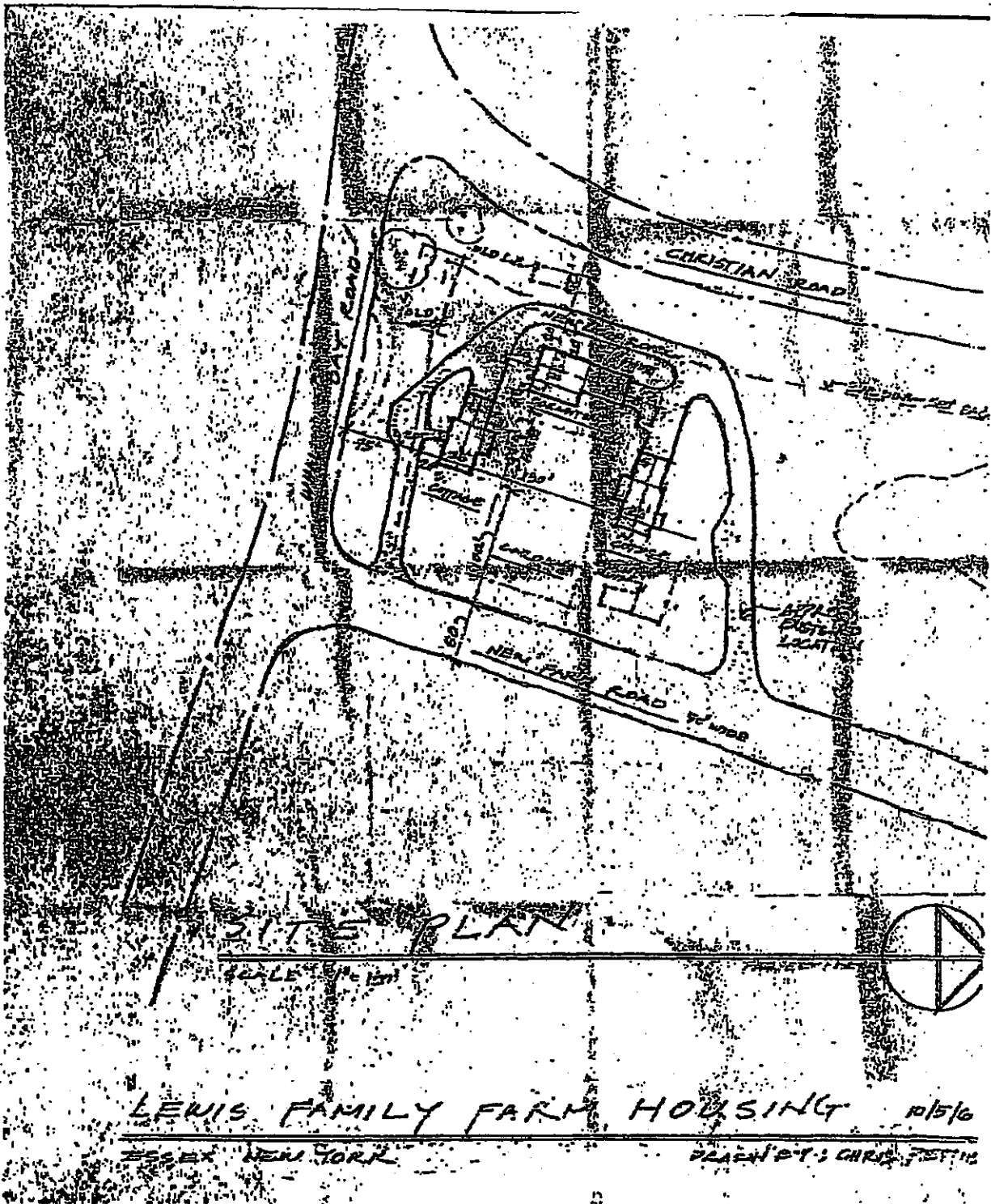
8. Based on the foregoing, and for the reasons set forth in the accompanying memorandum of law submitted herewith, the Lewis Family Farm respectfully asks this Court to enter an order staying the enforcement of the Agency's Determination pending the outcome of this Article 78 proceeding.


Barbara A. Lewis

Sworn to before me this
7th day of April, 2008.


Notary Public

JANET L. MERO
NOTARY PUBLIC STATE OF NEW YORK
ID. 2885400
QUALIFIED IN ESSEX COUNTY 9/30/09
COM. EXPIRES



The Lewis Family Farm employee housing cluster, as engineered and approved by the Town of Essex. (Lewis Aff., Ex. B).

Residence I is labeled "Dormitory" in October 2006.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ADIRONDACK PARK AGENCY,

Respondent.

**AFFIDAVIT IN
SUPPORT OF STAY**

Index No. 315-08
RJI No.

STATE OF NEW YORK)
) ss.:
COUNTY OF ESSEX)

JOHN J. PRIVITERA, being sworn, deposes and says:

1. I am duly licensed and admitted to practice law in the State of New York, and I am a principal with the law firm of McNamee, Lochner, Titus & Williams, P.C., attorneys for Petitioner Lewis Family Farm, Inc. (hereafter "Lewis Family Farm"). As such, I am fully familiar with the pleadings and proceedings had in this action, and with the matters set forth herein.

2. I make this affidavit in support of the Lewis Family Farm's motion to stay the enforcement of Respondent Adirondack Park Agency's March 25, 2008 Determination, whereby it wrongfully asserted jurisdiction over the Petitioner's agricultural use structures.

3. The Agency's Determination, among other things, directs Petitioner to (1) apply for an Agency permit for three new farm employee housing structures and a 4-lot subdivision by April 14, 2008; and (2) pay a \$50,000.00 civil penalty to the Agency by April 28, 2008. The

Determination further prohibits Petitioner's employees from occupying the farm employee houses until the Agency issues a permit.

4. Respondent has effectively slashed Petitioner's time in which to challenge the Determination from sixty (60) days to twenty (20) days by attempting to force compliance with the Determination by April 14, 2008. See N.Y. Executive Law § 818.

5. The Lewis Family Farm will suffer an actual and immediate irreparable injury during the pendency of this Article 78 proceeding if a stay of the enforcement of the Agency's Determination is not awarded.

6. If the Lewis Family Farm is compelled to obey the Agency's Determination and applies for a permit April 14, 2008, this entire proceeding becomes moot since the Petitioner will have already submitted to the Agency's jurisdiction.

7. Most importantly, if the Lewis Family Farm is forced to comply with the Agency's Order during the pendency of this litigation, the Lewis Farm will suffer significant financial harm. Specifically, the Agency wrongly refused to consider the Lewis Family Farm worker housing as "agricultural use structures"; rather, the Determination by the Agency directs Barbara Lewis, on behalf of the farm, to file an application for a "three-home subdivision." If Barbara Lewis does not receive a stay, and the farm is obliged to apply for subdivision approval, the farm employee houses may be treated as a development project rather than a farm asset. In this event, the accounting treatment, tax treatment and tax exemption of agricultural structures are at significant risk. That is, although a tax exemption is supposed to apply to building used to provide housing for regular and essential employees and their immediate families who are primarily employed in farming operations, there is no guarantee of this treatment by federal, state and local taxing authorities if Barbara Lewis is forced to abide by the Agency's directive to

complete an application for a three-home subdivision upon a finding that the buildings are not agricultural use structures. (See generally, Real Property Tax Law § 483-a (New York State Board of Real Property Services Form RP-483-ins), attached hereto as **Exhibit "A"**).

8. This case presents compelling questions of constitutional law as well as the relationship between New York State's Agricultural & Markets Law and the other laws of New York State, including the Adirondack Park Agency Act. These matters were fully briefed before the Agency, but the Agency failed to consider these significant matters. (See *Petitioner's Right to Farm* Memorandum of Law, dated January 22, 2008, attached hereto as **Exhibit "B"**.)

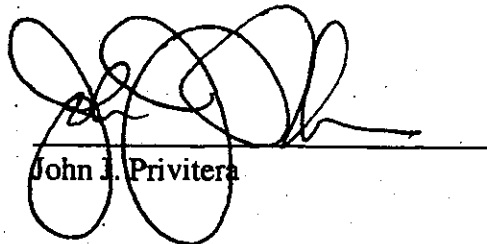
9. Without a stay, the Lewis Family Farm runs the risk of accumulating hundreds of thousands of dollars in additional penalties pursuant to Executive Law §813 during this appeal of the Agency's Determination, because the Determination directs payment by April 28, 2008.

10. Respondent will not be harmed if a stay is granted. This case is solely about jurisdiction. The Agency has already declared that the structures at issue in this proceeding can remain in their current position. There is no threat of any harm to the environment. Further, there is no harm to the Agency's land use plan, which counts all agricultural use structures and single family dwellings occupied by farm workers and their families as one principal building for intensity purposes. See N.Y. Exec. Law § 802(50)(g).

11. The Lewis Family Farm commenced the farm employee housing project in November 2006, and despite being aware of the project, the Agency did not issue a Notice of Apparent Violation until September 2007. This was not enforced until the Determination that is the subject of this proceeding. Thus, the Agency cannot claim any prejudice by the passage of time if a stay is granted.

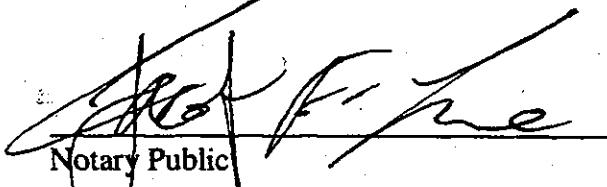
12. Based on the foregoing, and for the reasons set forth in the accompanying memorandum of law submitted herewith, the Lewis Family Farm respectfully asks this Court to enter an order staying the enforcement of the Agency's Determination pending the outcome of this Article 78 proceeding.

13. In accordance with the Local Rules, I asked the Agency to agree to a stay pending judicial review of the Determination. After several days in considering this request, the Agency declined to agree.



John J. Privitera

Sworn to before me this
7th day of April, 2008.



Notary Public

JACOB F. LAMME
Notary Public, State of New York
Qualified in Albany County
No. 02LA6150759
Commission Expires Aug. 7, 2010



NYS BOARD OF REAL PROPERTY SERVICES

INSTRUCTIONS FOR APPLICATION FOR TAX EXEMPTION OF AGRICULTURAL AND HORTICULTURAL BUILDINGS AND STRUCTURES

Place of filing application.

This application for exemption must be filed with the city or town assessor. Do not file this form with the State Board of Real Property Services. If a facility is located in a village which assesses, a copy of the application must also be submitted to the village assessor. In Nassau County, applications for exemption from county, town or school district taxes should be filed with the Nassau County Board of Assessors. In Tompkins County, applications should be filed with the Tompkins County Division of Assessment.

Timing of filing application.

The application must be filed on or before the taxable status date of the city, town or village whose taxes are involved. The taxable status date in most towns is March 1. In towns in Erie County, the taxable status date is May 1. In towns in Westchester County the taxable status date is June 1. In Nassau County, taxable status date is January 2. In cities, taxable status date is determined from charter provisions so the city assessor's office should be consulted for the specific date. For most villages which are assessing units, taxable status date is January 1, but the village clerk should be consulted to ascertain whether the village uses a different date.

Amount and term of exemption; penalty for conversion.

The increase in assessed value attributable to qualified new construction or reconstruction shall be exempt from taxation for a period of ten years. In the event the land or structures or buildings are converted to non-agricultural use during the exemption period, the property becomes subject to roll-back taxes for the period during which the exemption was operative.

Completion of the application form. (Numbers correspond to the numbers on the application.)

1 - 4. Self-explanatory

5. The exemption applies to newly constructed or reconstructed structures or buildings (or portions thereof) used directly and exclusively in the raising and production for sale of agricultural and horticultural commodities including structures or buildings used for the storage of honey bees. Therefore, the building or structure (or portion thereof) for which the exemption is sought must be identified with particularity and its current use described as fully possible. If not currently used, set forth the proposed use.

6. The construction or reconstruction must be completed on or before the appropriate taxable status date and application for exemption must be made within one year from the date of completion of the improvement.

7. Self-explanatory.

8. The exemption generally does not apply to a building or structure (or portion thereof) used for the processing of agricultural or horticultural commodities, but a building or structure (or portion thereof) used in the production of maple syrup, honey or beeswax may be eligible for exemption. The exemption also does not apply to a building or structure (or portion thereof) used for the retail merchandising of such commodities. A building is used for processing whenever the principal activity occurring therein is the preparation of farm commodities for market as distinguished from the raising, producing or storing of such farm commodities. A building is not disqualified if processing activities are merely incidental to exempt activities. A building or structure (or portion thereof) is used for retail merchandising when it is used for the sale of a farm commodity to the ultimate customer. The exemption does not apply to silos, farm feed grain storage bins, commodity sheds, manure storage and handling facilities or bulk milk tanks and coolers used to hold milk awaiting shipment to market as those types of structures are exempt from taxation pursuant to Real Property Tax Law, section 483-a (request RP-483-a from your assessor).

9. The exemption applies to buildings used to provide housing for regular and essential employees and their immediate families who are primarily employed in farming operations. It does not apply, however, to buildings occupied as a residence by the owner and his immediate family.

10. The exemption applies to buildings or structures essential to the operation of lands consisting of not less than five acres actually used in an agricultural or horticultural operation carried on for profit. An eligible building or structure may include an indoor exercise arena used exclusively by a farmer or a commercial horse boarding operation to train and exercise horses. Such an arena does not qualify for tax exemption when used by a riding academy or a dude ranch.

REAL PROPERTY TAX LAW SECTION 483**Exemption from taxation of structures and buildings essential to the operation of agricultural and horticultural lands.**

1. Structures and buildings essential to the operation of lands actively devoted to agricultural or horticultural use and actually used and occupied to carry out such operation which are constructed or reconstructed subsequent to January 1, 1969 and prior to January 1, 2009 shall be exempt from taxation to the extent of any increase in value thereof by reason of such construction or reconstruction for a period of ten years.
2. The term "structures and buildings" shall include: (a) structures and buildings or portions thereof used directly and exclusively in the raising and production for sale of agricultural and horticultural commodities or necessary for the storage thereof, but not structures and buildings or portions thereof used for the processing of agricultural and horticultural commodities other than maple syrup, honey or beeswax, or the retail merchandising of such commodities; (b) structures and buildings used to provide housing for regular and essential employees and their immediate families who are primarily employed in connection with the operation of lands actively devoted to agricultural and horticultural use, but not including structures and buildings occupied as a residence by the applicant and his immediate family; and (c) structures and buildings used as indoor exercise arenas exclusively for training and exercising horses in connection with the raising and production for sale of agricultural and horticultural commodities or in connection with a commercial horse boarding operation as defined in section three hundred one of the agriculture and markets law. For purposes of this section, the term "indoor exercise arenas" shall not include riding academies or dude ranches. The term "structures and buildings" shall not include silos, bulk milk tanks or coolers, or manure storage and handling facilities as such terms are used in section four hundred eighty three-a of this title.
3. The term "lands actively devoted to agricultural and horticultural use" shall mean lands not less than five acres in area actually used in bona fide agricultural and horticultural production and operation and carried on for profit.
4. Such exemption from taxation shall be granted only upon an application by the owner of the building or structure on a form prescribed by the State Board. The applicant shall furnish such information as such board shall require. Such application shall be filed with the assessor of the city, town, village or county having the power to assess property for taxation on or before the appropriate taxable status date of such city, town, village or county and within one year from the date of such construction or reconstruction.
5. If the assessor is satisfied that the applicant is entitled to an exemption pursuant to this section, he shall approve the application. Such structures or buildings shall be exempt from taxation as herein provided.
6. The assessed value of any exemption granted pursuant to this section shall be entered by the assessor on the portion of the assessment roll provided for property exempt from taxation. An exemption granted pursuant to this section shall continue only while the buildings and structures are actually used and occupied as provided herein, but in no event for more than ten years.
7. In the event that land or buildings or structures in agricultural or horticultural use are converted to non-agricultural or non-horticultural use during the period of an exemption granted pursuant to this section, the structures or buildings upon which the exemption was granted shall be subject to roll-back taxes for the period during which the exemption was operative. Structures and buildings subject to roll-back taxes shall be taxed as provided herein.
 - (a) Notwithstanding any limitations contained in section 550 of this chapter, the assessor of the appropriate assessing unit shall enter on the taxable portion of the assessment roll of the current year the assessed valuation or valuations of the structures or buildings on which exemption was granted in any prior year or years at the assessed valuation or valuations as set forth on the exemption portion of the assessment roll or rolls.
 - (b) The amount of roll-back taxes shall be computed by the appropriate tax levying body by applying the applicable tax rate for each such prior year to the assessed valuation, as set forth on the exempt portion of the assessment roll, for such structures or buildings for each such prior year during such period of exemption.
 - (c) Such roll-back taxes shall be levied and collected in the same manner and at the same time as other taxes are imposed and levied on such roll.
8. As used in this section, the term "agricultural and horticultural" shall include the activity of raising, breeding and boarding of livestock, including commercial horse boarding operations.

PENALTY FOR FALSE STATEMENT

A person making false statements on an application for exemption is guilty of an offense punishable by law.

Exhibit B: *Right to Farm* Memorandum of Law

[Reproduced at pp. 1124-1346]

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

**AMENDED VERIFIED
PETITION**

ADIRONDACK PARK AGENCY,

Index No.: 315-08

Respondent.

LEWIS FAMILY FARM, INC., sometimes referred to herein as Petitioner, by and through its undersigned counsel, alleges the following as and for its Amended Verified Petition pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR):

PRELIMINARY STATEMENT

1. This Special Proceeding seeks to annul and vacate a March 25, 2008 Determination issued by Respondent, Adirondack Park Agency (the "Agency" or the "Respondent"), by and through its members. The March 25, 2008 Determination (the "March 25 Determination") sought to be annulled in this Special Proceeding is attached hereto as **Exhibit "A"**.

2. As described more fully below, Petitioner seeks to annul the March 25 Determination insofar as it finds that the Agency has specific jurisdiction over Petitioner's farm buildings that were designed and built on the Lewis Farm for farm workers. The March 25 Determination is confusing, inconsistent, not supported by law, and Petitioner specifically seeks findings by this Court that:

- a. the Agency "is proceeding or is about to proceed without or in excess of its jurisdiction" in asserting regulatory power over agricultural use structures in violation of CPLR § 7803(2);
- b. the March 25 Determination was "affected by an error of law" in violation of CPLR § 7803(3) in finding that Respondent's legal authority reaches Petitioner's farm employee housing structures;
- c. the March 25 Determination was entered in violation of lawful procedure for failure to be supported by an evidentiary record of an administrative hearing, in derogation of CPLR § 7803(3);
- d. the March 25 Determination is not "supported by substantial evidence" in violation of CPLR § 7803(4); and
- e. the March 25 Determination is an "abuse of discretion" in prescribing a penalty against Petitioner.

STATEMENT OF FACTS

3. In 1978, Salim B. Lewis and Barbara A. Lewis purchased a farmstead in the County of Essex. Over the years they acquired adjacent lands thus forming what is now a farm of approximately 1,200 acres. Their farmstead is known as The Lewis Family Farm.

4. Petitioner Lewis Family Farm, consisting of approximately 1,200 acres, is one of New York State's largest USDA Certified organic farms and a national leader in organic farming. (Lewis Aff., ¶¶ 2-3; Martens Aff., ¶ 4).

5. The Lewis Family Farm produces certified organic beef animals and raises cows, bulls, heifers and steers. Additionally, the farm produces a range of organic crops, which have

included hard white winter wheat; soy beans; alfalfa; mixed, cool-season grasses; corn; spelt and triticale.

6. The Lewis Family Farm is located within the Essex County Agricultural District No. 4, a county-adopted, state-certified agricultural district. (Privitera Reply Aff., Ex. A).

7. Over the years, the Lewis Family Farm has cleaned up its land and demolished at least fifteen (15) residences that were beyond repair. (Lewis Aff., ¶¶ 5-6; Martens Aff., ¶ 6).

8. The Lewis Family Farm also constructed at least fifteen (15) new farm buildings and other agricultural use structures, including bridges and a 60-foot grain bin, in support of the farm, all without Agency permits. (Lewis Aff., ¶ 7 and Ex. H).

9. As a successful large-scale organic farm, the Lewis Family Farm has a full-time manager, three full-time employees, and several interns and other farm workers working on the farm. (Lewis Aff., ¶¶ 8-10).

10. The Lewis Family Farm's employees require on-farm housing in order to monitor the barns, the barn yard and operate the farm. (Martens Aff., ¶ 12).

11. Suitable off-farm housing is not available for farm employees within the area of the Lewis Family Farm.

12. The Lewis Family Farm decided to provide quality housing for farm workers in an effort to recruit employees that will bring their families to the farm and become vested in the farm and the community.

13. In November 2006, the Lewis Family Farm commenced an employee housing project involving four new houses on the Farm, three of which are built in a cluster next to the barns on the footprint of buildings previously erected at the old Walker Farm. (See Lewis Aff., ¶¶ 12, 30).

14. The Lewis Family Farm obtained permits from the Town of Essex for the four farm employee houses, including the three-house cluster near the barns that is the subject of this proceeding. The Town granted local permits, determining that the buildings met all state building code requirements, had complied with all Town regulations, and that the water and septic systems were protective of human health and the environment and complied with state and local law.

15. The Lewis Family Farm's employee housing cluster is located more than 150 feet from the mean high water mark of the Boquet River.

16. The Lewis Family Farm's employee housing cluster, which provides easy and energy efficient access to and surveillance of the adjacent barns, was specifically designed for use by farm employees only. (Lewis Aff., ¶ 14).

17. The Lewis Family Farm did not subdivide its land to build the employee houses. (Lewis Aff., ¶ 14)

18. The three residences in the Lewis Family Farm employee housing cluster, which were specifically designed as a farmer community, share a common well, driveway, septic system and leach field located around a common courtyard. (Lewis Aff., ¶ 14).

19. The Lewis Family Farm employee housing cluster is located on the edge of or within the Hamlet of Whallonsburg. (Privitera Aff., ¶ 13; Privitera Reply Aff., ¶ 5, Ex. B).¹

20. The three farm worker housing structures on the Lewis Family Farm are necessary to the farm's operation.

21. Farm worker housing is an integral part of numerous farm operations. Farmers often provide on-farm housing for their farm laborers to, among other things, accommodate the

¹ The Hamlet of Whallonsburg seems to include the old Walker Farm, where the Lewis Family Farm employee housing cluster is located. Id. Housing in Hamlets is non-jurisdictional.

long work day, meet seasonal housing needs and address the shortage of nearby rental housing in rural areas. The use of such homes for farmworker housing is a common practice. On-farm housing provides a practical and cost effective means for farmers to meet their farm labor housing and recruitment needs.

22. Farm labor housing used for the on-farm housing of permanent and seasonal employees is part of a farm operation and is protected by the right to farm law under Section 305-a of the Agriculture and Markets Law.

23. Farm employee housing is a fundamentally sound agriculture practice that is crucial to the operation of the Lewis Family Farm. (Lewis Aff., ¶ 11; Martens Aff., 16).

24. On February 1, 2008, the Commissioner of the New York State Department of Agriculture and Markets made a formal, binding determination of fact and law under Section 305-a of the Agriculture and Markets Law, concluding that the Lewis Family Farm employee houses are agricultural buildings under the New York Right to Farm Law. The Commissioner's February 1, 2008 Determination is attached hereto as **Exhibit "B"**.

25. Thus, the Lewis Family Farm's use of its land for the three home housing cluster on the is agricultural in nature, as a matter of law.

26. Prior to the March 25 Determination, Agency staff proposed a "settlement agreement" demanding that the Lewis Family Farm waive the right to challenge Agency jurisdiction to regulate farming and submit to review by the Agency of all future farm buildings. (Lewis Aff., ¶ 22).

27. The Agency, created in the executive department by the Adirondack Park Agency Act (N.Y. Executive Law §§ 800 to 820), (the "Act"), was given responsibility for the

implementation of a land use and development plan inside the Park. N.Y. Exec. Law § 825.

However, the Agency was not given jurisdiction to regulate farming or farming structures.

28. The Adirondack Park Agency acknowledges in its public literature that it lacks jurisdiction to regulate "agricultural use structures". (See Privitera Aff., ¶ 12, Ex. G).

The Agency's Enforcement Proceeding Against the Lewis Family Farm

29. Notwithstanding the facts and law set forth above, on or about September 5, 2007, Petitioner was served with a Notice of Apparent Violation ("NAV") by Agency staff, alleging that the Lewis Family Farm's employee housing structures were illegal unless it received a permit from Respondent. The formal NAV, in the form of an administrative complaint, sought an order by the Agency (i) determining that the Lewis Family Farm violated N.Y. Executive Law § 809 and 9 NYCRR Part 577 and (ii) directing the Lewis Family Farm to pay a substantial fine.

30. The Agency's enforcement proceeding was commenced nearly one year after construction of the farm worker houses was commenced.

31. Respondent's NAV alleged that the Lewis Family Farm committed the following violations by failing to obtain a permit:

- (i) Subdivision of Resource Management lands into sites pursuant to N.Y. Executive Law §§ 809(2)(a) and 810(1)(e)(3);
- (ii) Subdivision of Resource Management lands in a River Area into sites pursuant to 9 NYCRR § 577.5(c)(1);
- (iii) Construction of single family dwellings on Resource Management lands pursuant to N.Y. Executive Law §§ 809(2)(a) and 810(2)(d)(1); and
- (iv) Construction of single family dwellings on Resource Management lands in a River Area pursuant to 9 NYCRR § 577.5(c)(1).

32. Respondent's NAV stated that if there were facts in dispute, a hearing would be scheduled before an Administrative Law Judge to develop a record for the Agency's Enforcement Committee to consider.

33. On October 4, 2007, the Lewis Family Farm timely answered the NAV, denying that Respondent had jurisdiction over the farm employee housing structures. In addition, the Lewis Family Farm agreed to and specifically requested a hearing before an Administrative Law Judge.

34. Even though Respondent pleaded that a hearing would be held before an Administrative Law Judge and notwithstanding the fact that Petitioner also demanded a hearing, Respondent entered the March 25 Determination without a hearing before an Administrative Law Judge, a violation of law.

35. Petitioner's answer to the NAV contested the Agency's jurisdiction over the farm buildings and specifically contested the Agency's power to impose fines to Petitioner for having constructed them without the alleged required permit.

36. The March 25 Determination makes substantial findings that are unsupported by any evidence in the record. For example, Paragraphs 16 and 46 of the March 25 Determination are entirely not supported by any evidence in the record, and therefore not based on "substantial evidence" in violation of CPLR § 7803(4).

37. The March 25 Determination is inarticulate, confusing and inconsistent. The March 25 Determination is *correct* insofar as it appears to make a general determination that Respondent does not have general jurisdiction over "agricultural use structures". These findings are as follows:

...In fact, most agricultural uses do not require Agency permits. In addition [the Adirondack Park Agency Act, Rivers Act and Freshwater Wetlands Act] provide

special privileges for agricultural uses, including under the Adirondack Park Agency Act an exception to the application of the overall intensity guidelines for all farm structures including farm worker housing (§802[50][g]).

(Exhibit A, Paragraph 40, pg. 10).

38. Pursuant to 9 NYCRR § 577.4(b)(3)(ii), an "agricultural use structure" would not require a Rivers' Permit, except that any such structure must adhere to the structure set back requirements for the recreational river areas (150 feet from the mean high water mark). (Exhibit A, Paragraph 34, pg. 8).

39. However, the March 25 Determination is contradictory arbitrary, capricious, contrary to law and reaches beyond the Respondent's jurisdiction in making the following unlawful determinations:

37. 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 structure), and not "agricultural use structures." The types of structures specifically listed in the 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 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 include 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' dwelling (for a single family) more precisely fit under the definition of "single family dwelling" or "mobile home."

38. Moreover, "single family dwelling" and "agricultural use structure" are treated as separate and distinct uses under the Adirondack Park Agency Act. This is evident upon inspection of §805(3) of the Act, which always lists "agricultural use structure" and "single family dwelling" as separate uses for compatibility and jurisdictional purposes under the Act. Similarly, §802(50)(g) lists these two types of uses separately for eligibility for special consideration under the Act regarding the application of the overall intensity guidelines.¹ "Single family dwelling: is a narrowly and specifically defined term and is a keystone of Agency jurisdiction. The term "agricultural use structure" is a broader term for certain agricultural structures, which for the purposes of jurisdiction does not include "single family

dwelling." If the drafters of the Adirondack Park Agency had intended farm worker dwellings to be included within the definition of "agricultural use structure," it would not have needed to include the phrases "single family dwelling" or "mobile home" separately in either §805(3) or §802(50)(g) in addition to the phrase "agricultural use structure." While the Agency agrees that farm worker housing is important to the enhancement of farm operations, it is not an "agricultural use structure" under the Act, but either a "single family dwelling," "multiple family dwelling," or "mobile home," depending on the type of dwelling.

40. The Agency's March 25 Determination is arbitrary, capricious, an error of law and in exceedance of the Agency's jurisdiction because it finds that the Agency can regulate farm employee housing structures as "single family dwellings" rather than treating them as "agricultural use structures."

The Agency Lacks Jurisdiction Over The Farm Employee Housing Under the Act

41. The Act defines "agricultural use structure" to include "any barn, stable, shed, silo, garage, fruit and vegetable stand or other building *or structure directly and customarily associated with agricultural use.*" N.Y. Exec. Law § 802(8) (emphasis supplied).

42. Since the term "structure" is defined separately in the Act, its definition must necessarily be incorporated into the definition of "agricultural use structure" by reference. See Friedman v. Connecticut Gen. Life Ins. Co., 9 N.Y.3d 105, 115 (2007) ("A court must consider a statute as a whole, reading and construing all parts of an act together to determine legislative intent, and...[give] effect and meaning...to the entire statute and every part and word thereof") (internal citations omitted).

43. The Act defines "structure" to include "...buildings, sheds, single family dwellings, mobile homes, signs, tanks, fences and poles and any fixtures, additions and alterations thereto." N.Y. Exec. Law § 802(62) (emphasis supplied).

44. Therefore, a "single family dwelling" that is directly or customarily associated with agricultural use, such as a farm worker's house, is necessarily an "agricultural use structure" under the Act. See N.Y. Exec. Law § 802(8).

45. The Lewis Family Farm conclusively established by uncontested affidavits that (i) the buildings at issue in this proceeding are farm employee houses; and (ii) on-farm employee housing is a sound agricultural practice directly and customarily associated with agricultural use that provides the foundation for any self-sustaining farm. (See Lewis Aff., ¶¶ 11-12; Martens Aff., ¶ 16; Privitera Aff. ¶¶ 5-6, Ex. C and D).

46. Moreover, the Commissioner of the New York State Department of Agriculture & Markets investigated the Lewis Family Farm employee housing and issued a formal opinion under New York State's Right to Farm Law that the farm employee houses at issue in this proceeding are agricultural use structures as a matter of law.

47. On February 1, 2008, the Commissioner of the New York State Department of Agriculture and Markets issued a written opinion pursuant to Section 308(4) of the Agriculture and Markets Law, whereby he proclaimed that:

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

(See Ex. B, Commissioner Hooker's February 1, 2008 Opinion, pg. 2)

48. After reviewing the facts in this case, the Commissioner issued this formal opinion under the Right to Farm Law, finding that farm worker housing is warranted at the

Lewis Family Farm, and that the use of land for the employee houses in this case is undoubtedly **"agricultural in nature."** (Id. at 3) (emphasis added).

49. Although Commissioner Hooker's formal opinion was in the record, the Agency intentionally ignored it and made no reference to it in its determination.

50. Thus, the Agency improperly determined that the Lewis Family Farm employee houses are not structures that are "directly and customarily associated with agricultural use," which would render them non-jurisdictional "agricultural use structures."

The Agency Also Lacks Jurisdiction Because Petitioner Did Not Subdivide Its Land

51. The Act defines "subdivision of land" as a "division of land into two or more lots, parcels or sites" for "separate ownership or occupancy". N.Y. Exec. Law § 802(63).

52. The Lewis Family Farm constructed housing for its employees without changing the use or description of its land in real property terms.

53. The Lewis Family Farm did not divide its land, create lots, or impose new ownerships or leaseholds. The Lewis Family Farm owns and occupies each building on the farm.

54. Indeed, the farm employee housing cluster cannot be divided since it was specifically designed as a farmer community. The agricultural use structures share a common well, driveway, septic system and leach field located around a common courtyard. (Lewis Aff., ¶ 14).

55. Moreover, the Agency's regulations clarify that the construction of farm employee housing does not automatically create a subdivision because "subdivision into sites" only occurs when an additional principal building is constructed. 9 NYCRR § 570.3(ah)(3).

56. The Agency counts the number of principal buildings for intensity purposes as follows:

[A]ll agricultural use structures and single family dwellings or mobile homes occupied by a farmer of land in agricultural use, his employees engaged in such use and members of their respective immediate families, will together constitute and count as a *single principal building*.

N.Y. Exec. Law § 802(50)(g) (emphasis supplied).

57. Thus, the Agency erroneously determined that the Lewis Family Farm subdivided its land when it did not actually subdivide the land and did not construct any additional principal buildings, as that term is defined and used under the Act.

The Agency Has Failed To Discharge Its Constitutional And Statutory Duties

58. Article 14 of the New York State Constitution, which was adopted as part of the "Conservation Bill of Rights", imposes a mandatory duty upon the Agency to encourage improvement of farms, not penalize farm development. Specifically, Section 4 of Article 14 states as follows:

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

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

59. The Agency does not have an agriculture policy at all.

60. The Agency has violated its constitutional duty in this enforcement case by seeking to penalize the Lewis Family Farm for constructing locally permitted, statutorily-exempt farm buildings.

61. New York State's Constitution is unquestionably the supreme law of the State. See Dalton v. Pataki, 5 N.Y.3d 243, 296 (2005). Thus, the Agency failed to obey the New York

State Constitution by developing a policy of encouraging the development and improvement of agricultural lands. Accordingly, the Agency's determination, which unduly attempts to regulate the Lewis Family Farm without the Agency having a written pro-farm development policy, is unconstitutional and clearly "affected by an error of law".

62. Moreover, Section 305 of the New York State Agriculture and Markets Law requires all New York State agencies (including the Respondent) to create and/or modify policy to support the development of farming within the State:

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

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

63. The Lewis Family Farm is located in such an agricultural district, so it is entitled to the benefit of this statutory protection.

64. The Agency has yet to implement these statutorily-mandated regulation and procedure modifications, which is evident since the Agency has issued a determination attempting to penalize the Lewis Family Farm for constructing locally permitted, statutorily-exempt farm buildings.

65. On March 4, 2008, the Adirondack Park Local Government Review Board, which was created under the Adirondack Park Agency Act to advise and assist the Agency in carrying out its functions, powers and duties (see N.Y. Exec. Law § 803-a), issued a Resolution declaring:

"WHEREAS, the Board finds that the pending enforcement proceeding by the Agency against the Lewis Family Farm, Agency File E2007-041, is in conflict with the terms of the Plan, which provide that agricultural use structures are non-jurisdictional; and

WHEREAS, the Board finds that the Agency has constitutional and statutory duties to develop and implement a farm policy that encourages farming in the Adirondack Park; and

WHEREAS, the Board finds that the Agency has not discharged its constitutional duty or its statutory duty to develop a farm policy."

(Adirondack Park Local Government Review Board's March 4, 2008 Resolution, attached hereto as Exhibit "C".)

66. The Agency failed to consider the March 4, 2008 Resolution in making its March 25 Determination.

67. For these foregoing reasons, the Agency lacks regulatory power over farm employee housing structures under the Rivers Act or the Adirondack Park Agency Act.

AS AND FOR A FIRST CAUSE OF ACTION

68. Petitioner repeats and realleges each and every allegation set forth in Paragraphs 1 through 67 above, with the same force and effect as if set forth in full herein.

69. Respondent's March 25 Determination is affected by an error of law because the Agency has not fulfilled its constitutional duty to encourage the development and improvement of agricultural lands pursuant to Section 4 of Article 14 of the New York State Constitution.

AS AND FOR A SECOND CAUSE OF ACTION

70. Petitioner repeats and realleges each and every allegation set forth in Paragraphs 1 through 69 above, with the same force and effect as if set forth in full herein.

71. Respondent's March 25 Determination is affected by an error of law because the Agency has not fulfilled its statutory duty to modify its administrative procedures and regulations to encourage the maintenance of viable farming in agricultural districts pursuant to Section 305 of the Agriculture and Markets Law.

AS AND FOR A THIRD CAUSE OF ACTION

72. Petitioner repeats and realleges each and every allegation set forth in Paragraphs 1 through 71 above, with the same force and effect as if set forth in full herein.

73. Respondent's March 25 Determination is affected by an error of law because the Agency violated Section 305-a of the Agriculture and Markets Law, and the teachings of Town of Lysander v. Hafner, 96 N.Y.2d 558 (2001), by unreasonably restricting and/or regulating farm operations within agricultural districts.

AS AND FOR A FOURTH CAUSE OF ACTION

74. Petitioner repeats and realleges each and every allegation set forth in Paragraphs 1 through 73 above, with the same force and effect as if set forth in full herein.

75. Respondent's March 25 Determination is affected by an error of law because the Agency was obliged to defer to the policy of the Department of Agriculture and Markets and the February 1, 2008 formal opinion of Commissioner Patrick Hooker, which was issued pursuant to the right to farm law under Section 308 of the Agriculture and Markets Law.

AS AND FOR A FIFTH CAUSE OF ACTION

76. Petitioner repeats and realleges each and every allegation set forth in Paragraphs 1 through 75 above, with the same force and effect as if set forth in full herein.

77. Respondent's March 25 Determination is ultra vires and beyond the Agency's jurisdiction because the Agency has no delegated authority to regulate agriculture under the Adirondack Park Agency Act.

AS AND FOR A SIXTH CAUSE OF ACTION

78. Petitioner repeats and realleges each and every allegation set forth in Paragraphs 1 through 77 above, with the same force and effect as if set forth in full herein.

79. Respondent's March 25 Determination is ultra vires and beyond the Agency's jurisdiction because the Agency has no delegated authority to regulate farm worker housing and other agriculture use structures under the Adirondack Park Agency Act.

AS AND FOR A SEVENTH CAUSE OF ACTION

80. Petitioner repeats and realleges each and every allegation set forth in Paragraphs 1 through 79 above, with the same force and effect as if set forth in full herein.

81. Respondent's March 25 Determination is ultra vires and beyond the Agency's jurisdiction because the Lewis Family Farm did not subdivide its land under the Adirondack Park Agency Act by constructing farm worker housing.

AS AND FOR A EIGHTH CAUSE OF ACTION

82. Petitioner repeats and realleges each and every allegation set forth in Paragraphs 1 through 81 above, with the same force and effect as if set forth in full herein.

83. Respondent's March 25 Determination is ultra vires and beyond the Agency's jurisdiction because the Agency has no delegated authority to regulate agriculture under the Wild, Scenic and Recreational River System Act.

AS AND FOR A NINTH CAUSE OF ACTION

84. Petitioner repeats and realleges each and every allegation set forth in Paragraphs 1 through 83 above, with the same force and effect as if set forth in full herein.

85. Respondent's March 25 Determination is ultra vires and beyond the Agency's jurisdiction because the Agency has no delegated authority to regulate farm worker housing and

other agriculture use structures on Resource Management lands that are more than 150 feet from the mean high water mark of a recreational river under the Wild, Scenic and Recreational River System Act.

AS AND FOR A TENTH CAUSE OF ACTION

86. Petitioner repeats and realleges each and every allegation set forth in Paragraphs 1 through 85 above, with the same force and effect as if set forth in full herein.

87. Respondent's March 25 Determination is ultra vires and beyond the Agency's jurisdiction because the Lewis Family Farm did not subdivide its land under the Wild, Scenic and Recreational River System Act by constructing farm worker housing.

AS AND FOR A ELEVENTH CAUSE OF ACTION

88. Petitioner repeats and realleges each and every allegation set forth in Paragraphs 1 through 87 above, with the same force and effect as if set forth in full herein.

89. Respondent's March 25 Determination is affected by an error of law because it failed to consider the March 4, 2008 Resolution of the Adirondack Park Local Government Review Board.

AS AND FOR A TWELFTH CAUSE OF ACTION

90. Petitioner repeats and realleges each and every allegation set forth in Paragraphs 1 through 89 above, with the same force and effect as if set forth in full herein.

91. The March 25 Determination found that the Lewis Family Farm had "actual notice" that a permit was required for farm worker housing. March 25 Determination Finding ¶ 16. There is no substantial evidence in support of this finding. Respondent's March 25 Determination found that all three farm employee houses in the horseshoe cluster on the Lewis

Farm violate the law. Determination ¶ 46. There is no substantial evidence in support of this finding.

92. Respondent's March 25 Determination was entered in violation of lawful procedure by failing to be supported by substantial evidence.

AS AND FOR A THIRTEENTH CAUSE OF ACTION

93. Petitioner repeats and realleges each and every allegation set forth in Paragraphs 1 through 92 above, with the same force and effect as if set forth in full herein.

94. Respondent's March 25 Determination was entered in violation of due process because the Agency failed to hold a hearing before an Administrative Law Judge in violation of the State Administrative Procedure Act.

AS AND FOR A FOURTEENTH CAUSE OF ACTION

95. Petitioner repeats and realleges each and every allegation set forth in Paragraphs 1 through 94 above, with the same force and effect as if set forth in full herein.

96. Respondent's March 25 Determination was ultra vires and beyond the Agency's jurisdiction because the Agency lacks the authority to order that dwellings remain unoccupied.

AS AND FOR A FIFTEENTH CAUSE OF ACTION

97. Petitioner repeats and realleges each and every allegation set forth in Paragraphs 1 through 95 above, with the same force and effect as if set forth in full herein.

98. Respondent's March 25 Determination violated due process and the Lewis Family Farm suffered actual prejudice because of the Agency's delay in commencing its enforcement proceeding.

AS AND FOR A SIXTEENTH CAUSE OF ACTION

99. Petitioner repeats and realleges each and every allegation set forth in Paragraphs 1 through 98 above, with the same force and effect as if set forth in full herein.

100. Respondent's March 25 Determination violated due process because it ordered the payment of a fine before a final judicial determination could be had.

WHEREFORE, Petitioner Lewis Family Farm, Inc. respectfully prays that an Order of this Court be entered vacating and annulling the March 25, 2008 Decision of Respondent Adirondack Park Agency because:

- a. the March 25 Determination was "affected by an error of law" in violation of CPLR § 7803(3) by the Agency's failure to fulfill its constitutional duty pursuant to Section 4 of Article 14 of the New York State Constitution;
- b. the March 25 Determination was "affected by an error of law" in violation of CPLR § 7803(3) by the Agency's failure to fulfill its statutory duty pursuant to Section 305 of the Agriculture and Markets Law;
- c. the March 25 Determination was "affected by an error of law" in violation of CPLR § 7803(3) because the Agency unreasonably restricted and/or regulated farm operations in violation of Section 305-a of the Agriculture and Markets Law;
- d. the March 25 Determination was "affected by an error of law" in violation of CPLR § 7803(3) because the Agency failed to defer to the policy of the Department of Agriculture and Markets and the Commissioner's February 1, 2008 formal opinion issued under the right to farm law of Section 308 of the Agriculture and Markets Law;
- e. the Agency "is proceeding or is about to proceed without or in excess of its jurisdiction" in asserting regulatory power over agriculture in violation of CPLR § 7803(2);
- f. the Agency "is proceeding or is about to proceed without or in excess of its jurisdiction" in asserting regulatory power over farm worker housing in violation of CPLR § 7803(2);

- g. the Agency "is proceeding or is about to proceed without or in excess of its jurisdiction" in violation of CPLR § 7803(2) because the Lewis Family Farm did not subdivide its land by constructing farm worker housing;
- h. the March 25 Determination was "affected by an error of law" in violation of CPLR § 7803(3) because the Agency's failed to consider the March 4, 2008 Resolution of the Adirondack Park Local Government Review Board;
- i. the March 25 Determination was not "supported by substantial evidence" in violation of CPLR § 7803(4);
- j. the March 25 Determination violates due process because the Agency failed to hold a hearing in violation of the State Administrative Procedure Act;
- k. the Agency "is proceeding or is about to proceed without or in excess of its jurisdiction" in violation of CPLR § 7803(2) by ordering that the Lewis Family Farm's farm worker houses stand unoccupied;
- l. the March 25 Determination is an "abuse of discretion" by prescribing a penalty against Petitioner; and
- m. the March 25 Determination violated due process because of the Agency's delay in commencing its enforcement proceeding.

And for costs of this special proceeding and for further relief as the Court may deem just and appropriate.

Dated: April 14, 2008
Albany, New York

Respectfully submitted,

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

By: 

John J. Privitera, Esq.

Jacob P. Lamme, Esq.

Attorneys for Petitioner

677 Broadway

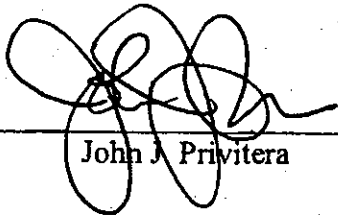
Albany, New York 12207-2503

Telephone: (518) 447-3200

VERIFICATION

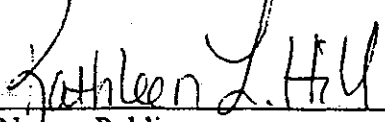
STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

JOHN J. PRIVITERA, being duly sworn, states that he is the attorney for petitioner, LEWIS FAMILY FARM, INC., in this action; that he believes the matters set forth herein to be true; and that the reason why this verification is not made by petitioner is that petitioner does not have an office in the County of Albany wherein your deponent maintains his office.



John J. Privitera

Sworn to before me this
14th day of April, 2008



Notary Public

KATHLEEN L. HILL
Notary Public, State of New York
No. 01H6029213

Qualified in Alb. Co.
Commission Expires Aug. 9, 2009

STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

LEWIS FAMILY FARM, INC.,

Petitioner,

v.

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Respondent.

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

NOTICE OF MOTION
TO DISMISS

INDEX No. 315-08

RJI No. 15-1-2008-0109

Hon. Richard B. Meyer

INDEX No. 332-08

RJI No. 15-1-2008-0117

PLEASE TAKE NOTICE that, upon the affirmation of Loretta Simon, Assistant Attorney General for the State of New York, dated June 13, 2008, with exhibits thereto; the affidavit of Paul Van Cott, dated June 13, 2008, with exhibits thereto; and the affidavit of John F. Rusnica dated June 13, 2008, the Adirondack Park Agency ("APA") will move this Court, at a Special Term thereof to be held on the 19th day of June, 2008, at 1:30 pm, at the Essex County Courthouse, Elizabethtown, New York, or as soon thereafter as counsel may be heard, for an order:

- (1) dismissing the 3rd, 5th, 6th, 7th, 8th, 9th, and 10th

claims in the amended petition pursuant to CPLR 3211 (a)(5), because petitioner is barred by the doctrine of collateral estoppel from relitigating issues and claims previously decided; and

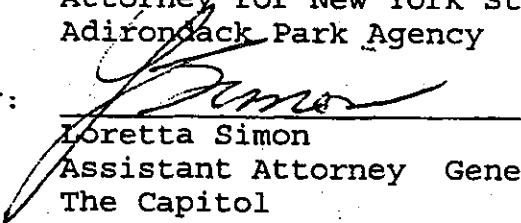
(2) dismissing the 4th and 11th claims in the amended petition pursuant to CPLR § 3211 (a)(7) for failure to state a cause of action; and

(3) such other and further relief as the Court deems just and appropriate.

In the event the State APA's motion to dismiss is denied in whole or in part, the State respectfully requests 30 days after service of notice of entry of the order denying this motion, in which to serve an answer to the petition.

Dated: Albany, New York
June 13, 2008

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for New York State
Adirondack Park Agency

By: 

Loretta Simon
Assistant Attorney General
The Capitol
Albany, New York 12224
(518) 402-2724

TO: John J. Privitera, Esq.
McNamee, Lochner, Titus
& Williams, P.C.
677 Broadway
Albany, New York 12207-2503

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

v.

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Respondent.

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

ANSWER IN PART, RECORD AND
OBJECTIONS IN POINT OF LAW
INDEX No. 315-08
RJI No. 15-1-2008-0109
Hon. Richard B. Meyer

INDEX No. 332-08
RJI No. 15-1-2008-0117

State respondent, the Adirondack Park Agency (the Agency" or "APA") by its attorney Andrew M. Cuomo, Attorney General of the State of New York, objects to the amended petition dated April 14, 2008 herein on the following points of law:

A. Petitioner Lewis Family Farm's, Inc. (Lewis Farm) allegations and causes of action challenging the jurisdiction of the APA over Lewis Farm's construction of three single-family dwellings and seeking to annul the APA's March 25, 2008 determination must be dismissed in part because:

i. Having lost its challenge to APA's jurisdiction in its prior declaratory judgment action (Lewis Family Farm Inc., v. APA Essex County Supreme Court, Index No. 498-07, "Lewis Farm I"), Lewis Farm is collaterally estopped from re-litigating all claims and issues previously decided in Lewis Farm I, in this new CPLR Article 78 proceeding; and

ii. Petitioner fails to state a cause of action against the APA in its fourth cause of action pursuant to Agriculture and Markets Law § 308; and

iii. Petitioner fails to state a cause of action in its eleventh cause of action because pursuant to the APA Act § 803-a, the Adirondack Park Local Government Review Board's resolution is advisory, not binding on the APA, and was considered in by the Agency and is part of the Record of its determination and;

Without waiving the foregoing objections in point of law and motion to dismiss, the State APA, as and for its answer in part, to the amended petition dated April 14, 2008:

1. Admits the allegation in ¶ 1 that the APA issued a March 25, 2008 determination but asserts that the amended petition was served without any exhibits and the Agency affirmatively asserts that the March 25, 2008 determination of the APA in the matter of the apparent violation of the Executive Law Section 809 and 9 NYCRR 577 by Lewis Family Farm Inc., issued by the Agency pursuant to 9 NYCRR 581-2.6, speaks for

itself and refers to the document for its complete text, context, meaning and legal effect.

2. Denies the allegations in ¶ 2 that the Agency lacks jurisdiction over the Lewis Farm housing project, and asserts that Lewis Farm is collaterally estopped from challenging APA jurisdiction having lost its challenge to the APA's jurisdiction in its prior declaratory judgment action; Lewis Farm I. The Agency further denies that the March 25, 2008 determination is confusing, inconsistent and not supported by law and refers to the document for its complete text, context, meaning and legal effect.

- a. Denies the allegation in ¶ 2a of the amended petition that single-family dwellings are agricultural use structures pursuant to the APA Act, and asserts that the Agency has jurisdiction over the three single-family dwellings at issue herein pursuant to the Adirondack Park Agency Act, Executive Law § 801, et. seq. ("the APA Act") and the Wild, Scenic, and Recreational River System Act ("Rivers Act"), Environmental Conservation Law ("ECL") § 15-2701 et. seq and asserts that Lewis Farm is collaterally estopped from raising this claim pursuant to Lewis Farm I.
- b. Denies the allegation in paragraph 2b of the

- amended petition and affirmatively asserts that the Agency has jurisdiction over the dwellings.
- c. Denies the allegation in paragraph 2c of the amended petition and affirmatively asserts that the Agency proceeding followed lawful procedure that did not require an adjudicatory hearing and that resulted in a lawful determination pursuant to 9 NYCRR § 581-2.6(d).
 - d. Denies the allegation in ¶ 2d of the amended petition and affirmatively asserts that the Agency determination was not made as a result of an adjudicatory hearing and therefore CPLR § 7803 (4) is not applicable.
 - e. Denies the allegation in paragraph 2e of the amended petition and affirmatively asserts that the APA has specific statutory authority to assess civil penalties of up to \$500.00 per day for each day a violation of the APA Act continues, pursuant to Executive Law § 813, and up to \$1,000 per day pursuant to ECL § 15-2723 for violations of the Rivers Act.

3. Lacks knowledge or information sufficient to form a belief regarding the allegations in ¶ 3, except that, admits that the farm is known as Lewis Family Farm.

4. Lacks knowledge or information sufficient to form a belief regarding the allegations in ¶ 4 of the amended petition, except admits the allegation in ¶ 4 that Lewis Farm is approximately 1,100 acres.

5. Lacks knowledge or information sufficient to form a belief regarding the allegations in ¶ 5.

6. Admits the allegation in the amended petition ¶ 6 that the Lewis Farm is located in Essex County in an agricultural district.

7. Lacks knowledge or information sufficient to form a belief regarding the allegations in ¶ 7.

8. Lacks knowledge or information sufficient to form a belief regarding the allegation in ¶ 8, but admits that Lewis Farm does not have any Agency permits.

9. Lacks knowledge or information sufficient to form a belief regarding the allegations in ¶ 9.

10. Lacks knowledge or information sufficient to form a belief regarding the allegation in ¶ 10.

11. Lacks knowledge or information sufficient to form a belief regarding the allegation in ¶ 11.

12. Lacks knowledge or information sufficient to form a belief regarding the allegations in ¶ 12.

13. Lacks knowledge or information sufficient to form a belief regarding the allegations in ¶ 13, but affirmatively

asserts that the Agency learned in March of 2007 that construction of the three single-family dwellings at issue herein had commenced, but admits that the three single-family dwellings at issue are built in a cluster.

14. Admits the allegations in ¶ 14 insofar as the Lewis Farm obtained permits from the Town of Essex for its single-family dwellings but affirmatively asserts that the housing project failed to comply with Agency requirements and further asserts that the Agency lacks knowledge or information sufficient to form a belief regarding the allegation that the project complies with other state or local requirements as alleged in ¶14.

15. Admits the allegations in ¶ 15 to the extent that the housing "cluster" is not located within 150 feet of the Bouquet River, but affirmatively asserts that it is located within the designated Bouquet River Recreational River Area.

16. Lacks knowledge or information sufficient to form a belief regarding the allegation in ¶ 16.

17. Denies the allegations in ¶ 17, and affirmatively asserts that Lewis Farm's housing project constitutes a subdivision into sites as defined at 9 NYCRR 570.3(a)(3).

18. Lacks knowledge or information sufficient to form a belief regarding the allegation in ¶ 18.

19. Admits the allegations in ¶ 19 that the housing project

is in the vicinity of an area know as Whallonsburg, but denies that it is an area designated "Hamlet" pursuant to the Adirondack Park Land Use and Development Plan Map ("Official Map") and Executive law § 805. The Agency affirmatively asserts that the three single-family dwellings that are the subject of this proceeding are located in a land use area designated "Resource Management" pursuant to the Official Map and Executive Law § 805.

20. Lacks knowledge or information sufficient to form a belief regarding the allegations in ¶ 20.

21. Lacks knowledge or information sufficient to form a belief regarding the allegations in ¶ 21.

22. Lacks knowledge or information sufficient to form a belief regarding the allegations in ¶ 22, except affirmatively asserts that Section 305-a of the Agricultural and Markets Law is not applicable to the APA and does not restrict the jurisdiction of the APA.

23. Lacks knowledge or information sufficient to form a belief regarding the allegation in paragraph 23.

24. Admits the Commissioner of the State Department of Agriculture and Markets issued an opinion dated February 1, 2008 pursuant to Agricultural and Markets Law, but denies that the opinion is binding on the APA since the APA is a state agency and refers to the document which speaks for itself.

25. Lacks knowledge or information sufficient to form a

belief regarding the allegation in ¶ 25, and affirmatively asserts that the Agency has jurisdiction over the three single-family dwellings.

26. Admits the allegation in ¶ 26 in so far as the Agency staff made an offer of settlement to Lewis Farm in 2007, but denies the Agency made demands and refers to the offer of settlement which speaks for itself.

27. Admits the allegation in ¶ 27 that the Adirondack Park Agency Act is found at Executive Law § 801-820, but denies that the Act is found in Executive Law § 825. The Agency affirmatively asserts that it administers the Adirondack Park Land Use and Development Plan set forth in the Sections 805, 806, 809 and 810 of the APA Act. The Agency further asserts that the APA Act and the regulations at 9 NYCRR ¶ 570-588, provide specific exemptions for farms and certain structures on farms, but that single-family dwellings in Resource Management areas and in designated river areas are subject to APA jurisdiction.

28. Denies the allegation in ¶ 28 that APA public literature acknowledges that the Agency lacks any jurisdiction to regulate "agricultural use structures" and lacks knowledge sufficient to form an opinion based on Privitera Affidavit, Exhibit G. (Privitera Aff., Exhibit G, omits the reference to "agricultural use structures", and it fails to include the Agency's jurisdiction over such structures if they are located

within shoreline setbacks (806 or Rivers Act) or in wetlands).

29. Admits the allegation in ¶ 29 that a Notice of Apparent Violation was served in September 2007 and affirmatively asserts that the document speaks for itself. The Agency denies that the Notice of Apparent Violation was in the form of an administrative complaint and denies that it sought an order or a "substantial fine". The APA affirmatively asserts that staff sought a determination by the Agency's Enforcement Committee pursuant to 9 NYCRR ¶ 581-2.6(d) and refers to the Notice of Apparent Violation for its full text, context and legal meaning.

30. Denies the allegations in ¶ 30 and affirmatively asserts that the Agency's enforcement process commenced in March 2007, when staff first became aware of the violations and continued diligently through March of 2008 when the Agency issued its determination.

31. With regard to the allegations in ¶ 31 regarding the Notice of Apparent Violation, the Agency:

- (i) Refers to full text and meaning of Notice of Apparent Violation.
- (ii) Refers to full text and meaning of Notice of Apparent Violation.
- (iii) Refers to full text and meaning of Notice of Apparent Violation.
- (iv) Refers to full text and meaning of Notice of

Apparent Violation.

32. Denies the allegations in ¶ 32 that the Notice of Apparent Violation says a hearing would be held before an Administrative Law Judge ("ALJ"), and affirmatively states that the Notice of Apparent Violation states that if there are facts in dispute, a hearing will be held, and refers to the document for its full text, context and legal meaning.

33. Refers to the to full text and meaning of Lewis Farm's Answer dated October 4, 2007 and received by the Agency on October 9, 2007 which speaks for itself, regarding the allegations in ¶ 33.

34. Denies the allegations in ¶ 34 that the APA pleaded that a hearing would be held before an ALJ and refers to the to full text and meaning of Notice of Apparent Violation and 9 NYCRR § 581-2. The Agency further denies that the March 25, 2008 determination was a violation of law and affirmatively asserts that a determination was issued lawfully pursuant to 9 NYCRR § 581-2.6(d), as there was no factual dispute that the three single-family dwellings were constructed. The Agency further asserts that Lewis Farm was not entitled to an evidentiary adjudicatory hearing before an ALJ pursuant to 9 NYCRR § 581-4.1, which sets forth circumstances that trigger the requirement for an adjudicatory hearing which are: to enforce the Freshwater Wetlands Act; and for proceedings to modify, suspend or revoke an

Agency permit, and refers to the full text and legal meaning of 9 NYCRR § 581-4.1.

35. Admits the allegation in ¶ 35 that Lewis Farm's October 4, 2007 Answer to the Notice of Apparent Violation challenged Agency jurisdiction over construction of the three single-family dwellings, except refers to the to full text and meaning of the document. Denies the allegation that the document makes reference to contesting the Agency's power to impose fines, but affirmatively asserts that the APA has statutory authority to impose civil penalties pursuant to the APA Act and the Rivers Act and refers to the full text and legal meaning of the document and Executive Law § 813 and ECL § 15-2723.

36. Denies the allegations in ¶ 36, refers to the full text and legal meaning of the March 25, 2008 Agency determination, and affirmatively asserts that CPLR § 7803 (4) does not apply to this proceeding and that the standard of review for the March 25 determination is set forth at CPLR § 7803 (3) and refers to the full text and legal meaning of those statutes.

37. Denies the allegations in ¶ 37 and refers to the full text and legal meaning of the March 25, 2008 Agency determination and Executive Law § 802.

38. Admits the allegations in ¶ 38 that an Agency permit would not be required for an "agricultural use structure" pursuant to 9 NYCRR § 577.4(b)(3)(ii) pursuant to the Rivers Act,

except affirmatively asserts that an Agency permit would also be required if the structure impacts wetlands. The Agency further affirmatively asserts that a single-family dwelling is not an "agricultural use structure" pursuant to the APA Act, the Rivers Act or corresponding regulations, and that a single-family dwelling within 1/4 mile of the Boquet River requires a permit and refers to the text and legal meaning of the Rivers Act, and regulations at 9 NYCRR § 577 and appendix Q-6 thereto.

39. Denies the allegations in ¶ 39 and refers to the text and legal meaning determination speaks for itself.

37. Refers to the text and legal meaning of the March 25, 2008 determination which speaks for itself.

38. Refers to the text and legal meaning of the March 25, 2008 determination which speaks for itself.

40. Denies the allegations in ¶ 40 and affirmatively asserts that single-family dwellings are not "agricultural use structures" pursuant to the APA Act and refers to the text and legal meaning of Executive Law § 802 (8) and (58).

41. With respect to the allegations in ¶ 41, refers to the APA Act for its full text, context and legal meaning.

42. Denies the allegation in ¶ 42 and refers to the APA Act for the full text, context and legal meaning.

43. With respect to the allegations in ¶ 43, refers to the APA Act for the full text, context and legal meaning.

44. Denies the allegations in ¶ 44, and asserts that the term "single-family dwelling" is separately defined in Executive Law § 802(58) and single-family dwellings are regulated separately under the APA and River Acts and refers to both Acts for their full text, context and legal meaning.

45. Lacks knowledge or information sufficient to form a belief regarding the allegations in ¶ 45.

46. Lacks knowledge or information sufficient to form a belief regarding the allegations in ¶ 46 as to an investigation of the State Department of Agriculture and Markets, except to assert that the Commissioner of Agriculture and Markets issued a letter dated February 1, 2008, interpreting Agriculture and Markets Law, and the APA refers to the full text, context and legal meaning of said document and law.

47. Refers to the full text, context and legal meaning of the letter of the Commissioner of Agriculture and Markets dated February 1, 2008, interpreting Agriculture and Markets Law.

48. Refers to the full text, context and legal meaning of the Commissioner of Agriculture and Markets letter dated February 1, 2008, interpreting Agriculture and Markets Law and affirmatively asserts that the document refers to the Agriculture and Markets statute and not the APA Act.

49. Denies the allegations in ¶ 49 and affirmatively asserts that the February 1, 2008 letter of the Commissioner of Agriculture and Markets is part of the record that was considered by the APA Enforcement Committee in its March 25, 2008 determination.

50. Denies the allegations in ¶ 50, and affirmatively asserts that the APA has jurisdiction over the three single-family dwellings pursuant to the APA Act and the Rivers Act.

51. Refers to the full text, context and legal meaning of Executive Law § 802 (63) which speaks for itself, and refers to the definition of "subdivision into sites" set forth at 9 NYCRR § 570.3(ah).

52. Lacks knowledge or information sufficient to form a belief regarding the allegations in ¶ 52.

53. Lacks knowledge or information sufficient to form a belief regarding the allegations in ¶ 53 but refers to the statutory definition of subdivisions in the APA Act, and the regulatory definition set forth at 9 NYCRR § 570.3(ah)(3) which includes any form of separate occupancy; and refers to the full text, context and legal meaning of Executive Law § 802 (63) and 9 NYCRR § 570.3(ah)(3).

54. Lacks knowledge or information sufficient to form a belief regarding the allegations in ¶ 54, except asserts that the single-family dwellings are not agricultural use structures

pursuant to the APA Act, and refers to the full text, context and legal meaning of Executive Law § 802 (8) and (58), and to the regulatory definition of "subdivision into sites" set forth at 9 NYCRR § 570.3(ah) (3).

55. Denies the allegations in ¶ 55, and refers to 9 NYCRR § 570.3(ah) (3) which speaks for itself as to the true and full meaning and effect of the regulatory definition of "subdivision into sites" and further asserts that petitioner references only a selective portion of the regulation, and said section should be read within the full text, context and meaning of the regulation.

56. Denies the allegation in ¶ 56 that the cited, selective portion of the statutory definition of "principal building" is how the Agency counts the number of principal buildings for intensity purposes, and asserts that the full definition of the term speaks for itself as to its meaning and effect and refers to the full text of Executive Law § 802(50), including subsections (a) through (i).

57. Denies the allegations in ¶ 57 and refers to the full text, context and legal meaning of Executive Law § 802 (50), (58), and (63), and asserts that pursuant to Executive Law § 809(2) (a) and § 810(1) (e) (3) and pursuant to 9 NYCRR § 577.5(c) (1), Lewis Farm is required to obtain a permit for any subdivision of land into sites on Resource Management lands in a Recreational River Area.

58. Denies the allegations in ¶ 58, and affirmatively refers to Article 14 of the New York State Constitution for its full text, context and legal meaning.

59. Denies the allegations in paragraph 59 and affirmatively asserts that the APA Act and regulations set the policy for supporting and encouraging development and improvement of agricultural lands, and contain specific agricultural exemptions; and further asserts that the Agency's goals of protecting natural resources and open space are compatible with the goal of improvement of agricultural lands in the Adirondack Park. The Agency further asserts that it has consistently worked with the New York State Department of Agriculture and Markets to address farming issues in the Adirondack Park.

60. Denies the allegations in ¶ 60 and affirmatively asserts that the single-family dwellings constructed in the Adirondack Park, on the property of Lewis Farm, are within a Resource Management area pursuant to the APA Act, and within 1/4 mile of the Bouquet River, which is designated by the State of New York as a protected river pursuant to the Rivers Act, are not exempt from permit requirements pursuant to these Acts.

61. Admits the allegation that the New York State Constitution is the supreme law of the State, but denies the remaining allegations in ¶ 61, and refers to the full text, context and legal meaning of the New York State Constitution

which speaks for itself.

62. Refers to the full text, context and legal meaning of Agricultural and Markets Law § 305(3) which speaks for itself.

63. Lacks knowledge or information sufficient to form a belief regarding the allegations in ¶ 63, and affirmatively asserts that the location of the three single-family dwellings in such an agricultural district does not affect the APA's statutory jurisdiction over these dwellings, or of Lewis Farm's subdivision into sites.

64. Denies the allegations in ¶ 64, and affirmatively asserts that the APA Act and regulations set policy for supporting and encouraging development and improvement of agricultural lands, and contain specific agricultural exemptions and further asserts that the agency staff implement this policy through actions including, but not limited to, consultation with the Department of Agriculture and Markets on other farming issues in the Adirondack Park.

65. With regard to the allegations in ¶ 65, refers to the full text, context and legal meaning of Executive Law § 803-a regarding the Adirondack Park Local Government Review Board, and refers to the document of the Local Government Review Board titled "Resolution" dated March 4, 2007, which is included in the Record of the Agency Determination and refers to the full text, context and meaning of the document which speaks for itself.

66. Denies the allegations in ¶ 66, and affirmatively asserts that the Local Government Review Board "Resolution" dated March 4, 2007, is one of the documents considered by the Agency in its determination in this matter, and it is part of the Agency Record.

67. Denies the allegations in ¶ 67.

AS AND FOR A FIRST CAUSE OF ACTION

68. Repleads the responses set forth in ¶¶ 1-67.

69. Denies the allegations in ¶ 69 and affirmatively asserts that the New York State Legislature enacted the APA Act and created the APA with the mandate to preserve and protect the natural resources and scenic beauty of the Adirondack Park consistent with the NYS Constitution Article XIV § 4, and further asserts that the APA Act and corresponding regulations extend specific exemptions to farms and support and encourage farming in the Adirondack Park.

AS AND FOR A SECOND CAUSE OF ACTION

70. Repleads the responses set forth in ¶¶ 1-70.

71. Denies the allegations in ¶ 71 and affirmatively asserts that consistent with Agricultural and Markets Law § 305 (3), the APA Act and the Agency's regulations promote and encourage agricultural activity in the Adirondack Park, and provide exemptions for most agricultural activities.

AS AND FOR A THIRD CAUSE OF ACTION

72. Repleads the responses set forth in ¶¶ 1-72.

73. Denies the allegations in ¶ 73, and affirmatively asserts that Agricultural and Markets Law § 305-a, and Town of Lysander v. Hafner, 96 N.Y.2d 558 (2001), restrict local governments from unreasonably regulating farm operations and do not apply to state agencies. The Agency affirmatively asserts that Lewis Farm is barred by the doctrine of res judicata and collateral estoppel from raising this claim which was previously adjudicated and decided against them, in Essex County Supreme Court in 2007 (Lewis Family Farm, Inc., v. APA, Essex Co. Sup. Ct., Index No. 498-07, RJI No. 15-1-2007-0153, assigned to Hon. Kevin K. Ryan [hereafter "Lewis Farm I"]).

AS AND FOR A FOURTH CAUSE OF ACTION

74. Repleads the responses set forth in ¶¶ 1-74.

75. Denies the allegations in ¶ 75 and affirmatively asserts that petitioner fails to state a cause of action against the APA pursuant to Agricultural and Markets Law § 308, and refers to the full text, context and legal meaning of the statute.

AS AND FOR A FIFTH CAUSE OF ACTION

76. Repleads the responses set forth in ¶¶ 1-76.

77. Denies the allegations in ¶ 77, and affirmatively asserts that the APA has jurisdiction to require permits for the

three single-family dwellings located in a Resource Management area pursuant to the APA Act, and within 1/4 mile of a river pursuant to the Rivers Act, and that Lewis Farm is barred by the doctrines of res judicata and collateral estoppel from raising this claim which was previously adjudicated and decided against them in Essex County Supreme Court in 2007 (Lewis Farm I).

AS AND FOR A SIXTH CAUSE OF ACTION

78. Repleads the responses set forth in ¶¶ 1-78.

79. Denies the allegations in ¶ 79, refers to the full text, context and legal meaning of Executive Law § 802 (8) for the definition of "agricultural use structure" pursuant to the APA Act, and affirmatively asserts that the APA has jurisdiction to regulate the three single-family dwellings as that term is defined in Executive law § 802(58), and pursuant to the Rivers Act, and that Lewis Farm is barred by the doctrines of res judicata and collateral estoppel from raising this claim which was previously adjudicated and decided against them in Essex County Supreme Court in 2007 (Lewis Farm I).

AS AND FOR THE SEVENTH CAUSE OF ACTION

80. Repleads the responses set forth in ¶¶ 1-80.

81. Denies the allegations in ¶ 81 and affirmatively asserts that the APA has jurisdiction to regulate subdivision of land into sites pursuant to the APA Act, and further asserts that Lewis Farm is barred by the doctrines of res judicata and

collateral estoppel from raising this claim which was previously adjudicated and decided against them in Essex County Supreme Court in 2007 (Lewis Farm I).

AS AND FOR A EIGHTH CAUSE OF ACTION

82. Repleads the responses set forth in ¶¶ 1-82.

83. Denies the allegations in ¶ 83, and affirmatively asserts that the APA has jurisdiction to regulate the three single-family dwellings pursuant to the Rivers Act, and that Lewis Farm is barred by the doctrines of res judicata and collateral estoppel from raising this claim which was previously adjudicated and decided against them in Essex County Supreme Court in 2007 (Lewis Farm I).

AS AND FOR A NINTH CAUSE OF ACTION

84. Repleads the responses set forth in ¶¶ 1-84.

85. Denies the allegations in ¶ 85, and affirmatively asserts that the APA has jurisdiction to require permits for the three single-family dwellings located in a Resource Management area pursuant to the APA Act, and within 1/4 mile of the Boquet river pursuant to the Rivers Act, and that Lewis Farm is barred by the doctrines of res judicata and collateral estoppel from raising this claim which was previously adjudicated and decided against them, in Essex County Supreme Court in 2007 (Lewis Farm I).

AS AND FOR A TENTH CAUSE OF ACTION

86. Repleads the responses set forth in ¶¶ 1-86.

87. Denies the allegations in ¶ 87, and affirmatively asserts that the APA has jurisdiction to regulate the subdivision of land into sites pursuant to the Rivers Act, and further asserts that Lewis Farm is barred by the doctrines of res judicata and collateral estoppel from raising this claim which was previously adjudicated and decided against them in Essex County Supreme Court in 2007 (Lewis Farm I).

AS AND FOR AN ELEVENTH CAUSE OF ACTION

88. Repleads the responses set forth in ¶¶ 1-88.

89. Denies the allegations in ¶ 89 and affirmatively asserts that Lewis Farm fails to state a cause of action against the APA pursuant to a resolution of the Adirondack Park Local Government Review Board, which resolution is not binding on the APA, and affirmatively refers to Executive Law § 803-a for its full text, meaning and context. The APA further asserts that the resolution is part of the Record considered by the Agency in its determination.

AS AND FOR A TWELFTH CAUSE OF ACTION

90. Repleads the responses set forth in ¶¶ 1-90.

91. Denies the allegations in ¶ 91.

92. Denies the allegations in ¶ 92.

AS AND FOR A THIRTEENTH CAUSE OF ACTION

93. Repleads the responses set forth in ¶¶ 1-93.

94. Denies the allegations in ¶ 94 insofar as the Agency determination was entered in violation of due process, or in violation of the State Administrative Procedure Act and affirmatively asserts that the Agency conducted a lawful enforcement proceeding pursuant to 9 NYCRR § 581-2, and Lewis Farm was afforded notice and an opportunity to be heard.

AS AND FOR A FOURTEENTH CAUSE OF ACTION

95. Repleads the responses set forth in ¶¶ 1-95.

96. Denies the allegations in ¶ 96 and affirmatively asserts that the APA has jurisdiction to regulate the three single-family dwellings pursuant to the APA Act and the Rivers Act.

AS AND FOR A FIFTEENTH CAUSE OF ACTION

97. Repleads the responses set forth in ¶¶ 1-97.

98. Denies the allegations in ¶ 98 and affirmatively asserts that the Agency commenced its enforcement actions in March of 2007 when it learned that Lewis Farm had commenced construction of the dwellings, and further asserts that it diligently prosecuted such enforcement action until the Agency issued its determination in March, 2008.

AS AND FOR A SIXTEENTH CAUSE OF ACTION

99. Repleads the responses set forth in ¶¶ 1-99.

100. Denies the allegations in ¶ 100, and affirmatively asserts that the APA has specific statutory authority to determine civil penalties pursuant to the APA Act, Executive Law § 813; and the Rivers Act, ECL § 15-2723, and further asserts that Lewis Farm had notice of the Agency proceeding and an opportunity to be heard at the proceeding where it was represented by counsel.

RETURN & RECORD

The Agency certifies that the Return Items 1 through 17 constitute the minutes, transcript and the Record of the proceeding of the Agency under review in this matter.

WHEREFORE, the Agency respectfully requests an Order and Judgment:

- I. Dismissing claim 3, 5, 6, 7, 8, 9, and 10 pursuant to CPLR 3211 §(a)(5) for res judicata and collateral estoppel; and dismissing claims 4 and 11 pursuant to CPLR 3211 § (a)(7) for failure to state a cause of action; and denying the petition; and
- II. In the event the APA's Motion to Dismiss is denied in whole or in part, the State respectfully requests 30 days after service of notice of entry of the order denying the motion, in which to serve a full answer to

the amended petition.

III. Such other and further relief that this Court may find to be just and equitable, together with costs and disbursements.

Dated: Albany, New York
June 13, 2008

ANDREW M. CUOMO
Attorney General of the State
of New York
Attorney for Adirondack Park Agency

By:


LORETTA SIMON
Assistant Attorney General
The Capitol
Albany, New York 12224
(518) 402-2724

To: John J. Privitera, Esq.
McNamee, Lochner, Titus & Williams, P.C.
677 Broadway
Albany, New York 12207-2503

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF ESSEX)

PAUL VAN COTT, being duly sworn, deposes and says:

I am a Senior Attorney for the Adirondack Park Agency (the "Agency"). I have read the foregoing objections in point of law and answer, and know the contents thereof, and the same is true to my own knowledge except as to matters therein stated to be alleged upon information and belief, and as to those matters, I believe them to be true. The source of my knowledge, information and belief are the Agency's files, and discussions with Agency personnel. I make this verification pursuant to CPLR § 3020(d)(2), on the basis that I am acquainted with the facts.



PAUL VAN COTT

Sworn to before me this 13th
day of June, 2008.

Mary B. Palmer

MARY B. PALMER
Notary Public, State of New York
01PA6128438
Commission Expires June 13, 20 09

ADIRONDACK PARK AGENCY RETURN & RECORD OF PROCEEDING

VOLUME I : ITEMS 1-2
MINUTES AND TRANSCRIPT

- 1) Minutes of the Adirondack Park Agency Enforcement Committee Proceeding held on March 13, 2008 with attachments below;

Addendum dated May 2, 2008

Determination of the Enforcement Committee pursuant to 9 NYCRR 581-2.6 dated March 25, 2008 (Attachment 2)
*Attachment 1 is omitted (unrelated matter)
- 2) Transcript of Oral Argument before the Adirondack Park Agency Enforcement Committee on March 13, 2008

ADIRONDACK PARK AGENCY RECORD OF PROCEEDING

VOLUME II : ITEMS 3-17
RECORD OF PROCEEDING

- 3) Notice of Apparent Violation (E2007-041), served September 5, 2007
- 4) Lewis Farm's Answer to NAV, dated October 4, 2007
- 5) Staff Notice of Request for Enforcement Committee Determination dated December 17, 2007 including Affirmation of Paul Van Cott dated December 13, 2007
 - Ex. A: Agency's Motion to Dismiss (Index No. 000498-07) dated August 1, 2007;
Affirmation of John Banta dated July 23, 2007;
Affirmation of Sarah Reynolds dated July 20, 2007
 - Ex. A: Proposed Settlement Agreement
 - Ex. B: Explanatory letter of May 14, 2007
 - Ex. C: June 12, 2007 letter from David Cook, Esq.
 - Ex. D: June 19, 2007 letter from Mark McKenna, Project Manager
 - Affidavit of John L. Quinn sworn to July 23, 2007
 - Ex. A: Partial Application
 - Ex. B: Notice of Incomplete Permit Application letter

Ex. C: Potential Violation Report
Affidavit of Douglas Miller sworn to July 20,
2007

Ex. A: Tax Map
Ex. B: APA Plan Map
Ex. C: Annotated Plan Map
Ex. D: March 23, 2007 letter from Miller
to Lewis Family Farm
Ex. E: March 28, 2007 photos
Ex. F: June 27, 2007 photos
Ex. G: Cease and Desist Order
Ex. H: July 2, 2007 photos
Ex. I: July 5, 2007 photo

Ex. B: Decision and Order of Honorable Kevin K. Ryan
dated August 16, 2007;

Ex. C: Letter dated August 31, 2007 from APA to David
Cook, Esq.
Cease and Desist Order dated June 27, 2007.

- 6) Affidavit of Douglas Miller sworn to December 12, 2007
Ex. A: Photos of dwelling dated August 31, 2007
Ex. B: Photos of dwelling dated September 5, 2007
Ex. C: Photos of dwelling dated December 7, 2007
Ex. D: Affidavit of Salim B. Lewis sworn to
August 7, 2007
- 7) Affidavit of John L. Quinn sworn to December 12, 2007
- 8) Memorandum of Law in Support of Agency Staff's Request for a
Determination by Enforcement Committee pursuant to 9 NYCRR
581-2.6 (b) submitted by Paul Van Cott, Esq. dated December
14, 2007
- 9) Document entitled "The Right to Farm in the Champlain Valley
of New York" dated January 2008 which includes:
Memorandum of Law in Support of Respondent's Request for
Dismissal of This Enforcement Proceeding and Annulment of
the Cease and Desist Order and in Opposition to Staff's
Application for Imposition of Penalties without a Hearing;
Affidavit of Barbara A. Lewis sworn to January 17, 2008
Ex. A: Project Description
Ex. B: Drawing of Lewis Family Farm Housing dated
10/5/06
Application for a Project Permit, Town of
Essex, Application #2-263 dated 11/12/06
(recorded 11/14/06) for 3 residences (with

drawings);
 Building Codes Dept., Essex NY Building Permit
 No. A-662 dated 11/30/06 re: construction of a
 single family home for farm residence at 1058
 Whallons Bay Rd.
 Application for a Project Permit, Town of
 Essex, Application # 2-264 dated 11-30-06 with
 attached drawings (17);
 Building Permit Application, Town of Essex
 No. A-698 dated 6-25-06 (see side panel date
 6/25/07) (one family dwelling, project cost
 estimate \$335,000, Cross Rd.);
 Building Permit Application, Town of Essex,
 No. A-701 dated 6-25-07
 (1 family dwelling project cost estimate
 \$350,000- Whallons Bay Rd. S. Cottage);
 Building Permit Application, Town of Essex
 No. A-700 dated 6-25-07 (1 family dwelling
 project cost estimate \$320,000 - Whallons Bay
 Rd. N. Cottage);
 Building Permit Application, Town of Essex ,
 No. A-699 dated 6-25-07 (one family dwelling,
 project cost estimate \$315,000, Whallons Bay
 Rd.);
 Application for a Project Permit, Town of
 Essex, Application #2-263 dated 11/12/06
 (recorded 11/14/06) for 3 residences (no
 drawings);
 Application for a Project Permit, Town of
 Essex, Application # 2-264 dated 11-30-06 with
 (no drawings);
 Building Permit Application, Town of Essex
 No. A-714 dated 9-20-07 (Marco - septic);
 Building Permit Application, Town of Essex
 No. A-715 dated 9-20-07 (North & South -
 septic);
 Building Permit Application, Town of Essex
 No. A-716 dated 9-20-07 (Residence- septic);
 Building Permit Application, Town of Essex
 No. A-662 dated 11/30/06 (Residence -
 Foundation);
 Building Permit Application, Town of Essex No.
 A-662 dated 11/30/06 (Marco- Foundation)
 Building Permit Application, Town of Essex No.
 A-662 dated 11/30/06 (North Cottage -
 foundation)
 Building Permit Application, Town of Essex No.
 A-662 dated 11/30/06 (South Cottage -

- foundation)
- Ex. C: Building Codes Dept., Essex NY Building Permit A656, 657, 658 dated 11/14/06 (construction of 3 foundations for 3 single family homes as per application at 909 Whallons Bay Rd.)
- Ex. D: Building Codes Dept., Essex NY Building Permit A-698, dated 6/25/07 (Marco Home) construction, instillation of a pre-fab home as per dwgs (2350 sq. ft.) at Cross Rd and Whallons Bay Rd.;
Building Permit A699, Residence #1 dated 6/25/07 re: construction of modular home single family 2350 sq ft as per dwgs at former Caroline Walker site Whallons Bay Rd.;
Building Codes Dept., Essex NY Building Permit A-700, dated 6/25/07 (North Cottage) construction of modular hm (single family) 2,350 sq. ft. as per dwgs at former Carolyn Walker site, Whallons Bay Rd. ;
Building Codes Dept., Essex NY Building permit A-701, dated 6/25/07 (So. Cottage) construction of modular hm (single family) 2,350 sq. ft. As per dwgs at former Carolyn Walker site, Whallons Bay Rd.
- Ex. E: Drawing of Lewis House Project dated 10-30-06
Drawing of Lewis House Project dated 10-30-06, revised 9-2-07
Drawings and revisions (3) of Lewis House Project Septic System
- Ex. F: Building Codes Dept., Essex NY Building permit A-710, dated 8/8/07 (Farm Manager's Residence) re: construction of an on site septic system as per PE Mark Buckley plans at Marco Turco residence (Whallons Bay Road);
Building Codes Dept., Essex NY Building permit A-716, Residence #1 dated 9/19/07 re: construction of septic system as per plans at 52 Christian Rd.;
Building Codes Dept., Essex NY Building permit A-715, dated 9/19/07 (South Cottage) re: construction of septic system as per plans at 52 Christian Rd.;
Building Codes Dept., Essex NY Building Permit A- 714, dated 9/19/07 (North Cottage) re: construction of septic system as per plans at 52 Christian Rd.
- Ex. G: Affidavit of Salim B. Lewis sworn to August 7, 2007

Ex. H: Color photographs

Affidavit of Klaas Martens sworn to January 17, 2008 ;

Affidavit of John J. Privitera sworn to January 18, 2008,

Ex. A: Map of Adirondack Park

Ex. B: Letter dated November 26, 2007 from
Commissioner Hooker

Ex. C: Department of Agriculture and Markets
Guidelines for Review of Local Laws Affecting
Farm Worker Housing

Ex. D: APA policies

Ex. E: 2006 Annual Report

Ex. F: Agency General Enforcement Guidelines

Ex. G: APA Jurisdictional Table

Ex. H: Map showing Agency Land Use Classification in
the Town of Essex

Ex. I: Satellite map of Lewis Family Farm

Ex. J: New York State Council on Food Policy

Ex. K: Governor Spitzer's State of Upstate Address on
January 16, 2008

10) Staff's Reply Affirmation of Paul Van Cott dated January 29,
2008

Ex. A: Correspondence between APA and Department of
Agriculture and Markets which includes:
Letter dated December 4, 2007 from APA to
Commissioner of the Department of Agriculture
and Markets;
Letter dated December 3, 2007 from APA to
Commissioner of the Department of Agriculture
and Markets;
Letter dated November 26, 2007 from the
Commissioner of the Department of Agriculture
and Markets to APA;
Letter dated August 7, 2007 from APA to
Department of Agriculture and Markets;
Letter dated June 29, 2007 from the Department
of Agriculture and Markets to APA.

11) Reply Memorandum of Law in Support of Lewis Farm's Request
for Dismissal of this Enforcement Proceeding dated February
26, 2008

Reply Affidavit of John Privitera sworn to February 26, 2008

Ex. A: Letter dated February 1, 2008 from Department
of Agriculture and Markets to Sandy and
Barbara Lewis

Ex. B: Instructions for Application for Tax Exemption

of Agricultural and Horticultural Buildings
and Structures

Ex. C: Town of Essex Land Use Map

Ex. D: Article entitled "New Effort Against Illegal
Adirondack Subdivisions"

- 12) Staff's Reply Memorandum of Law in Support of Agency Staff's Request for a Determination by the Enforcement Committee pursuant to 9 NYCRR 581-2.6(d) of Paul Van Cott dated March 5, 2008 including:
Affidavit of Douglas Miller dated March 4, 2008
Ex. A: 2003 Aerial photograph of Lewis Farm
- 13) Letter dated February 21, 2008 from NY Farm Bureau to Governor Spitzer, submitted by John Privitera at the March 13, 2008 Enforcement Committee Proceeding
- 14) Undated Statement of Barbara Lewis on behalf of Lewis Farm (with photo), submitted by John Privitera at the March 13, 2008 Enforcement Committee Proceeding
- 15) Letter dated March 5, 2008 from Adirondack Park Review Board to Governor Spitzer dated March 4, 2007 with Resolution dated March 4, 2007 attached, submitted by John Privitera at the March 13, 2008 Enforcement Committee Proceeding
- 16) Undated Proposed Order (E2007-041) submitted by John Privitera at the March 13, 2008 Enforcement Committee Proceeding
- 17) A color copy of the Power Point presentation entitled "The Matter of Housing at the Lewis Family Farm and the Right to Farm in the Champlain Valley of New York", made to the Agency by John Privitera on March 13, 2008

STATE OF NEW YORK)
) ss.:
COUNTY OF ESSEX)

BARBARA ROTTIER, being duly sworn, deposes and says:

I am employed by respondent Adirondack Park Agency as Associate Counsel. I am acquainted with the facts and circumstances of this matter on the basis of my personal knowledge and personal communications with various employees of the Adirondack Park Agency and an examination of the Agency's records.

I have reviewed the foregoing Adirondack Park Agency Minutes, Transcript and Record consisting of the list of Exhibits 1-17, and know the contents thereof and I believe it to be a true and accurate copy of the records of the Agency in this matter.

This verification is made pursuant to the provisions of CPLR § 3020(d)(2).

Barbara A. Rottier
BARBARA ROTTIER

Sworn to before me this
13th day of June, 2008

Mary B. Palmer
Notary Public

MARY B. PALMER
Notary Public, State of New York
01PA6128439
Commission Expires June 13, 20 09

STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

LEWIS FAMILY FARM, INC.,

Petitioner,

v.

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Respondent.

AFFIDAVIT OF
PAUL VAN COTT

INDEX No. 315-08
RJI No. 15-1-2008-0109

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

INDEX No. 332-08
RJI No. 15-1-2008-0117

STATE OF NEW YORK)
) ss:
COUNTY OF ESSEX)

PAUL VAN COTT, having been duly sworn, deposes and says:

1. I am an Associate Attorney for the Adirondack Park Agency (the "Agency" or "APA") and have served as the Agency's Enforcement Attorney since 2001. I supervise the Agency's enforcement program, including a Senior Attorney and six enforcement officers. In this role, I am responsible for

Affidavit of Paul Van Cott
dated June 13, 2008

administrative enforcement of the Agency's laws and regulations, including in the Town of Essex, Essex County.

2. I am familiar with the file in this matter and make this affidavit in support of the Agency's motion to dismiss in part and to answer in part, Lewis Family Farm's ("Lewis Farm") amended petition. The facts stated herein are upon information and belief based upon the affidavits submitted by Agency staff in the administrative enforcement proceeding, including my own affirmation, and based on the Agency file in this matter.

3. The Lewis Farm owns approximately 1,111 acres located in the Adirondack Park, in the Town of Essex, Essex County, New York. Record Item 5 (July 20, 2007 Miller Affidavit, p. 2 ¶¶ 4, 6).

4. In June of 2007, Lewis Farm placed three modular single-family dwellings on the subject property in a Resource Management Area of the Adirondack Park, on lands within the designated Bouquet River Recreational River area, without an Agency permit. Id., (p. 2, ¶¶ 4, 7 and p. 3, ¶¶ 7, 10 and p. 5, ¶ 17). See also Exhibit A (Timeline).

5. The Adirondack Park Agency Act ("APA Act") requires an Agency permit for subdivisions and placement of single-family dwellings in Resource Management areas within the

Adirondack Park. See Executive Law §§ 809(2)(a), 810(1)(e)(3) and 810(2)(d)(1).

6. The Wild, Scenic, and Recreational River System Act (the "Rivers Act"), Environmental Conservation Law ("ECL") § 15-2701, which is implemented within the Adirondack Park pursuant to the Agency's regulations set forth at 9 NYCRR Part 577, requires an Agency permit for subdivisions and placement of single-family dwellings on Resource Management lands in Recreational River Areas.

STATUTORY OVERVIEW

7. The Official Adirondack Park Land Use and Development Plan Map classifies private lands in the Adirondack Park under the following land use categories: "Hamlet," "Moderate Intensity Use," "Low Intensity Use," "Rural Use," "Resource Management," and "Industrial Use." See Executive Law § 805.

The Adirondack Park Agency Act

8. Executive Law § 809(2)(a) requires individuals and corporations to obtain a permit from the Agency prior to the undertaking of any Class A regional project or the undertaking of any Class B regional project in any town not governed by an Agency-approved local land use program in the Adirondack Park.

The Town of Essex does not have an Agency-approved local land use program.

9. Pursuant to 9 NYCRR § 570.3(ai)(1), "undertake" is defined as the:

commencement of a material disturbance of land, including ... clearing of building sites, excavation (including excavation for the installation of foundations, footings and septic systems); ... or any other material disturbance of land preparatory or incidental to a proposed land use or development or subdivision.

Subdivision Jurisdiction

10. Executive Law § 810(1)(e) lists the Class A regional projects in a Resource Management land use area that require an Agency permit pursuant to Executive Law § 809(2)(a). These projects include, inter alia, any subdivision of land (and all land uses and development related thereto) involving two or more lots, parcels or sites. Executive Law § 810(1)(e)(3).

11. Pursuant to Executive Law § 802(63), a "subdivision" is:

any division of land into two or more lots, parcels, or sites ... for the purpose of ... any form of separate ownership or occupancy (including any grading, road construction, installation of utilities or other improvements or any other land use and development preparatory or incidental to any such division) . . .

(Emphasis added).

12. 9 NYCRR § 570.3(a)(3) defines a subdivision into sites as occurring "where one or more new dwelling(s) or other principal building(s) is to be constructed on a parcel already containing at least one existing dwelling or other principal building, and regardless of whether the existing building is proposed to be removed after completion of the new building(s)."

Single-Family Dwelling Jurisdiction

13. Executive Law § 810(2)(d) lists the Class B regional projects in a Resource Management land use area that are subject to Agency review in the Town of Essex pursuant to Executive Law § 809(2)(a). These projects include, inter alia, the construction of any new single-family dwelling. Executive Law § 810(2)(d)(1).

14. Executive Law § 802(58) defines a "single-family dwelling" as "any detached building containing one dwelling unit, not including a mobile home."

Distinguishing Single-Family Dwelling Jurisdiction From Agricultural Use Structure Jurisdiction

15. Executive Law § 802(8) defines an "agricultural use structure" as "any barn, stable, shed, silo, garage, fruit and vegetable stand or other building or structure directly and customarily associated with agricultural use."

16. Executive Law § 802(50)(g) indicates that agricultural use structures and single-family dwellings, including dwellings used for farmworker housing, are separate structures for jurisdictional purposes by providing under the definition of "principal building" that:

all agricultural use structures and single family dwellings or mobile homes occupied by a farmer of land in agricultural use, his employees engaged in such use and members of their respective immediate families, will together constitute and count as a single principal building.

(Emphasis added).

17. Executive Law § 802(50)(g) also indicates that, although they require a permit, single-family dwellings constructed for farmworker housing are more easily approvable by the Agency than dwellings used for non-agricultural purposes, as the approval requirements of Executive Law §§ 805(3) and 809(10) are lessened when dwellings are to be used for farmworker housing.

18. Unlike single-family dwellings, including dwellings used for farmworker housing, the Executive Law exempts agricultural use structures from Agency jurisdiction by omitting such structures from the list of jurisdictional projects. Executive Law § 810.

19. In addition, Executive Law § 810(1) specifically exempts land use and development within various critical environmental areas from Agency jurisdiction when the land use and development involves agricultural uses.

20. Executive Law § 810(1) also exempts agricultural use structures in excess of forty feet in height from Agency jurisdiction, where all other structures except residential radio and television antennas require permits from the Agency.

21. Executive Law § 805(3)(g)(1) describes the character of Resource Management areas as follows:

"Resource Management areas, delineated in green on the plan map, are those lands where the need to protect, manage and enhance forest, agricultural, recreational and open space resources is of paramount importance because of overriding natural resource and public considerations. Open space uses, including forest management, agriculture and recreational activities, are found throughout these areas."

22. Executive Law § 805(3)(g)(2) sets forth the purposes, policies and objectives for land use on Resource Management lands in the Adirondack Park:

"The basic purposes and objectives of resource management area are to protect the delicate physical and biological resources, encourage proper and economic management of forest, agricultural and recreational resources and preserve the open spaces that are essential and basic to the unique character of the park...." [Emphasis supplied.]

23. In furtherance of the character, purposes and objectives established for Resource Management lands, Executive Law § 805(3)(g)(4)(1) classifies agricultural uses as a primary compatible use on Resource Management lands.

The Civil Penalty Provision

24. Executive Law § 813 states in part:

1. Any person who violates any provision of this article or any rule or regulation promulgated by the agency, or the terms or conditions of any order or permit issued by the agency pursuant to this article shall be liable to a civil penalty of not more than five hundred dollars for each day or part thereof during which such violation continues. The civil penalties provided by this subdivision shall be recoverable in an action instituted in the name of the agency by the attorney general on his own initiative or at the request of the agency.

2. Alternatively or in addition to an action to recover the civil penalties provided by subdivision one of this section, the attorney general may institute in the name of the agency any appropriate action or proceeding to prevent, restrain, enjoin, correct or abate any violation of, or to enforce any provision of this article or any rule or regulation promulgated by the agency, or the terms of conditions of any order or permit issued by the agency pursuant to this article.

(Emphasis added.)

The Adirondack Park Local Government Review Board

25. Pursuant to Executive Law § 803-a, the Adirondack Park Local Government Review Board was created for the "purpose of advising and assisting the Adirondack park agency in carrying out its functions, powers and duties..."

The Rivers Act and 9 NYCRR § 577

26. The Rivers Act was enacted pursuant to a legislative finding that "many rivers of the state, with their immediate environs, possess outstanding natural, scenic, historic, ecological and recreational values." ECL § 15-2701(1).

27. The Rivers Act was enacted to implement a public policy "that certain selected rivers of the state which, with their immediate environs, possess the aforementioned characteristics, shall be preserved in free-flowing condition and that they and their immediate environs shall be protected for the benefit and enjoyment of present and future generations." ECL § 15-2701(3).

28. Section 15-2705 of the Rivers Act states that "the functions, powers and duties encompassed by this section shall be vested in the Adirondack park agency as to any privately owned part of a river area within the Adirondack park as defined by law which may become part of this system." Section 15-2709(1) states that, within the Adirondack Park, the

Adirondack Park Agency "shall make and enforce regulations necessary for the management, protection, and enhancement of and control of land use and development in the wild, scenic and recreational river areas."

29. Pursuant to 9 NYCRR § 577.4(a), "no person shall undertake a rivers project without first obtaining an agency permit."

30. In recreational river areas, rivers projects include, inter alia, all subdivisions of land in Resource Management land use areas. 9 NYCRR § 577.5(c)(1). The Bouquet River is a New York State designated recreational river. See 9 NYCRR § 577, Appendix Q-6, 5a.

31. Rivers projects in recreational river areas do not include agricultural uses or agricultural use structures and no Agency permit is required for such uses or structures. 9 NYCRR § 577.4(b)(3)(ii).

32. In recreational river areas, rivers projects include, inter alia, all land uses and developments classified compatible uses by the Adirondack Park land use and development plan in Resource Management land use areas. 9 NYCRR § 577.5(c)(1).

33. Pursuant to Section 805(3)(g)(4) of the Adirondack Park Agency Act, single-family dwellings constitute compatible uses in Resource Management land use areas.

34. Section 15-2723 of the Rivers Act states in part:

Any person who violates any provision of this title or any regulation or order issued pursuant to this act by the commissioner or the agency may be compelled to comply with or obey the same by injunction, mandamus or other appropriate remedy. In addition, any such person shall pay a civil penalty of not less than one hundred dollars or more than one thousand dollars for each day of such violation.

(Emphasis added.)

FACTUAL STATEMENT AND BACKGROUND

35. In December 2005, at the invitation of S.B. "Sandy" Lewis (a shareholder of Lewis Family Farm), senior Agency staff visited the subject property and informed Mr. Lewis that an Agency permit was required prior to construction of single-family dwellings on the subject property. Record Item 5 (Banta Aff., p. 2, ¶ 4-6).

36. On or about March 14, 2007, Barbara Lewis and S.B. Lewis submitted an application to the Agency for a permit for the construction of three single-family dwellings on the subject property. Record Item 5 (Quinn Aff., ¶ 4, Exhibit A).

37. On or about March 15, 2007, the Agency issued a Notice of Incomplete Permit Application and Receipt of Application in response to the application. Id., ¶ 5, Exhibit B.

38. On or about March 19, 2007, Lewis Farm notified the Agency that it had already constructed the foundations and septic systems for the dwellings. Record Item 5 (Quinn Aff., ¶¶ 6-7). This was the Agency's first notice of potential violations on Lewis Farm's property. Based on this information, on March 20, 2007, Agency staff ceased review of the Farm's permit application, as required by 9 NYCRR § 581-2.7, and opened an enforcement file to investigate the potential violations by Lewis Farm involving its single-family dwellings. On March 23, 2007, Agency staff sent Lewis Farm a contact letter, advising them of the investigation into the potential violations and seeking cooperation in that investigation.

39. Upon further investigation, including a March 28, 2007 site visit and discussions with Lewis Farm, the Agency concluded that violations had occurred and sought to resolve the matter through the negotiation of a settlement agreement. Record Item 5 (Reynolds Aff. ¶¶ 23-28, Quinn Aff. ¶ 8).

Agency staff made its initial settlement offer on May 14, 2007. Record Item 5 (Reynolds Affidavit).

40. Lewis Farm objected to paying a penalty or undertaking an environmental benefit project and, as a consequence, refused to enter into a settlement agreement. Despite ongoing settlement negotiations, on June 27, 2007, Lewis Farm installed the three single-family dwellings on the subject property in violation of the Executive Law and the Rivers Act. Record Item 5 (Reynolds Aff., ¶¶ 29-38; Banta Aff., ¶ 7; Miller Aff., ¶¶ 17, 20-21).

41. Upon learning the dwellings were being installed, on June 27, 2007, Agency staff served a Cease and Desist Order on Lewis Farm. See Record Item 5 (Miller Aff., ¶ 18-19, Exhibit G). The Cease and Desist Order gave Lewis Farm notice of the alleged violations, and ordered Lewis Farm to stop construction until the violations were resolved.

42. Upon information and belief, two dwellings were installed prior to the Cease and Desist Order and the third home was installed after the Order was served. Record Item 5 (Miller Aff. ¶¶ 17-20).

43. Thereafter, Lewis Farm commenced a declaratory judgment action by order to show cause in Supreme Court, Essex County, seeking a restraining order against the Agency's

enforcement action. Record Item 5 (Affirmation of Paul Van Cott, dated December 13, 2007 ["Van Cott Aff."]), ¶ 3.

44. The Agency, represented by the Attorney General's office, moved to dismiss the action. During the pendency of the Lewis Farm's declaratory judgment action, Agency staff voluntarily suspended its administrative enforcement proceeding against Lewis Farm in deference to the Court. See Exhibit A (Timeline).

45. The Court granted the Agency's motion in a Decision and Order issued August 16, 2007. Record Item 5 (Van Cott Aff., ¶ 4; Exhibit B). In that Decision and Order, the Court confirmed the Agency's jurisdiction over Lewis Farm's single-family dwellings. Record Item 5 (Van Cott Aff.).

46. The Decision and Order was served on Lewis Farm on or about August 31, 2007. Record Item 5 (Van Cott Aff., ¶ 4).

47. On August 31, 2007, Agency staff observed Lewis Farm's property from an off-site location and discovered that Lewis Farm had resumed construction work on the new single-family dwellings. Record Item 6 (Affidavit of Douglas Miller ["Miller Aff."], dated December 12, 2007, ¶ 3; Exhibit A).

48. By telefaxed letter of that same date, Agency staff advised Lewis Farm's lawyers of the ongoing construction and that the June 27, 2007 Cease and Desist Order remained in

effect. Record Item 5 (Van Cott Aff., ¶ 5; Exhibit C).

Counsel for Lewis Farm did not respond to staff's notice.

49. On September 5, 2007, a follow-up inspection by Agency staff revealed that Lewis Farm was continuing construction work on the dwellings. Record Item 6 (Douglas Miller Aff., ¶ 4; Exhibit B).

50. Agency staff served Lewis Farm by a Notice of Apparent Violation ("NAV") on or about September 5, 2007. The NAV provided Lewis Farm with notice of the alleged violations and of staff's request for injunctive relief and penalties.

The NAV included the following notice to Lewis Farm:

"PLEASE ALSO TAKE NOTICE THAT prior to consideration of this matter by the Enforcement Committee, a record consisting of relevant documents, testimony, evidence and any legal briefs must be developed for the Enforcement Committee to consider. If there are no facts in dispute, that record may be developed by stipulation or at the request of either party for a determination pursuant to 9 NYCRR § 581-2.6(d). If there are facts in dispute, a hearing will be held to develop the record for consideration by the Enforcement Committee."

51. In September and October, 2007, Agency staff endeavored to restart settlement negotiations to resolve Lewis Farm's violation. By letter of October 1, 2007, I advised one of Lewis Farm's attorneys, Joseph Brennan, Esq. of Brennan &

White, LLP, of the substance of Agency staff's settlement offer. Thereafter, I spoke with Mr. Brennan and he advised me that David Cook, Esq. of Nixon, Peabody had withdrawn as counsel to Lewis Farm and that Lewis Farm was in the process of securing new counsel.

52. Lewis Farm's current attorney, John Privitera, Esq., answered the NAV for Lewis Farm on or about October 4, 2007.

53. By letter of October 31, 2007, I wrote to Mr. Privitera, expressing the Agency's continuing interest in trying to resolve the matter by settlement, and asking whether his client was willing to discuss this matter. Mr. Privitera never responded to my letter.

54. On December 7, 2007, Agency staff inspected Lewis Farm's property from off-premises and found that, since September 5, 2007, Lewis Farm had undertaken additional construction work on the new single-family dwellings. Record Item 6 (Douglas Miller Aff., ¶ 5; Exhibit C). On that date the dwellings appeared to be fully installed, with doors and windows, finished roofs and siding, and curtains in the windows of one of the dwellings. Id.

55. On December 17, 2007, Agency staff served a Notice of Request for Enforcement Committee Determination on Lewis Farm's attorney, arguing that a hearing was unnecessary

because there were no material facts in dispute. Record Item 5 (Notice of Request for Enforcement Committee Determination). Lewis Farm was given 30 days to respond to the Request for an Enforcement Committee Determination, and responded on January 17, 2008. Record Item 9 (The Right to Farm in the Champlain Valley).

56. Thereafter, the administrative enforcement matter was originally scheduled to be considered by the Enforcement Committee at its next regular, monthly meeting on February 7, 2008, but was adjourned to the Committee's March 13, 2008 meeting at the request of Lewis Farm's attorney, John Privitera. See Exhibit C. The Enforcement Committee is comprised of Agency members and is authorized to make enforcement determinations on behalf of the Agency pursuant to 9 NYCRR §§ 581-2.1 and 581-2.6.

57. On March 13, 2008, Agency staff and Lewis Farm's counsel each had an opportunity to present oral argument on the record before the Enforcement Committee, after which the Committee members asked questions of both parties. Lewis Farm's counsel spoke for approximately 30 minutes. Agency staff and Lewis Farm's counsel each made powerpoint presentations on the record. Record Item 17. A stenographic transcript of the proceeding was made. Record Item 2.

AGENCY DETERMINATION

58. On March 25, 2008, the Agency Enforcement Committee issued its Determination in the administrative enforcement proceeding, finding Lewis Farm in violation of the Adirondack Park Agency Act and the Wild, Scenic and Recreational Rivers Act, requiring Lewis Farm to obtain after-the-fact permits for its single-family dwellings and subdivisions, and imposing a civil penalty in the amount of \$50,000 for the violations.

59. In its March 25, 2008 Determination, the Enforcement Committee took notice of the fact that Lewis Farm had a prior violation involving Agency requirements. Record Item 1 (Determination, p. 5, ¶ 16). That prior violation involved wetlands on the Lewis Farm property and was resolved by a so-ordered stipulation and payment of a sum of \$50,000 for an environmental benefit project, and was signed by Essex County Supreme Court Justice Dawson. See Simon Aff., Exhibit N.

60. The March 25, 2008 Determination also found that all three single-family dwellings were constructed in violation of the Adirondack Park Agency Act and the Rivers Act, even though Agency staff had thought only two of the three dwellings to be violations. Record Item 1 (Determination, p. 11, ¶¶ 46, 48). The Committee found that none of the three dwellings met the regulatory requirements for a lawful replacement of a pre-

Affidavit of Paul Van Cott
dated June 13, 2008

existing single-family dwelling that would not require a permit. Id. The Enforcement Committee did not include the third single-family dwelling in its penalty determination, but did require Lewis Farm to obtain a permit for all three single-family dwellings. Id.

61. Agency Associate Counsel Barbara Rottier transmitted the March 25, 2008 Determination to Lewis Farm's attorney by telefax on March 26, 2008. The Determination was also served on Lewis Farm by certified mail, return receipt requested.

62. On that date, Lewis Farm's attorney called Ms. Rottier, requesting that the Agency "stay" its Determination pending disposition of litigation that he stated his client intended to bring.

63. Thereafter, in March, 2008, Ms. Rottier advised Lewis Farm's attorney that the Agency would not agree to "stay" its determination.

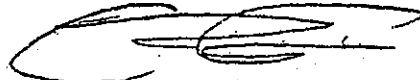
64. On April 18, 2008, the Chairman of the Agency's Board and the Chairman of the Agency's Enforcement Committee, acting on behalf of the Agency pursuant to the authority of the "Resolution of the Adirondack Park Agency on Delegating Certain Powers and Responsibilities" (see Exhibit B, herein March 9, 2007), transmitted to counsel for Lewis Farm a

Affidavit of Paul Van Cott
dated June 13, 2008

R00384

revised Enforcement Committee Determination striking Paragraph
4, Page 12 of the original Determination.

DATED: Ray Brook, New York
June 13, 2008



Paul Van Cott, Esq.

Sworn to before me this
13th day of June, 2008

Mary B. Palmer
Notary Public

MARY B. PALMER
Notary Public, State of New York
01PA6128439
Commission Expires June 13, 2009

Affidavit of Paul Van Cott
dated June 13, 2008

VAN COTT AFFIDAVIT
LIST OF EXHIBITS

- Exhibit A Timeline of Agency Enforcement Actions
- Exhibit B Resolution of the Adirondack Park Agency on
Delegating Certain Powers and Responsibilities
- Exhibit C Letter to John Privitera from Barbara Rottier
dated March 4, 2008

TIMELINE OF AGENCY ENFORCEMENT ACTION

- December 2005 - Agency staff advise S.B. Lewis that Agency permits are required for construction of single family dwellings on the Lewis Farm.
- March 14, 2007 - Lewis Farm submits application to the Agency for permit to construct three single-family dwellings on the Lewis Farm.
- March 15, 2007 - Agency issues Notice of Incomplete Permit Application Receipt of Partial Application.
- March 19, 2007 - Lewis Farm notified the Agency that it had already commenced constructed on the foundations for the three single-family dwellings. This was the Agency's first notice of potential violations on Lewis Farm's property.
- March 20, 2007 - Agency staff suspended processing of Lewis Farm's permit applications pursuant to 9 NYCRR Section 581-2.7 pending resolution of the potential violations through enforcement action.
- March 20, 2007 - Agency staff opened an enforcement file to investigate the potential violations by Lewis Farm involving its three single-family dwellings.
- March 23, 2007 - Agency staff sent Lewis Farm a contact letter, advising them of the enforcement investigation into the potential violations and seeking cooperation in that investigation.
- March 28, 2007 - Agency staff site visit to Lewis Farm to investigate potential violations.
- May 14, 2007 - Agency staff transmitted initial enforcement settlement offer to Lewis Farm.
- May 15, 2007 - Agency Attorney Sarah Reynolds spoke with Barbara Lewis about the enforcement settlement offer.
- May 24, 2007 - Agency Attorneys Sarah Reynolds and Paul Van Cott had a conference call with the Lewis Farm's attorney, John Greenthal, Esq. of Nixon Peabody, LLP to discuss the Agency's settlement offer.

- June 1, 2007 - Agency Attorney Sarah Reynolds met with Barbara Lewis and David Cook, Esq. of Nixon Peabody, LLP to discuss the Agency's settlement offer.
- June 12, 2007 - David Cook, Esq. responded by letter to Agency staff's settlement offer.
- June 15, 2007 - Agency Attorney Sarah Reynolds spoke with David Cook, Esq. in furtherance of settlement discussions.
- June 19, 2007 - Agency Attorney Sarah Reynolds spoke with David Cook, Esq. in furtherance of settlement negotiations.
- June 27, 2007 - Lewis Farm installed the three single-family dwellings on the subject property.
- June 27, 2007 - Agency staff served a Cease and Desist Order on Lewis Farm. The Cease and Desist Order gave Lewis Farm notice of the alleged violations, and ordered Lewis Farm to stop construction until the violations were resolved.
- June 28, 2007 - Lewis Farm serves a declaratory judgment action on Agency by order to show cause in Supreme Court, Essex County.
- July 20, 2007, Lewis Farm amends its declaratory judgment action.
- The Agency, represented by the Attorney General's office, moved to dismiss the action. During the pendency of the Lewis Farm's declaratory judgment action, Agency staff voluntarily suspended its prosecution of the administrative enforcement action against Lewis Farm in deference to the Court.
- August 16, 2007 - The Court issued a Decision and Order determining that, among other things, the APA has jurisdiction and granting the Agency's motion to dismiss.
- August 31, 2007 - The Decision and Order was served on Lewis Farm.
- August 31, 2007 - Agency staff observed Lewis Farm's property from an off-site location and discovered that Lewis Farm had resumed construction work on the new single-family dwellings.

- August 31, 2007 - By telefaxed letter, Agency staff advised Lewis Farm's lawyers of the ongoing construction and that the June 27, 2007 Cease and Desist Order remained in effect.
- September 5, 2007 - Follow-up inspection by Agency staff revealed that Lewis Farm was continuing construction work on the dwellings.
- September 5, 2007 - Agency staff served Lewis Farm by a Notice of Apparent Violation ("NAV") to commence formal administrative enforcement proceedings against Lewis Farm.
- September/October, 2007 - Agency staff endeavored to restart enforcement settlement negotiations to resolve Lewis Farm's violation.
- October 1, 2007 - Agency Attorney Paul Van Cott wrote to one of Lewis Farm's attorneys, Joseph Brennan, Esq. of Brennan & White, LLP, of the substance of Agency staff's settlement offer. Mr. Brennan responded, advising that David Cook, Esq. Of Nixon, Peabody had withdrawn as counsel to Lewis Farm and that Lewis Farm was in the process of securing new counsel.
- October 4, 2007 - Lewis Farm's current attorney, John Privitera, Esq., answered the NAV for Lewis Farm.
- October 31, 2007 - Agency Attorney Paul Van Cott wrote to John Privitera, Esq., expressing the Agency's continuing interest in trying to resolve the matter by settlement, and asking whether his client was willing to discuss this matter.
- December 7, 2007 - Agency staff inspected Lewis Farm's property from off-premises and found that, since September 5, 2007, Lewis Farm had undertaken additional construction work on the new single-family dwellings.
- December 17, 2007 - Agency staff served a Notice of Request for Enforcement Committee Determination on Lewis Farm's attorney, arguing that a hearing was unnecessary because there were no material facts in dispute. The matter was scheduled to be heard by the Enforcement Committee on February 7, 2008.
- January 17, 2008 - Lewis Farm responded to Agency staff's Notice of Request for Enforcement Committee Determination.

- Late January, 2008 - Lewis Farm sought an adjournment from the Enforcement Committee's February 7, 2008 meeting to the Committee's March 13, 2008. That adjournment request was granted.
- March 13, 2008 - Agency staff and Lewis Farm appeared before the Enforcement Committee.
- March 25, 2008 - Enforcement Committee issues its Determination in the administrative enforcement proceeding.
- March 26, 2008 - Agency Associate Counsel Barbara Rottier transmitted the March 25, 2008 Determination to Lewis Farm's attorney by telefax.
- April 18, 2008 - The Chairman of the Agency's Board and the Chairman of the Agency's Enforcement Committee, acting on behalf of the Agency pursuant to the authority of the "Resolution of the Adirondack Park Agency on Delegating Certain Powers and Responsibilities" (See Exhibit B herein March 9, 2007), transmitted to counsel for Lewis Farm a revised Enforcement Committee Determination striking Paragraph 4, Page 12 of the original Determination.



NEW YORK STATE
Adirondack
parkagency

**RESOLUTION
OF THE
ADIRONDACK PARK AGENCY
ON
DELEGATING CERTAIN POWERS
AND
RESPONSIBILITIES**

Amended March 9, 2007

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Chairperson of any Standing Committee or by any other Agency Member.

II. COMMITTEES OF THE AGENCY

A. APPOINTMENT OF STANDING COMMITTEES

With the concurrence of five Members of the Agency, the Chairperson is authorized to appoint Standing Committees of Agency Members as specified in Sections 572.12, 581-2.1, and 583.6 of the Rules and Regulations and as specified herein, and to designate a Member other than himself or herself as the Chairperson of each Committee. The Chairperson may, in his or her discretion, sit as a voting Member of any Standing Committee, and, in the absence of the Standing Committee Chairperson, may designate any Agency Member, including himself or herself, as acting Chairperson. The Commissioner of Environmental Conservation, the Commissioner of Economic Development and the Secretary of State may designate a deputy or other officer to exercise his or her other powers and perform his or her duties, including the right to vote, on any Standing Committee to which he or she has been appointed by the Chairperson. Alternate Designees of these Ex-officio Members may participate in the meetings of any other Committee, but shall not vote.

B. APPOINTMENT OF AD HOC COMMITTEES AND ADVISORY TASK FORCES

With the concurrence of five Members of the Agency, the Chairperson is authorized to appoint ad hoc Committees of Agency Members and advisory task forces consisting of Agency Members, citizens of the Adirondack Park, local or state officials and such other Members as he or she may deem appropriate for the purpose of investigating and analyzing any issues and problems relevant to the business of the Agency.

2. REGULATORY PROGRAMS COMMITTEE

The Regulatory Programs Committee, established by Section 572.12 of the Rules and Regulations, shall:

- (a) Perform the initial review of applications for project permits or other determinations submitted to the Agency under Sections 809 and 814 of the Adirondack Park Agency Act; the Wild, Scenic and Recreational Rivers System Act; and the Freshwater Wetlands Act, excepting those projects which may be acted on by the Deputy Director Regulatory Programs as provided by Section 572.11 of the Rules and Regulations and this resolution, unless the Committee is requested to perform the initial review of such projects by the Deputy Director Regulatory Programs or by any Agency Member.
- (b) Perform the initial review of applications for variances of the provisions of Section 806 of the Adirondack Park Agency Act and the Wild, Scenic and Recreational Rivers System Act.
- (c) Re-evaluate, at the request of the project sponsor, the terms and conditions of permits issued by the Deputy Director Regulatory Programs.
- (d) Advise the Agency on the reconsideration of Agency actions with respect to projects or variances, except for appeals of prior decisions of the Agency on a project or variance where no new information is sought to be provided and the application is not otherwise amended or revised.
- (e) Guide the staff in the preparation of testimony to be offered on behalf of the Agency in any proceeding before the Public Service Commission or other public body to which the Agency is a party.

- (b) Formulate revisions to Agency rules and regulations.
- (c) Monitor liaison with the Attorney General with reference to litigation involving the Agency, and, in consultation with the Chairperson, advise the Attorney General concerning conduct of litigation.
- (d) Perform initial review of the legal elements and aspects of local land use programs and local freshwater wetlands protection ordinances submitted to the Agency for approval.
- (e) Monitor the interpretation of laws and regulations administered by or affecting the Agency, including jurisdictional determinations, and maintain a compendium of such determinations.
- (f) Monitor Agency legal relations with local, state and federal agencies.

The Legal Affairs Committee shall report its decisions or determinations with respect to any business taken up by it to the whole Agency at each regularly scheduled meeting of the Agency. The Agency shall fully discuss any such matter upon request of any Member, and may ratify, modify, or reverse the Committee action.

The Legal Affairs Committee may, at the request of the Agency, the Chairperson, its Chairperson, the Executive Director or at its own initiative, take up other matters not specifically enumerated herein but within the general scope of the duties imposed hereby.

4. PARK POLICY AND PLANNING COMMITTEE

The Park Policy and Planning Committee, established by Section 583.6 of the Rules and Regulations, shall:

- (a) Perform the initial review of applications for the amendment of the Official Adirondack Park Land Use and Development Plan Map submitted to the Agency pursuant

5. ENFORCEMENT COMMITTEE

The Enforcement Committee established by Section 581-2.1 of the Rules and Regulations, shall in cases not resolved by agreement between Agency staff and the alleged violator:

- (a) Determine the cause, nature and scope of violations of the statutes and regulations administered by the Agency and establish the terms and conditions of settlement agreements.
- (b) Monitor compliance with the terms of settlement agreements executed by the Agency and persons responsible for violations.
- (c) Refer cases to the Attorney General and monitor liaison with the Attorney General with reference to enforcement litigation involving the Agency, and, in consultation with the Chairperson, advise the Counsel concerning conduct of such litigation.
- (d) Review all proposals to modify, suspend or revoke permits and alleged violations of the Freshwater Wetlands Act pursuant to Subparts 581-3 and 581-4 of the Rules and Regulations and make recommendations to the Agency for consideration.

The Enforcement Committee shall also provide general policies and guidelines to staff regarding the general terms and conditions of resolutions by staff of violations resolved by it pursuant to delegated authority.

The Committee shall report its decisions or determinations with respect to any business taken up by it to the whole Agency at the next regularly scheduled meeting of the Agency.

The Enforcement Committee may, at the request of the Agency, the Chairperson, its Chairperson, the Executive Director, or on its own initiative, take up other matters not specifically enumerated herein but within the general scope of the duties imposed hereby.

7. INTERPRETIVE PROGRAMS COMMITTEE

There is hereby established an Interpretive Programs Committee which shall consist at a minimum of five Agency Members; provided, however, that any Agency Member who attends a meeting of the Committee shall have the right to vote, and an affirmative vote of the majority of Agency Members present at any meeting shall be required for the Committee to act.

The Interpretive Programs Committee shall report its decisions and determinations with respect to any business taken up by it to the whole Agency at each regularly scheduled meeting of the Agency. The Agency shall fully discuss any such matter upon request of any Member, and may ratify, modify or reverse the Committee.

The Interpretive Programs Committee may, at the request of the Agency, the Chairperson, its Chairperson, the Executive Director, or on its own initiative, take up other matters not specifically enumerated herein but within the general scope of the duties imposed hereby.

8. PARK ECOLOGY COMMITTEE

There is hereby established a Park Ecology Committee which shall consist of a minimum of three Members. The Park Ecology Committee shall:

- (a) Formulate standards and procedures applicable to the scientific and technical aspects of the statutes and regulations administered by the Agency, such as wetland determinations made pursuant to 9 NYCRR 578.3.
- (b) Propose guidelines and standards for private land development, intended for promulgation, which will help protect natural resource characteristics of the Park by defining generally acceptable methods and limitations for development.

- (c) lead the review and coordination of the following initiatives:
 - (1) local land use programs, components and amendments, and
 - (2) designated industrial sites pursuant to Section 807.4 of the APA Act and river land management plans;
- (d) recommend, in coordination with other committees:
 - (1) proposed model provisions and ordinances, and
 - (2) educational programs;
- (e) monitor and evaluate, in coordination with other committees:
 - (1) the administration of Agency-approved local land use programs, and
 - (2) the status of Parkwide local planning; and
- (f) consult with the Park Policy and Planning Committee on the adequacy of Comprehensive Master Plans in meeting the criteria provided by section 805(2)(c)(3) of the Act.

The Local Government Services Committee shall report its recommendations or determinations with respect to any business taken up by it to the whole Agency at each regularly scheduled meeting of the Agency. The Agency shall discuss and may ratify, modify, or reverse the Committee recommendation.

The Local Government Services Committee may, at the request of the Agency, the Chairperson, its Chairperson, the Executive Director, or on its own initiative, take up other matters not specifically enumerated herein but within the general scope of the duties imposed hereby.

III. PROCEDURES FOR THE REVIEW OF PRIOR AGENCY ACTIONS

A. RECONSIDERATIONS

Requests for reconsideration of prior Agency actions which are based upon new information or changed conditions which may materially alter the basis therefore shall be referred initially to the Standing Committee which originally considered the matter.

B. APPEALS

Appeals of prior Agency actions where no new information is sought to be provided shall be made to the full Agency.

IV. GENERAL POWERS AND AUTHORITY OF THE EXECUTIVE DIRECTOR

The Executive Director, under the supervision of the Chairperson, shall have authority to exercise the following powers on behalf of the Agency:

- A. With the advice and consent of the Agency, to appoint or remove the Deputy Director Regulatory Programs, Deputy Director Planning, and Counsel.
- B. To appoint or remove all other employees of the Agency as provided for by the rules and regulations of the Department of Civil Service and the Director of the Division of the Budget.
- C. To make and execute contracts and all other instruments necessary or convenient for the exercise and fulfillment of the Agency's powers and responsibilities, including contracts for professional and technical assistance, and to accept any assistance, including gifts, grants, loans or funds or property from the Federal Government or any agency or instrumentality thereof, or from public and private sources, subject, where required, to the approval of the Director of the Division of the Budget.
- D. To exercise the authority and responsibility with respect to Agency enforcement provided by Section 581-2.3 of the Rules and Regulations.

V. **AUTHORITY OF THE DEPUTY DIRECTOR REGULATORY PROGRAMS**

The Deputy Director Regulatory Programs, under the supervision of the Executive Director, shall have authority to exercise the following powers on behalf of the Agency:

- A. To approve projects, as specified in Section 572.11 of the Rules and Regulations, and to approve determinations with respect to projects by state agencies called for in Section 579.3(d) of the Rules and Regulations.
- B. To schedule public hearings on projects where the Uniform Procedures Act time limitation for doing so would expire prior to the next regularly scheduled Agency meeting.
- C. To schedule public hearings on shoreline restriction variance applications and to issue a notice of intent to hold, and to schedule, a hearing to consider both the variance and the project, in the case of any project application involving a variance. The Deputy Director Regulatory Programs shall report the exercise of the power granted by paragraphs A, B, and C at or prior to each regularly scheduled meeting of the Agency.
- D. To direct and supervise the Project Review Staff in the conduct of consultation with project sponsors, both with respect to preliminary and informal plans for proposed projects, and with respect to the rendering of staff recommendations in regard to such proposals; in the receipt and processing of applications for project permits and variances; in the determination of the completeness of applications, and the notification of applicants; in site inspections necessary to the performance of Agency responsibilities; in the staff review of applications and the formulation of final staff recommendations to the Agency.
- E. To determine questions involving compliance by project sponsors with conditions imposed in a notification of determination precedent to, and subsequent to the issuance of a permit, and to issue project permits following compliance.

- C. To execute orders effecting the amendment of the Official Adirondack Park Land Use and Development Plan Map and to direct the filing of such amendments.
- D. To direct and supervise the Planning Staff in the conduct of consultations with applicants for map amendments and the rendering of staff recommendations in regard to such applications; in the determination of the completeness of applications, and the notification of applicants; in site inspections necessary to the performance of Agency responsibilities in the staff review of applications and the formulation of final staff recommendations to the Agency.

In the event of the absence or incapacitation of the Executive Director and the Deputy Director Regulatory Programs, the Deputy Director Planning, as a Deputy Director of the Agency, shall, under the supervision of the Chairperson, have the authority to exercise those powers delegated to the Executive Director.

VII. AUTHORITY OF THE COUNSEL

The Counsel to the Agency, under the supervision of the Executive Director, shall have the authority to exercise the following powers on behalf of the Agency:

- A. To determine legal issues referred by the Agency, the Chairperson, the Chairperson of the Legal Committee, the Executive Director, the Deputy Director Regulatory Programs, and the Deputy Director Planning, related to statutes and regulations administered by or affecting the Agency, including the determination of the preexistence of subdivisions under the Adirondack Park Agency Act and Agency Rules and Regulations.
- B. To effect the filing of documents with the Secretary of State regarding the revision of the Rules and Regulations.

In the event of the absence or incapacitation of the Counsel, the Associate Counsel shall, under the guidance of the Chairperson and the Executive Director, have the authority to exercise those powers delegated to and exercised by Counsel.

IX. AMENDMENT AND SUPERSESSION

The Agency may alter or modify any provision of this resolution, either in a specific instance or generally, by taking express inconsistent action by a vote of a majority of its Members at any meeting. In the absence of such express action, these provisions shall remain in effect until amended or repealed.

X. REPEAL OF PREVIOUS RESOLUTION

The previous resolution of this title, originally adopted May 1974, fully revised October 17, 1980, last amended February 11, 2000, is hereby repealed.



AGENCY MINUTES

MARCH 9, 2007

[Adopted April 13, 2007]

FRIDAY, MARCH 9, 2007

AGENCY MEMBERS, DESIGNEES AND EXECUTIVE STAFF PRESENT

Ross Whaley, Chair
Arthur Lussi, Member
Katherine Roberts, Member
William Thomas, Member
James Townsend, Member
Randy Beach, Designee, Department of Economic Development
Stuart Buchanan, Designee, Department of Environmental
Conservation
Richard Hoffman, Designee, Department of State
Richard Lefebvre, Executive Director
John Banta, Counsel

AGENCY STAFF PRESENT

Stephen Erman, Special Assistant for Economic Affairs
Keith McKeever, Public Information Director
Mark Sengenberger, Deputy Director, Regulatory Programs
Holly Kneeshaw, Assistant Director, Regulatory Programs
George Outcalt, Environmental Program Specialist 2
Tracy Darrah, Secretary 1
Colleen Parker, Environmental Program Specialist 2
Mary Reardon, Keyboard Specialist 1
Edward Hood, Assistant Director, Planning
Mark Rooks, Associate Project Analyst, Biological Resources
Mary O'Dell, Biologist 1 (Ecology)
Brian Grisi, Local Planning Assistance Specialist
Laurie Bullis, Secretary 1

LOCAL GOVERNMENT REVIEW BOARD MEMBERS PRESENT

Frederick Monroe, Executive Director

Chairman Whaley called the meeting to order at 9:05 a.m.

1. Approval of February 2007 Draft Minutes

On motion of Mr. Townsend, seconded by Mrs. Roberts, the Agency unanimously adopted the February 2007 Draft Agency Minutes.

2. Executive Director's Report

Mr. Lefebvre noting the upcoming Local Government Days scheduled for March 21-22. He also welcomed Professor Wang of China, as well as panelists for the energy discussion scheduled after the morning's plenary session. He then referred to continuing interest regarding improved cell service in the Park. He reported on a panel discussion hosted by Senator Little and Assemblywomen Sayward and Duprey on March 8 in Saranac Lake where cell service providers, emergency use providers, local officials and Agency representatives assembled with a spirit of cooperation and pledged to move forward to find a resolution. He also reported on the Agency's recent request for a temporary exemption to the requirement of Executive Order No. 3 for all state agencies to webcast public meetings. The Agency has no opposition to webcast of its meetings, but finds itself in a difficult situation due to its remote location and lack of IT capabilities, as well as the financial aspects of such an undertaking at this time. He gave his assurance that the Agency would continue to work towards satisfying the requirements of Executive Order 3.

Chairman Whaley recalled the Agency's adoption last month of a resolution recognizing Nellie Staves on the occasion of her birthday, which was later presented to her in person at a celebration held in her honor at DEC in Ray Brook. He reported that Ms. Staves, as a reflection of her graciousness, later presented the Chairman with a plaque in expression of her own appreciation.

3. Motion for Executive Session

On motion of Mr. Townsend, seconded by Mrs. Roberts, the Agency unanimously voted to convene in executive session at the conclusion of the day's business to discuss personnel matters.

4. Introduction of Professor Wang

Chairman Whaley introduced Professor Wang Canfa, Professor of China University Political Science and Law and Superintendent of their Environment and Resource Law Center. Professor Wang has traveled the world speaking on environmental issues in China. He has also created an NGO in China - the Center for Legal Assistance to Pollution Victims. Professor Wang and his group spent Thursday afternoon with a number of Agency staff learning about the Agency's administration of the laws and regulations.

Professor Wang was also interested in media coverage of the Agency and how the Agency responded to that coverage, the "taking" issue as it relates to the Agency's restrictions and government compensation or losses of value in property. Professor Wang effectively works across borders and lecturing around the world. He is accompanied by interpreters, Ms. Guo and Mr. Chung, and Ms. Yang, a former student of Professor Wang and a professor in China who is in the United States working a post-doctorate at Columbia University. Chairman Whaley expressed appreciation to Professor Wang for taking the time to visit the Agency, and presented him with an APA lapel pin.

Professor Wang greeted those present at the meeting, noting it was an honor for him to have this opportunity to visit the Adirondack Park and discuss its management. As a researcher of environmental law and an organizer of an NGO, he described it as a great honor and opportunity for him to be able to engage in this academic exchange. He noted efforts underway in China to write a national preserves law which contains aspects of park management. As one of the writers of the law, Professor Wang is eager to learn about the successful experience of Adirondack Park management. The global environment is a whole; therefore, each part of the environment is necessarily related to the well being of the whole world. If China does a good job in terms of environmental protection, it benefits all, including Americans, which might explain why Americans are very interested in Chinese environmental protection efforts. There are many environmental organizations at work in China, and Professor Wang's center has developed close relations and collaboration with several American organizations such as NRDC. In addition, this visit has led to further associations. For example, Professor Wang's speaking engagement at a conference several days ago at Vermont Law School has resulted in plans for future collaboration. Professor Wang hopes that through this research trip he can learn from the Agency's experience and help China to write an effective environmental protection law. He encouraged all Americans and Chinese to contribute towards global and environmental protection.

Chairman Whaley noted that Professor Wang would be at The Nature Conservancy for a presentation at 7 p.m. that evening at the Conservancy's offices in Keene. The public is encouraged to attend.

He then turned the floor over to the Planning, Local Government and Economic Affairs Committees at 9:25 a.m.

p. 406

NEW YORK STATE
Adirondack
parkagency

VIA TELEFAX AND MAIL

March 4, 2008

John Privitera, Esq.
McNamee, Lochner, Titus and Williams, P.C.
75 State Street
Box 459
Albany, NY 12201

Re: Lewis Family Farm, Inc. (E2007-041)

Dear Mr. Privitera:

This letter responds to yours of March 3, 2008 to Cecil Wray, Enforcement Committee Chair. I am providing legal counsel to the Committee on the above-referenced matter, and am responding to your letter on Mr. Wray's behalf.

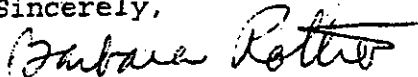
This matter was originally scheduled for the Agency's February meeting and was adjourned at your request. At the time of that adjournment, you were advised by letter dated January 31, 2008, that the matter would be scheduled on March 13, 2008 at 3:00 p.m. Later, you contacted the Agency's public information officer to request a different time for this matter on March 13th. By letter dated February 19, 2008, the Agency again specified that the matter is scheduled to be heard on March 13, 2008 at 3:00 p.m.

This matter will remain on the Agency schedule for March 13, 2008 at 3:00 p.m. Please understand that this matter is only one of many agenda items on the various Agency and Committee agendas for that date and rearrangement of the schedule is not possible at this time. I can offer to schedule your case first on the Enforcement Committee agenda at 2:30 PM, but that is the best we can offer.

Please be advised that I will be sending another letter setting out the Chairman's procedures for the Committee meeting.

I am available if you have questions.

Sincerely,



Barbara Rottier
Associate Counsel

Paul Van Cott, Associate Attorney

**STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY**

-----X

LEWIS FAMILY FARM, INC.,

Petitioner,

v.

**NEW YORK STATE ADIRONDACK
PARK AGENCY,**

Respondent.

-----X

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

-----X

AFFIRMATION

INDEX NO. 315-08

INDEX NO. 332-08

JOHN F. RUSNICA affirms the following under penalty of perjury:

1. I am an attorney duly admitted to practice before the courts of the State of New York. I am employed as an Associate Attorney with the New York State Department of Agriculture and Markets (hereinafter referred to as "Department") and work with the Division of Agricultural Protection and Development Services. I assist this division with its administration and enforcement of Agriculture and Markets Law (AML) Article 25-AA, Agricultural Districts, which establishes and implements New York's agricultural districts program.
2. I submit this affirmation to explain the Department's role with regard to administering AML Article 25-AA which is involved in the underlying Special Proceeding. The proceeding seeks to annul the March 25, 2008 Determination of the Respondent, Adirondack Park Agency (the "APA" or "Respondent"). The APA's determination held that Petitioner's three single family residences, characterized as "farmworker housing," violated the APA Act and the Wild and Scenic Rivers Act because they were constructed in a resource protection

zone without permits, and were not exempt "agricultural use structures" under the APA Act, Executive Law § 802(8).

3. Article XIV, Section 4 of the New York State Constitution provides, in part, that the "policy of the State shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products." AML Article 25-AA, enacted in 1971 and referred to as the Agricultural Districts Law (ADL), forms the cornerstone of New York's agricultural protection program and implements the Constitutional directive to preserve and protect the State's agricultural lands as important State resources. This is accomplished, in part, by promoting the retention of farmland in active agricultural use.

4. AML Article 25-AA §300 recognizes the Constitutional directive and "provide[s] a locally-initiated mechanism for the protection and enhancement of New York state's agricultural land as a viable segment of the local and state economies and as an economic and environmental resource of major importance." County governments may create agricultural districts [AML §303], which consist primarily of viable farmland. Land in an agricultural district receives the benefits and protections of both the general agricultural preservation policies of AML §300, and the specific benefits and protections of AML §305, including an agricultural assessment [AML §305(1)]; a limitation on the power of special improvement districts to impose assessments or special ad valorem levies for sewer, water or other services, on farmland within a district [AML §305(5)]; and notice of intent requirements which provide for review of public acquisitions of land, and expenditures for public improvements, within agricultural districts [AML §305(4)]. I am informed that the Petitioner's land is located within Essex County Agricultural District, No. 4, a county-adopted, State certified agricultural district.

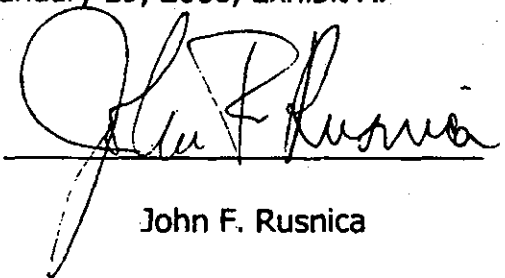
5. Farm operations in an agricultural district are protected by AML §305-a, which prohibits local governments from unreasonably restricting or regulating such operations located within an agricultural district unless it can be shown that the public health or safety is threatened. Upon request, the Department of Agriculture and Markets evaluates, on a case-by-case basis, the reasonableness of a specific local requirement or process imposed on a farm operation. If warranted after that review, the Commissioner may issue an Order, or bring an action against the local government to enforce the §305-a prohibition. Section 305-a, by its express terms, does not apply to State agencies such as the APA, but embodies the Department's approach regarding all regulations governing farm operations.

6. In its administration of AML §305-a the Department has established guidance documents which explain the Department's position on matters addressed under prior reviews. For example, the Department has issued Guidelines for Review of Local Laws Affecting Farm Worker Housing explaining that the Department has consistently determined that "on-farm buildings" include farm labor housing and those buildings are protected by AML §305-a as part of a farm operation. This determination was upheld in *Town of Lysander v. Hafner*, 96 N.Y.2d 558 (2001).

7. Farming is also protected by AML §308, the "Right to Farm" law, which provides for the Commissioner to issue opinions as to whether particular agricultural practices are sound and whether a particular land use is "agricultural in nature." On February 1, 2008, the Commissioner issued an "agricultural in nature" opinion [AML §308(4)] at the request of the Petitioner stating, consistent with the Department's long-standing policy, that farm labor housing used for the on-farm housing of permanent and seasonal employees is part of a farm operation and is protected by AML §305-a. The opinion concluded that the use of the land in question underlying this proceeding, for the siting and construction of farm worker housing, is agricultural in nature. The February 1, 2008 opinion was advisory, and provides the opinion of the Department regarding the nature of the Lewis Farm operation's use of its land for farmworker housing. See copy of Commissioner Hooker's February 1, 2008 opinion, attached hereto as Exhibit A.

8. AML §305(3) applies to State agencies and provides "It shall be the policy of all State agencies to encourage the maintenance of viable farming in agricultural districts and their administrative regulations and procedures shall be modified to this end insofar as is consistent with the promotion of public health and safety and with the provisions of any federal statutes, standards, criteria, rules, regulations, or policies, and any other requirements of federal agencies, including provisions applicable only to obtaining federal, grants, loans or other funding." The Department has used this provision on a case-by-case basis to consult with other State agencies and to negotiate appropriate resolutions when projects constructed, reviewed or funded by State agencies have had potential negative impacts on farm operations located within agricultural districts.

9. The Department has participated in discussions over the years with APA staff, Farm Bureau, and Cornell Cooperative Extension, relating to agriculture in the Adirondack Park. Here, the Department conveyed its policy concerning farm worker housing to the APA, and specifically expressed its views regarding the APA's regulatory involvement with Lewis Farm's worker housing from the perspective of the Agriculture and Markets Law. See, Record, Item 10, Reply Affirmation of Paul Van Cott, January 29, 2008, Exhibit A.



John F. Rusnica

Dated: June 13, 2008

pp. 410-412



STATE OF NEW YORK
DEPARTMENT OF AGRICULTURE AND MARKETS

108 Airline Drive, Albany, New York 12235

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Eliot Spitzer
Governor

Patrick Hooker
Commissioner

February 1, 2008

Sandy and Barbara Lewis
The Lewis Family Farm, Inc.
1212 Whallons Bay Road
Essex, New York 12936

RE: Section 308, subd. 4 Opinion Concerning Farm Worker Housing

Dear Mr. and Mrs. Lewis:

On January 9, 2008, the Department received an e-mail from your attorney, John J. Privitera, requesting, on your behalf, an opinion pursuant to Agriculture and Markets Law (AML) §308, subdivision 4 as to whether land used for the siting and construction of farm worker housing is considered "agricultural in nature." The evaluation of land uses under this provision is conducted on a case-by-case basis upon information submitted and in consultation with the Advisory Council on Agriculture.

You indicate that Lewis Family Farm, Inc. is a USDA certified organic farm located in the Town of Essex, Essex County. Farm Manager Dr. Marco Turco reports that the farm encompasses approximately 1,200 acres and includes 826 cultivated acres, pastures, a sugar-bush, and a deciduous and conifer forest. The farm produces certified organic beef animals and raises cows, bulls, heifers and steers. Additionally, the farm produces a range of crops, which have included hard white winter wheat; soybeans; alfalfa; mixed, cool-season grasses; corn; spelt and triticale. Department staff confirmed that the land in question is located within Essex County Agricultural District No. 4, a county adopted, State certified agricultural district.

Dr. Robert Somers, Manager of the Department's Agricultural Protection Unit, visited the farm on January 9, 2008. Dr. Somers observed that four modular farm worker houses have been constructed on the property. Three of the farm worker houses are clustered in a U-shaped pattern at the corner of Christian and Whallons Bay Roads. You indicated that two of the four homes are complete; the other two homes have completed exteriors but are unfinished inside. You explained that one is occupied by the farm manager and the other, by a person working on the farm. You indicated that these three homes replaced an existing home and barn complex that were removed prior to construction. You indicated that the three homes share a common

R00410

driveway, septic leach field and water source (well). The fourth farm worker house is located off of Whallons Bay Road at the crest of a hill. You explained that the farm manager occupies this home because it has a strategic view of most of the farm, including the barns and the three new farm homes. You stated that all four of the modular homes were placed on poured concrete foundations with basements.

You indicate that the farm housing which was located on the property when it was purchased was old, energy inefficient and contaminated with mold. You stated that you decided to remove those structures and construct new homes for your farm workers and that suitable off-farm housing is not available within the area. You also indicate that it is your intent to provide quality housing for your workers in an effort to recruit employees that will bring their families to the farm and become vested in the farm and the community; and you hope that the housing will help recruit the most qualified workers to your state-of-the-art farm.

In considering whether a particular land use is agricultural in nature, the Department takes into account the definition of "farm operation" contained in AML §301. A land use does not need to fall within the meaning of that term in order to be "agricultural in nature." Examination of the definition is helpful, however, in considering the nature of a land use since it relates to agricultural activities. Included within the definition of "farm operation" (AML §301, subd. 11) are "[t]he land and on-farm buildings, equipment, manure processing and handling facilities, and practices which contribute to the production, preparation and marketing of crops, livestock and livestock products as a commercial enterprise...."

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

In evaluating the use of farm labor housing, the Department considers whether the housing is used for seasonal and/or full-time employees; is provided by the farm operator (irrespective of whether the operator owns or rents the farm for the production of agricultural products); whether the worker is an employee of the farm operator and employed in the farm operation(s); and whether the farm worker is a partner or owner of the farm operation. The Department does not consider the residence of the owner or partner of the farm operation to be part of a "farm operation" as defined in AML §301, subd. 11. Farm labor housing used for the on-farm housing of permanent and seasonal employees is part of a farm operation and is protected by AML §305-a.

Dr. Somers, during his visit to the farm, confirmed that farm worker housing was needed on the farm; existing residential structures had been removed, except for the

home of the landowner and a guest house; and that the three clustered farm worker houses could not be readily separated or easily subdivided due to the shared driveway, septic leach field, and electrical connection to the grid and water supply.

Based upon the information provided by you and Dr. Marco Turco, the Department's farm visit, and upon consultation with the Advisory Council on Agriculture, it is my opinion that use of the land in question for the siting and construction of farm worker housing is agricultural in nature.

Sincerely,



Patrick Hooker
Commissioner

cc: Advisory Council on Agriculture
Essex County Agricultural and Farmland Protection Board

STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

LEWIS FAMILY FARM, INC.,

Petitioner,

v.

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Respondent.

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

AFFIRMATION OF
LORETTA SIMON IN
SUPPORT OF MOTION
TO DISMISS IN PART
AND ANSWER IN PART
Hon. Richard B. Meyer

INDEX No. 315-08
RJI No. 15-1-2008-0109

INDEX No. 332-08
RJI No. 15-1-2008-0117

Loretta Simon, an attorney duly admitted to practice in the courts of the State of New York, hereby affirms under penalty for perjury pursuant to CPLR § 2106:

1. I serve as an Assistant Attorney General in the Environmental Protection Bureau of the Office of the New York State Attorney General and am litigation counsel to the Adirondack Park Agency ("the APA" or "the Agency") in this matter. I am familiar with this matter and the underlying facts,

Affirmation of Loretta Simon
dated June 13, 200

having represented the APA in a previous declaratory judgment action brought by Lewis Family Farm, Inc. ("Lewis Farm") against the APA in 2007 (Lewis Family Farm, Inc., v. APA, Essex Co. Sup. Ct., Index No. 498-07, RJI No. 15-1-2007-0153, assigned to Hon. Kevin K. Ryan [hereafter "Lewis Farm I"])).

2. In addition, I am counsel to the APA in Lewis Family Farm, Inc. v. APA, Sup. Ct., Essex Co., Index No. 315-08 (hereafter "Lewis Farm II") and the civil enforcement action against Lewis Farm and Barbara and Salim B. Lewis (APA v. Lewis Family Farm, Inc., Salim B. Lewis and Barbara Lewis, Index No. 332-08, [hereafter "Lewis Farm III"])).

3. I submit this affirmation in support of the APA's Motion to Dismiss in part and Answer in part Lewis Farm's CPLR Article 78 proceeding.

4. These three civil actions all arise from the same facts: Lewis Farm's construction of three single-family dwellings and subdivision of land pursuant to the APA Act, on land located in the Town of Essex, Essex County in violation of the Adirondack Park Agency Act ("APA Act") and the Wild, Scenic, and Recreational River System Act ("Rivers Act"). See Executive Law § 809 and Executive Law § 810; Environmental Conservation Law ("ECL") § 15-2701.

5. Lewis Farm installed foundations, septic systems, and three single-family dwellings, and subdivided the land for the

Affirmation of Loretta Simon
dated June 13, 2008

purpose of occupancy, as defined by the APA Act, all without APA permits.

STATEMENT OF FACTS

6. In March 2007 Barbara and Salim B. Lewis applied to the APA for a permit to construct three single-family dwellings along the Bouquet River, in Essex County on property of Lewis Farm. See Record Item 5 (Quinn Aff. dated July 23, 2007, Exhibit A). The APA informed Lewis Farm that the application was incomplete. See Record Item 5 (Quinn Aff., dated July 23, 2007, Exhibit B). On or about March 19, the Agency learned that Lewis Farm had already begun installation of the foundations for the dwellings and commenced enforcement actions. See Record Item 5 (Quinn Aff. dated July 23, 2007, ¶ 6).

7. From June of 2007 through August, 2007 the parties were engaged in litigation (Lewis Farm I) which resulted in the Decision and Order of Hon. Keyin K. Ryan, who held that the APA had jurisdiction over the housing and subdivision pursuant to the APA Act and the Rivers Act, that section 305-a of the Agriculture and Markets Law applies only to local governments, and dismissed the complaint. See Exhibit D.

8. Thereafter the APA scheduled and heard the matter on March 13, 2008 and issued an Agency determination dated March 25, 2008 finding Lewis Farm in violation of the APA Act, and the

Affirmation of Loretta Simor
dated June 13, 2008

Rivers Act. See Record Item 1.

LITIGATION SUMMARY

A. Lewis Farm I:

Lewis Family Farm Inc., v. APA (Index No. 498-07) 2007

9. In June 2007, during the pendency of the underlying APA administrative enforcement actions, Lewis Farm commenced an action by serving a complaint against the Agency in New York State Supreme Court, Essex County, seeking a declaratory judgment that the Agency had no jurisdiction over construction of farm worker housing, or if it did, that the Agriculture and Markets Law, § 305-a, superceded the APA Act and divested the APA of jurisdiction over such development. See Exhibit A (Complaint dated June 26, 2007, Index No. 498-07). Attorneys Joseph R. Brennan of Brennan & White, and David L. Cook and Jena R. Rotheim of Nixon Peabody LLP, represented Lewis Farm in this action.

10. The complaint was amended on or about July 3, 2007. See Exhibit B. At that time the Lewis Farm also sought an ex parte stay against the APA. The application for the ex parte stay was presented to Acting Supreme Court Justice Kevin K. Ryan, who declined to sign it. See Exhibit B (OSC dated July 13, 2007).

11. On or about August 1, 2007, the State filed a Motion to Dismiss the Amended Complaint for lack of subject matter

Affirmation of Loretta Simon
dated June 13, 2008

jurisdiction (CPLR § 3211[2]); prematurity; and failure to state a cause of action pursuant to CPLR § 3211(7) because Agriculture and Markets Law § 305-a does not preclude the APA from requiring a permit for the subdivision of land and construction of single-family dwellings. The APA also requested an order rejecting plaintiff's request for injunctive relief for failure to establish the elements required for injunctive relief.

12. On August 8, 2007, oral argument was held on the motion to dismiss before Justice Ryan. See Exhibit C (transcript dated August 8, 2007).

13. In a Decision and Order dated August 16, 2007, Justice Ryan denied Lewis Farm's motion for a restraining order against the Agency for failure to show irreparable damages and granted the Agency's motion to dismiss the proceeding. See Exhibit D (Decision and Order, Lewis Family Farm, Inc. v. APA, Sup. Ct. Essex Co., August 16, 2007 ("August 2007 Decision and Order")). The Court's Decision and Order further stated that the APA had jurisdiction over the dwellings and the subdivisions created by construction of the dwellings. See Exhibit D (August 2007 Decision and Order, pp. 4, 7).

14. The Court's August 2007 Decision and Order also rejected Lewis Farm's argument that the structures are "agricultural use structures" stating that when read in its

Affirmation of Loretta Simor
dated June 13, 2008

entirety, the APA Act and the regulations implementing the Rivers Act do not exempt such dwellings from Agency jurisdiction. See Exhibit D (August 2007 Decision and Order, p. 5).

15. The Court further held that Section 305-a of the Agriculture and Markets Law did not supersede Agency authority under the Adirondack Park Agency Act or its regulations, noting that from a plain reading of the section, it applies only to local laws. See Exhibit D (August 2007 Decision and Order, p. 6).

16. Justice Ryan dismissed the action as not ripe for judicial intervention noting that the APA has authority to review the matter as per Executive Law § 809. See Exhibit D (August 2007 Decision and Order, p. 6).

17. On or about October 1, 2007, Lewis Farm filed a Notice of Appeal of the August 2007 Decision and Order. See Exhibit E.

18. From September 2007 to May 2008 Lewis Farm failed to perfect its appeal to the Third Department. By Motion dated May 8, 2008, Lewis Farm sought to extend its time to appeal beyond the nine month abandonment deadline of June 26, 2008.

19. In a Decision and Order on Motion dated May 29, 2008, the Third Department granted Lewis Farm's Motion to extend the time to perfect its appeal, but ordered the appeal dismissed, unless the appellant filed and served its record and brief on or

Affirmation of Loretta Simon
dated June 13, 2008

before July 28, 2008. See Exhibit E.

B. Lewis Farm II:

Lewis Family Farm, Inc. v. APA (Index No. 315-08) 2008

20. On or about April 8, 2008, Lewis Farm, represented by John J. Privitera of McNamee, Lochner, Titus & Williams, P.C., initiated a second judicial challenge against the APA by filing an Article 78 proceeding in Essex County Supreme Court. The petition, like the earlier declaratory judgment complaint continues to challenge the APA's jurisdiction over the three dwellings. See Exhibit F.

21. The Article 78 petition was served on the Office of the Attorney General with an Order to Show Cause ("OSC") and ex parte stay against the State on or about April 8, 2008. See Exhibit F. The ex parte stay was later vacated after objection of the Office of the Attorney General, and replaced with an Amended Order to Show Cause on April 9, 2008. See Exhibit F (stay order dated April 9, 2008).

22. Oral argument on the OSC and stay application was held on April 11, 2008 before Honorable Richard B. Meyer. See Exhibit I (transcript dated April 11, 2008). In a Decision and Order dated April 11, 2007, Judge Meyer granted in part and denied in part Lewis Farm's request for a stay. See Exhibit J (April 11, 2008 Decision).

Affirmation of Loretta Simo
dated June 13, 200

23. On or about April 14, 2008, Lewis Farm moved for leave to renew and reargue the April 11, 2008 stay order, and also filed an amended petition. See Exhibit G.

24. On April 25, 2008, by letter Decision and Order Justice Meyer granted reargument but adhered to his April 11th Order. See Exhibit K.

25. On April 28, 2008, Lewis Farm sought by order to show cause to the Appellate Division, permission to appeal the April 11, 2008 stay order and to enjoin enforcement of the APA determination in its entirety. After oral argument, Honorable Leslie Stein ordered a limited, conditional stay pending a determination on the motion. See Exhibit L.

26. In a Decision and Order dated May 19, 2008, the Appellate Division granted Lewis Farm permission to appeal the April 11, 2008 stay order of Justice Meyer. See Exhibit M.

C. Lewis Farm III:
APA v. Lewis Family Farm, Inc., Salim B. Lewis,
and Barbara Lewis (Index No. 332-08)

27. On April 11, 2008, on behalf of the APA, the Office of the Attorney General filed a summons and complaint in Essex County, against Lewis Farm, Barbara Lewis and Salim B. Lewis, for violations of the Adirondack Park Agency Act ("APA Act"), Executive Law § 801, and the Wild, Scenic, and Recreational River System Act (the "Rivers Act") Environmental Conservation Law

Affirmation of Loretta Simon
dated June 13, 2008

("ECL") § 15-2701. The APA commenced civil action no. 332-08 for various violation of the permitting requirements and for enforcement of Executive Law §§ 809(2)(a), 810(1)(e)(3), and 810(2)(d)(1), ECL § 15-2701, and 9 NYCRR Part 57. The APA filed an amended complaint dated May 14, 2008.

28. Lewis Farm filed a motion to consolidate civil actions nos. 332-08 and 315-08, which was granted by Justice Meyer in his letter Decision and Order dated April 25, 2008. See Exhibit K.

29. A Request for Judicial Intervention ("RJI") form dated April 7, 2008, filed by Lewis Farm's counsel in Lewis Family Farm v. APA (Index No. 315-08), failed to list its prior related action heard by Justice Ryan (Index No. 498-07). In response to the last question on the RJI, a sworn statement, Lewis Farm indicated that there were no other related proceedings, notwithstanding the fact that Lewis Farm filed the prior proceeding which had been assigned to Justice Ryan (Index No. 498-07). See Exhibit H.

30. One week later, Lewis Farm filed an RJI form dated April 14, 2008, in the APA's enforcement action (Index No. 332-08) and again failed to alert the Court to the proceeding heard by Justice Ryan (Index No. 498-07). See Exhibit H.

31. The State, by motion, requested these matters be transferred to Justice Ryan consistent with the provisions of 22 NYCRR §§ 202.3 and 202.6 which requires all related matters to be

handled by the same IAS judge, because Justice Ryan was the original judge assigned to the first judicial action and because the second and third judicial actions are related to the first action.

32. The State's motion to transfer the matter was denied by Justice Meyer. See Exhibit K.

D. Prior Order: State of New York and APA v. Lewis Family Farm, Inc. (Index No. 626-00) (2000)

33. A prior action was brought by the State and APA against Lewis Farm for violations of Article XIV § 1 of the New York State Constitution and the APA Act involving drainage of wetlands onto State-owned Forest Preserve lands. See Exhibit N, p. 3.

34. Lewis Farm alleged that it was not legally responsible for the violations, and that it had the right to conduct the work under the agricultural exemption of the Federal Clear Water Act. See Exhibit N, p. 3.

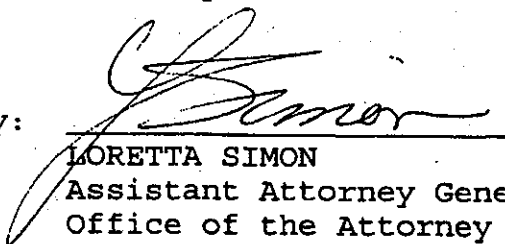
35. Salim Lewis signed a Consent Order on behalf of Lewis Farm, which included payment of \$50,000 for an environmental benefit project, restoration of the wetlands and stipulated penalties in the event of default. See Exhibit N, p. 4.

36. The Consent Order was entered as an Order of Honorable James P. Dawson on January 3, 2001. See Exhibit N (Order dated December 26, 2000).

Dated: Albany, New York
June 13, 2008

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for Adirondack Park Agency

By:


LORETTA SIMON
Assistant Attorney General
Office of the Attorney General
Environmental Protection Bureau
The Capitol
Albany, New York 12224-0341
(518) 402-2724

**SIMON AFFIRMATION
TABLE OF EXHIBITS**

LEWIS FARM I (Lewis Family Farm, Inc. v. NYS APA) Index No. 498-07

- Exhibit A Summons and Complaint dated June 26, 2007 (Index No. 498-07), with Exhibit A
- Exhibit B Order to Show Cause dated July 3, 2007 and Amended Complaint dated July 2007 (Index No. 498-07)
- Exhibit C Transcript of Oral Argument before Honorable Kevin K. Ryan dated August 8, 2007 (Index No. 498-07)
- Exhibit D Decision and Order of Honorable Kevin K. Ryan dated August 16, 2007 (Index No. 498-07) and Affidavit of Service of Order dated August 31, 2007
- Exhibit E Notice of Appeal dated September 26, 2007 and filed October 1, 2007 (Index No. 498-07); Decision and Order on Motion for extension of time to appeal dated May 29, 2008

LEWIS FARM II (Lewis Family Farm, Inc. v. APA) Index No. 315-08

- Exhibit F Ex Parte Order to Show Cause ("OSC") dated April 8, 2008; Amended OSC dated April 9, 2008 and Notice of Petition and Verified Petition dated April 7, 2008 (Index No. 315-08), with Exhibits A, B, C
- Exhibit G Amended Verified Petition dated April 14, 2008 (Index No. 315-08)
- Exhibit H Request for Judicial Intervention dated April 7, 2008 (Index No. 315-08)
Request for Judicial Intervention dated April 14, 2008 (Index No. 332-08)
- Exhibit I Transcript of Oral Argument before Honorable Richard B. Meyer dated April 11, 2008 (Index No. 315-08)
- Exhibit J Decision and Order on Motion for Stay of Honorable Richard B. Meyer dated April 11, 2008 (Index No. 315-08)
- Exhibit K Letter Decision on Motion to Reargue and Renew the April 11, 2008 Order and Motion to Consolidate and Cross-Motion to Transfer, of Honorable Richard B. Meyer dated April 25, 2008 (Index No. 315-08 and No. 332-08)
- Exhibit L Order to Show Cause dated April 28, 2008 signed by Honorable Leslie E. Stein, Appellate Division, Third Department for partial preliminary stay (Index No. 315-08, Case No. 504626)
- Exhibit M Decision and Order on Motion dated May 19, 2008 granting permission to appeal Supreme Court order of April 11, 2008, and extending partial stay pending appeal

PRIOR ORDER

- Exhibit N Order dated December 26, 2000 of Honorable James P. Dawson, Index No. 626-00, State of New York and APA v. Lewis Family Farm, Inc.

**Exhibit A: Summons and Complaint (Simon Aff. -
6/13/08)**

[Reproduced at pp. 13-20]

**Exhibit B: Order to Show Cause and Amended
Complaint (Simon Aff. - 6/13/08)
[Reproduced at pp. 38-40]**

**Exhibit C: Transcript dated 8/8/08 (Simon Aff. -
6/13/08)**

[Reproduced at pp. 176-203]

**Exhibit D: Decision and Order dated 8/16/07 (Simon
Aff. - 6/13/08)**
[Reproduced at pp. 4-12]

*Supreme Court, Appellate Division
Third Judicial Department*

Decided and Entered: May 29, 2008

Case # 504696

LEWIS FAMILY FARM, INC.,
Appellant,

**DECISION AND ORDER
ON MOTION**

v

**NEW YORK STATE ADIRONDACK
PARK AGENCY,** Respondent.

Motion for extension of time to perfect appeal.

Cross motion to dismiss appeal for failure of prosecution.

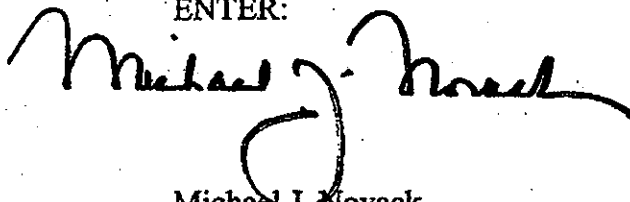
Upon the papers filed in support of the motion and the cross motion and the papers filed in opposition thereto, it is

ORDERED that the motion for an extension of time to perfect the appeal is granted, without costs, and the time to perfect the appeal is extended to July 28, 2008, and it is further

ORDERED that the appeal is dismissed, without costs, unless appellant shall filed and serve its record on appeal and brief on or before July 28, 2008, in which event the cross motion to dismiss the appeal is denied.

CARDONA, P.J., MERCURE, MUGGLIN, ROSE and LAHTINEN, JJ., concur.

ENTER:



Michael J. Novack
Clerk of the Court

**Exhibit F: Ex Parte Order to Show Cause dated
4/8/08 (Simon Aff. -6/13/08)
[Reproduced at pp. 248-249]**

**Exhibit G: Amended Verified Petition (Simon Aff.
6/13/08)**

[Reproduced at pp. 310-330]

LEWIS FARM II

Request for Judicial Intervention dated April 7, 2008 (Index No. 315-08)

LEWIS FARM III

Request for Judicial Intervention dated April 14, 2008 (Index No. 332-08)

REQUEST FOR JUDICIAL INTERVENTION

15-1-2008-0109
UCS - 840 (REV 1/2000)

SUPREME COURT
INDEX NO. _____

ESSEX COUNTY
DATE PURCHASED: _____

For Clerk Only

4/8/08

IAS Entry Dat

Judge Assigned

Dewson

RJI Date

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ADIRONDACK PARK AGENCY,

Respondent



PAID

95

000315 - 08

Date issue joined: n/a

Bill of particulars served (Y/N): [] Yes [x] No

NATURE OF JUDICIAL INTERVENTION (Check ONE box only AND enter information)

☐ Request for preliminary conference	☒ Notice of petition (return date June 6, 2008)
☐ Note of issue and/or certificate of readiness	Relief sought: <u>Annulment of Respondent's 3/25/08 Decision</u>
☐ Notice of motion (return date _____) Relief sought: _____	☐ Notice of medical or dental malpractice action (specify: _____)
☐ Order to show cause (clerk enter return date: _____) Relief sought: _____	☐ Statement of net worth
☐ Other ex parte application (specify: _____)	☐ Writ of habeas corpus
	☐ Other (specify: _____)

NATURE OF ACTION OR PROCEEDING (Check ONE box only)

MATRIMONIAL

- ☐ Contested -CM
☐ Uncontested -UM

COMMERCIAL

- ☐ Contract -CONT
☐ Corporate -CORP
☐ Insurance (where insurer is a party, except arbitration) -INS
☐ UCC (including sales, negotiable instruments) -UCC
☐ *Other Commercial -OC

REAL PROPERTY

- ☐ Tax Certiorari -TAX
☐ Foreclosure -FOR
☐ Condemnation -COND
☐ Landlord/Tenant -LT
☐ *Other Real Property -ORP

OTHER MATTERS

- ☐ * -OTH

TORTS

- Malpractice
☐ Medical/Podiatric
☐ Dental
☐ *Other Professional

☐ Motor Vehicle -MV
☐ *Products Liability -PL

☐ Environmental -EN
☐ Asbestos -ASB
☐ Breast Implant -BI
☐ *Other Negligence -OTN

☐ *Other Tort (including intentional) -OT

SPECIAL PROCEEDINGS

- ☐ Art. 75 (Arbitration) -ART75
☐ Art. 77 (Trusts) -ART77
☒ Art. 78 -ART78
☐ Election Law -ELEC
☐ Guardianship (MHL Art. 81) -GUARD
☐ *Other Mental Hygiene -MHYG

☐ *Other Special Proceeding -OSP
Petition to provide public access to Grand Jury Minute

RECEIVED
ESSEX COUNTY CLERK
08 APR - 8 AM 10:05
ELIZABETH H. H. 12932

*If asterisk used, please specify.

Check "YES" or "NO" for each of the following questions:

Is this action/proceeding against a:

YES NO

[] [x] Municipality:
(Specify _____)

YES NO

[] [x] Public Authority:
(Specify _____)

YES NO

[x] [] Does this action/proceeding seek equitable relief?
[] [x] Does this action/proceeding seek recovery for personal injury?
[] [x] Does this action/proceeding seek recovery for property damage?

Pre-Note Time Frames:

(This applies to all cases except contested matrimonial and tax certiorari cases)

Estimated time period for case to be ready for trial (from filing of RJ1 to filing of Note of Issue)

☐ Expedited: 0-8 months

☒ Standard: 9-12 months

☐ Complex: 13-15 months

Contested Matrimonial Cases Only: (Check and give data)

Has summons been served:

☐ No

☐ Yes, Date: _____

Was a Notice of No Necessity filed?

☐ No

☐ Yes, Date: _____

ATTORNEY(S) FOR PLAINTIFF(S):

<u>Self Rep.*</u>	<u>Name</u>	<u>Address</u>	<u>Phone #</u>
☐	John J. Privitera, Esq. Jacob F. Lamme, Esq.	McNamee, Lochner, Titus & Williams, P.C. 677 Broadway, Albany, NY 12207	518-447-3200

ATTORNEY(S) FOR DEFENDANT(S):

<u>Self Rep.*</u>	<u>Name</u>	<u>Address</u>	<u>Phone #</u>
☐	Andrew Cuomo, Attorney General	Department of Law, The Capitol Albany, New York 12224-0341	518-474-7330

* Self Represented: parties representing themselves, without an attorney, should check the "Self Rep." box and enter their name, address, and phone # in the space provided above for attorneys.

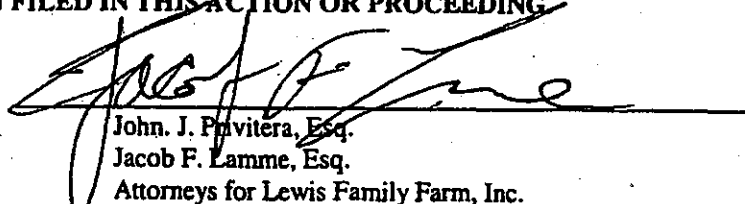
INSURANCE CARRIERS: n/a

RELATED CASES: (If NONE, write "NONE" below)

<u>Title</u>	<u>Index #</u>	<u>Court</u>	<u>Nature of Relationship</u>
NONE			

I AFFIRM UNDER PENALTY OF PERJURY THAT, TO MY KNOWLEDGE, OTHER THAN AS NOTED ABOVE, THERE ARE AND HAVE BEEN NO RELATED ACTIONS OR PROCEEDINGS, NOR HAS A REQUEST FOR JUDICIAL INTERVENTION PREVIOUSLY BEEN FILED IN THIS ACTION OR PROCEEDING.

Dated: April 7, 2008


John J. Privitera, Esq.
Jacob F. Lamme, Esq.
Attorneys for Lewis Family Farm, Inc.
677 Broadway
Albany, New York 12207
Tel. (518) 447-3200
Fax (518) 426-4260

ATTACH RIDER SHEET IF NECESSARY TO PROVIDE REQUIRED INFORMATION.

R00434

REQUEST FOR JUDICIAL INTERVENTION

UCS - 840 (REV 1/200)

SUPREME COURT
INDEX NO. 332-08ESSEX COUNTY
DATE PURCHASED:

For Clerk Only

IAS Entry Dat

Judge Assigned

RJI Date

ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

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

Date issue joined: n/a

Bill of particulars served (Y/N): [] Yes [x] No

NATURE OF JUDICIAL INTERVENTION (Check ONE box only AND enter information)

☐ Request for preliminary conference	☐ Notice of petition Relief sought:
☐ Note of issue and/or certificate of readiness	☐ Notice of medical or dental malpractice action (specify: _____)
☒ Notice of motion (return date April 24, 2008) Relief sought: <u>Consolidation pursuant to CPLR 602</u>	☐ Statement of net worth
☐ Order to show cause (clerk enter return date: _____) Relief sought: _____	☐ Writ of habeas corpus
☐ Other ex parte application (specify: _____)	☐ Other (specify: _____)

NATURE OF ACTION OR PROCEEDING (Check ONE box only)**MATRIMONIAL**

☐ Contested	-CM
☐ Uncontested	-UM

COMMERCIAL

☐ Contract	-CONT
☐ Corporate	-CORP
☐ Insurance (where insurer is a party, except arbitration)	-INS
☐ UCC (including sales, negotiable instruments)	-UCC
☐ *Other Commercial	-OC

REAL PROPERTY

☐ Tax Certiorari	-TAX
☐ Foreclosure	-FOR
☐ Condemnation	-COND
☐ Landlord/Tenant	-LT
☐ *Other Real Property	-ORP

OTHER MATTERS

☒ Attorney General action to enforce Agency Enforcement determination	-OTH

TORTS

Malpractice	
☐ Medical/Podiatric	-MM
☐ Dental	-DM
☐ *Other Professional	-OPM
☐ Motor Vehicle	-MV
☐ *Products Liability	-PL
☐ Environmental	-EN
☐ Asbestos	-ASB
☐ Breast Implant	-BI
☐ *Other Negligence	-OTN
☐ *Other Tort (including intentional)	-OT

SPECIAL PROCEEDINGS

☐ Art. 75 (Arbitration)	-ART75
☐ Art. 77 (Trusts)	-ART77
☐ Art. 78	-ART78
☐ Election Law	-ELEC
☐ Guardianship (MHL Art. 81)	-GUARD
☐ *Other Mental Hygiene	-MHYG
☐ *Other Special Proceeding	-OSP

Petition to provide public access to Grand Jury Minute

Check "YES" or "NO" for each of the following questions:

Is this action/proceeding against a:

YES NO

[] [x] Municipality:
(Specify _____)

YES NO

[] [x] Public Authority:
(Specify _____)

YES NO

[x] [] Does this action/proceeding seek equitable relief?
[] [x] Does this action/proceeding seek recovery for personal injury?
[] [x] Does this action/proceeding seek recovery for property damage?

Pre-Note Time Frames:

(This applies to all cases except contested matrimonial and tax certiorari cases)

Estimated time period for case to be ready for trial (from filing of RJI to filing of Note of Issue)

☐ Expedited: 0-8 months ☒ Standard: 9-12 months ☐ Complex: 13-15 months

Contested Matrimonial Cases Only: (Check and give data)

Has summons been served: ☐ No ☐ Yes, Date: _____

Was a Notice of No Necessity filed? ☐ No ☐ Yes, Date: _____

ATTORNEY(S) FOR PLAINTIFF(S):

<u>Self Rep.*</u>	<u>Name</u>	<u>Address</u>	<u>Phone #</u>
☐	Andrew Cuomo, Attorney General	Department of Law, The Capitol Albany, New York 12224-0341	518-474-7330

ATTORNEY(S) FOR DEFENDANT(S):

<u>Self Rep.*</u>	<u>Name</u>	<u>Address</u>	<u>Phone #</u>
☐	John J. Privitera, Esq. Jacob F. Lamme, Esq.	McNamee, Lochner, Titus & Williams, P.C. 677 Broadway, Albany, NY 12207	518-447-3200

* Self Represented: parties representing themselves, without an attorney, should check the "Self Rep." box and enter their name, address, and phone # in the space provided above for attorneys.

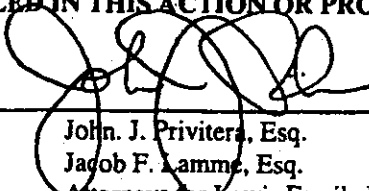
INSURANCE CARRIERS: n/a

RELATED CASES: (If NONE, write "NONE" below)

<u>Title</u>	<u>Index #</u>	<u>Court</u>	<u>Nature of Relationship</u>
Lewis Family Farm v. APA	315-08	Essex Co. Supreme (Judge Meyer)	Identical facts and law (see attached)

I AFFIRM UNDER PENALTY OF PERJURY THAT, TO MY KNOWLEDGE, OTHER THAN AS NOTED ABOVE, THERE ARE AND HAVE BEEN NO RELATED ACTIONS OR PROCEEDINGS, NOR HAS A REQUEST FOR JUDICIAL INTERVENTION PREVIOUSLY BEEN FILED IN THIS ACTION OR PROCEEDING.

Dated: April 14, 2008



John J. Privitera, Esq.
Jacob F. Lamme, Esq.
Attorneys for Lewis Family Farm, Inc.
677 Broadway
Albany, New York 12207
Tel. (518) 447-3200
Fax (518) 426-4260

ATTACH RIDER SHEET IF NECESSARY TO PROVIDE REQUIRED INFORMATION.

R00436

STATE OF NEW YORK

SUPREME COURT

COUNTY OF ESSEX

-----*
LEWIS FAMILY FARM, INC.,)
 Petitioner,)

- v -

ADIRONDACK PARK AGENCY,)
 Respondent.)
-----*

Index No.: 315-2008
RJI No.: 15-1-2008-0109

Order to Show Cause proceedings held in the
above-entitled matter in Essex County Supreme Court,
Elizabethtown, New York, before the Honorable Richard
B. Meyer on April 11, 2008.

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
2 Friday, April 11, 2008, by the
3 Hon. Richard B. Meyer at 1:30 p.m.)

4 THE COURT: This is the matter of Lewis
5 Family Farm against the Adirondack Park
6 Agency, it's a Supreme Court matter bearing
7 Index No. 315-08. We'll get the appearances,
8 Mr. Privitera?

9 MR. PRIVITERA: Yes, your Honor, John
10 Privitera. Good afternoon.

11 THE COURT: Good afternoon. And also
12 present is Mr. Lewis of the Lewis Family
13 Farm.

14 MR. PRIVITERA: Yes, your Honor.

15 THE COURT: Ma'am?

16 MS. SIMON: Loretta Simon from the
17 attorney general's office.

18 THE COURT: And you, ma'am?

19 MS. REYNOLDS: Sarah Reynolds from the
20 Adirondack Park Agency.

21 THE COURT: All right, thank you. Please
22 be seated. I have read the papers so I'm
23 somewhat familiar with the arguments being
24 made here. Mr. Privitera, is there something
25 that you want to make an argument here

1 without going into detail over the papers
2 because I have read them and gone through
3 them?

4 MR. PRIVITERA: Yes, your Honor. Thank
5 you. First, your Honor, thank you for making
6 the time on such short notice to be heard
7 this afternoon. The issue before the Court
8 this afternoon is very narrow at this early
9 procedural hour. As an acting supreme court
10 justice, a Court of general jurisdiction, you
11 will be administering justice in this case
12 from the Order to Show Cause that you signed
13 earlier this week through the conclusion of
14 this matter and the final judgment entered by
15 the Court. Today's issue is narrow because
16 we ask you to determine only how you will
17 carve out the elbow room and the scope of
18 this matter so that when you do finally
19 render a determination, you are able to serve
20 due process and the full administration of
21 justice.

22 The stay that we seek today, your Honor,
23 is only under 7805. You have sole discretion
24 to make that decision. When you make that
25 decision the Third Department will respect it

1 and defer to you and affirm if there's any
2 way that they can. In fact you could enter a
3 stay under 7805 under your own initiative
4 under the terms of the statute without even
5 heard by the parties if you thought it was
6 important to the administration of due
7 process. And courts have said that it's a
8 mistake to pass on the merits at this time,
9 so the affidavits that have been filed by the
10 respondent here are largely immaterial.

11 Your Honor, when we ask you to pass on the
12 merits, you will be the first jurist in the
13 history of this state to interpret and imply
14 Article 14, Section 4 of the New York State
15 Constitution, part of the Conservation Bill
16 of Rights that's nestled against the Forever
17 Wild clause, and you will be the first jurist
18 to be asked to what extent that clause of our
19 Constitution protects the right to farm.
20 You will be the first jurist in the history
21 of this state to decide the scope of Section
22 305.3 of the Agricultural and Markets Law and
23 determine whether the respondent has a duty
24 to modify its regulations as the statute
25 demands in order to protect the right to

1 farm.

2 You will be the first jurist to decide the
3 scope of the Court of Appeals case in the
4 *Town of Lysander* as to the right to farm
5 worker housing in the Adirondack Park, and
6 you will be the first jurist in the history
7 of the state to interpret and decide whether
8 the Adirondack Park Agency has jurisdiction
9 over farming to any extent and certainly
10 under the Act with respect to farm worker
11 housing. You will be the first to decide the
12 impact of the commissioner of the Department
13 of Ag and Markets decision in this case that
14 was ignored by the determination that you
15 have before you in which the commissioner
16 found that the Lewis Family Farm had the
17 right to farm under 308.4 of the Ag and
18 Markets Law which is a final determination
19 that can be only challenged by an Article 78
20 and has not been challenged here in which the
21 commissioner found that the specific houses
22 in this case on February 1, were agricultural
23 buildings.

24 THE COURT: Why is that binding on the
25 Agency which has its own definitions and own

1 regulations? Why is that determination
2 binding particularly I don't think the Agency
3 was a party to that determination, were they?

4 MR. PRIVITERA: No, they weren't, your
5 Honor, but we're not here to decide the
6 merits. You will be deciding whether or not
7 it's possible for the commissioner in Ag and
8 Markets to find that a building is
9 agricultural and for another agency perhaps
10 to find that it is not as was done here. And
11 you will be the first to decide whether the
12 Agency may ignore the advice, the statutory
13 advice of the Adirondack Park local
14 government review board which was given here
15 and not even mentioned in the determination
16 and they represent all of the towns inside
17 the Blue Line.

18 When you ultimately reach the merits here,
19 and I know your Honor will take that up in
20 due time when it's fully briefed and you
21 have an answer and a return before you, you
22 will then be asked to administer justice in
23 this matter. If I may approach, your Honor,
24 please, I have a proposed Order if your Honor
25 would like it, but I have a proposed Order

1 because I would like to go through, if I may,
2 the specific terms of the decretal paragraph
3 of the Agency.

4 THE COURT: Are you talking about the
5 determination here?

6 MR. PRIVITERA: Yes, your Honor.

7 THE COURT: I have that. In the paper?

8 PRIVITERA: I meant the last page, your
9 Honor, and if I may approach your Honor?

10 THE COURT: Certainly.

11 MR. PRIVITERA: This quotes from the
12 determination, your Honor, the determination
13 that we ask to be stayed here in the narrow
14 business of the Court this afternoon. This
15 determination says and orders that Barbara
16 Lewis shall apply for a permit for the three
17 new buildings and the four lots, four lot
18 subdivision, that's to say subdividing these
19 farm worker housing from the farm even though
20 they are not subdivided now, by April 14, on
21 Monday, and submitting the appropriate major
22 project application to the Agency.

23 The Order also says that the penalty that
24 was levied -- I'm sorry, in paragraph 2 it
25 also says by April 28 to submit to the Agency

1 a detailed description of the dwellings and
2 as built planing plans for the septic system.
3 Your Honor, I have no idea where that came
4 from because when you get to the record in
5 this matter, and I'm sorry, the deal of no
6 merits, there is detailed drawings and
7 approvals by the Town of Essex approving the
8 septic system in accordance with all building
9 codes, having looked at the stamped drawings
10 of a professional engineer, so it's already
11 been determined that the septic system and
12 the wells and everything about the houses,
13 the three houses are in compliance with all
14 building codes and all state standards.

15 THE COURT: That's been submitted to the
16 Agency?

17 MR. PRIVITERA: Yes, and it's in the
18 record. That will be part of the return
19 before you, your Honor. By the way, the Town
20 of Lysander case, the Court of Appeals said
21 that was all a family ever has to do is to
22 get the local town and code enforcement
23 officer to bless the construction, so I don't
24 know where paragraph 2 comes from. That was
25 already in the record.

Paragraph 3 says that the Lewis Family Farm must reply to any information requests after filing the application within thirty days and then, this is very important, your Honor, paragraph 4 says Lewis Farm will retain all rights of appeal in the project review process but foregoes the right to challenge agency jurisdiction and the review clocks otherwise applicable. So what the Order seeks, your Honor, is to avoid your review of the merits. It seeks and by its terms directs that the Lewis Family Farm submit an application where we have before you a constitutional and statutory challenge saying that the Agency does not have jurisdiction over farm worker housing, it says almost immediately. This decision was only a couple of weeks ago. Walk in, submit jurisdiction, and the minute you do that you forgo the right to challenge the agency's jurisdiction.

They are seeking, your Honor, to avoid judicial review by you of the merits and that is what will happen if we comply. If we comply the case is moot. If we comply we

1 have lost all of our arguments, some of which
2 are sound in the Constitution, to have your
3 Honor deliver justice and consider all of the
4 matters before you.

5 Number 5 says that we shall not occupy the
6 three dwellings during this entire proceeding
7 even though that's where the farm workers are
8 supposed to live, even though the Agency has
9 said the buildings can stay where they are.
10 Then it says that we must pay the penalty of
11 \$50,000 by the end of the month. And then
12 finally it says, which is sort of
13 interesting, it directs agency staff to
14 review the application, the application in
15 which we can no longer argue our
16 constitutional rights, review the application
17 with the interest of getting workers in the
18 houses this growing season, "However that can
19 happen only if respondent responds
20 immediately and favorably to this
21 determination and submits the required
22 information and penalty."

23 Your Honor, I would like to suggest that
24 due process in the country generally allows a
25 trial before sentencing, generally allows a

1 day in court before a penalty, and I don't
2 even want to mention regress that we hold so
3 abhorrent that to not allow that we do that,
4 but certainly have we never in this country
5 seen an Order that says submit, forgo the
6 right to challenge and do it immediately?

7 We ask your Honor to stay that and what's
8 the impact of a stay? The impact of a stay
9 is that ultimately, your Honor, if we lose
10 and you determine all of our many points in
11 Article 78 are wrong, we will have to decide,
12 but certainly will be subject to the Order to
13 apply for a permit and pay a fine. If your
14 Honor decides that any one point in our
15 proceeding here is correct, we will at least
16 have had the opportunity to have your Honor
17 apply your obligation as a jurist to review
18 the merits and decide what if anything might
19 be done with respect to these issues.

20 Certainly if we win, your Honor, we're
21 entitled, frankly to win, not to be subject
22 to an Order that directs us to waive
23 jurisdiction immediately.

24 Your Honor, there are other issues that
25 are raised in our papers. If the subdivision

1 occurs, it destroys the value of the farm.
2 Understand that this Order says that the --
3 that we must treat these three farm worker
4 houses, and by the way it's very interesting
5 that the Agency admits they are farm worker
6 houses in paragraph 7 before you, and admits
7 that we're harmed if we can't immediately use
8 them. Why else would they say let's hurry up
9 and use the dwellings where they are? They
10 admit they are farm worker houses. They know
11 that is what they are and they are directing
12 that the application be filed with the Agency
13 that treats it as a three-home subdivision as
14 a separate investment, your Honor, cuts it
15 off from the farm. It's on the farm now,
16 it's on the lot of the farm, it's next to the
17 barns right where farmers always have their
18 houses so they can monitor the farm and
19 monitor the barns and walk to the barns.
20 They are only farm worker houses.

21 And look at Mrs. Lewis' affidavit, your
22 Honor. I know your Honor has read it but if
23 you could just look at the exhibits to her
24 affidavit, please. Your Honor, Exhibit A,
25 you have been a lawyer for a while just like

1 me before you were a judge, can you tell me
2 how do we subdivide these three houses that
3 are in the drawing? They have a common
4 well, they have a common septic system that
5 is approved by the town code enforcement
6 officer. They have a common driveway. The
7 three front doors face each other to form a
8 front playground and the north country, the
9 north family cottage which is on the right of
10 what you're looking at, your Honor, has a
11 back door that looks out at the barns. The
12 addresses of these homes currently empty are
13 probably going to be 3, 5 and 7 New Farm
14 Road. Fifteen people can live there?

15 Now, are we going to have these houses
16 vacant for the entire year, year and a half
17 or more so that this matter is litigated?
18 What's the harm in people living there.
19 They haven't even cited any authority that
20 says they can't order people to live in the
21 house.

22 THE COURT: What's the irreparable harm?

23 MR. PRIVITERA: I know there isn't any
24 case law on this in the state but if I could,
25 your Honor, I started with *Mitchell* against

1 *Cuomo, Second Circuit Court, 748 F.2d 804,*
2 which says, "When an alleged deprivation of a
3 constitutional right is involved, most courts
4 hold that no further showing of irreparable
5 injury is required."

6 The Second Circuit Court is also, in a
7 number of cases collected at 475 F.Supp. 1282
8 said that the loss of business is irreparable
9 harm and here, your Honor, we can't run a
10 farm without farm workers. So the harm of
11 not living there is palpable and has been
12 held to be irreparable in a number of cases.

13 THE COURT: Maybe you can tell me how did
14 they operate the farm last year without the
15 houses?

16 MR. PRIVITERA: There are a couple of
17 workers that come from other places, they
18 drive. One comes all the way from
19 Plattsburgh. There is a farm manager in one
20 of the houses which was also built but we're
21 just at the point -- we built the houses to
22 use them. We're just at the point, your
23 Honor, where we need them in order to run the
24 farm. But most importantly the irreparable
25 harm, your Honor, is that case is moot if we

1 comply. If we comply it says we don't have
2 any jurisdiction and we have submitted.

3 THE COURT: What's the irreparable harm of
4 not using the houses?

5 MR. PRIVITERA: They are a farm asset with
6 no farm workers in them and we have -- we
7 need them in order to run the farm. Just
8 because we didn't have them last year doesn't
9 mean we don't need them now. This farm has
10 been growing for thirty years. This is
11 finally at a point where we need to attract
12 three farm families or two plus workers in
13 this farm to move this farm to the next level
14 and we can't do that without people living
15 there and that's harming.

16 THE COURT: You're saying other
17 arrangements can't be made for the workers?
18 There's no other housing in the area?

19 MR. PRIVITERA: No, your Honor. Look at
20 what's been all over the newspapers. There's
21 a housing shortage inside the Blue Line.
22 There's no -- the Adirondack Park, you will
23 see when you see the merits, the Adirondack
24 Park acknowledges, they came out with an
25 economic report that says there's a housing

1 crisis inside the Blue Line. We have no
2 place to live. That is why we built them.
3 But what if they come from another county,
4 your Honor? Where are they going to live?
5 Besides that the reason they are all calling
6 to install them, the farmer has to be on the
7 farm to do everything a farmer does. It's
8 not to say that you can't sometimes have a
9 farm worker come from another place, but to
10 get to the point of a fully functioning farm
11 you need somebody looking at the barns and
12 that -- I can't tell you how much harm we
13 might have depending on what happens to the
14 barns if nobody is living there.

15 One way or the other it's a standing
16 investment that's not being used and what's
17 the harm to the other side? Your Honor,
18 they have made no showing that when you
19 balanced the equities, their orders, their
20 jurisdiction is harmed in any way if we wait.
21 They have said that the houses can stay where
22 they are, they said they will permit them as
23 long as we submit, and they have said also
24 that -- I mean that's right in paragraph 7 of
25 the Order that's before you, your Honor, that

1 the houses can stay where they are.

2 And, your Honor, I know that there's
3 references in one of the affidavits that was
4 filed this morning to protection of the
5 scenic views from the river, your Honor. The
6 houses that you're looking at have a hamlet
7 between themselves and the river. Dozens of
8 houses, railroad tracks. They can't even be
9 seen from the river and that is why the
10 Agency has said that they are permitted where
11 they are. There is no environmental interest
12 to be protected by them not being occupied.
13 There's no environmental interest that's
14 protected by the forced submission to
15 jurisdiction, rather it's merely a violation
16 of due process.

17 Every case they have cited on the other
18 side, your Honor, is not a 7805 case. They
19 have cited 6301 cases. They even still --
20 their papers in opposition to an injunction,
21 we haven't asked for injunction. 7805 says a
22 stay, and you have the broadest jurisdiction
23 that a jurist may have to grant a stay
24 subject only to reversal for abuse of
25 discretion and the primary case there is,

1 your Honor, is interestingly enough, an
2 environmental case. The primary case there
3 is the *Jorling* case, Second Department
4 *Jorling* case that I believe we have cited for
5 your Honor which where in the Second
6 Department stayed an Order of the Department
7 of Environmental Conservation to close a land
8 fill, stayed it, and what the Second
9 Department said was that all petitioner had
10 to show was that there had been -- that there
11 was irreparable harm and they found
12 irreparable harm in the *Jorling* lean case.
13 merely because of an -- of the harm that the
14 town would suffer if the land fill was
15 closed, similar to the harm we'll face if
16 we're unable to use the building. That is
17 the matter of *The Town of East Hamilton*
18 *against Jorling, Second Department, 181 AD2d*
19 *781*. It's cited in all of the literature,
20 it's the standard and it says only this,
21 "Given the possibility of irreparable injury
22 to the towns if the DEC were permitted to
23 proceed with enforcement, the Court did not
24 improvidently exercise its discretion in
25 granting the stay in question." See CPLR

1 7805.

2 Your Honor, I don't think that we're
3 subject to the preliminary injunction
4 standard here under 6301, but I'd also like
5 to suggest that the balance of -- balance of
6 equities is strongly in our favor and there
7 is no harm at all to the Agency in allowing
8 this Order to proceed like any other
9 administrative Order, your Honor. Can you
10 can see in these papers what the significance
11 of Monday is or the significance of April 28?
12 They are completely arbitrary dates. These
13 buildings were begun a year ago and the
14 Agency knew it a year ago.

15 THE COURT: Didn't they take enforcement
16 action? Didn't they seek a cease and desist?

17 MR. PRIVITERA: The staff issued a cease
18 and desist and the board never took it up and
19 enforced it, never took it up and enforced
20 it. They didn't do anything until the board
21 took action two weeks ago.

22 THE COURT: Which board?

23 MR. PRIVITERA: The determination before
24 you.

25 THE COURT: You're talking about the

1 Committee?

2 MR. PRIVITERA: Yes, so given the passage
3 of a year before the Board took action,
4 there's no harm in waiting while your Honor
5 administers justice and considers the merits
6 here and there's certainly no harm in the
7 passage of time. No harm is identified in
8 the respondent's papers. The dates of April
9 14 and 28 are arbitrary and we ask only, your
10 Honor, that you serve justice by allowing
11 yourself to review these matters, allowing
12 yourself to consider the merits before the
13 farm is punished, and before the farm is
14 submitted to the very jurisdiction that the
15 farm claims is beyond the Agency. Thank you.

16 THE COURT: Ms. Simon.

17 MS. SIMON: Thank you, your Honor.
18 Notwithstanding the fact that counsel for
19 petitioner was not there to discuss the
20 merits, he spent quite a bit of his time
21 discussing the merits and I wanted to, for
22 the record, indicate a couple of things and
23 then get to the three-prong test that you
24 know he argues here today for a stay.

25 First of all I think it's disingenuous to

1 not have told this Court that this very same
2 matter, this very same violation that came
3 before the Court a year ago, and I was here
4 last summer with a different law firm, all
5 the issues are in Judge Ryan's Order. I'm
6 further dismayed to learn after getting a
7 copy of the RJL in the mail on this, this
8 prior case by Judge Ryan was not listed.
9 This case dealt with the very same violation,
10 the construction of these three-family
11 dwellings, and the petitioner brought the
12 case against the State of New York and did
13 file same and without notifying the state and
14 attorney general, so that being said all of
15 the points, many of the points that are
16 raised here already have been dealt with by
17 Judge Ryan.

18 THE COURT: I read his decision and the
19 only thing I saw him deal with was the issue
20 of whether 305-a of the Agriculture and
21 Markets Law superseded APA authority and he
22 said it didn't, 305-a of the local land use.

23 MS. SIMON: That is right.

24 THE COURT: Did it also deal with the
25 issues of the jurisdiction the Agency based

1 upon the definition and statute and
2 regulation?

3 MS. SIMON: It did deal with jurisdiction.
4 It said the Agency had jurisdiction, that
5 these two definitions are indifferent
6 statutes of agricultural use and the Agency
7 was -- is within its power to ask for a
8 permit. It doesn't preempt, they don't
9 preempt each other, they operate in tandem.

10 THE COURT: Were the same claims made
11 regarding whether there is a subdivision or
12 not, whether this is -- whether the
13 agricultural use definition structure, I
14 should say, definition in the APA includes a
15 single-family dwelling structure and
16 therefore it's exempt from the permitting
17 based upon the APA's own definition?

18 MS. SIMON: Your Honor, as you know from
19 having given you a copy of the Order and now
20 you have seen it, we got the proceeding
21 dismissed on grounds, and now here we are.
22 There's a reason why we're in litigation with
23 these guys. We went through that, got our --
24 got it dismissed, we have the Order
25 dismissing it. The Judge made certain

1 findings including we discussed *Lysander*.
2 It's in our papers. It doesn't apply.
3 *Lysander* limits local government. It does
4 not limit the state, the Agricultural Market
5 Law, it does not limit the Adirondack Park
6 Agency.

7 THE COURT: My question, I guess, to be
8 more pointed, were the issues before Judge
9 Ryan the same as we have here or are there
10 different issues that weren't presented to
11 Judge Ryan?

12 MS. SIMON: The answer is yes, some were
13 and some are new. What's new is we have a
14 determination from the Agency that can be
15 challenged. Clearly we go forth, forward on
16 Article 78 and we'll reply and answer and
17 make our case to you, so some of this is new.
18 But I wanted to point out to the Court that a
19 lot of this has been dealt with even though
20 the other side hasn't told you that.

21 THE COURT: Are you asking me to take
22 judicial notice of the pleadings in that
23 case?

24 MS. SIMON: Certainly, your Honor, and
25 determination.

1 THE COURT: I better get that file.

2 MS. SIMON: I also wanted to answer that.

3 The *Jorling* case that he's referring to
4 involving DEC, yes, of course you can get a
5 stay against the state. There are plenty of
6 cases. The *Jorling* case the harm was
7 radically different. That is three towns on
8 Long Island all being ordered to close land
9 fills with significant repercussions. The
10 DEC was stayed from those proceedings because
11 of the impact on the towns. We have nothing
12 like that here.

13 Here petitioner argues he doesn't have to
14 show the three-prong test. I think there is
15 no doubt that he has to show. The Court of
16 Appeals case in *Grant* clearly lays that out.
17 That came subsequent to his *Stewart* case,
18 which is a Third Department case which is
19 many years older, and there's plenty of cases
20 that you have to show the three-prong test,
21 whether it has a likelihood of success,
22 irreparable harm and how the equities weigh.

23 So on those particular issues, because
24 that is all we are here to argue, we're not
25 here to argue the merits, I think some of the

1 things that have been said I would disagree
2 with in terms of the facts and that's why
3 we're going to go forward with the Article
4 78. The question is should the Adirondack
5 Park Agency be denied it's statutory
6 authority and right to go forward and do
7 whatever it deems proper under the statute to
8 enforce its determination? I would argue
9 that given the three-prong test I think they
10 can't show any one of the three prongs of
11 that test and they should be denied.

12 THE COURT: Let me ask you while you're on
13 the point with regard to Item 4 in the
14 determination where the petitioner is
15 required to forgo the right to challenge
16 Agency jurisdiction, what authority does the
17 Agency have to do that?

18 MS. SIMON: Are you saying paragraph 4?

19 THE COURT: In the determination, in the
20 determination of the Agency.

21 MS. SIMON: I'm looking.

22 THE COURT: At the end it lists seven
23 determinations and says that 4, Lewis Farm
24 will retain all rights of appeal in the
25 project review process, but it goes on to

1 say, it foregoes the right to challenge
2 Agency jurisdiction and review clocks
3 otherwise applicable. What authority does
4 the Agency have to do that and why?

5 MS. SIMON: That is for an after-the-fact
6 permit. If they want to do an after-the-fact
7 permit, which apparently they don't want to
8 do any permit, but if they wanted an
9 availment of an after-the-fact permit, they
10 have already put the houses in, that is
11 standard language they use. Obviously we're
12 here and you might rule later on that is an
13 improper provision, that's my sense today
14 before I have had a chance to answer
15 officially on the law.

16 THE COURT: So I am -- it's a --

17 MS. SIMON: There are probably a dozen
18 things on the merits that I am not prepared
19 to argue.

20 THE COURT: I understand.

21 MS. SIMON: I think that the first thing,
22 the reason this stay should not be imposed
23 against the state is because the likelihood
24 that they're going to succeed on the merits
25 of many of the claims in light of Judge

1 Ryan's determination, he denied the
2 restraining Order for failure to show
3 irreparable harm, he rejected the farms
4 argument about agriculture structures and the
5 APA and Agricultural and Market Law
6 component. All of that was discussed. I
7 think it puts a great weight on them and not
8 in their favor. There's a Court Order
9 already from this Court, Supreme Court Essex
10 County saying many of these claims the Judge
11 does not agree with you on.

12 THE COURT: Which is not appealed.

13 MS. SIMON: Sorry?

14 THE COURT: Not appealed?

15 MS. SIMON: They have filed a Notice of
16 Appeal, they Haven't perfected. The second
17 issue on irreparable harm, petitioner's
18 allegations of what the harm would be, the
19 way I read the papers they have raised two
20 kinds of harm; one is loss of tax incentives
21 if they file for an APA permit, and the
22 second is imposition of penalty or the fact
23 they would have to pay a penalty.

24 First of all a tax incentive is
25 speculative. I think that whether or not

1 simply applying for an APA permit would
2 eliminate whatever tax benefits they may or
3 may not get in the future is speculative and
4 is speculative as to whether what entities of
5 government would interpret the APA statute to
6 their subdivision. I think they haven't
7 shown that to be factually true, so it's
8 speculative harm. And even if it were to be
9 true, that amount of money, its harm in the
10 terms of finance and financial harm is not to
11 be granted in this kind of a stay where you
12 could recoup the money if you win the
13 lawsuit. So I think it's case law that I put
14 in my brief that this is, to me, an example
15 of financial harm.

16 THE COURT: What course of action do they
17 have against the Agency or state if
18 ultimately they prevail? How do they have a
19 claim for damages against the state?

20 MS. SIMON: I'm not suggesting they have a
21 claim for damages.

22 THE COURT: How are they going to recover
23 their financial loss?

24 MS. SIMON: If they win they are not going
25 to have a fine. That's the harm, they are

1 alleging tax incentive loss.

2 THE COURT: If I don't grant the stay they
3 are required to file for permit by Monday and
4 they are required to pay the fine which I'm
5 sure they can get back if they win, but they
6 have to file for the permit. If that is a
7 delay, if that is delayed throughout the
8 process of the Agency needing more
9 information because as a provision it says
10 they may need more information, if they
11 sustain financial damages as a result of that
12 and they ultimately win here or on appeal,
13 how do they collect that monetary damage?
14 Who do they collect it from?

15 MS. SIMON: I don't know and I'm not their
16 attorney so I'm not going to stand here and
17 give them that advice, and I think they are
18 capable of getting their own counsel.

19 THE COURT: I think in a private action I
20 hear you, I'm not sure there's any liability
21 on the part of the state or --

22 MS. SIMON: There is the thinking, this is
23 a law enforcement matter notwithstanding
24 comparing us to some third world country.
25 There is due process rights that, you know,

1 are ridiculously oppressive. The APA is
2 simply enforcing a statutorily authorized
3 permit requirement. All they are saying is
4 submit your permit, we'll give you an
5 after-the-fact permit, get your septic in
6 order showing us the Department of Health
7 approval, you have put them in according to
8 the Department of Health. You shouldn't have
9 built that close to a designated river and
10 these are basic statutorily.

11 This is not unreasonable. They have had
12 more than a year to comply. They have chosen
13 and therefore they have created their own
14 harm. They have chosen not to comply. The
15 Agency originally agreed to accept an
16 application and issue an after-the-fact
17 permit and they said no, sue. When the Court
18 tells them they continued to ignore it. They
19 violated the cease and desist, they install
20 the homes completely, this is -- this would
21 be encouraging law breaking or ignoring the
22 authority of the state legislature laws
23 invested in the APA.

24 THE COURT: Isn't it taking the provision
25 that I read where they have to forgo any

1 rights they have to challenge Agency
2 jurisdiction, why can't they make the
3 application and submit this information
4 without having to forgo those rights?

5 MS. SIMON: Why didn't they do that? What
6 harm comes by submitting a piece of paper?
7 They did it once already, they didn't wait
8 for it to be accepted.

9 THE COURT: It's their point once they go
10 down that road they will be deemed under this
11 determination and perhaps by some future
12 court to have waived their rights to
13 challenge your jurisdiction.

14 MS. SIMON: I think that is not true.
15 There is plenty of Article 78 cases in the
16 state where the people can challenge. An
17 agency makes a determination, you challenge
18 that. That is what we have here. You have
19 to go forward and wait for your determination
20 on the merits. But in the meantime should
21 you stay law enforcement when the APA is
22 doing what it's mandated? It's given them a
23 minimal penalty compared to what it could
24 give, a penalty of \$500 a day. You might
25 say, okay, that is too much. But the

1 legislature made the laws, we're demanding
2 the right to enforce and the state should not
3 be stayed from it's right to enforce the
4 laws, especially in a circumstance where they
5 have repeatedly been given opportunities to
6 comply and they have ignored the Agency's
7 permitting process and desist and doesn't
8 even acknowledge jurisdiction when the
9 Supreme Court says herein the APA has
10 jurisdiction. Given all those things I think
11 the likelihood, and they do not have a
12 likelihood of success, personally I think, on
13 any of these claims but the county, this
14 Court has only looked at a few, but in the
15 harm I think when you create your own harm I
16 think you are not entitled to a stay and I
17 have some citations for that in my papers.

18 Finally there was some discussion of the
19 equities and whether they weigh in favor or
20 not. You know, you could argue that there
21 is, you know, perhaps you might say, economic
22 harm versus environmental preservation or
23 harm or what impact does it have on the
24 Agency. The question is putting in these
25 homes with septic systems within a certain

1 distance to river which is protected, does
2 this create potential environmental harm?
3 And the Agency is being reasonable, we want
4 to know the particulars. We want you to
5 certify that the Department of Health
6 standards have been met. These are
7 reasonable requirements. All of these things
8 could be submitted and not harm these farm
9 owners.

10 I think for them to say that the state has
11 no interest here is disingenuous. We have an
12 interest of maintaining the integrity, the
13 scenic park, that the septic doesn't leak,
14 that it's going to sustain three homes. I
15 don't even know all the issues involving
16 septic systems so there's some harm to the state and
17 it's also a harm that someone or an entity
18 can go an entire year or more and violate
19 state law and not be held accountable. I
20 think there's a harm to the enforcement
21 process and sort of respect and deference to
22 the legislative finding that the Adirondack
23 Park is worthy of preserving, and these, the
24 Rivers Act and Adirondack Park Agency Act are
25 designed to protect these areas. And the

1 area where they built the homes is
2 specifically designated resource management.

3 In the end, you know, at the end of the
4 day it isn't about the Agency telling them to
5 take the homes down, some significant harm,
6 they are saying submit a permit on Monday.
7 They did this once. They submitted a permit
8 back in March of 07. They didn't wait, they
9 put the septic in and didn't wait.

10 THE COURT: What's the status of that
11 permit application?

12 MS. SIMON: Nothing. They haven't met
13 requirements.

14 THE COURT: It's not complete?

15 MS. SIMON: Correct.

16 THE COURT: Why do they have to file a new
17 one? Can't they use that one and just
18 provide --

19 MS. SIMON: Now? The Agency made a
20 determination. I can't speak to that, we
21 have to go with the Agency's determination.
22 If the Court finds that it's not rationally
23 based or some other problem at the end of the
24 Article 78, so be it. But as it stands here
25 today they need to submit something on Monday

1 to be in compliance. I don't think that is
2 such a great harm filling out a piece of
3 paper, swallowing your pride, that the Court
4 of the state of New York, at least this Court
5 in this jurisdiction has said that the APA
6 does have jurisdiction. There is no conflict
7 with Agricultural and Market Law. The other
8 issues will be dealt with in due course and I
9 do not think they met any of the three
10 prongs, but they have to meet all three and I
11 ask the Court to reject the stay and we go
12 forward and we each have our opportunity to
13 make our argument.

14 MR. PRIVITERA: Thank you, your Honor.
15 Yes, your Honor, I have three or four points
16 here. First this septic system is a major,
17 major red herring and a gross
18 misrepresentation of the record. I'm sorry
19 to have to get into the merits. These houses
20 are 700 to 800 feet from the river. The
21 septic systems were designed and built by a
22 PE named Mr. Buckley who stamped the drawings
23 and the town of Essex building inspector
24 inspected the septic system, signed off on it
25 and said that they were in compliance with

1 state law and those documents are in the
2 record. Your Honor, would you like to see
3 them?

4 THE COURT: I don't think it's appropriate
5 at this point. I don't think it's necessary.

6 MR. PRIVITERA: But you understand our
7 view, it's a misrepresentation of the facts.
8 They are fully protective of the human health
9 and environmental law, protective of the
10 river and they are in the record and the town
11 of Essex has determined so after looking at
12 Mr. Buckley's drawings.

13 Second, Judge Ryan's decision, your Honor,
14 there is a very important and very
15 substantial vein of federal and state
16 jurisprudence² that's based on constitutional
17 principles of separating of power. Your
18 Honor, no jurist is supposed to render an
19 advisory opinion. The primary case on this
20 in the Court of Appeals where we see the
21 intelligent language of Judge Cardozo and
22 Judge Wachtler, *NYPIRG against Carry*, 42 NY2d
23 527, a 1977 decision.

24 Your Honor, in federal law and in state
25 law a court is supposed to exercise judicial

1 restraint and not express an advisory opinion
2 with respect to a matter that's not before
3 him or her. Judge Ryan's decision is only
4 binding to the extent it says this matter is
5 dismissed because no final determination is
6 made. It's not right, he even says so. He
7 says I'm not going to interfere with interim
8 agency matters. This is dismissed and
9 remanded. Everything that -- everything
10 else that Judge Ryan said is not binding on
11 you, the Agency or any other party because it
12 is advisory. It is not necessary to the
13 decision, and when a court determines that a
14 matter must be dismissed because there's no
15 case or constitutional language, the court is
16 not allowed to express an advisory opinion
17 and the court's constantly advised judicial
18 restraint.

19 With all due respect to Judge Ryan, I
20 respectfully suggest that his opinion should
21 have been restrained to the decision at hand
22 and his advisory discussion of the law is
23 something that you're going to want to
24 revisit and you're going to want to look at
25 this when you look at the merits. Moreover,

1 you will find when you look at the merits
2 that the Court of Appeals decision in *Hunt*
3 *Brothers* says that the APA functions as a
4 zoning board and planing board and it's very
5 possible they will determine in this case if
6 it gets there or the Third Department or you
7 will determine that based on the *Hunt*
8 *Brothers* teachings that Judge Ryan is wrong
9 on the 305 issue that he advised upon.

10 Your Honor, let's look at what happens.
11 Again, no harm has been identified here at
12 this stage because if we lose the APA has
13 vindicated it's rights. We will be ordered
14 to submit to jurisdiction and we will be
15 ordered to pay the penalty. Every decision
16 that I have been able to find with respect to
17 individual decision making by an agency in
18 matters such as this does not have these
19 control dates in. A typical decision would
20 have just said we lost.

21 THE COURT: Let me ask you whether or not
22 these dates before, April 14 and 28, are put
23 in the so they would be expeditious in the
24 handling of this application so that the APA
25 could presumptively assume it's proceeding in

1 good faith act upon that application? I
2 would assume very closely around the 28th of
3 April, isn't that the purpose of those dates?

4 MR. PRIVITERA: I don't know.

5 MS. SIMON: Yes, I can tell you.

6 MR. PRIVITERA: I thought I was speaking.

7 THE COURT: I'll control my courtroom,
8 thank you. But I believe that's how I read
9 the decision, it was -- those dates were put
10 in for those purposes.

11 MR. PRIVITERA: And did they think about
12 the impact of that on their review ability of
13 the decision because when I discussed, see in
14 my affidavit, I had to say that I asked for a
15 stay before I sought one and I asked the
16 Agency counsel if they had thought about what
17 happens if we sought redress in the matter,
18 and they said all they thought about was
19 pursuing compliance and they expected us to
20 comply with the Order. They hadn't thought
21 through what the impact would be if we
22 decided to seek judicial review of the
23 matter, and that is all before your Honor.

24 Assume that that was a good faith attempt
25 and that we are in -- if we -- let's assume,

1 your Honor, that we do not -- that you do not
2 stay the matter and we decide not to submit
3 the jurisdiction. That means they can
4 enforce it. How do they enforce it? They
5 come before you and say they didn't file the
6 applications, let's penalize them \$500 a day,
7 because they just said they could penalize us
8 \$500 a day, they enforce it, they don't want
9 your Honor to stay enforcement.

10 THE COURT: Can't they go after you for
11 that \$500 a day from the 25th of March until
12 today no matter what I do?

13 MR. PRIVITERA: No, your Honor, because I
14 don't think we disobey the Order until
15 Monday.

16 THE COURT: All right. Let's say Monday,
17 what happens if I don't grant the stay but
18 the case proceeds? Let's go back, what
19 happens if I grant the stay, the case
20 proceeds and you ultimately win, can't they
21 go back in time and get the \$500 a day?

22 MR. PRIVITERA: No, that is what your
23 Honor's stay means that the Order stayed
24 pending a final determination. You stay the
25 penalty while the trial is held.

1 THE COURT: What about -- what if I only
2 stayed the provision that said that you forgo
3 your rights to challenge jurisdiction?

4 MR. PRIVITERA: Your Honor, we're still
5 directed to apply for a permit for a
6 subdivision. When we -- our petition says we
7 have a constitutional right to not have to do
8 that and I have -- that is irreparable harm.
9 According to the Cuomo case we shouldn't have
10 to until your Honor makes a determination on
11 the merits and there's no harm in waiting for
12 due process to be reached.

13 THE COURT: Are the houses occupied now?

14 MR. PRIVITERA: No.

15 THE COURT: Anything else, Mr. Privitera?

16 MR. PRIVITERA: No.

17 THE COURT: Ms. Simon, last word.

18 MS. SIMON: There isn't going to be a
19 trial. This is an Article 78. What will be
20 decided is was the Agency determination,
21 rational, arbitrary. There's no trial.
22 We're going to look at the standard for
23 Article 78. I just wanted to clarify that
24 they chose not to comply. Harm is
25 self-created and I fail to see how submitting

1 an application to an agency for a permit is
2 harm enough to stop the statute of the state
3 of New York for enforcement of Adirondack
4 Park Agency Law.

5 And secondly, the other harm they are
6 alleging here if they submit a detailed
7 description of use of each dwelling and an
8 acceptable plan for septic and evaluation by
9 a New York State licensed professional
10 engineer as to whether they installed a
11 septic for three dwellings, how are they
12 harmed? They are telling us they have
13 already done it, submit the stuff, let's work
14 this out.

15 The harm, the final harm in this
16 determination is the \$50,000 penalty. Yes,
17 that's a lot of money. I have not heard them
18 name one case that a penalty constitutes
19 harm, a penalty that is statutorily
20 authorized. I have not heard one case cited
21 to that effect.

22 So on the very first issue, your Honor, to
23 stay the state of New York from any action
24 involving this matter I would argue, your
25 Honor, that it's not appropriate here.

1 There's not harm. The likelihood of success
2 is poor. Some of the areas of their argument
3 is already determined and I think the
4 equities balance in favor of the state, given
5 the tax especially since they have had more
6 than a year, the Agency has bent over
7 backwards to try to accommodate and they
8 violated a cease and desist.

9 Just for the record these are two-story,
10 single family dwellings, two-car garage,
11 within a quarter of a mile of a protected
12 river. We ask you not to order any stay,
13 your Honor.

14 THE COURT: Thank you. I'm going to
15 reserve decision. I'll decide something this
16 afternoon. I don't know if you want to stay
17 around, I have another case and I want to
18 look at a couple of cases, but I will issue
19 something today.

20 MS. SIMON: Since we're both likely to be
21 in Albany, will we get a fax or something?

22 THE COURT: Yes.

23 MR. PRIVITERA: Thank you, your Honor.

24 MS. SIMON: Thank you, your Honor.

25 THE COURT: Thank you very much.

(Court was adjourned at 2:25 p.m.)

C E R T I F I C A T E

I, Ellen D. Chase, court reporter of the Essex
County Supreme Court, do hereby certify that the
foregoing pages numbered 2 through 43, inclusive,
comprise a full, true and correct transcript to the
best of my ability of the proceedings held before me on
April 11, 2008, as to which a transcript was duly
ordered and transcribed by me.

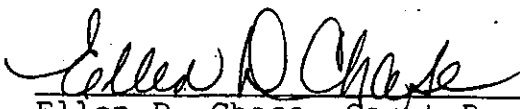

Ellen D. Chase, Court Reporter

Exhibit J: Decision and Order dated 4/11/08
(Simon Aff. -6/13/08)
[Reproduced at pp. 252-257]

**Exhibit K: Letter Decision dated 4/25/08 (Simon Aff.
-6/13/08)**

[Reproduced at pp. 258-260]

**Exhibit L: Order to Show Cause dated 4/28/08
(Simon Aff. -6/13/08)
[Reproduced at pp. 261-262]**

Exhibit M: Decision and Order dated 5/19/08
(Simon Aff. -6/13/08)
[Reproduced at pp. 263-264]

Exhibit N: Order dated 12/26/00
(Simon Aff. -6/13/08)
[Reproduced at pp. 543-557]

**APA Return and Record of Proceeding certified June
13, 2008**

[Reproduced at pp. 844-1461]

**ADIRONDACK PARK AGENCY RETURN AND
RECORD OF PROCEEDING IS REPRODUCED AT
RECORD VOLUME III, PAGES 843-1461**

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

AFFIRMATION

Petitioner,

ACTION NO. 1

-against-

ADIRONDACK PARK AGENCY,

Index No. 315-08

Respondent.

Hon. Richard B. Meyer

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ESSEX

ADIRONDACK PARK AGENCY,

Plaintiff,

ACTION NO. 2

-against-

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

Index No.: 332-08

Defendants.

Hon. Richard B. Meyer

JOHN J. PRIVITERA, an attorney at law duly admitted to practice in the courts of the State of New York, swears and affirms under penalty of perjury as follows:

1. I am duly licensed and admitted to practice law in the State of New York, and I am a principal with the law firm of McNamee, Lochner, Titus & Williams, P.C., attorneys for defendants Lewis Family Farm, Inc., Salim B. "Sandy" Lewis and Barbara A. Lewis (collectively "Defendants"). As such, I am fully familiar with the pleadings and proceedings had in this action, and with the matters set forth herein.

2. I make this affirmation in response to the Record submitted by the Adirondack Park Agency (hereafter "Agency") pursuant to CPLR 7804.

3. On March 7, 2008, I received permission from Barbara Rottier, Associate Counsel to the Agency, to have the Agency's Enforcement Committee hearing on March 13, 2008 video recorded. A copy of Ms. Rottier's letter is attached as **Exhibit "A"**.

4. Ms. Rottier indicated to me that the video recording was being allowed upon the condition that the Agency promptly received a copy for the record.

5. I am informed that Mirror Image Video, Inc., the company who video recorded the hearing, sent a copy of the video directly to Ms. Rottier.

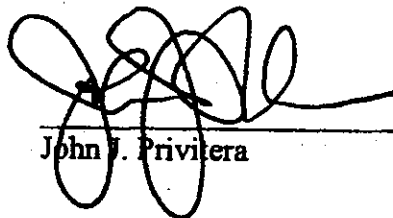
6. On May 30, 2008, Jacob Lamme, Esq., an associate in my firm, wrote a letter to Assistant Attorney General Loretta Simon making sure that she would include the video in the record for this Article 78 proceeding. A copy of Mr. Lamme's letter is attached as **Exhibit "B"**.

7. My firm never received a written response to Mr. Lamme's May 30, 2008 letter.

8. Accordingly, I have attached a DVD copy of the Agency's March 13, 2008 Enforcement Hearing as **Exhibit "C"**.

9. Based on the reasons set forth in the Lewis Family Farm's Memorandums of Law dated June 3, 2008 and June 17, 2008, the Lewis Family Farm respectfully asks this Court to enter an order annulling and vacating the Agency's March 25, 2008 Determination, dismissing the Agency's duplicative enforcement action, denying the Agency's motion to dismiss the Article 78 Petition, and granting such other and further relief as the Court deems just and proper.

I hereby swear and affirm the above under penalty of perjury this 17th day of June, 2008.



John J. Privitera

EXHIBIT A

p. 490

NEW YORK STATE
Adirondack
parkagency

VIA TELEFAX AND MAIL

March 7, 2008

John Privitera, Esq.
McNamee, Lochner, Titus and Williams, P.C.
75 State Street
Box 459
Albany, NY 12201

Re: Lewis Family Farm, Inc. (E2007-041)

Dear Mr. Privitera:

This letter responds to your request to video the Enforcement Committee meeting on March 13, and provides the Enforcement Committee's procedures for that meeting, some of which you and I discussed on March 5th.

Oral argument will be allowed; each party (staff and respondent) will be limited to 15 minutes. No new factual information may be submitted during oral argument. The parties are limited to the factual record which has already been submitted. You may use our electronic equipment for a power point, and agreed to bring a thumb drive for such purpose. You agreed to provide an electronic copy of your power point to staff before the meeting, and also agreed to bring 9 physical copies of the presentation for the Committee's use. The power point must only include materials already in the record.

The Agency will have a stenographer transcribing the meeting. If you wish to have an expedited transcript, you will have to make a private arrangement with the stenographer.

You may tape record and video the meeting, provided you adhere to the following protocols: 1) operate from a fixed position in the room at least 20 feet from the Members to ensure it will not be obtrusive or distracting to their work, and 2) provide the Agency with a complete copy of the audio and video within 5 days of the meeting.

If you have any questions do not hesitate to call me.

Sincerely,



Barbara Rottier
Associate Counsel

cc: Paul Van Cott, Associate Attorney

**MCNamee, Lochner,
Titus & Williams, P.C.**

ATTORNEYS AT LAW

JACOB F. LAMME

Direct Dial
(518) 447-3348

lamme@mltw.com

May 30, 2008

VIA FIRST-CLASS MAIL & FACSIMILE - (518) 473-2534

Loretta Simon, Esq.
Assistant Attorney General
State of New York
Office of the Attorney General
The Capitol
Albany, New York 12224

**RE: Lewis Family Farm, Inc. v. Adirondack Park Agency
Essex County Index No. 315-08
Adirondack Park Agency v. Lewis Family Farm, Inc., et al.
Essex County Index No. 332-08**

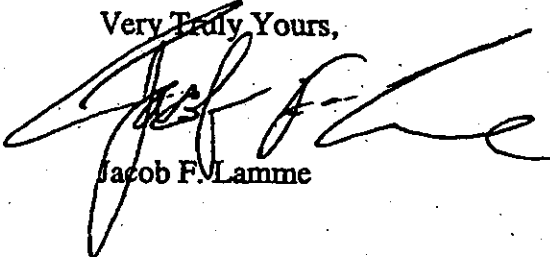
Dear Ms. Simon:

When compiling the record, please make sure to include the following: (1) the minutes of the Agency's enforcement committee meeting of March 13, 2008; (2) the transcript of the meeting; and (3) the video of the meeting.

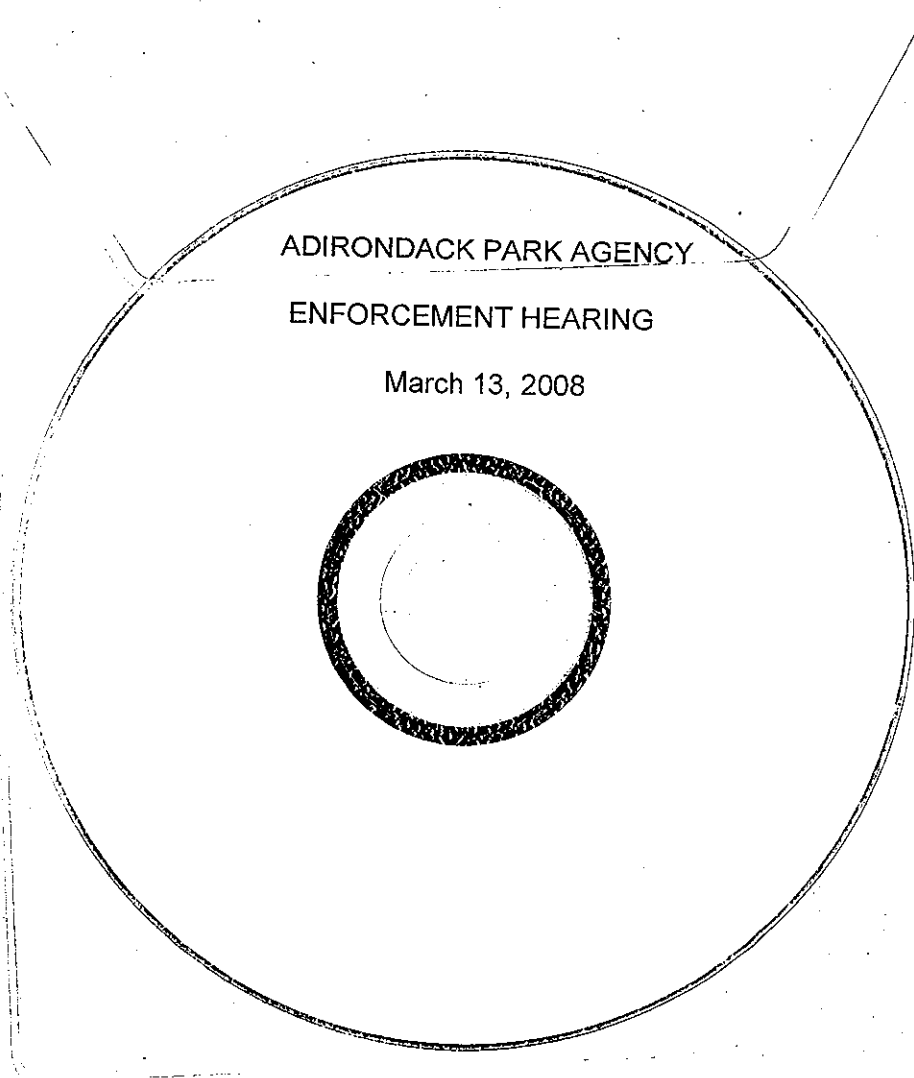
The Agency's internal counsel agreed to let the meeting to be videotaped and transcribed so long as it received copies for the record. Thus, they must be included in the record.

Thank you for your attention to this matter.

Very Truly Yours,



Jacob F. Lamme



STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

LEWIS FAMILY FARM, INC.,

Petitioner,

v.

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Respondent.

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

REPLY AFFIRMATION OF
LORETTA SIMON IN
FURTHER SUPPORT OF MOTION
TO DISMISS IN PART
AND ANSWER IN PART
Hon. Richard B. Meyer

INDEX No. 315-08

RJI No. 15-1-2008-0005

ENTERED AND FILED
ESSEX COUNTY CLERK
08 JUN 19 AM 11:12
ELIZABETH TOWN, NY 12932

INDEX No. 332-08

RJI No. 15-1-2008-0117

Loretta Simon, an attorney duly admitted to practice in the courts of the State of New York, hereby affirms under penalty for perjury pursuant to CPLR § 2106:

1. I serve as an Assistant Attorney General in the Environmental Protection Bureau of the Office of the New York State Attorney General and am litigation counsel to the Adirondack Park Agency ("the APA" or "the Agency") in this matter. I am familiar with this matter and the underlying facts,

Affirmation of Loretta Simon
dated June 18, 2008

and I am counsel to the APA in, Lewis Family Farm, Inc. v. APA, Sup. Ct., Essex Co., Index No. 498-07 (hereafter "Lewis Farm I"); Lewis Family Farm, Inc. v. APA, Sup. Ct., Essex Co., Index No. 315-08 (hereafter "Lewis Farm II") and the civil enforcement action against Lewis Farm and Barbara and Salim B. Lewis (APA v. Lewis Family Farm, Inc., Salim B. Lewis and Barbara Lewis, Index No. 332-08, [hereafter "Lewis Farm III"])).

2. I submit this affirmation in reply and further support of the APA's Motion to Dismiss in part and Answer in part Lewis Farm's CPLR Article 78 proceeding, pursuant to CPLR § 2214 (b).

3. In its June 18, 2008 reply memorandum of law in support of judgment and in opposition to the APA's motion to dismiss, Lewis Family Farm, Inc. ("Lewis Farm") argues that two affirmations and an affidavit submitted by the APA in support of its motion to dismiss in part and to answer in part must be stricken as they are not part of the record. See petitioner's Memo of law dated June 18, 2008, p.1.

4. Reply affirmations and affidavits submitted outside the record of an administrative determination are permitted where an affidavit was a proper and necessary response to a petition (In the Matter of Grogan et. al. v. Zoning Board of Appeals 221 A.D.2d 441, 442 (2d Depot 1995); where they contain significant factual statements which are relevant to the allegations in the petition (Matter of Energy Nuclear Indian Point 2, LLC et. al. v.

Affirmation of Loretta Simon
dated June 18, 2008

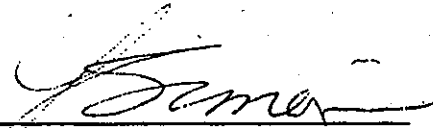
NYSDEC, 3 Misc. 3d 1070, 1074 (2004); where they are submitted in opposition to factual allegations (Matter of K.C.B. Bakeries, Inc., v. Butcher, et. al., 144 A.D.2d 894 (3rd Dep't 1988); and affidavits that set forth some of the deliberative process and criteria that was considered (377 Greenwich LLC v. NYSDEC, 14 Misc. 3rd 417, 426 (2006)).

5. For the forgoing reasons, the Affirmations of Loretta Simon and John Rusnica dated June 13, 2008 and the Affidavit of Paul Van Cott dated June 13, 2008 are properly before this Court for consideration in this matter.

Dated: Albany, New York
June 18, 2008

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for Adirondack Park Agency

By:


LORETTA SIMON
Assistant Attorney General
Office of the Attorney General
Environmental Protection Bureau
The Capitol
Albany, New York 12224-0341
(518) 402-2724

Affirmation of Loretta Sim
dated June 18, 20

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

v.

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Respondent.

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

SUPPLEMENTAL ANSWER
RESPONDING TO THE THIRD,
FIFTH, SIXTH, SEVENTH,
EIGHTH, NINTH, TENTH AND
ELEVENTH CLAIMS IN THE
AMENDED PETITION

INDEX NO. 315-08
RJI No. 15-1-2008-0109
Hon. Richard B. Meyer

INDEX No. 332-08
RJI No. 15-1-2008-0117

State respondent, the Adirondack Park Agency (the "Agency" or "APA") by its attorney Andrew M. Cuomo, Attorney General of the State of New York, objects to the amended petition dated April 14, 2008 herein and without waiving its objections in point of law, its motion to dismiss, and partial answer previously submitted, the APA, as and for its supplemental answer to the third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh claims in the amended petition, dated April 14, 2008:

AS AND FOR A THIRD CAUSE OF ACTION

1. Denies the allegations in ¶ 73, and affirmatively asserts that the APA's March 25, 2008 determination is not affected by error of law in violation of Town of Lysander v. Hafner ("Lysander"), 96 N.Y.2d 558 (2001), and that the holdings of the Court of Appeals in Lysander relate to Agriculture and Markets Law § 301(11), not the Adirondack Park Agency Act ("APA Act") (Executive Law § 801 et. seq.) or the Wild, Scenic and Recreational Rivers System Act ("Rivers Act") (Environmental Conservation Law § 15-2701 et. seq.), and do not apply to or supercede the APA's enforcement authority pursuant to the APA Act, the Rivers Act or the Agency's March 25, 2008 determination. Specifically, the Agency further asserts that the APA Act definition of "agricultural use structure" does not include single family dwellings, which dwellings require a permit pursuant to the APA Act and the Rivers Act, and refers to Executive Law § 802 (8) and (58) for the full meaning, text, context and effect of the terms "agricultural use structure" and "single family dwelling" and refers to the APA's March 25, 2008 determination for its full text, context, effect and meaning.

AS AND FOR A FIFTH CAUSE OF ACTION

2. Denies the allegations in ¶ 77, denies that the Agency is regulating Lewis Farm's "agriculture use" as that term is

defined in the APA Act § 802(7); and affirmatively asserts that the APA has statutory and regulatory authority to require permits for Lewis Farm's three single family dwellings and subdivision into sites in a Resource Management area pursuant to the APA Act, and in a designated recreational river area pursuant to the Rivers Act, as provided in Executive Law §§ 802, 805, 809 and 810 and Environmental Conservation Law ("ECL") Article 15, Title 27, and 9 NYCRR Part 577, and refers to those provisions and to the APA's March 25, 2008 determination for their full meaning, text, context and effect.

AS AND FOR A SIXTH CAUSE OF ACTION

3. Denies the allegations in ¶ 79, and affirmatively asserts that the APA has jurisdiction pursuant to §§ 809 and 810 of the APA Act to regulate Lewis Farm's three single family dwellings, as the term "single family dwelling" is defined in Executive Law § 802(58), because: (i) the dwellings are on Resource Management lands in the Town of Essex; (ii) single family dwellings under the APA Act are not included in the definition of "agricultural use structure" set forth in APA Act § 802(8); and (iii) all new single family dwellings (except for lawful replacements of pre-1973 dwellings) in Resource Management areas in the Town of Essex are within the Agency's jurisdiction, and refers to Executive Law §§ 802(58) and 802(8) and to the APA

March 25, 2008 determination for their full meaning, text, context and effect.

AS AND FOR THE SEVENTH CAUSE OF ACTION

4. Denies the allegations in ¶ 81 and affirmatively asserts that the APA has jurisdiction to regulate all subdivisions of land into sites on Resource Management lands pursuant to §§ 809 and 810 of the APA Act, and that Lewis Farm's construction of three single family dwellings for separate occupancy constitutes a violation of the subdivision requirements of the APA Act and refers to Executive Law § 802(63) and 9 NYCRR § 570.3(a)(3), and to the APA March 25, 2008 determination for their full meaning, text, context and effect.

AS AND FOR A EIGHTH CAUSE OF ACTION

5. Denies the allegations in ¶ 83, denies that the Agency is regulating Lewis Farm's "agricultural use" as that term is defined in APA Act § 802(7), and affirmatively asserts that Lewis Farm's three single family dwellings are located, and its subdivision into sites occurred, within the designated Bouquet River recreational river area pursuant to 9 NYCRR, Appendix Q-6, Item 5a (Recreational Rivers), and that the APA has jurisdiction to regulate the three single family dwellings and subdivision into sites herein pursuant to the Rivers Act and 9 NYCRR Part

577, which requires a permit for all single family dwellings and subdivisions on Resource Management lands within a designated recreational river area, and refers to the Rivers Act, 9 NYCRR Part 577, and to the APA March 25, 2008 determination for their full meaning, text, context and effect.

AS AND FOR A NINTH CAUSE OF ACTION

6. Denies the allegations in ¶ 85, and denies that Lewis Farm's three single family dwellings are agricultural use structures and affirmatively asserts that the APA has jurisdiction to require permits for Lewis Farm's three single family dwellings located on Resource Management lands within the Bouquet River recreational river area pursuant to 9 NYCRR Part 577, and that the Bouquet River recreational river area extends 1/4 of a mile from each bank of the river in the Town of Essex, Essex County, pursuant to 9 NYCRR Appendix Q-6, Item 5a (Recreational Rivers), and refers to the Rivers Act, 9 NYCRR Part 577, and to the APA March 25, 2008 determination for their full meaning, text, context and effect.

AS AND FOR A TENTH CAUSE OF ACTION

7. Denies the allegations in ¶ 87, and affirmatively asserts that the APA has jurisdiction to require permits for Lewis Farm's subdivision into sites of Resource Management lands

within the Bouquet River recreational river area pursuant to 9 NYCRR Part 577, and 9 NYCRR Appendix Q-6, Item 5a (Recreational Rivers), and refers to the Rivers Act, 9 NYCRR Part 577, and to the APA March 25, 2008 determination for their full meaning, text, context and effect.

AS AND FOR AN ELEVENTH CAUSE OF ACTION

8. Denies the allegations in ¶ 89 and affirmatively asserts that the resolution of the Adirondack Park Local Government Review Board, which resolution is not binding on the APA under Executive Law § 803-a, was considered by the APA and is part of the Record of the APA March 25, 2008 determination; and that the Executive Director of the Local Government Review Board was present at the Agency proceeding in this matter and participated in the proceeding, and refers to the Record, Executive Law § 803-a, and the APA March 25, 2008 determination for their full meaning, text, context and effect.

WHEREFORE, the Agency respectfully requests an Order and Judgment:

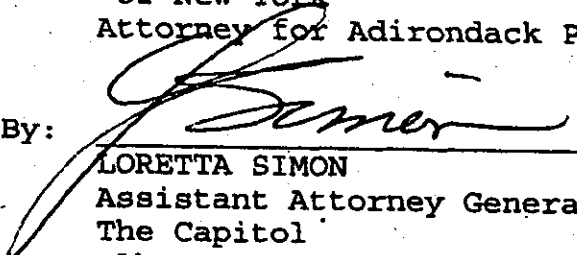
- I. Denying claims three, five, six, seven, eight, nine, ten and eleven in the Amended Petition for all the reasons stated herein and for the reasons stated in the State APA's Answer In Part dated June 13, 2008; and

- II. Dismissing the Amended Petition in its entirety; and
- III. Granting such other and further relief that this Court may find to be just and equitable, together with costs and disbursements.

Dated: Albany, New York
July 30, 2008

ANDREW M. CUOMO
Attorney General of the State
of New York
Attorney for Adirondack Park Agency

By:



LORETTA SIMON
Assistant Attorney General
The Capitol
Albany, New York 12224
(518) 402-2724

To: Jacob F. Lamme, Esq.
John J. Privitera, Esq.
McNamee, Lochner, Titus & Williams, P.C.
677 Broadway
Albany, New York 12207-2503

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF ESSEX)

PAUL VAN COTT, being duly sworn, deposes and says:

I am an Associate Attorney for the Adirondack Park Agency (the "Agency"). I have read the foregoing objections in point of law and supplemental answer, and know the contents thereof, and the same is true to my own knowledge except as to matters therein stated to be alleged upon information and belief, and as to those matters, I believe them to be true. The source of my knowledge, information and belief are the Agency's files, and discussions with Agency personnel. I make this verification pursuant to CPLR § 3020(d)(2), on the basis that I am acquainted with the facts.


PAUL VAN COTT

Sworn to before me this
3rd day of July, 2008.

Mary B. Palmer

MARY B. PALMER
Notary Public, State of New York
01PA5128439
Commission Expires June 13, 20 09

STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

LEWIS FAMILY FARM, INC.,

Petitioner,

v.

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Respondent.

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

STATE OF NEW YORK)
) ss:
COUNTY OF ESSEX)

PAUL VAN COTT, having been duly sworn, deposes and says:

1. I am an Associate Attorney for the Adirondack Park Agency (the "Agency" or "APA") and have served as the Agency's Enforcement Attorney since 2001. I supervise the Agency's enforcement program, including a Senior Attorney and six enforcement officers. In this role, I am responsible for administrative enforcement of the Agency's laws and regulations, including in the Town of Essex, Essex County.

AFFIDAVIT OF
PAUL VAN COTT

INDEX No. 315-08
RJI No. 15-1-2008-0109

INDEX No. 332-08
RJI No. 15-1-2008-0117

2. I am familiar with the file in this matter, having represented Agency staff in the administrative enforcement proceeding, and any facts stated herein are upon information and belief or based upon the affidavits submitted by Agency staff in the administrative enforcement proceeding, including my own affirmation.

3. I submit this affidavit in support of the APA's supplemental answer to claims three, five, six, seven, eight, nine, ten and eleven, and in further opposition to the Amended Petition.

APA Jurisdiction under the APA Act

4. The Adirondack Park Agency Act ("APA Act") establishes unequivocal permitting jurisdiction over certain types of specifically defined land uses and development in the Adirondack Park. Permits are required by APA Act § 809 for all new land uses and development listed in § 810 as either class A regional projects or class B regional projects. Many of the new land uses and development listed in § 810 are specific uses that are expressly defined in § 802.

5. APA Act § 809(1) provides that:

"The agency shall have jurisdiction to review and approve all class A regional projects, including those proposed to be located in a land use area governed by an approved local land use program, and all class B regional projects in any land use area not governed by an approved and validly enacted or adopted local land use program."
(emphasis added).

6. APA Act § 809(2)(a) provides that:

"Any person proposing to undertake a class A regional project in any land use area, or a class B regional project in any land use area not governed by an approved and validly enacted or adopted local land use program, shall make application to the agency for approval of such project and receive an agency permit therefore prior to undertaking the project."

See also, Record, Volume I, Item 1, Determination of the Enforcement Committee in the Matter of Lewis Family Farm, Inc., dated March 25, 2008 ("Determination"), ¶ 17.

7. Since the Town of Essex does not have an approved local land use program, the Agency has permitting jurisdiction over all of the new land uses and development listed in Section 810 proposed to be undertaken there.

Subdivision Jurisdiction

8. APA Act § 810(1)(e) lists the Class A regional projects in a Resource Management land use area that require an Agency permit. These projects include, inter alia, all subdivisions of land (and all land uses and development related thereto) involving two or more lots, parcels or sites. Executive Law § 810(1)(e)(3).

9. "Subdivision" is defined in APA Act § 802(63) as:

"any division of land into two or more lots, parcels, or sites ... for the purpose of ... any form of separate ownership or occupancy (including any grading, road construction, installation of utilities or other improvements or any other land use and development preparatory or incidental to any such division) . . ."(emphasis added).

10. The Agency's regulations define "subdivision into sites" as occurring:

"where one or more new dwelling(s) or other principal building(s) is to be constructed on a parcel already containing at least one existing dwelling or other principal building, and regardless of whether the existing building is proposed to be removed after completion of the new building(s)." 9 NYCRR § 570.3 (ah) (3).

11. All subdivisions into sites of Resource Management lands require an Agency permit pursuant to APA Act §§ 809(2)(a) and 810(1)(e)(3). The Agency's Enforcement Committee found in its March 25, 2008 Determination that Lewis Farm had undertaken a subdivision into sites and violated these provisions by constructing three new single family dwellings on the Resource Management portion of the Lewis Farm. See, Record Volume I, Item 1, Determination, ¶¶ 6, 41 and 42.

Single Family Dwelling Jurisdiction

12. APA Act § 810(2)(d) lists the Class B regional projects in a Resource Management land use area that require an Agency permit in the Town of Essex. These projects include, inter alia, all single family dwellings. APA Act § 810(2)(d)(1).

13. "Single family dwelling" is defined in APA Act § 802(58) as:

"any detached building containing one dwelling unit, not including a mobile home."

14. The APA Act does not provide any exception to § 810(2)(d)(1) permitting jurisdiction over all new single family dwellings in Resource Management. In contrast, APA Act § 810(1)(e)(8) asserts Agency permitting jurisdiction over all structures in excess of forty feet in height in Resource Management, "except agricultural use structures and residential and radio and television antennas". (emphasis added). Presumably, the NYS Legislature would have included a similar exception for single family dwellings in Section 810(2)(d)(1) if certain single family dwellings were to be considered agricultural use structures.

15. All new single family dwellings (except for lawful replacements of pre-1973 dwellings) on Resource Management lands require an Agency permit pursuant to §§ 809(2)(a) and 810(2)(d)(1). Based on a cursory review of Agency records, I have identified at least seventy Agency permits issued pursuant to these provisions for single family dwellings in Resource Management, including four permits issued to farms for farmer and farmworker housing. The Agency's Enforcement Committee found in its March 25, 2008 Determination that Lewis Farm had violated these provisions by constructing three new single family dwellings on the Resource Management portion of the Lewis Farm. See, Record Volume I, Item 1, Determination, ¶¶ 6, 45 and 46.

APA Jurisdiction under the Rivers Act and 9 NYCRR Part 577

16. The Wild, Scenic and Recreational Rivers Act ("Rivers Act") was enacted pursuant to a legislative finding that:

"many rivers of the state, with their immediate environs, possess outstanding natural, scenic, historic, ecological and recreational values."

ECL § 15-2701(1); see also, Determination, ¶ 27.

17. The Rivers Act was enacted to implement a public policy that:

"certain selected rivers of the state which, with their immediate environs, possess the aforementioned characteristics, shall be preserved in free-flowing condition and that they and their immediate environs shall be protected for the benefit and enjoyment of present and future generations."

ECL § 15-2701(3).

18. Section 15-2705 of the Rivers Act charges the Adirondack Park Agency with responsibility for administration and enforcement of the Rivers Act on private lands within the Adirondack Park, and the Agency has promulgated regulations in 9 NYCRR Part 577:

"for the management, protection, and enhancement of and control of land use and development in the wild, scenic and recreational river areas."

ECL § 15-2709(1); see also, Record Volume I, Item 1, Determination, ¶ 29.

19. The Bouquet River is designated as a recreational river in 9 NYCRR Appendix Q-6 (See, Item 5a. (Recreational Rivers)) The recreational river area associated with the Bouquet River in the Town of Essex, Essex County, extends one-quarter of a mile from each bank of the river. See also, Determination, ¶ 6.

20. Pursuant to 9 NYCRR § 577.4(a), "no person shall undertake a rivers project without first obtaining an agency permit." See also, Record Volume I, Item 1, Determination, ¶ 30.

21. In recreational river areas, rivers projects include, inter alia, all subdivisions of land in Resource Management land use areas. 9 NYCRR § 577.5(c)(1); see also, Determination, ¶ 31. In the Determination, the Agency's Enforcement Committee found that Lewis Farm had undertaken a subdivision into sites on Resource Management lands in a recreational river area in violation of 9 NYCRR Part 577. Determination, ¶¶ 43, 44.

22. In recreational river areas, unless otherwise provided, rivers projects that require an Agency permit also include all land uses and developments classified as "compatible uses" by the Adirondack Park land use and development plan in Resource Management land use areas. 9 NYCRR § 577.5(c)(1); see also, Record Volume I, Item 1, Determination, ¶ 32.

23. Section 805(3)(g)(4) of the APA Act lists the compatible uses on Resource Management lands in the Adirondack Park that constitute "rivers projects" under 9 NYCRR Part 577. While agricultural uses (§ 805(3)(g)(4)(1)) and agricultural use structures (§ 805(3)(g)(4)(2)) are listed as "primary compatible uses", these uses are expressly exempted from Agency "rivers project" permitting requirements by 9 NYCRR § 577.4(b)(3)(ii).

24. Pursuant to APA Act § 805(3)(g)(4)(1), single family dwellings are listed as "secondary compatible uses" in Resource Management land use areas. Thus, all single family dwellings (except lawful replacements of pre-1973 dwellings) require Agency permits as "rivers projects" pursuant to 9 NYCRR § 577.4(a). See also, Record Volume I, Item 1, Determination, ¶¶ 33, 38. In its Determination, the Agency's Enforcement Committee found Lewis Farm in violation of 9 NYCRR Part 577 by failing to obtain a permit from the Agency prior to constructing its three new single family dwellings on Resource Management lands in the Bouquet River recreational river area.

Single Family Dwellings and Agricultural Use Structures

25. Single family dwellings and agricultural use structures are defined separately in APA Act § 802. The term "structure" is broadly defined in § 802(62) to include:

"any object constructed, installed or placed on land to facilitate land use and development or subdivision of land, such as buildings, sheds, single family dwellings, mobile homes, signs, tanks, fences and poles and any fixtures, additions and alterations thereto."

26. This wide-ranging definition applies to a number of specific types of structures that are individually and expressly defined in § 802 of the Act:

- Agricultural use structure [§ 802(8)]
- Forestry use structure [§ 802(22)]
- Mineral extraction structure [§ 802(36)]
- Mobile home [§ 802(37)]
- Multiple family dwelling [§ 802(39)]
- Public or semi-public building [§ 802(54)]
- Single family dwelling [§ 802(58)]
- Tourist accommodation [§ 802(64)]

27. Not all "structures" trigger the Agency's permit jurisdiction pursuant to APA Act §§ 809 and 810. However, except for agricultural use structures, all of these separately-defined structures listed in § 802 require an Agency permit as new land use and development in Resource Management pursuant to §§ 809 and 810. In addition, all "structures" in excess of forty feet in height (except for agricultural use structures and private television and radio antennas) require an Agency permit.

28. The term "agricultural use structure" is defined in APA Act § 802(8) as:

"any barn, stable, shed, silo, garage, fruit and vegetable stand or other building or structure directly and customarily associated with agricultural use."

Pursuant to the definitions provided by the APA Act, the examples of agricultural use structures provided in § 802(8) are all accessory structures¹ to an "agricultural use".²

29. Significantly, the definition of agricultural use structure in the APA Act does not expressly include any reference to on-farm single family dwellings or mobile homes. On-farm single family dwellings or mobile homes are not agricultural use structures in the definitions of "single family dwelling" and "mobile home" provided by the Act. In fact, nowhere in the APA Act is there any express indication that on-farm "single family dwellings" or "mobile homes" are defined or considered as "agricultural use structures".

¹ "Accessory structure" means any structure customarily incidental and subordinate to a principal land use or development and that customarily accompanies or is associated with such principal land use or development. APA Act § 802(5).

² "Agricultural use" means any management of any land for agriculture; raising of cows, horses, pigs, poultry and other livestock; horticulture or orchards; including the sale of products grown or raised directly on such land. APA Act § 802(7).

30. Further, single family dwellings and agricultural use structures are treated differently by, and distinguished within, the definition of "principal building" in § 802(50) of the APA Act. "Principal building" is defined at § 802(50) as:

- "a. a single family dwelling constitutes one principal building;
- b. a mobile home constitutes one principal building;
- c. a tourist cabin or similar structure for rent or hire over three hundred square feet or more of floor space constitutes one principal building;
- d. each dwelling unit of a multiple family dwelling constitutes one principal building;
- e. each motel unit, hotel unit, or similar tourist accommodation unit which is attached to a similar unit by a party wall, each accommodation unit of a tourist home or similar structure, and each tourist cabin or similar structure for rent or hire involving less than three hundred feet of floor space, constitutes one-tenth of a principal building;
- f. each commercial use structure and each industrial use structure in excess of three hundred square feet constitutes one principal building;
- g. all agricultural use structures and single family dwellings or mobile homes occupied by a farmer of land in agricultural use, his employees engaged in such use, and members of their respective immediate families, will together constitute and count as a single principal building;
- h. any other structure which exceeds twelve hundred fifty feet of floor space constitutes one principal building.

An accessory structure does not constitute a principal building."³

31. Under §§ 802(50)(a) and 802(50)(b) of the APA Act, all single family dwellings and mobile homes each count separately as "principal buildings". Agricultural use structures, however, do not automatically count as a "principal building". See, APA Act § 802(50). Other large structures, including agricultural use structures, only count as a "principal building" if their floor space exceeds twelve hundred and fifty feet. See, APA Act § 802(50)(h).

32. Under Section 802(50)(g) of the APA Act, the NYS Legislature made an exception to these counting rules in order to encourage the agricultural use of land in the Adirondack Park. Specifically, § 802(50)(g) provides that all structures on farms that would ordinarily count separately as principal buildings under normal counting rules are combined to count as only one principal building.

33. The NYS Legislature recognized and § 802(50)(g) expressly distinguishes between agricultural use structures and single family dwellings by referring to them as separate types of structures in the same paragraph. If the NYS

3 The definition of "principal building" relates to the overall intensity guidelines ("OIGs") for development in classified private land use areas in the Adirondack Park. In Resource Management, only 15 "principal buildings" are allowed per square mile (§ 805(3)(g)(3)). Based on the definition of "principal building", the OIGs are applied in the permitting of all projects listed in § 810 pursuant to § 809(10)(c).

Legislature considered on-farm single family dwellings and mobile homes to be agricultural use structures, there would be no need for the excepting language "and single family dwellings or mobile homes occupied by a farmer of land in agricultural use, his employees engaged in such use, and members of their respective immediate families" in § 802(50)(g) of the Act. This express language of § 802(50)(g) leaves no doubt that the NYS Legislature did not consider single family dwellings or mobile homes to be agricultural use structures under the APA Act.

34. In ¶¶ 37 and 38 of its March 25, 2008 Determination, the Agency's Enforcement Committee specifically found that "single family dwellings" and "agricultural use structures" are mutually exclusive "structures" for purposes of APA jurisdiction. Specifically, in ¶ 37, the Committee found that "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 of farm products ("fruit and vegetable stand")."

By contrast, in these paragraphs of its March 25, 2008 Determination, the Committee found that a farmer's dwelling or a dwelling for a farmworker and his family more precisely fit under the definition of "single family dwelling", and that the NYS Legislature had clearly intended to treat "agricultural use structures" and "single

family dwellings" as separate and distinct uses concluding in ¶ 38 that:

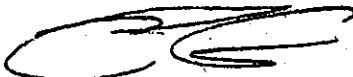
"While the Agency agrees that farm worker housing is important to the enhancement of farm operations, it is not an "agricultural use structure" under the Act, but either a "single family dwelling," "multiple family dwelling," or "mobile home," depending on the type of dwelling."

Local Government Review Board Participation

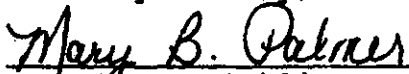
35. In the March 13, 2008 Lewis Farm proceedings before the Enforcement Committee, Lewis Farm's attorney submitted to the Committee a letter and resolution from the Local Government Review Board to former Governor Spitzer. In the Determination (page 2), the Committee specifically lists this letter as document number 13 that it considered prior to making its findings and determinations. See Record, Volume I, Item 1.

36. Furthermore, during the March 13, 2008 proceedings before the Enforcement Committee, Local Government Review Board Executive Director Frederick Monroe participated in the proceedings by offering a statement on the Lewis Farm Matter. See, Record Volume I, Item 1, Transcript, page 46, lines 19-25, and page 47, line 3-17.

Dated: Ray Brook, New York


Paul Van Cott, Esq.

Sworn to before me this
30th day of July, 2008


Notary Public

MARY B. PALMER
Notary Public, State of New York
01PA8128439
Commission Expires June 13, 20 09

STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

X

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

X

SUMMONS

Index No.
RJI No.

000332-08

TO THE ABOVE NAMED DEFENDANTS:

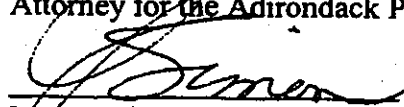
YOU ARE HEREBY SUMMONED to answer the verified complaint in this action and to serve a copy of your answer on the plaintiff's attorney within 20 days after the service of this summons and verified complaint, exclusive of the day of service (or within 30 days after service is complete if this summons is not personally delivered to you within the State of New York). In the case of your failure to appear and answer, judgment will be taken against you by default for the relief demanded in the verified complaint.

Venue is proper in Essex County because defendant resides there; because it is where the property that is the subject of this action is located, and because all of defendants' acts and omissions giving rise to this complaint occurred or are occurring there.

DATED: April 10, 2008
Albany, New York

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for the Adirondack Park Agency

By:


Loretta Simon
Assistant Attorney General
The Capitol
Albany, New York 12224
(518) 402-2724

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ALBANY, NEW YORK

STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

**VERIFIED
COMPLAINT**

Index No. 000332 -08
RJI No.

Plaintiff, Adirondack Park Agency (the "Agency"), alleges as follows:

PRELIMINARY STATEMENT

1. This action arises from the Lewis Family Farm's construction of three single-family dwellings on land located in the Town of Essex, Essex County ("the Site"), in violation of the Adirondack Park Agency Act ("APA Act"), the Wild, Scenic, and Recreational River System Act (the "Rivers Act"), Executive Law § 809 and Executive Law § 810 as well as Environmental Conservation Law ("ECL") § 15-2701. The construction of three single family dwellings, installation of foundations and septic systems, and subdivision of land, all without APA permits, interferes with the protection of Adirondack Park lands and the scenic view-shed along a recreational river and undermines the Agency's regulatory mandate. The Agency brings this action for violation of the permitting requirements and for enforcement of Executive Law §§ 809(2)(a), 810(1)(e)(3), and 810(2)(d)(1) and ECL § 15-2701, and 9 NYCRR Part 577.

2. The Agency seeks an order requiring defendants Lewis Family Farm, Salim B. Lewis and Barbara Lewis (hereafter "Lewis Farm") to: (i) comply with an Agency Cease and

Desist order issued June 27, 2007 ("Cease and Desist Order") and refrain from any further work on or use of the three unpermitted single family dwellings on the Site; (ii) apply for and obtain an Agency permit for subdivision of the Lewis Farm for the three single-family dwellings; (iii) deliver to the APA a detailed description of the placement and construction and evaluation of the dwellings' septic systems, demonstrating compliance with New York State Department of Health and Agency standards; and (iv) pay a civil penalty of \$50,000 for violation of the APA Act and the Rivers Act.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to Executive Law § 813 and ECL § 15-2705.

4. Venue is proper in Essex County because the Site is located there and because the unlawful activities described in this Verified Complaint have occurred and are occurring there.

PARTIES

5. The Adirondack Park Agency (the "APA" or "Agency") is duly constituted within the Executive Department of the State of New York, with its headquarters in Essex County, New York. The Agency is empowered to implement and enforce the Adirondack Park Agency Act and is specifically entrusted with protecting and preserving the resources of the Adirondack Park through the exercise of its permitting authority (Executive Law § 801 et seq.). The APA is also vested with authority pursuant to the Rivers Act, Environmental Conservation Law § 15-2705 to protect designated rivers within the Adirondack Park. The Rivers Act

authorizes the APA to make and enforce regulations necessary for the management, protection, enhancement of and control of land use and development in the wild, scenic and recreational river areas, including requirements for obtaining an Agency permit. See ECL § 15-2709(1); see also 9 NYCRR § 577.4(a).

6. Lewis Family Farm, Inc., is a corporation organized under the laws of the State of New York, by Salim B. Lewis, whose signature appears on the Certificate of Incorporation dated September 23, 1985. Upon information and belief, Lewis Farm is the owner of approximately 1,100 acres located in the Town of Essex, County of Essex, Tax Map Parcel 49.3-2-27 in the Adirondack Park. Upon information and belief, the principal place of business of Lewis Farm is 1212 Whallons Bay Road, Essex New York, 12936. See Exhibit A, Certificate of Incorporation.

7. Salim B. ("Sandy") Lewis is a principal of Lewis Family Farm, Inc., and incorporated Lewis Family Farm, Inc. See Exhibit A. Mr. Lewis is listed as President of Lewis Farm in a Consent Order with the Agency signed in 2000. See Exhibit B.

8. Barbara Lewis, is a shareholder of Lewis Family Farm, Inc., and is listed as President of Lewis Family Farm, Inc. on the Certificate of Incorporation. See Exhibit A.

STATUTORY FRAMEWORK

The Adirondack Park Agency Act

9. In 1971, the New York State Legislature enacted the Adirondack Park Agency Act, codified at Article 27 of the Executive Law, to protect the unique scenic, historic, ecological and natural resources within the Adirondacks. See L. 1971, c. 706; Executive Law § 801. The Legislature described the six-million acre Adirondack Park as containing "priceless resources" of

"national and international significance." Executive Law § 801.

10. The Official Adirondack Park Land Use and Development Plan Map (the "Official Map") classifies private lands in the Adirondack Park as within one of the following land use categories: "Hamlet," "Moderate Intensity Use," "Low Intensity Use," "Rural Use," "Resource Management," and "Industrial Use." Executive Law § 805. A description of "Resource Management" areas is set forth in Executive Law § 805(3)(g).

11. Executive Law § 809(2)(a) requires persons to obtain a permit from the Agency prior to undertaking any Class A Regional Project or Class B Regional Project. Pursuant to 9 NYCRR § 570.3 (ai)(1), "undertake" is defined as the "commencement of a material disturbance of land, including clearing of building sites, excavation (including excavation for the installation of foundations, footings and septic systems), or any other material disturbance of land preparatory or incidental to a proposed land use or development or subdivision."

12. Executive Law § 810(2)(d) lists the Class B Regional Projects in a Resource Management land use area that are subject to Agency review in the Town of Essex pursuant to § 809(2)(a), including, inter alia, the construction of any new single family dwelling. Executive Law § 810 (2)(d)(1).

13. "Single family dwelling" is defined as any detached building containing one dwelling unit, not including a mobile home. Executive Law § 802(58).

14. Executive Law § 810(1)(e) lists Class A Regional Projects in a Resource Management land use area that require an Agency permit pursuant to Executive law § 809(2)(a), which includes any subdivision of land. Executive Law § 810(1)(e)(3).

15. Executive Law § 802(63) defines "subdivision of land" or "subdivision" as

meaning, in pertinent part:

[A]ny division of land into two or more lots, parcels or sites, whether adjoining or not, for the purpose of sale, lease, license or any form of separate ownership or occupancy (including any grading, road construction, installation of utilities or other improvements or any other land use and development preparatory or incidental to any such division) by any person

16. A subdivision of land occurs when one or more dwellings or other principal building(s) will be constructed on a parcel already containing at least one existing dwelling or other principal building, regardless of whether the existing building is proposed to be removed after completion of the new building(s). 9 NYCRR § 570.3(ah)(3).

17. Where an existing dwelling will not be removed until after the new dwelling is placed or constructed, an Agency permit is required for subdivision into sites, if the subdivision is a Class A or Class B Regional Project. 9 NYCRR § 573.6(e).

18. Executive Law § 813 provides for a civil penalty of up to \$500 per day for each day a violation of the APA Act continues.

The Wild, Scenic, and Recreational River System Act and 9 NYCRR Part 577

19. The Wild, Scenic, and Recreational River System Act ("Rivers Act") was enacted pursuant to a legislative finding that many rivers of the state possess outstanding natural, scenic, historic, ecological and recreational values. ECL § 15-2701(1).

20. ECL Section 15-2705 states that its functions, powers and duties are vested in the APA as to any privately owned part of a river that becomes part of the system within the Adirondack Park.

21. The Rivers Act authorizes the APA to make and enforce regulations necessary for the management, protection and enhancement of and the control of land use and development in

these areas. ECL § 15-2709(1).

22. Pursuant to 9 NYCRR § 577.4(a), no person shall undertake a project subject to the Rivers Act without first obtaining an agency permit.

23. In recreational river areas, rivers projects include, inter alia, all subdivisions of land in Resource Management areas, and all "compatible uses" pursuant to the Land Use and Development Plan. 9 NYCRR § 577.5(c)(1). A single family dwelling constitutes a compatible use in Resource Management areas. Executive Law § 805 (3)(g)(4).

24. The Boquet River is a New York State-designated recreational river area within 1/4 mile of each bank from the confluence with its North fork to Lake Champlain, pursuant to 9 NYCRR § 570, Appendix Q-6, "Recreational Rivers" (5a).

25. Violations of the Rivers Act are subject to penalties of up to \$1,000 for each day such violation continues. ECL § 15-2723.

FACTUAL ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

26. Lewis Farm, upon information and belief, owns the Site comprised of Tax Map Parcel 49.3-2-27, in the Town of Essex, Essex County.

27. The Site is located on Whallons Bay Road, in Essex, New York, on lands classified "Resource Management" on the Adirondack Park Land Use and Development Plan Map. Portions of the affected property also lie within the designated river area of the Boquet River, a New York State designated recreational river.

28. The Site is approximately 1,100 acres and is operated as an organic farm.

29. On or about December 5, 2005, the Agency's Director, Counsel, and Deputy Director of Regulatory Programs, visited the Lewis Farm at the invitation of Salim B. Lewis.

During the visit Mr. Lewis told the APA staff that he was planning to build farm worker housing. Agency staff advised him that any new single family dwelling would require an Agency permit.

30. On or about March 14, 2007, S. B. Lewis and Barbara A. Lewis, as project sponsors, submitted a permit application to the Agency for permission to construct 3 single family dwellings on the Lewis Farm, for use by farm employees. The application was for a minor project (single family dwelling and two lot subdivision) and was signed by Barbara Lewis. See Exhibit C, Permit Application.

31. On or about March 15, 2007, the Agency sent Barbara Lewis, Salim Lewis and Mark McKenna, their authorized representative, a Notice of Incomplete Permit Application - Receipt of Partial Permit Application. See Exhibit D, Notice of Incomplete Permit Application dated March 15, 2007.

32. On or about March 19, 2007, Barbara Lewis called the Agency and stated that construction of the three single-family dwellings on the Lewis Farm had begun with installation of foundations and the on-site waste water treatments system, indicating that the foundations were located at the corner of Whallons Bay Road and Christian Road. During the conversation, the Agency advised Barbara Lewis that the Agency considered the project "undertaken" with the installation of foundations and the water treatments systems, and that the construction without a permit constituted a violation. The Agency also advised Barbara Lewis not to proceed with further construction until an Agency permit was obtained, and that the matter would be referred to the Agency's enforcement division.

33. On March 28, 2007, an Agency enforcement officer visited the Lewis Farm. He determined that three single family dwelling foundations were already constructed on lands

designated Resource Management on the Official Map, which lands also lie within the designated river area of the Boquet River, a New York State designated recreational river pursuant to 9 NYCRR § 570, Appendix Q-6 (5a).

34. Lewis Farm did not obtain an Agency permit prior to the commencement of construction of the three dwellings.

35. No local review was undertaken which would have served as a substitute for Agency approval, because the Town of Essex does not have an Agency approved local program for the review of any Class B Regional Project located within its borders pursuant to Executive Law.

36. On May 14, 2007, Agency staff sent a proposed Settlement Agreement to Lewis Farm by letter, alleging the violations and offering to resolve the matter with an after-the-fact permit for the three dwellings and payment of a \$10,000 civil penalty or contribution of a comparable amount of money toward an appropriate environmental benefit project. See Exhibit E, Letter from Sarah Reynolds to S.B. and Barbara Lewis and proposed Settlement Agreement.

37. Thereafter, Lewis Farm had numerous contacts with Agency staff, and requested staff to remove the civil penalty or any payment of an environmental benefit project sums as part of the proposed settlement. Staff declined.

38. On June 27, 2007, the Agency received a report that Lewis Farm had resumed construction of the three single family dwellings. In response, an Agency staff member traveled to the Site and observed that two modular homes had already been set on foundations and a third home was partially set on a foundation. On June 27, 2007, Agency staff issued a Cease and Desist Order requiring Lewis Farm to cease construction of the three single family dwellings See

Exhibit F, June 27, 2007 Cease and Desist Order.

39. On or about June 28, 2007, Lewis Farm commenced an action by serving a complaint against the Agency in New York State Supreme Court, Essex County, seeking a declaratory judgment that the Agency had no jurisdiction over construction of farm worker housing or if it did, that the Agriculture and Markets Law, specifically, Agricultural and Markets Law § 305-a, supercedes the Adirondack Park Agency Act. The complaint was amended on or about July 3, 2007. See Exhibit G, Amended Order to Show Cause and Amended Complaint dated July, 2007.

40. Staff observed the single family dwelling on the Site on July 2 and July 6, 2007, and observed that Lewis Farms was continuing construction on the three, two-story modular houses placed on the foundations.

41. In a decision dated August 16, 2007, Supreme Court Acting Justice Kevin J. Ryan denied Lewis Farm's motion for a restraining order against the Agency and granted the Agency's motion to dismiss the proceeding. The decision stated that the Agency had jurisdiction over the dwellings and the subdivisions created by construction of the dwellings. The Court rejected Lewis Farm's argument that the structures are "agricultural use structures," stating that when read in its entirety, the APA Act and the regulations implementing the Rivers Act do not exempt the dwellings from Agency jurisdiction. The Court further noted that Section 305-a of the Agriculture and Markets Law did not supersede Agency authority under the Adirondack Park Agency Act or its regulations, and dismissed the action as not ripe for judicial intervention and referred it back to the Agency to proceed with its enforcement procedures. See Exhibit H, Decision and Order Lewis Family Farm v. APA, (S. Ct. Essex Co.) (August 16, 2007).

42. On August 31, 2007, Agency staff observed further construction activity of the three single family dwellings on the Site, including that workers were shingling the roofs of the three dwellings. By letter of that date, Agency staff reiterated to Lewis Farm's counsel that the Cease and Desist Order remained in effect. See Exhibit F, August 31, 2007 letter from Paul Van Cott to David Cook.

43. Construction continued on the single family dwellings as observed by staff on September 5, and by December 7, 2007, the dwellings appeared largely complete. Sometime after September 5 and before December 7, 2007, a preexisting dwelling which had been located near the three new dwellings was removed.

44. The Enforcement Committee of the Agency convened on March 13, 2008 pursuant to 9 NYCRR § 581-2.6, to address the Lewis Farm alleged violations. The Enforcement Committee heard oral argument from counsel for Lewis Farm and for the Agency.

45. The Agency's Enforcement Committee issued a determination on March 25, 2008. The determination noted that Lewis Farm had a wetlands violation in 2000 with the Agency (see Exhibit B), and also had previous projects approved by the Agency. The determination noted that Lewis Farm had actual and timely notice from senior Agency staff that an Agency permit would be required prior to the construction of any new single family dwelling in the Resource Management portion of its property. The Enforcement Committee determined that Lewis Farm failed to seek a jurisdictional determination from the Agency prior to undertaking the construction of the three dwellings and, in doing so, violated the APA Act and the Rivers Act. See Exhibit I, March 25, 2008 Enforcement Committee Determination.

46. On or about March 26, 2008, counsel for Lewis Farm was served a copy of the

Agency determination via telefax and mail. Service on Lewis Farm was completed by on or about April 4, 2008.

47. On or about March 26, 2008, counsel for Lewis Farm contacted the Agency requesting a stay of provisions of the Agency determination, pending resolution of litigation. The Agency declined to stay the determination.

FIRST CAUSE OF ACTION

*(Failure to obtain an Agency permit for construction of
three new single family dwellings under the APA Act)*

48. Pursuant to Executive Law § 809(2)(a), a permit is required from the Agency prior to the construction of any single family dwelling on lands classified "Resource Management" in the Adirondack Park.

49. Lewis Farm violated Executive Law § 809(2)(a) by undertaking the construction of three single family dwellings on the Site, without obtaining an Agency permit.

SECOND CAUSE OF ACTION

*(Failure to obtain Agency permits for construction
of three new single family dwellings under the Rivers Act)*

50. Pursuant to 9 NYCRR § 577.5(c)(1), a permit is required from the Agency prior to construction of a single family dwelling on Resource Management lands pursuant to the Rivers Act.

51. Lewis Farm violated 9 NYCRR § 577.5(c)(1), by undertaking the construction of three single family dwellings on the Site, without obtaining an Agency permit pursuant to the

Rivers Act.

THIRD CAUSE OF ACTION

(Failure to obtain an Agency permit for subdivision of land under the APA Act)

52. Pursuant to Executive law § 809(2)(a) and 810(1)(e)(3) a Class A Regional Project permit is required from the Agency prior to any subdivision of Resource Management lands into sites.

53. Lewis farm violated Executive Law §§ 809(2)(a) and 810(1)(e)(3) by failing to obtain a permit from the Agency prior to subdividing the Lewis Farm into sites by construction of three new single family dwellings on the Site.

FOURTH CAUSE OF ACTION

(Failure to obtain an Agency permit for subdivision of land under the Rivers Act)

54. Pursuant to 9 NYCRR § 577.5(c)(1) a permit is required from the Agency prior to any subdivision of land into sites in Resource Management lands in a river area.

55. Lewis Farm violated 9 NYCRR § 577.5(c)(1) by failing to obtain a permit from the Agency prior to subdividing the Lewis Farm into sites by constructing three new single family dwellings on the Site.

PRAYER FOR RELIEF

WHEREFORE, the Agency respectfully requests that this Court enter judgment against Lewis Family Farm, Inc., as follows:

- (1) Finding Lewis Farm in violation of Executive Law § 809(2)(a) and 9 NYCRR § 577 and enjoining Lewis Farm to refrain from any further work on or use of the three

unpermitted single family dwellings on the Site until all APA permits are obtained; and

- (2) Requiring Lewis Farm to apply for and obtain an Agency permit for the three single family dwellings and for subdivision of the Site; and
- (3) Requiring Lewis Farm to submit to the Agency a detailed description and evaluation of the septic systems for the dwellings, demonstrating compliance with both New York State Department of Health and Agency standards; and
- (4) Requiring Lewis Farm to pay a civil penalty pursuant to Executive Law § 813(1) of \$50,000 for the violations alleged herein; and
- (5) Enjoining Lewis Farm from further violations of the Executive Law; and
- (6) Such other and further relief as this Court may deem just and proper.

Dated: April 10, 2008
Albany, New York

Andrew M. Cuomo
Attorney General of the
State of New York
Attorney for the Adirondack Park Agency
New York State Department of Law

By:


Loretta Simon
Assistant Attorney General
State of New York
Office of the Attorney General
The Capitol
Albany, New York 12224
Phone: 518-402-2724

VERIFICATION

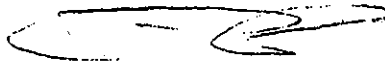
STATE OF NEW YORK)

) ss.:

COUNTY OF ESSEX)

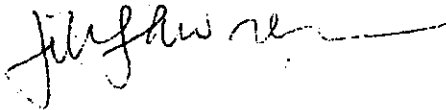
PAUL VAN COTT, being duly sworn, deposes and says:

I am an Associate Attorney for the Adirondack Park Agency (the "Agency"). I have read the foregoing verified complaint and know the contents thereof, and the same is true to my own knowledge except as to matters therein stated to be alleged upon information and belief, and as to those matters, I believe them to be true. The source of my knowledge, information and belief are the Agency's files, and discussions with Agency personnel. I make this verification pursuant to CPLR § 3020(d)(2), on the basis that I am acquainted with the facts.



PAUL VAN COTT

Sworn to before me this 19th
day of April, 2008.



JILL LAWRENCE
Notary Public - State of New York
Qualified in Franklin County
No. 01LA6175330
Commission Expires Oct. 9, 2016

Lewis Farm Exhibits to Complaint

- Exhibit A** **Certificate of Incorporation, Lewis Family Farm, Inc.,
dated September 23, 1985, with attachments**
- Exhibit B** **Consent Order, 2000
State and APA v. Lewis Family Farm, Inc.**
- Exhibit C** **Permit Application, dated February 15, 2007**
- Exhibit D** **Notice of Incomplete Permit Application, dated March 15, 2007**
- Exhibit E** **Cover Letter dated May 14, 2007 and Proposed Settlement
Agreement, 2007**
- Exhibit F** **Cease and Desist Order, dated June 27, 2007;

Letter to David L. Cook, Esq. re: Cease and Desist Order,
dated August 31, 2007**
- Exhibit G** **Lewis Family Farm, Inc. v. APA, Amended Complaint, July 2007**
- Exhibit H** **Lewis Family Farm, Inc. v. APA, Decision and Order,
dated August 16, 2007**
- Exhibit I** **Adirondack Park Agency Determination, dated March 25, 2008
In the matter of the apparent violations of Executive Law Section 809
and 9 NYCRR Part 577 by Lewis Family Farm, Inc., Respondent**

STATE OF NEW YORK
DEPARTMENT OF STATE

I hereby certify that the annexed copy has been compared with the original document in the custody of the Secretary of State and that the same is a true copy of said original.



WITNESS my hand and official seal of the
Department of State, at the City of Albany, on
July 16, 2007.

A handwritten signature in cursive script that reads "Paul LaPointe".

Paul LaPointe
Special Deputy Secretary of State

CERTIFICATE OF INCORPORATION

LEWIS FAMILY FARM, INC.

Under Section 405 of the Business Corporation Law

905-410
THE UNDERSIGNED, a natural person at least
eighteen years of age, for the purpose of forming a
corporation pursuant to Section 405 of the Business
Corporation Law of the State of New York, hereby certifies
as follows:

FIRST. The name of the corporation is Lewis
Family Farm, Inc.

SECOND. The purposes for which the corporation is
formed are as follows:

To engage in any commercial, mercantile,
industrial, manufacturing, marine, exploration, mining,
agricultural, research, financing, agency, securities
or brokerage business to the extent permitted by the
Business Corporation Law of the State of New York, and
any, some or all of the foregoing.

To acquire, hold, create interests in or dispose
of real or personal property, tangible or intangible,
of any kind in any manner.

B270506

THIRD. The office of the corporation in the State of New York is to be located in the Town of Essex, County of Essex.

FOURTH. The aggregate number of shares which the corporation shall have authority to issue is 100,000 shares without par value.

FIFTH. The Secretary of State of the State of New York is designated as agent of the corporation upon whom process in any action or proceeding against it may be served. The address to which the Secretary of State shall mail a copy of any process against the corporation served upon it is Barbara A. Lewis, 66 Montross Avenue, Short Hills, New Jersey 07078.

SIXTH. By-laws of the corporation may be adopted, amended or repealed by the board of directors of the corporation by the vote of a majority of the directors present at a meeting of the board at which a quorum is present.

SEVENTH. No holder of shares of the corporation of any class, now or hereafter authorized, shall have any preferential or prescriptive right to subscribe for, purchase or receive any shares of the corporation of any class, now or hereafter authorized, or any options or warrants for such shares, or any rights to subscribe for or purchase such shares, or any securities convertible into or exchangeable

for such shares, which may at any time be issued, sold or offered for sale by the corporation.

IN WITNESS WHEREOF, I have subscribed and affirm
as true under the penalties of perjury this certificate this
23rd day of September, 1943.

WILLIAM H. HILL, New Jersey 07078

11. 1990年12月15日

LEWIS FAMILY FARM, INC. (NE3 FOR 40 DATES)

CONCLUSIONS

1953年11月19日 星期四

DISSEMINATION

ANNEX 1

100

TABLE 2

1964

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STATE OF NEW YORK
DEPARTMENT OF STATE

FILED SEP 25 1985

AMT OF CHECK 127.50
FILED FEE 1.00
FEE 1.00
IDENTITY FEE 1.00
COPY 1.50
SERIAL 1.00
SPEC HANDLE 1.00

CD

CERTIFICATE OF INCORPORATION

LEWIS FAMILY FARM, INC.

Under Section 409 of the Business Corporation Law

595710

B270506

Trans. Res.
9/13/85 *304615-1*
Jan 1984

SEP 25 1985
R.F.

UB - CO
BILLED

CHAMBERLAIN, ROBERT & CORRELL

125 N. 4th St. New York, N.Y. 10012

FILED

STATE OF NEW YORK

DEPARTMENT OF STATE

I hereby certify that the annexed copy has been compared with the original document in the custody of the Secretary of State and that the same is a true copy of said original.



WITNESS my hand and official seal of the
Department of State, at the City of Albany, on
July 17, 2007.

Paul LaPointe

Paul LaPointe
Special Deputy Secretary of State

NYS DEPARTMENT OF STATE - DIVISION OF CORPORATIONS
Statement of Addresses and Directors, Part A
 CORPORATION NAME
 LEWIS FAMILY FARM, INC.

1027619	FILING PERIOD 09/1992	FEE \$50.00

1 PASSE CORPORATION	☒ The corporation is a corporation engaged in the production of crops, livestock, and livestock products on land used in agricultural production (Agriculture and Markets Law Section 301). It is not required to report.		
2 NAME AND BUSINESS ADDRESS OF THE CHAIRMAN OF THE BOARD OF DIRECTORS	NAME		
	ADDRESS		
	CITY	STATE	ZIP + 4
3 ADDRESS OF THE PRINCIPAL EXECUTIVE OFFICE	NAME		
	ADDRESS		
	CITY	STATE	ZIP + 4
4 SERVICE OF PROCESS ADDRESS	NAME		
	ADDRESS		
	CITY	STATE	ZIP + 4

NYS DEPARTMENT OF STATE - DIVISION OF CORPORATIONS
Statement of Addresses and Directors, Part B
 CORPORATION NAME
 LEWIS FAMILY FARM, INC.

1027619	FILING PERIOD 09/1992	FEE \$50.00

11. NAME AND BUSINESS ADDRESS OF THE CHAIRMAN OF THE BOARD OF DIRECTORS
 NO ADDRESS ON FILE
12. ADDRESS OF THE PRINCIPAL EXECUTIVE OFFICE
 NO ADDRESS ON FILE
31. SERVICE OF PROCESS ADDRESS
 BARBARA A. LEWIS
 66 MONTVIEW AVENUE
 SHORT HILLS NJ 07078

AK 98042300 3085

MAKE NO MARKS BELOW THIS LINE

PLEASE SIGN AND DATE ON REVERSE

DBS-1182 BY/MS

0199209 601027619 308000

IMPORTANT NOTICE

93042300

3085

A New York Corporation which is no longer conducting business should file a Certificate of Dissolution pursuant to section 1003 of the Business Corporation Law, and a foreign corporation no longer conducting business in New York State should file a Surrender of Authority pursuant to section 1310 or a Termination of Existence pursuant to section 1311 of the Business Corporation Law. An inactive corporation continues to accrue tax liability and possible interest and penalties until formally dissolved, surrendered, or terminated. Questions regarding the filing of these certificates should be directed to the NYS Department of State, Division of Corporations, 162 Washington Avenue, Albany, NY 12231-0001 or by calling 518-473-2492. You are also advised to request Publication 110, "Information and Instructions for Termination of Business Corporations" from the Department of Taxation and Finance. Requests for this publication may be made by phone within New York State by calling 1-800-482-6100 or from outside of New York State by calling (518) 438-1073. Mail requests should be addressed to: NYS Department of Taxation & Finance, Taxpayer Assistance Bureau, W. A. Harriman Campus, Albany NY 12227.

Filing Period and Penalty - the filing period is the calendar month during which the original certificate of incorporation or application for authority was filed or the effective date that corporate existence began, if stated in the certificate of incorporation. Failure to timely file this statement will be reflected in the department's records as past due or delinquent and may later subject the corporation to a fine of \$250. See section 409 of the Business Corporation Law.

Filing Fee. The statutory filing fee is \$50. Checks and money orders must be made payable to the "Department of State." **DO NOT** mail cash.

Send entire form, completed, and with \$50.00 fee, in the self-mailer envelope, to the Department of State, Division of Corporations, 162 Washington Avenue, Albany, NY 12231-0002.

Statement of Addresses and Directors, Part C

IN WITNESS WHEREOF, this certificate has been subscribed this 16 day of March, 1993, by the undersigned who affirms that the statements made herein are true under the penalties of perjury.

BARBARA H. LEWIS
PRINT OR TYPE NAME

PRESIDENT
PRINT OR TYPE TITLE

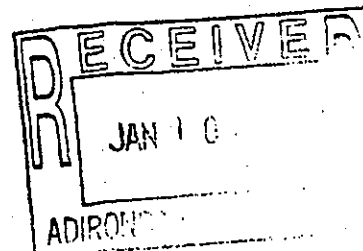
[Signature]
SIGNATURE

STATE OF NEW YORK
DEPARTMENT OF STATE

FILED APR 23 1993

MAKE NO MARKS BELOW THIS LINE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ESSEX



STATE OF NEW YORK and the ADIRONDACK PARK
AGENCY,

Plaintiffs,

NOTICE OF ENTRY

-against-

Index No. 626-00

LEWIS FAMILY FARM, INC.,

Defendant.

-----X

PLEASE TAKE NOTICE that attached hereto is a true copy of an Order of the Court
(Hon. James P. Dawson), dated December 26, 2000, ordering the parties to comply with the
terms of a Consent Order, annexed to said Order, filed and entered on January 3, 2001, in the
office of the County Clerk of Essex County, located in Elizabethtown, New York.

Dated: January 8, 2001
Albany, New York

ELIOT SPITZER
Attorney General of the State
of New York
Attorney for Plaintiffs
The Capitol
Albany, New York 12224

By: (518) 402-2260
Robert Rosenthal
ROBERT ROSENTHAL
Assistant Attorney General

To: John Privitera
MCNAMEE, LOCHNER, TITUS & WILLIAMS, P.C.
Attorneys for Defendant
75 State Street, P.O. Box 459
Albany, New York 12201
(518) 447-3237

ENTERED AND FILED
ESSEX COUNTY CLERK

01 JAN -3 PM 2:13

ELIZABETHTOWN, NY 12932

At an Ex Parte Term of the Supreme Court of the
State of New York for the County of Essex, at
Supreme Court Chambers, Elizabethtown,
New York on the 26th day of December, 2000.

PRESENT: HON. JAMES P. DAWSON, J.S.C.

**STATE OF NEW YORK and the
ADIRONDACK PARK AGENCY,**

Plaintiffs,

-against-

LEWIS FAMILY FARM, INC.,

Defendant.

ORDER

**Index No. 626-00
RJI No. 15-1-00-0354**

The Plaintiffs, having served the Defendant with a copy of the summons and verified complaint dated December 7, 2000 and filed December 12, 2000, and the Defendant having acknowledged service by the notice of appearance of its counsel (undated) and as memorialized in the affidavit of John J. Privitera, Esq., sworn to December 20, 2000, with exhibits, and the parties having agreed to a resolution of the dispute raised in the pleadings as set forth in a document entitled "Consent Order" which was signed by counsel for the Plaintiffs on December 7, 2000, and was signed by counsel for the Defendant on December 11, 2000, with the corporate Defendant having signed that document on December 8, 2000, and the Court deeming this "Consent Order" to be a Stipulation of the parties, and the Plaintiffs, by the affidavit of Robert Rosenthal, Esq., sworn to December 11, 2000, having moved for an order settling the parties' dispute pursuant to the terms of that Stipulation, and the Defendant having consented to that relief and having implicitly withdrawn its appearance by the above-mentioned affidavit of Attorney Privitera sworn to December 20, 2000,

and not otherwise evincing an intention to answer the complaint, thus allowing the Court to treat Plaintiffs' motion as one seeking a default judgment and thereby permitting the Court to approve the resolution of the parties' dispute in accordance with the terms set forth in the Stipulation, it is hereby

ORDERED, that the Plaintiffs may enter judgment against the Defendant pursuant to the terms of the parties' Stipulation, and it is further

ORDERED, that the parties comply with all enforceable terms and conditions of that Stipulation.

DATED: December 26th, 2000
Elizabethtown, New York



HON. JAMES P. DAWSON, J.S.C.

ENTER:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ESSEX

STATE OF NEW YORK and the ADIRONDACK PARK
AGENCY,

Plaintiffs,

CONSENT ORDER

-against-

Index No. 626-00

LEWIS FAMILY FARM, INC.,

Defendant.

WHEREAS:

A. The Lewis Family Farm, Inc. ("LFF") owns and operates an approximately 100-acre farm field ("farm field"), within a larger parcel of land also owned by LFF, located off of Clark Road, in the Town of Essex, Essex County, New York. The farm field is located adjacent to the environmentally sensitive Webb Royce Swamp (the "Swamp"), a 300-acre wetland ecosystem of which one-third was acquired by the State of New York in the 1990's. The Swamp, located within the Adirondack Park, is classified as Wild Forest under the State Land Master Plan and includes freshwater wetlands.

B. The farm field includes approximately eight acres of freshwater wetlands in its southeast corner immediately adjacent to the state-owned portion of the Swamp. The LFF-owned 8-acre wetland is part of the Swamp ecosystem.

C. The Adirondack Park Agency ("the APA") is responsible, pursuant to Environmental Conservation Law ("ECL") Article 71, title 23, for enforcing the New York State Freshwater Wetlands Act ("the Act"), ECL Article 24, within the Adirondack Park.

D. The Swamp is protected under the Act, which prohibits all draining, dredging, excavating, filling, and depositing in, on or adjacent to freshwater wetlands, and any other activity that substantially impairs the functions served by or the benefits derived from wetlands if not permitted by the APA. See ECL §§ 24-0105, 24-0701, 24-0705, and 24-0801. Pursuant to its delegated authority under 9 New York Code, Rules and Regulations ("NYCRR") Part 578, the APA has rated the Swamp as a category "1" wetland, the highest value on a scale of 1 to 4. Under this rating, the APA cannot approve a proposed activity within the wetland without a finding that the activity would be compatible with the preservation of the entire wetland and would not result in degradation or loss of any part of the wetland or its associated values. See 9 NYCRR § 578.10(a).

E. The State-owned portion of the Swamp is also protected under Article XIV, § 1, of the New York State Constitution, which provides that "[t]he lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands."

F. From in or about October 1998 until February 1999, LFF installed an extensive drainage system both on the farm field and within the Webb Royce Swamp for the purpose of draining the farm field of both surface and subsurface water for crop production.

G. Plaintiffs allege that the drainage project included extensive work on the farm field, including (i) the removal of trees and vegetation, (ii) extensive regrading, (iii) filling of the 8-acre wetland area discussed above, (iv) excavation of two long-abandoned ditches and side-casting of the dredged materials onto adjacent wetlands, (v) installation of a culvert to collect and channelize

surface water from the two ditches, and (vi) installation of subsurface tile drains and a manhole for the purpose of collecting water from the drains.

H. Plaintiffs further allege that both the surface and subsurface water flows from the drainage system located on the farm field were channelized into and through the Swamp via a 250-foot long ditch, between 10 and 12 feet wide, and having a depth of between 18 inches and two feet, excavated into the Swamp by LFF's employees and contractors; the dredged materials were deposited over the adjacent wetlands vegetation in the Swamp; and, in order to excavate the ditch, LFF's employees and contractors clear-cut timber, understory, and other vegetation in the Swamp.

I. LFF neither sought nor received permission from the APA or from the New York State Department of Environmental Conservation ("DEC") for conducting any of the work within the farm field or the State-owned Forest Preserve lands of the Swamp.

J. Plaintiffs allege that through the activities conducted by LFF's employees and contractors within the Swamp, LFF has violated both Article XIV, § 1, of the New York State Constitution and the Act. Plaintiffs also allege that said activities and their lasting impact on the Swamp constitute a continuing trespass and have damaged the natural resources of the State.

K. LFF alleges that it is not legally responsible for the alleged violations, that it had a right to conduct the alleged work under the agricultural exemption of the Federal Clean Water Act, 33 U.S.C. §§ 1344(f)(1)(A) and (C), and the Act, ECL § 24-0701(4), and that the Swamp was not harmed.

L. Prior to agreeing to the terms of this Consent Order ("Order"), LFF contributed \$50,000 to the Town of Keene for the purpose of assisting in the funding of the "Rivermede Streambank Protection Project," as an Environmental Benefit Project.

NOW, without admission, in the interests of resolving this matter and upon the consent of the undersigned counsel for Plaintiffs and of LFF, it is hereby STIPULATED and AGREED by the parties as follows:

1. Restoration of Swamp Area: LFF shall restore both the area where the ditch was excavated in the Swamp and the historical flow into the Swamp area in accordance with the requirements and schedule set forth in the Engineering Plan, attached hereto as Exhibit A and made a part hereof.

2. Stipulated Penalties: In the event that LFF defaults by failing to timely comply with the requirements of paragraph 1, above, the APA shall provide LFF with written notice of such default served by overnight courier to the address set forth on the signatory page of this Order. LFF shall thereafter have three (3) days from the receipt of the written notice to cure the default. If LFF fails to cure the default, the APA shall be entitled to payment by LFF of a stipulated penalty or penalties to be calculated in accordance with the following schedule:

<u>Period of Non-compliance</u>	<u>Penalty per Day</u>
1st day through 30th day	\$500
Each day beyond the 30th day	\$1,000.

3. Inspections: LFF shall allow authorized representatives of the APA access to the farm field without prior notice at such times as may be necessary in order for the APA to inspect and determine the status of LFF's compliance with this Judgment.

4. **Force Majeure:** LFF shall not suffer any penalty under any of the provisions, terms and conditions hereof, or be subject to any proceedings or actions for any remedy or relief, if LFF cannot comply with any requirements contained herein because of an Act of God, war, riot, or other catastrophe as to which negligence or willful misconduct on the part of LFF were not a proximate cause, provided, however, that LFF shall immediately notify the APA in writing upon obtaining knowledge of any such condition and request an extension or modification of the provisions hereof.

5. **Indemnity:** LFF shall indemnify and hold harmless New York State, the APA, DEC, and any of their employees or contractors for all claims, actions, damages and costs resulting from the APA's, DEC's, or LFF's acts in fulfillment or attempted fulfillment of the provisions of this Judgment, unless said acts were caused by the intentional or reckless acts of New York State, the APA, DEC, or any of their employees or contractors.

6. **Reservation of Rights:** Nothing in this Judgment precludes the APA from enforcing, at its election, in law or equity, the terms, provisions, and conditions of this Judgment against LFF in the event that LFF shall fail to fulfill any of the obligations contained herein. The existence of this Judgment shall not be a ground for requiring initiation, continuance, or transfer of any enforcement proceeding or action to any forum not of the State's choosing.

7. **Entire Settlement:** This Judgment shall constitute the entire agreement of the parties with respect to settlement of those violations specifically referenced in the Complaint and is in full satisfaction of all civil or administrative claims that were or could have been raised in the Complaint against LFF, its principals, shareholders, officers, employees, agents, and contractors with respect to the facts alleged therein. Other than the Complaint that is hereby resolved and

except as is necessary in the discretion of the State of New York to enforce the terms of this Order, the State of New York and each of its agencies shall forbear from bringing any action, proceeding or suit against LFF and its principals, shareholders, officers, employees, agents, contractors and representatives for any penalties, relief, remediation or restoration based upon the activities alleged in the Complaint. Nothing herein shall constitute a release of LFF's liability for conditions on and adjacent to the farm field unknown to the State on the date hereof.

8. Binding Effect: This Judgment shall be binding on LFF, and its officers, directors, partners, affiliates, employees, successors and assigns.

9. Continuing Jurisdiction: The Court shall have continuing jurisdiction over this matter to enforce the terms and conditions of this Judgment.

SO ORDERED:

J.S.C.

DATED: _____

CONSENTED AND AGREED TO BY:

ELIOT SPITZER
Attorney General of the State
of New York
Attorney for Plaintiffs
New York State Department of Law
The Capitol
Albany, New York 12224
(518) 402-2260

By: Robert Rosenthal
Robert Rosenthal
Assistant Attorney General

Dated: 12/07/00

MCNAMEE, LOCHNER, TITUS &
WILLIAMS, P.C.
Attorneys for Defendant
75 State Street, P.O. Box 459
Albany, New York 12201
(518) 447-3237

By: John Privitera
John Privitera
Partner at Firm

Dated: 12/11/00

LEWIS FAMILY FARM, INC.
66 Montview Ave.
Short Hills, New Jersey 07078
(973) 379-4446

By: Salim Lewis
Salim Lewis
President

Dated: 12/8/00



Exhibit A

- A. Supervision: Prior to the commencement of restoration work on State land, LFF shall provide notice to the APA (Ray Curran) and DEC (Ken Kogut, Region 5) of the specific dates that the restoration activities are to be undertaken; no work shall be undertaken on State land until an employee or authorized agent of the APA or DEC is on site.
- B. Restoration Work in the Swamp: Restoration of the Swamp shall be undertaken as described herein:
- (i) All restoration activities shall be conducted only in dry conditions and when the soils within the Swamp are able to withstand the application of the equipment to be used to carry out the activities. LFF shall employ all practicable measures to ensure that the restoration activities are undertaken and completed without further damage to the Swamp.
 - (ii) The area upon which the restoration activities are to be conducted shall be delineated with caution tape.
 - (iii) All machinery and material utilized in conducting the restoration activities shall be pressure-washed prior to bringing them into the Swamp in order to avoid the introduction of seeds of invasive species.
 - (iv) Filter fabric and rock to hold the fabric in place shall be installed at the northern opening of the ditch. Filter fabric shall also be properly installed across the ditch at 50-foot intervals.
 - (v) A tracked excavator, or like equipment, shall be used to redeposit soils into the ditch. Swamp mats, approximately 5' x 14' in size, shall be installed across the ditch to support the excavator. The mats shall be installed with the long side across the ditch.
 - (vi) The restoration activities shall be conducted in approximately 15- to 20-foot segments along the length of the ditch, starting at the southern end of the ditch. The tracked excavator shall be used to remove soil from the sidecast stockpiles adjacent to the ditch and place such soil carefully into the ditch around the filter fabric. The soils are to be compacted as they are deposited in the ditch. If the excavator cannot properly compact the deposited soils, the soils shall be wetted and then compacted with a tamper. The ditch shall be filled with at least 90 percent of the sidecast stockpile material to create a parabolic shape that does not exceed 12 inches in depth below adjacent grade of the "natural" soil surface nor shall the depression be wider than 12 inches as shown on the map entitled, "Conceptual Drainage Plan" (hereinafter referred to as the "Map"), attached hereto. The restoration process shall be repeated for each section until the entire ditch is filled with soil.

- (vii) Woody debris, including root masses, branches, and stems of trees and shrubs, are to be removed from the sidecast soils prior to their deposit into the ditch. Root masses are to be deposited on top of the soils in the refilled ditch. The remainder of the woody debris is to be scattered in the areas where the sidecast stockpiles were located prior to their removal. LFF shall employ all practicable measures to ensure that the excavator does not dig into and below the surface of the "natural" soil underlying the stockpiled soils.
 - (viii) No more than 10 percent of the sidecast stockpile soils and no more than 16 cubic yards shall be removed from the Swamp and deposited on the southern portion of the farm field. This removed material may be used to recontour the farm field ditch in the vicinity of State land as shown on the Map.
 - (ix) No longer than one week after the stockpiled soils have been deposited in the ditch, the areas upon which the ditch was filled and the sidecast stockpiles were located prior to their removal shall be seeded with "Northeast Wetland Hummock Seed Mix," manufactured by Southern Tier Consulting, Inc. (or equivalent) at the rate of one pound per 13,460 square feet.
- C. Modification of the Drainage System on the Farm Field: The drainage system currently installed on the estimated 100 acres constituting the farm field shall be modified and maintained in the future so that direct and indirect runoff into the Swamp land is filtered, dispersed and diffused, and so that the hydrology of the Swamp over the 30 years preceding January of 1999 is maintained to the greatest extent practicable. The existing drainage system shall be modified or replaced to be consistent with the conceptual design depicted in the Map.
- (i) The manhole in the southeast corner of the farm field shall be removed.
 - (ii) A detention pond shall be constructed on the southeastern section of the farm field, at least 75 feet north of the field's southern boundary and upgrade of the Swamp. As shown on the Map, this pond is anticipated to be saucer-shaped, three feet deep on the northern side near the tile drain outlets, sloping to meet the grade at its southern side. Rock or crushed stone shall be laid along the southern bank of the detention area to protect that edge from flows of water out of the detention area while allowing for a broad, diffuse outlet of such flows. The entire detention area shall be stabilized with jute netting and revegetated with an appropriate seed mixture.
 - (iii) The two tile drains underlying the farm field that flow in a southerly direction shall be reconstructed so that they enter the north side of the one-acre detention depression (commonly referred to as "daylighting" the drains). A 12-inch rip-rapped outlet shall be installed on the easternmost drain and an 18-inch rip-rapped

outlet shall be installed on the westernmost drain. Several microtopographic depressions and ridges shall be constructed downslope of the outfalls of these tile drain outlets and upslope of the detention area as shown on the Map. These microtopographic features shall function to diffuse and dissipate flow of water from the outlets and into the detention area.

- (iv) The two open drainage ditches on the farm field, one flowing from north to south and the other from west to east, shall be gradually turned and recontoured, as shown on the Map, so they direct flow into the detention area. Up to 16 cubic yards (no more than 10 percent) of the soils material in the spoils piles on State land may be used to recontour the ditches. Downslope of the detention area the ditches shall be recontoured to mesh with the adjacent grade on State land. The existing grades on the adjacent State land shall not be disturbed.

D. Restoration and Future Activities in the Wetlands Area: LFF shall comply with the following requirements with regard to the approximately 8 acre-wetland area designated as wetlands on the Map:

- (i) The area designated as wetland on the Map shall be allowed to revegetate naturally to function as a buffer area to the adjacent Swamp.
- (ii) No excavation, ditching, filling, or removal of vegetation or soil material shall occur without prior written approval of the APA in the form of a wetlands permit.
- (iii) Mowing of the vegetation shall be permitted so long as the constructed topography and facilities are not materially altered by such operations.

E. Compliance Schedule: All work described in paragraphs B and C of this section shall commenced by June 1, 2001, and be completed as follows:

- (i) Restoration of the ditch within the Swamp shall commence concurrently with modification or replacement of the drainage system and shall be completed within thirty days, or on a schedule consistent with necessary approval/permit from the United States Army Corps of Engineers ("Corps").
- (ii) The modification or replacement of the existing surface/subsurface drainage system on the farm field shall be completed within thirty days, or on a schedule consistent with necessary approval/permit from the United States Army Corps of Engineers.
- (iii) The thirty day period for completion of activities may be extended by reason of inclement weather or other unforeseen circumstances upon authorization of the APA.

- (iv) LFF shall obtain the necessary approval/permit from the Corps prior to commencing the restoration activities.

**Exhibit C: Permit Application dated 2/15/07
(Complaint - 4/10/08)
[Reproduced at pp. 995-1006]**

**Exhibit D: Notice of Incomplete Permit Application
dated 3/15/07 (Complaint -4/10/08)
[Reproduced at pp. 111-114]**

Exhibit E: Letter dated 5/14/07 (Complaint - 4/10/08)
[Reproduced at pp. 82-83]

**Exhibit F: Cease and Desist Order dated 6/27/07
(Complaint - 4/10/08)
[Reproduced at pp. 149-151]**

**Exhibit G: Amended Order to Show Cause dated
7/13/07/ Amended Complaint (Complaint -4/10/08)
[Reproduced at pp. 38-40]**

**Exhibit H: Decision and Order dated 8/16/07
(Complaint - 4/10/08)
[Reproduced at pp. 4-12]**

**Exhibit I: Determination dated 3/25/08 (Complaint -
4/10/08)**

[Reproduced at pp. 855-870]

STATE of NEW YORK SUPREME COURT
ESSEX COUNTY

Affidavit of Service of John G. Phillips of APA's
Complaint on Salim B. Lewis, sworn to 4/29/08 and
filed 4/30/08 pp. 565-567

Adirondack Park Agency,
Plaintiff,
-against-

Lewis Family Farm, Inc.,
Salim B. Lewis and Barbara Lewis,

Defendant(s).

AFFIDAVIT OF SERVICE

Index No. 000332-08

ENTERED AND FILED
ESSEX COUNTY CLERK
08 APR 30 AM 10:45
ELIZABETHTOWN, NY 12932

STATE OF NEW YORK
COUNTY OF CLINTON

ss.:

1. John G. Phillips being duly sworn, deposes and says that he is over eighteen years of age and is employed by the New York State Attorney General's Office. Deponent served the Summons and Verified Complaint, with exhibits, in the above-captioned matter on Salim B. Lewis, a.k.a. Sandy Lewis, by personally delivering a true copy thereof to his residence located at 1212 Whallons Bay Road, Essex, New York, at 12:35 pm on April 25, 2008. Deponent knew the said Salim B. Lewis so served to be the person named in the above matter and further describes the person actually served as a white male, approximately 69 years of age, approximately 72 inches tall, weighing approximately 195 pounds, and having white hair.

2. Upon arrival at 1212 Whallons Bay Rd., Essex, NY I observed a large house which appeared to be served by 2 driveways, one to the west of the house and one to the east. As I drove by the house I observed that the eastern driveway was paved and led to a garage structure where I could observe three vehicles. I entered the eastern driveway and parked my vehicle behind the other vehicles. As I exited my vehicle I observed a female standing on a porch located on the western side of the house. As I approached her I called out, "hello." She looked up and saw me. I asked if she might be Barbara Lewis. She responded that she was not, but that Barbara was

just inside in the kitchen.

3. I reached the porch and approached the woman as she opened the door and called to Barbara Lewis. Ms. Lewis came to the door. I reached out and shook her hand and identified myself by name and said that I was from the Attorney General's Office. I further informed her that I was there to serve her and her husband with legal papers. I extended the documents to her. She did not take them. She asked me to move back onto the porch. I complied. As I moved back, Ms. Lewis turned back toward the kitchen and called, Sandy, would you come here, or words to that effect.

4. The gentleman who came out on the porch, in response to Mrs. Lewis's call did not identify himself. However, I believe the gentleman was Salim (Sandy) Lewis because he appeared to be the same person identified as Mr. Lewis in a photograph printed in the April 14, 2008, issue of the New York Times, page B1. Mr. Lewis asked what I was doing there. I informed him that I was from the Attorney General's Office and I was there to serve him and his wife with legal papers. He asked again what are you doing here. He accused me of trespassing. I again told him I was there to serve him legal papers. He asked the location of my vehicle. I told him where I had parked. He instructed me to return to my vehicle and escorted me there. He repeatedly informed me that this was his property and I was trespassing.

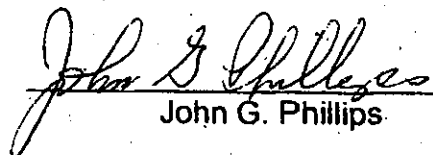
5. When we arrived at my vehicle I showed him my shield and identification and offered him a business card. He refused and told me he didn't care who I was. I again informed Mr. Lewis that I was serving him and his wife and that he had been served. I repeatedly offered the documents. He continually refused to take them and ordered me off his property.

6. I placed the 2 sets of the documents near Mr. Lewis, on the roof of the car located next to mine. Mr. Lewis picked up the documents from the roof of the vehicle and put them on the roof of my vehicle. I again informed him that he and his wife had

been served and that the copies now belonged to him.

7. I again placed the documents on the vehicle next to mine. Mr. Lewis again picked up the documents, removed them and threw them onto the roof of my vehicle as I was entering it. I retrieved the documents and informed Mr. Lewis that I would be leaving the documents on his property. I then drove down the eastern driveway onto the Whallons Bay Road. When I arrived at the entrance to the western driveway I pulled onto the shoulder of the Whallons Bay Road. I placed the two sets of documents in a clear plastic zip bag and tossed the package into the middle of the driveway. The documents were left on the ground, in the western driveway of the 1212 Whallons Bay Road property. I then left the area.

8. Deponent further states, on information and belief, that said Salim B. Lewis is not on active duty with the Armed Forces of the United States.


John G. Phillips

Sworn to before me this
29th day of April, 2008


NOTARY PUBLIC

LAWRENCE A. RAPPOPORT
Notary Public, State of New York
Qualified in Albany County
No. 4513713

My Commission Expires March 30, 2011

DECEMBER 31, 2009

STATE of NEW YORK SUPREME COURT
ESSEX COUNTY

Affidavit of Service of John G. Phillips of APA's
Complaint on Barbara A. Lewis, sworn to 4/29/08
and filed 4/30/08 pp. 568-569

Adirondack Park Agency,
Plaintiff,
-against-

Lewis Family Farm, Inc.,
Salim B. Lewis and Barbara Lewis,

Defendant(s).

AFFIDAVIT OF SERVICE

Index No. 000332-08

ELIZABETH T. HARRIS
08 APR 30 AM 10:45
12932

STATE OF NEW YORK
COUNTY OF CLINTON

ss.:

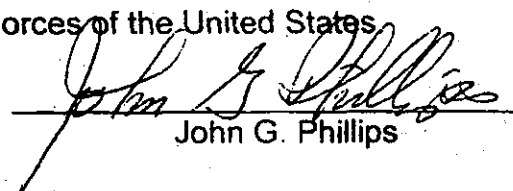
1. John G. Phillips being duly sworn, deposes and says that he is over eighteen years of age and is employed by the New York State Attorney General's Office.
2. Deponent served the Summons and Verified Complaint and exhibits in the above-captioned matter on Barbara Lewis by personally delivering a true copy thereof to her residence located at 1212 Whallons Bay Road, Essex, New York, at 12:35 pm on April 25, 2008. Deponent knew the said Barbara A. Lewis so served to be the person named in the above matter and further describes the person actually served as a white female, approximately 72 years of age, approximately 64 inches tall, weighing approximately pounds 165, and having white hair.
3. Upon arrival at 1212 Whallons Bay Rd., Essex, NY I observed a large house which appeared to be served by 2 driveways, one to the west of the house and one to the east. As I drove by the house I observed that the eastern driveway was paved and led to a garage structure where I could observe three vehicles. I entered the eastern driveway and parked my vehicle behind the other vehicles. As I exited my vehicle I observed a female standing on a porch located on the western side of the house. As I approached her I called out, "hello." She looked up and saw me. I asked if

she might be Barbara Lewis. She responded that she was not, but that Barbara was just inside in the kitchen.

4. I reached the porch and approached the woman as she opened the door and called to Barbara Lewis. Ms. Lewis came to the door. I reached out and shook her hand and identified myself by name and said that I was from the Attorney General's Office. I further informed her that I was there to serve her and her husband with legal papers. I extended the documents to her. She did not take them. She asked me to move back onto the porch. I complied. As I moved back, Ms. Lewis turned back toward the kitchen and called, Sandy, would you come here, or words to that effect.

5. Barbara Lewis refused to retain the documents served, and following a conversation with her husband Salim B. Lewis, I left the documents on the ground in the western driveway of the 1212 Whallons Bay Road property. I placed the two sets of documents in a clear plastic zip bag and tossed the package into the middle of the driveway. The documents were left on the ground, in the western driveway of the 1212 Whallons Bay Road property. I then left the area.

6. Deponent further states, on information and belief, that said Barbara A. Lewis is not on active duty with the Armed Forces of the United States.


John G. Phillips

Sworn to before me this
27th day of April, 2008


NOTARY PUBLIC

LAWRENCE A. RAPPOPORT
Notary Public, State of New York
Qualified in Albany County
No. 4513713
My Commission Expires March 30, 2011

December 21, 2009

McNamee, Lochner, Titus & Williams, P.C.

ATTORNEYS AT LAW

JACOB F. LAMME

Direct Dial
(518) 447-3348

lamme@mltw.com

May 13, 2008

VIA FACSIMILE - (518) 473-2534

Loretta Simon, Esq.
Assistant Attorney General
State of New York
Office of the Attorney General
The Capitol
Albany, New York 12224

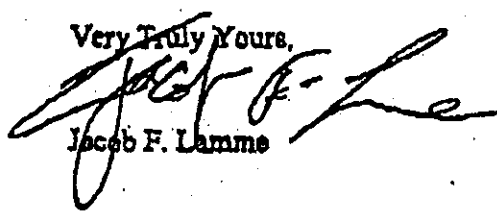
RE: Lewis Family Farm, Inc. v. Adirondack Park Agency
Essex County Index No. 315-08
Adirondack Park Agency v. Lewis Family Farm, Inc., et al.
Essex County Index No. 332-08

Dear Ms. Simon:

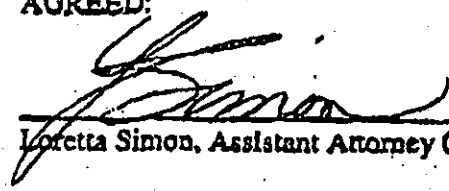
This letter confirms that my firm has agreed to accept service on behalf of the named defendants in the action that the Agency commenced on or about April 11, 2008 (Index No. 332-08). It is agreed that service of the summons and complaint on all defendants is deemed complete as of April 25, 2008. You have agreed to extend the defendants' time to answer or otherwise respond to the complaint until May 30, 2008, with delivery to the Office of the Attorney General by 5:00 p.m.

Please countersign this letter and return it to me so that I may note your acceptance of the terms of our agreement.

Very Truly Yours,


Jacob F. Lamme

AGREED:


Loretta Simon, Assistant Attorney General

cc: Hon. Richard B. Meyer

(140) (7/10/08, 1)

677 Broadway, Albany, New York 12207-2503 • (518) 447-3200 • Fax (518) 426-4260 • www.mltw.com

TOTAL P.02 R00570

STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

AMENDED
SUMMONS

Index No. 332-08
RJI No. 15-1-2008-0117

TO THE ABOVE NAMED DEFENDANTS:

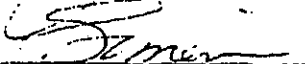
YOU ARE HEREBY SUMMONED to answer the verified amended complaint in this action and to serve a copy of your answer on the plaintiff's attorney within 20 days after the service of this amended summons and verified complaint, exclusive of the day of service (or within 30 days after service is complete if this summons is not personally delivered to you within the State of New York). In the case of your failure to appear and answer, judgment will be taken against you by default for the relief demanded in the verified complaint.

Venue is proper in Essex County because defendant resides there; because it is where the property that is the subject of this action is located, and because all of defendants' acts and omissions giving rise to this complaint occurred or are occurring there.

DATED: May 14, 2008
Albany, New York

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for the Adirondack Park Agency

By:


Loretta Simon
Assistant Attorney General
The Capitol
Albany, New York 12224
(518) 402-2724

ELIZABETH TOWN, NY 12932

08 MAY 15 PM 4:19

ESSEX COUNTY CLERK
FILED AND ENTERED

STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

**VERIFIED
AMENDED
COMPLAINT**

Index No. 332-08
RJI No.15-1-2008-0117

Plaintiff, Adirondack Park Agency (the "Agency"), alleges as follows:

PRELIMINARY STATEMENT

1. This action arises from the Lewis Family Farm's construction of three single-family dwellings on land located in the Town of Essex, Essex County ("the Site"), in violation of the Adirondack Park Agency Act ("APA Act"), the Wild, Scenic, and Recreational River System Act (the "Rivers Act"), Executive Law § 809 and Executive Law § 810 as well as Environmental Conservation Law ("ECL") § 15-2701. The construction of three single family dwellings, installation of foundations and septic systems, and subdivision of land, all without APA permits, interferes with the protection of Adirondack Park lands and the scenic view-shed along a recreational river and undermines the Agency's regulatory mandate. The Agency brings this action for violation of the permitting requirements and for enforcement of Executive Law §§ 809(2)(a), 810(1)(e)(3), and 810(2)(d)(1) and ECL § 15-2701, and 9 NYCRR Part 577, and an administrative determination dated March 25, 2008 and amended April 18, 2008.

2. The Agency seeks an order requiring defendants Lewis Family Farm, Inc., Salim

B. Lewis and Barbara Lewis (hereafter collectively "Lewis Farm") to: (i) comply with an Agency Cease and Desist order issued June 27, 2007 ("Cease and Desist Order") and refrain from any further work on or use of the three unpermitted single family dwellings on the Site; (ii) apply for and obtain an Agency permit for subdivision of the Lewis Farm for the three single-family dwellings; (iii) deliver to the APA a detailed description of the placement and construction and evaluation of the dwellings' septic systems, demonstrating compliance with New York State Department of Health and Agency standards; and (iv) pay a civil penalty of \$50,000 for violation of the APA Act and the Rivers Act.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to Executive Law § 813 and ECL § 15-2705.

4. Venue is proper in Essex County because the Site is located there and because the unlawful activities described in this Verified Complaint have occurred and are occurring there.

PARTIES

5. The Adirondack Park Agency (the "APA" or "Agency") is duly constituted within the Executive Department of the State of New York, with its headquarters in Essex County, New York. The Agency is empowered to implement and enforce the Adirondack Park Agency Act and is specifically entrusted with protecting and preserving the resources of the Adirondack Park through the exercise of its permitting authority (Executive Law § 801 et seq.). The APA is also vested with authority pursuant to the Rivers Act, Environmental Conservation

Law § 15-2705 to protect designated rivers within the Adirondack Park. The Rivers Act authorizes the APA to make and enforce regulations necessary for the management, protection, enhancement of and control of land use and development in the wild, scenic and recreational river areas, including requirements for obtaining an Agency permit. See ECL § 15-2709(1); see also 9 NYCRR § 577.4(a).

6. Lewis Family Farm, Inc., is a corporation organized under the laws of the State of New York, by Salim B. Lewis, whose signature appears on the Certificate of Incorporation dated September 23, 1985. Upon information and belief, Lewis Farm is the owner of approximately 1,100 acres located in the Town of Essex, County of Essex, Tax Map Parcel 49.3-2-27 in the Adirondack Park. Upon information and belief, the principal place of business of Lewis Farm is 1212 Whallons Bay Road, Essex New York, 12936. See Exhibit A, Certificate of Incorporation.

7. Salim B. ("Sandy") Lewis is a principal of Lewis Family Farm, Inc., and incorporated Lewis Family Farm, Inc. See Exhibit A. Mr. Lewis is listed as President of Lewis Farm in a Consent Order with the Agency signed in 2000. See Exhibit B.

8. Barbara Lewis, is a shareholder of Lewis Family Farm, Inc., and is listed as President of Lewis Family Farm, Inc. on the Certificate of Incorporation. See Exhibit A.

STATUTORY FRAMEWORK

The Adirondack Park Agency Act

9. In 1971, the New York State Legislature enacted the Adirondack Park Agency Act, codified at Article 27 of the Executive Law, to protect the unique scenic, historic, ecological and natural resources within the Adirondacks. See L. 1971, c. 706; Executive Law § 801. The

Legislature described the six-million acre Adirondack Park as containing "priceless resources" of "national and international significance." Executive Law § 801.

10. The Official Adirondack Park Land Use and Development Plan Map (the "Official Map") classifies private lands in the Adirondack Park as within one of the following land use categories: "Hamlet," "Moderate Intensity Use," "Low Intensity Use," "Rural Use," "Resource Management," and "Industrial Use." Executive Law § 805. A description of "Resource Management" areas is set forth in Executive Law § 805(3)(g).

11. Executive Law § 809(2)(a) requires persons to obtain a permit from the Agency prior to undertaking any Class A Regional Project or Class B Regional Project. Pursuant to 9 NYCRR § 570.3 (ai)(1), "undertake" is defined as the "commencement of a material disturbance of land, including clearing of building sites, excavation (including excavation for the installation of foundations, footings and septic systems), or any other material disturbance of land preparatory or incidental to a proposed land use or development or subdivision."

12. Executive Law § 810(2)(d) lists the Class B Regional Projects in a Resource Management land use area that are subject to Agency review in the Town of Essex pursuant to § 809(2)(a), including, inter alia, the construction of any new single family dwelling. Executive Law § 810 (2)(d)(1).

13. "Single family dwelling" is defined as any detached building containing one dwelling unit, not including a mobile home. Executive Law § 802(58).

14. Executive Law § 810(1)(e) lists Class A Regional Projects in a Resource Management land use area that require an Agency permit pursuant to Executive law § 809(2)(a), which includes any subdivision of land. Executive Law § 810(1)(e)(3).

15. Executive Law § 802(63) defines "subdivision of land" or "subdivision" as meaning, in pertinent part:

[A]ny division of land into two or more lots, parcels or sites, whether adjoining or not, for the purpose of sale, lease, license or any form of separate ownership or occupancy (including any grading, road construction, installation of utilities or other improvements or any other land use and development preparatory or incidental to any such division) by any person

16. A subdivision of land occurs when one or more dwellings or other principal building(s) will be constructed on a parcel already containing at least one existing dwelling or other principal building, regardless of whether the existing building is proposed to be removed after completion of the new building(s). 9 NYCRR § 570.3(ah)(3).

17. Where an existing dwelling will not be removed until after the new dwelling is placed or constructed, an Agency permit is required for subdivision into sites, if the subdivision is a Class A or Class B Regional Project. 9 NYCRR § 573.6(e).

18. Executive Law § 813 provides for a civil penalty of up to \$500 per day for each day a violation of the APA Act continues.

The Wild, Scenic, and Recreational River System Act and 9 NYCRR Part 577

19. The Wild, Scenic, and Recreational River System Act ("Rivers Act") was enacted pursuant to a legislative finding that many rivers of the state possess outstanding natural, scenic, historic, ecological and recreational values. ECL § 15-2701(1).

20. ECL Section 15-2705 states that its functions, powers and duties are vested in the APA as to any privately owned part of a river that becomes part of the system within the Adirondack Park.

21. The Rivers Act authorizes the APA to make and enforce regulations necessary for

the management, protection and enhancement of and the control of land use and development in these areas. ECL § 15-2709(1).

22. Pursuant to 9 NYCRR § 577.4(a), no person shall undertake a project subject to the Rivers Act without first obtaining an agency permit.

23. In recreational river areas, rivers projects include, inter alia, all subdivisions of land in Resource Management areas, and all "compatible uses" pursuant to the Land Use and Development Plan. 9 NYCRR § 577.5(c)(1). A single family dwelling constitutes a compatible use in Resource Management areas. Executive Law § 805 (3)(g)(4).

24. The Boquet River is a New York State-designated recreational river area within 1/4 mile of each bank from the confluence with its North fork to Lake Champlain, pursuant to 9 NYCRR § 570, Appendix Q-6, "Recreational Rivers" (5a).

25. Violations of the Rivers Act are subject to penalties of up to \$1,000 for each day such violation continues. ECL § 15-2723.

FACTUAL ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

26. Lewis Farm, upon information and belief, owns the Site comprised of Tax Map Parcel 49.3-2-27, in the Town of Essex, Essex County.

27. The Site is located on Whallons Bay Road, in Essex, New York, on lands classified "Resource Management" on the Adirondack Park Land Use and Development Plan Map. Portions of the affected property also lie within the designated river area of the Boquet River, a New York State designated recreational river.

28. The Site is approximately 1,100 acres and is operated as an organic farm.

29. On or about December 5, 2005, the Agency's Director, Counsel, and Deputy

Director of Regulatory Programs, visited the Lewis Farm at the invitation of Salim B. Lewis. During the visit Mr. Lewis told the APA staff that he was planning to build farm worker housing. Agency staff advised him that any new single family dwelling would require an Agency permit.

30. On or about March 14, 2007, S. B. Lewis and Barbara A. Lewis, as project sponsors, submitted a permit application to the Agency for permission to construct 3 single family dwellings on the Lewis Farm, for use by farm employees. The application was for a minor project (single family dwelling and two lot subdivision) and was signed by Barbara Lewis. See Exhibit C, Permit Application.

31. On or about March 15, 2007, the Agency sent Barbara Lewis, Salim Lewis and Mark McKenna, their authorized representative, a Notice of Incomplete Permit Application - Receipt of Partial Permit Application. See Exhibit D, Notice of Incomplete Permit Application dated March 15, 2007.

32. On or about March 19, 2007, Barbara Lewis called the Agency and stated that construction of the three single-family dwellings on the Lewis Farm had begun with installation of foundations and the on-site waste water treatments system, indicating that the foundations were located at the corner of Whallons Bay Road and Christian Road. During the conversation, the Agency advised Barbara Lewis that the Agency considered the project "undertaken" with the installation of foundations and the water treatments systems, and that the construction without a permit constituted a violation. The Agency also advised Barbara Lewis not to proceed with further construction until an Agency permit was obtained, and that the matter would be referred to the Agency's enforcement division.

33. On March 28, 2007, an Agency enforcement officer visited the Lewis Farm. He

determined that three single family dwelling foundations were already constructed on lands designated Resource Management on the Official Map, which lands also lie within the designated river area of the Boquet River, a New York State designated recreational river pursuant to 9 NYCRR § 570, Appendix Q-6 (5a).

34. Lewis Farm did not obtain an Agency permit prior to the commencement of construction of the three dwellings.

35. No local review was undertaken which would have served as a substitute for Agency approval, because the Town of Essex does not have an Agency approved local program for the review of any Class B Regional Project located within its borders pursuant to Executive Law.

36. On May 14, 2007, Agency staff sent a proposed Settlement Agreement to Lewis Farm by letter, alleging the violations and offering to resolve the matter with an after-the-fact permit for the three dwellings and payment of a \$10,000 civil penalty or contribution of a comparable amount of money toward an appropriate environmental benefit project. See Exhibit E, Letter from Sarah Reynolds to S.B. and Barbara Lewis and proposed Settlement Agreement.

37. Thereafter, Lewis Farm had numerous contacts with Agency staff, and requested staff to remove the civil penalty or any payment of an environmental benefit project sums as part of the proposed settlement. Staff declined.

38. On June 27, 2007, the Agency received a report that Lewis Farm had resumed construction of the three single family dwellings. In response, an Agency staff member traveled to the Site and observed that two modular homes had already been set on foundations and a third home was partially set on a foundation. On June 27, 2007, Agency staff issued a Cease and

Desist Order requiring Lewis Farm to cease construction of the three single family dwellings See Exhibit F, June 27, 2007 Cease and Desist Order.

39. On or about June 28, 2007, Lewis Farm commenced an action by serving a complaint against the Agency in New York State Supreme Court, Essex County, seeking a declaratory judgment that the Agency had no jurisdiction over construction of farm worker housing or if it did, that the Agriculture and Markets Law, specifically, Agricultural and Markets Law § 305-a, supercedes the Adirondack Park Agency Act. The complaint was amended on or about July 3, 2007. See Exhibit G, Amended Order to Show Cause and Amended Complaint dated July, 2007.

40. Staff observed the single family dwelling on the Site on July 2 and July 6, 2007, and observed that Lewis Farms was continuing construction on the three, two-story modular houses placed on the foundations.

41. In a decision dated August 16, 2007, Supreme Court Acting Justice Kevin J. Ryan denied Lewis Farm's motion for a restraining order against the Agency and granted the Agency's motion to dismiss the proceeding. The decision stated that the Agency had jurisdiction over the dwellings and the subdivisions created by construction of the dwellings. The Court rejected Lewis Farm's argument that the structures are "agricultural use structures," stating that when read in its entirety, the APA Act and the regulations implementing the Rivers Act do not exempt the dwellings from Agency jurisdiction. The Court further noted that Section 305-a of the Agriculture and Markets Law did not supersede Agency authority under the Adirondack Park Agency Act or its regulations, and dismissed the action as not ripe for judicial intervention and referred it back to the Agency to proceed with its enforcement procedures. See Exhibit H,

Decision and Order Lewis Family Farm v. APA, (S. Ct. Essex Co.) (August 16, 2007).

42. On August 31, 2007, Agency staff observed further construction activity of the three single family dwellings on the Site, including that workers were shingling the roofs of the three dwellings. By letter of that date, Agency staff reiterated to Lewis Farm's counsel that the Cease and Desist Order remained in effect. See Exhibit F, August 31, 2007 letter from Paul Van Cott to David Cook.

43. Construction continued on the single family dwellings as observed by staff on September 5, and by December 7, 2007, the dwellings appeared largely complete. Sometime after September 5 and before December 7, 2007, a preexisting dwelling which had been located near the three new dwellings was removed. On or about September 5, 2007 the Agency served a Notice of Apparent Violation on defendants.

44. On or about December 17, 2007, the Agency served a Notice of request for Enforcement Committee determination on defendant's counsel. Thereafter, the Enforcement Committee of the Agency convened on March 13, 2008 pursuant to 9 NYCRR § 581-2.6, to address the Lewis Farm alleged violations. The Enforcement Committee heard oral argument from counsel for Lewis Farm and for the Agency.

45. The Agency's Enforcement Committee issued a determination on March 25, 2008. The determination noted that Lewis Farm had a wetlands violation in 2000 with the Agency (see Exhibit B), and also had previous projects approved by the Agency. The determination noted that Lewis Farm had actual and timely notice from senior Agency staff that an Agency permit would be required prior to the construction of any new single family dwelling in the Resource Management portion of its property. The Enforcement Committee determined

that Lewis Farm failed to seek a jurisdictional determination from the Agency prior to undertaking the construction of the three dwellings and, in doing so, violated the APA Act and the Rivers Act. See Exhibit I, March 25, 2008 Enforcement Committee Determination.

46. On or about March 26, 2008, counsel for Lewis Farm was served a copy of the Agency determination via telefax and mail. Service on Lewis Farm was completed by on or about April 4, 2008.

47. On or about March 26, 2008, counsel for Lewis Farm contacted the Agency requesting a stay of provisions of the Agency determination, pending resolution of litigation. The Agency declined to stay the determination.

48. On or about April 18, 2008, the APA issued a corrected determination striking paragraph 4 on page 12. See Exhibit J.

FIRST CAUSE OF ACTION

(Failure to obtain an Agency permit for construction of three new single family dwellings under the APA Act)

49. Pursuant to Executive Law § 809(2)(a), a permit is required from the Agency prior to the construction of any single family dwelling on lands classified "Resource Management" in the Adirondack Park.

50. Lewis Farm violated Executive Law § 809(2)(a) by undertaking the construction of three single family dwellings on the Site, without obtaining an Agency permit.

SECOND CAUSE OF ACTION

(Failure to obtain Agency permits for construction

of three new single family dwellings under the Rivers Act)

51. Pursuant to 9 NYCRR § 577.5(c)(1), a permit is required from the Agency prior to construction of a single family dwelling on Resource Management lands pursuant to the Rivers Act.

52. Lewis Farm violated 9 NYCRR § 577.5(c)(1), by undertaking the construction of three single family dwellings on the Site, without obtaining an Agency permit pursuant to the Rivers Act.

THIRD CAUSE OF ACTION

(Failure to obtain an Agency permit for subdivision of land under the APA Act)

53. Pursuant to Executive law § 809(2)(a) and 810(1)(e)(3) a Class A Regional Project permit is required from the Agency prior to any subdivision of Resource Management lands into sites.

54. Lewis Farm violated Executive Law §§ 809(2)(a) and 810(1)(e)(3) by failing to obtain a permit from the Agency prior to subdividing the Lewis Farm into sites by construction of three new single family dwellings on the Site.

FOURTH CAUSE OF ACTION

(Failure to obtain an Agency permit for subdivision of land under the Rivers Act)

55. Pursuant to 9 NYCRR § 577.5(c)(1) a permit is required from the Agency prior to any subdivision of land into sites in Resource Management lands in a river area.

56. Lewis Farm violated 9 NYCRR § 577.5(c)(1) by failing to obtain a permit from the Agency prior to subdividing the Lewis Farm into sites by constructing three new single family dwellings on the Site.

FIFTH CAUSE OF ACTION

(compliance with Agency determination as amended April 18, 2008)

57. Pursuant to 9 NYCRR § 581-2.6, the Enforcement Committee of the APA conducted a proceeding on March 13, 2008 addressing defendants alleged violations and heard oral argument from counsel for defendants and plaintiff.

58. On March 25, 2008 the APA Enforcement Committee issued a determination finding defendant Lewis Farm in violation of the APA Act and the Rivers Act, and imposed specific conditions to address the violations and imposed a civil penalty of \$50,000.

59. On or about April 18, 2008, the APA issued a corrected determination striking paragraph 4 on page 12. See Exhibit J.

60. The APA seeks compliance with all the terms and conditions of the APA determination of March 25, 2008, as amended April 18, 2008.

PRAYER FOR RELIEF

WHEREFORE, the Agency respectfully requests that this Court enter judgment against Lewis Family Farm, Inc., Salim B. Lewis and Barbara Lewis as follows:

- (1) Finding the Lewis Farm defendants in violation of Executive Law § 809(2)(a) and 9 NYCRR § 577 and enjoining Lewis Farm to refrain from any further work on or use of the three unpermitted single-family dwellings on the Site until all APA permits are

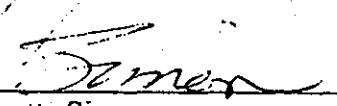
obtained; and

- (2) Requiring Lewis Farm to apply for and obtain an Agency permit for the three single family dwellings and for subdivision of the Site; and
- (3) Requiring Lewis Farm to submit to the Agency a detailed description and evaluation of the septic systems for the dwellings, demonstrating compliance with both New York State Department of Health and Agency standards; and
- (4) Requiring Lewis Farm to pay a civil penalty pursuant to Executive Law § 813(1) of \$50,000 for the violations alleged herein; and
- (5) Enjoining Lewis Farm from further violations of the Executive Law; and
- (6) Such other and further relief as this Court may deem just and proper.

Dated: May 14, 2008
Albany, New York

Andrew M. Cuomo
Attorney General of the
State of New York
Attorney for the Adirondack Park Agency
New York State Department of Law

By:


Loretta Simon
Assistant Attorney General
State of New York
Office of the Attorney General
The Capitol
Albany, New York 12224
Phone: 518-402-2724

VERIFICATION

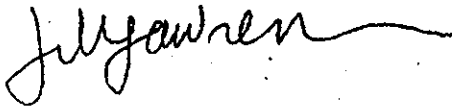
STATE OF NEW YORK)
) ss.:
COUNTY OF ESSEX)

PAUL VAN COTT, being duly sworn, deposes and says:

I am a Senior Attorney for the Adirondack Park Agency (the "Agency"). I have read the foregoing verified amended complaint and know the contents thereof, and the same is true to my own knowledge except as to matters therein stated to be alleged upon information and belief, and as to those matters, I believe them to be true. The source of my knowledge, information and belief are the Agency's files, and discussions with Agency personnel. I make this verification pursuant to CPLR § 3020(d)(2), on the basis that I am acquainted with the facts.


PAUL VAN COTT

Sworn to before me this 14th
day of May, 2008.



JILL LAWRENCE
Notary Public - State of New York
Qualified in Franklin County
No. 01LA6175330
Commission Expires Oct. 9, 2011

Lewis Farm Exhibits to Amended Complaint

- Exhibit A** **Certificate of Incorporation, Lewis Family Farm, Inc., dated September 23, 1985, with attachments**
- Exhibit B** **Consent Order, 2000**
State and APA v. Lewis Family Farm, Inc.
- Exhibit C** **Permit Application, dated February 15, 2007**
- Exhibit D** **Notice of Incomplete Permit Application, dated March 15, 2007**
- Exhibit E** **Cover Letter dated May 14, 2007 and Proposed Settlement Agreement, 2007**
- Exhibit F** **Cease and Desist Order, dated June 27, 2007;**

Letter to David L. Cook, Esq. re: Cease and Desist Order, dated August 31, 2007
- Exhibit G** **Lewis Family Farm, Inc. v. APA, Amended Complaint, July 2007**
- Exhibit H** **Lewis Family Farm, Inc. v. APA, Decision and Order, dated August 16, 2007**
- Exhibit I** **Adirondack Park Agency Determination, dated March 25, 2008**
In the matter of the apparent violations of Executive Law Section 809 and 9 NYCRR Part 577 by Lewis Family Farm, Inc., Respondent
- Exhibit J** **Corrected Adirondack Park Agency Determination, dated April 18, 2008**

Exhibit A - Certificate of Incorporation
(Amended Complaint - 5/14/08)
[Reproduced at pp. 534-54]

**Exhibit B: Consent Order dated 12/26/00
(Amended Complaint - 5/14/08)
[Reproduced at pp. 543-557]**

**Exhibit C: Permit Application dated 2/15/07
(Amended Complaint - 5/14/08)
[Reproduced at pp. 995-1006]**

**Exhibit D: Notice of Incomplete Permit Application
dated 3/15/07 (Amended Complaint -5/14/08)
[Reproduced at pp. 111-114]**

**Exhibit E: Letter dated 5/14/07 (Amended Complaint
- 5/14/08)**

[Reproduced at pp. 82-83]

**Exhibit F: Cease and Desist Order dated 6/27/07
(Amended Complaint - 5/14/08)
[Reproduced at pp. 149-151]**

**Exhibit G: Amended Order to Show Cause dated
7/13/07& Amended Complaint (Amended Complaint
-4/14/08) [Reproduced at pp. 38-40]**

**Exhibit H: Decision and Order dated 8/16/07
(Amended Complaint - 5/14/08)
[Reproduced at pp. 4-12]**

**Exhibit I: Determination dated 3/25/08 (Amended
Complaint -5/15/08)
[Reproduced at pp. 855-870]**

**Exhibit J: 4/18/08 Corrected Determination
(Amended Complaint - 5/14/08)
[Reproduced at pp. 855-856]**

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

NOTICE OF MOTION

Petitioner,

ACTION NO. 1

-against-

ADIRONDACK PARK AGENCY,

Index No. 315-08

Respondent.

Hon. Richard B. Meyer

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ESSEX

ADIRONDACK PARK AGENCY,

Plaintiff,

ACTION NO. 2

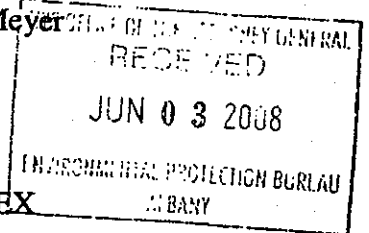
-against-

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

Index No.: 332-08

Defendants.

Hon. Richard B. Meyer

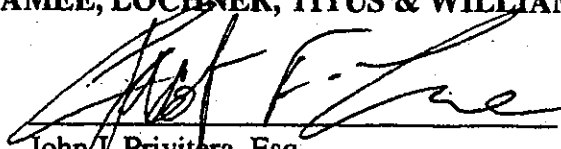


PLEASE TAKE NOTICE that upon the annexed Affirmation of John J. Privitera, Esq., dated June 3, 2008, the Memorandum of Law in Support of Judgment on the Lewis Family Farm's Article 78 Petition and in Support of the Motion to Dismiss the Agency's Duplicative Enforcement Action, dated June 3, 2008, and upon all prior papers and proceedings had in these consolidated actions, the undersigned will move this Court at an Individual Assignment Term to be held in and for the County of Essex, at the County Court House in Elizabethtown, New York, on June 19, 2008, at 1:30 p.m. of that day, or as soon thereafter as counsel can be heard, for an order pursuant to CPLR 3211 dismissing the Agency's action (Index No. 332-08) and granting such other or further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR 2214(b), answering affidavits and cross-motions, if any, shall be served at least seven (7) days before the hearing date.

Dated: June 3, 2008
Albany, New York

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

By: 

John J. Privitera, Esq.

Jacob F. Lamme, Esq.

Attorneys for Lewis Family Farm, Inc.,

Salim B. "Sandy" Lewis and Barbara A. Lewis

677 Broadway

Albany, New York 12207

Tel. No. (518) 447-3200

Fax No. (518) 426-4260

TO: Loretta Simon, Esq.
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Cynthia Feathers, Esq.
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Great Oaks Office Park
219 Great Oaks Blvd.
Albany, New York 12203

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ADIRONDACK PARK AGENCY,

Respondent.

AFFIRMATION

ACTION NO. 1

Index No. 315-08

Hon. Richard B. Meyer

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ESSEX

ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

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

Defendants.

ACTION NO. 2

Index No.: 332-08

Hon. Richard B. Meyer

AFFIRMATION IN SUPPORT OF THE MOTION TO DISMISS

JOHN J. PRIVITERA, an attorney at law duly admitted to practice in the courts of the State of New York, swears and affirms under penalty of perjury as follows:

1. I am duly licensed and admitted to practice law in the State of New York, and I am a principal with the law firm of McNamee, Lochner, Titus & Williams, P.C., attorneys for defendants Lewis Family Farm, Inc., Salim B. "Sandy" Lewis and Barbara A. Lewis (collectively "Defendants"). As such, I am fully familiar with the pleadings and proceedings had in this action, and with the matters set forth herein.

2. I make this affirmation in support of the Defendants' motion to dismiss the purported enforcement action commenced by the Adirondack Park Agency (hereafter "Agency") (Index No. 332-08).

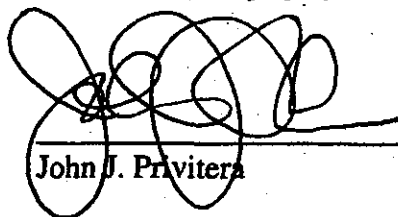
3. This enforcement action should be dismissed because it is wholly duplicative of the Agency's administrative enforcement proceeding, which culminated in the March 25, 2008 Determination of the Agency's Enforcement Committee (hereafter "Determination").

4. Indeed, this action was commenced before the timeframe for Agency's directives in Determination had expired, and it seeks no greater relief than the Determination itself.

5. Moreover, the Agency has named Salim B. "Sandy" Lewis and Barbara A. Lewis as individual defendants in this action. As demonstrated in the accompanying memorandum of law, the Agency lacks any basis whatsoever to pursue a claim against these individuals. Thus, this action serves no purpose other than to harass the Lewis Family Farm and its officers, who were not parties to the administrative enforcement proceeding.

6. Based on the foregoing, and on the reasons set forth in the accompanying memorandum of law, the Lewis Family Farm respectfully asks this Court to enter an order dismissing the Agency's duplicative enforcement action, and grant such other and further relief as the Court deems just and proper.

I hereby swear and affirm the above under penalty of perjury this 3rd day of June, 2008.


John J. Privitera

STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

LEWIS FAMILY FARM, INC.,

Petitioner,

v.

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Respondent.

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

REPLY
AFFIRMATION OF
LORETTA SIMON
IN OPPOSITION
TO MOTION TO DISMISS
APA'S COMPLAINT

INDEX No. 315-08
RJI No. 15-1-2008-0109

INDEX No. 332-08
RJI No. 15-1-2008-0117

Loretta Simon, an attorney duly admitted to practice in the courts of the State of New York, hereby affirms under penalty for perjury pursuant to CPLR § 2106:

1. I serve as an Assistant Attorney General in the Environmental Protection Bureau of the Office of the New York State Attorney General and am litigation counsel to the Adirondack Park Agency ("the APA" or "the Agency") in the above captioned matters. I am familiar with these matters and the underlying facts, having represented the APA in a previous action

June 10, 2008 Reply
Aff. of Loretta Simon

brought by Lewis Family Farm, Inc. ("Lewis Farm") against the APA in 2007 (Lewis Family Farm, Inc., v. APA, Essex Co. Sup. Ct., Index No. 498-07, RJI No. 15-1-2007-0153, assigned to Hon. Kevin K. Ryan [hereafter "Lewis Farm I"]). I also represent the APA in the above-captioned consolidated cases (Index No. 315-08 ["Lewis Farm II"] and Index No. 332-08 ["Lewis Farm III"]).

2. I submit this affirmation in opposition to the Motion of defendants' to dismiss the State APA's civil enforcement action (Lewis Farm III) against Lewis Family Farm Inc. ("Lewis Farm"), Barbara and Salim B. Lewis.

3. These three cases arise from the same underlying facts: construction of three single-family dwellings and subdivision of land pursuant to the APA Act, on land located in the Town of Essex, Essex County in violation of the Adirondack Park Agency Act ("APA Act") and the Wild, Scenic, and Recreational River System Act (the "Rivers Act"). See Executive Law § 809 and Executive Law § 810; Environmental Conservation Law ("ECL") § 15-2701.

4. A detailed recitation of the facts and litigation can be found in the documents already on file in these matters in Supreme Court Essex County and will not be restated herein.

5. The APA filed a civil enforcement action against Lewis Farm, Barbara Lewis and Salim B. Lewis on April 11, 2008, for violations of the Adirondack Park Agency Act ("APA Act"),

June 10, 2008 Reply
Aff. of Loretta Simor

Executive Law § 801, and the Wild, Scenic, and Recreational River System Act (the "Rivers Act") Environmental Conservation Law ("ECL") § 15-2701. The APA amended its complaint on May 15, 2008 to add the Agency's March 25, 2008 determination, as corrected.

6. Lewis Farm filed a motion to consolidate civil action no. 332-08 and proceeding no. 315-08, which motion was not opposed by the State and was granted by Justice Richard B. Meyer. See Exhibit A. In a letter to the parties regarding consolidation of the cases, Justice Meyer noted that the State's civil enforcement action would be deemed a counterclaim. See Exhibit A (letter dated May 30, 2008 of Hon. Richard B. Meyer).

7. Lewis Farm's memorandum of law is fashioned both in support of judgment on its CPLR Article 78 proceeding and in support of dismissal of the APA's complaint. This affirmation and accompanying memorandum of law responds solely to Lewis Farm's motion to dismiss. To the extent the petitioner/defendants' memorandum addresses the merits of the petition, the APA will address those matters in its responsive papers to be submitted in the CPLR Article 78 proceeding. See Lewis Farm's memorandum of law dated June 3, 2008 ("June 3, 2008 Memo of Law"), Points I -IV.

8. Lewis Farm asserts that the complaint should be dismissed because the APA has failed to state a cause of action against Lewis Farm, Barbara and/or Salim B. Lewis. See June 3,

June 10, 2008 Reply
Aff. of Loretta Simon

2008 Memo of Law, pp. 42-43.

9. As set forth in the documents previously submitted to this Court, Lewis Farm is located in the Adirondack Park, in an area regulated as "Resource Management" pursuant to the APA Act, and is also located within 1/4 mile of the Boquet River, a river designated as protected pursuant to the Rivers Act. See Affidavit of Douglas Miller dated March 4, 2008 ("March 4, 2008 Miller Aff.") ¶ 3, Exhibit A.

10. Essex County Supreme Court has determined that the APA has jurisdiction over the three dwellings at issue here. See Decision and Order of Honorable Kevin K. Ryan dated August 16, 2007 (Lewis Farm I).

11. The APA is authorized to bring its action pursuant to Executive Law § 813.

12. Barbara and Salim ("Sandy") B. Lewis are the named individuals who submitted an application to the APA for construction of the three single-family dwellings at issue in this litigation. See Exhibit B (Application of Barbara A. Lewis and Salim B. Lewis dated February 15, 2007).

13. Barbara Lewis and Salim B. Lewis are principals of Lewis Family Farm, Inc. The signature of Salim B. Lewis appears on the Certificate of Incorporation, and Barbara Lewis is listed as President of the corporation. See Exhibit C. (Certificate of Incorporation dated September 23, 1985). In addition, Salim B.

June 10, 2008 Reply
Aff. of Loretta Simon

Lewis submitted a sworn statement in Lewis Farm I indicating he is a shareholder of Lewis Family Farm Incorporated. See Affidavit of Douglas Miller dated December 12, 2007 ¶ 7, Exhibit D (Affidavit of Salim Lewis dated August 7, 2007, ¶ 1).

14. Lewis Farm argues that the APA's action should also be dismissed pursuant to CPLR § 3211 (a) (4), because it is duplicative of petitioner's CPLR Article 78 proceeding herein. While these cases stem from the same facts, the APA's law enforcement action is brought to enforce state statutes and an administrative determination, while the petitioner seeks to annul an administrative determination, along with other claims.

15. Pursuant to CPLR § 3211(a) (4) a party may move to dismiss on the ground that "there is another action pending between the same parties for the same cause of action... the court need not dismiss upon this ground but may make such an order as justice requires." While Lewis Farm II and III are factually and legally related, they are not "the same cause of action" as set forth in CPLR § 3211(a) (4). Moreover, this Court has already ordered that these actions are consolidated. See Exhibit A (letter Decision and Order of Justice Richard B. Meyer dated April 25, 2008).

16. Lewis Farm makes the puzzling argument (without any citation) that the APA's action is premature (See June 3, 2008 Lewis Farm Memo of Law, p. 45). However, there is no dispute

that the houses are already built; nor is there any dispute that the Agency has made a final determination on the violations. Moreover, the compliance deadlines have passed. Accordingly, the enforcement action is not premature.

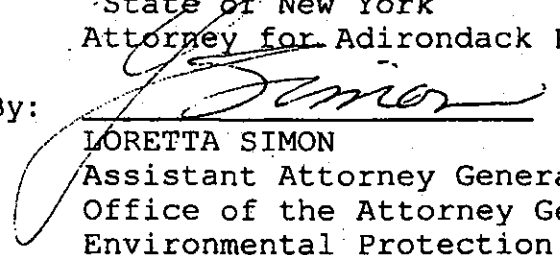
17. Finally, the Agency's enforcement action is not barred by collateral estoppel or res judicata. The Agency seeks enforcement of two state statutes: the APA Act and the Rivers Act, and has statutory authority to bring its action. See Executive Law § 813. No prior court decision prevents the APA from exercising its statutory responsibilities here. However, in contrast, clearly petitioner is barred by these same doctrines from relitigating the same jurisdictional issues already decided against it in the prior Supreme Court Order of Justice Ryan in Lewis Farm I.

18. Accordingly, this Court should deny Lewis Farm's motion to dismiss the APA enforcement action.

Dated: Albany, New York
June 10, 2008

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for Adirondack Park Agency

By:


LORETTA SIMON
Assistant Attorney General
Office of the Attorney General
Environmental Protection Bureau
The Capitol
Albany, New York 12224-0341
(518) 402-2724

June 10, 2008 Repl
Aff. of Loretta Simc

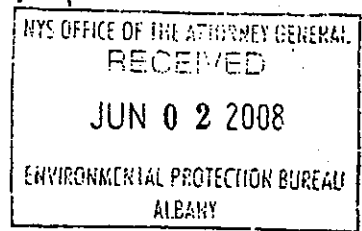


STATE OF NEW YORK
COUNTY OF ESSEX
COUNTY, FAMILY & SURROGATE'S COURTS

Exhibit A: Letter dated 5/30/08 with attachments
(Reply Aff. - 6/10/08)

pp. 608-615

RICHARD B. MEYER
JUDGE



AMY N. QUINN
COURT ATTORNEY
JILL H. DRUMMOND
SECRETARY

May 30, 2008

VIA FAX AND MAIL

McNamee, Lochner, Titus & Williams, P.C.
Attn: John J. Privitera, Esq.
677 Broadway
Albany, New York 12207

New York State Attorney General
Attn: Loretta Simon, Esq.
Assistant Attorney General
The Capitol
Albany, New York 12224-0341

Re: *Lewis Family Farm, Inc. v. Adirondack Park Agency*
Index No.: 315-08
RJI No.: 15-1-2008-0109

*Adirondack Park Agency -v- Lewis Family Farm, Inc.,
Salim B. Lewis and Barbara Lewis*
Index No.: 332-08
RJI No.: 15-1-2008-0117

Counselors:

Enclosed please find a copy of the signed order regarding the motion to reargue and renew, the original of which has been entered in the office of the Essex County Clerk this date.

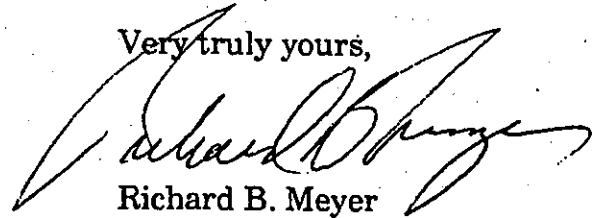
With regard to the pending consolidated proceeding/action, the captions of the two matters have been combined as indicated on the attached order. The oral argument date is hereby scheduled for June 19, 2008 at 1:30 p.m. Counsel are advised to comply with the requirements of CPLR §7804(c), (e) and (f). The action commenced by the Park Agency will be deemed a counterclaim, as indicated in the caption, and motions for summary judgment addressed to the issues raised in that action must comply with CPLR

Page -2-

Rule 2214(b). The supporting papers may refer to papers already filed without the need for new affidavits.

The Court has received an inquiry from the New York State Farm Bureau advising that it will be submitting a brief *amicus curiae*. While this is unusual at the trial court level, the Court is inclined to allow the submission of such a brief, and the Court may allow limited oral argument to be presented by the Farm Bureau on the 19th.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Richard B. Meyer", is written over the typed name.

Richard B. Meyer

RBM:jhd

cc: Cynthia Feathers, Esq.,
counsel for New York State Farm Bureau
Arroyo Copland & Associates, PLLC
219 Great Oakes Blvd.
Albany, NY 12203

Essex County Clerk



STATE OF NEW YORK
COUNTY OF ESSEX
COUNTY, FAMILY & SURROGATE'S COURTS

RICHARD B. MEYER
JUDGE

AMY N. QUINN
COURT ATTORNEY
JILL H. DRUMMOND
SECRETARY

May 30, 2008

Joseph A. Provoncha
Essex County Clerk
7559 Court Street, P.O. Box 217
Elizabethtown, NY 12932

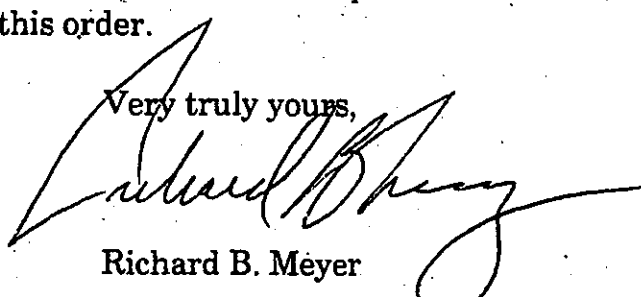
Re: *Lewis Family Farm, Inc. v. Adirondack Park Agency*
Index No.: 315-08
RJI No.: 15-1-2008-0109

Adirondack Park Agency -v- Lewis Family Farm, Inc.,
Salim B. Lewis and Barbara Lewis
Index No.: 332-08
RJI No.: 15-1-2008-0117

Dear Mr. Provoncha:

I enclose herein for filing the original order on the petitioner's motion to reargue and renew in the above matter. By way of a copy of this letter to counsel for petitioner and respondent, I am providing them with a copy of this order.

Very truly yours,


Richard B. Meyer

RBM:jhd
Enclosure

cc: John J. Privitera, Esq.
Loretta Simon, Esq., Assistant Attorney General

At a term of the Supreme Court
of the State of New York, held in
and for the County of Essex at the
Courthouse in Elizabethtown,
New York, on the 24th day of
April, 2008.

PRESENT: HON. RICHARD B. MEYER, J.S.C. (Acting)

*STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX*

LEWIS FAMILY FARM, INC.

Petitioner,

- against -

*NEW YORK STATE ADIRONDACK PARK
AGENCY,*

Index No. 315-08
RJI No. 15-1-2008-0109

Respondent.

ORDER

ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

LEWIS FAMILY FARM, INC.,

Index No. 332-08
RJI No. 15-1-2008-0117

Counterclaimed Defendant,

SALIM B. LEWIS and BARBARA LEWIS,

Defendants.

The petitioner having duly moved for an order to reargue and renew, and said

motion having regularly come on to be heard, and

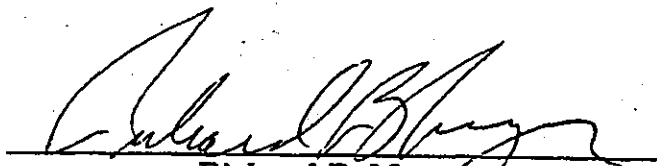
Upon reading and filing the notice of motion dated April 14, 2008, and the affirmation of John J. Privitera, Esq., attorney for petitioner, dated April 14, 2008 with exhibits A-D in support of said motion, and there being no affidavit of Marco Turco submitted therewith, and upon reading and filing the affirmations of Assistant Attorney General Loretta Simon, Esq., with exhibits A-K, and Sarah Reynolds, Esq., with exhibits A-G, both dated April 22, 2008 in opposition thereto, and due deliberation having been had thereon, and the Court having issued a letter decision dated April 25, 2008, a copy of which is annexed hereto and made a part hereof, it is hereby

ORDERED that the motion to reargue and renew be, and the same hereby is granted; and it is further

ORDERED that upon such reargument and renewal, the decision and order of this Court dated April 11, 2008 be and the same hereby is adhered to.

Order signed this 30th day of May, 2008 at Elizabethtown, New York.

ENTER


Richard B. Meyer
Acting Supreme Court Justice



STATE OF NEW YORK
COUNTY OF ESSEX
COUNTY, FAMILY & SURROGATE'S COURTS

00002831

BOOK 12 PAGE 317

RICHARD B. MEYER
JUDGE

AMY N. QUINN
COURT ATTORNEY
JILL H. DRUMMOND
SECRETARY

April 25, 2008

McNamee, Lochner, Titus & Williams, P.C.
Attn: John J. Privitera, Esq.
677 Broadway
Albany, New York 12207

New York State Attorney General
Attn: Loretta Simon, Esq.
Assistant Attorney General
The Capitol
Albany, New York 12224-0341

Re: Lewis Family Farm, Inc. v. Adirondack Park Agency
Index No.: 315-08
RJI No.: 15-1-2008-0109

Adirondack Park Agency -v- Lewis Family Farm, Inc.,
Salim B. Lewis and Barbara Lewis
Index No.: 332-08
RJI No.: 15-1-2008-0117

Counselors:

This letter constitutes the decision of this Court on the motions by Lewis Family Farm, Inc. to renew and reargue, and for consolidation, as well as on the cross-motion of the Adirondack Park Agency to transfer both cases to the Hon. Kevin K. Ryan, Acting JSC.

The Court has considered the following papers on each motion:

Motion to Reargue and Renew - Notice of Motion dated April 14, 2008 and Affirmation of John J. Privitera, Esq. dated April 14, 2008, with exhibits A-D, in support of the motion. There was no affidavit of Marco Turco sworn to April 14, 2008 included in the motion papers. Submitted in opposition were Affirmations of Assistant Attorney

ESSEX COUNTY COURTHOUSE
7559 COURT STREET, P.O. BOX 217 • ELIZABETHTOWN, NEW YORK 12932
(518) 873-3326 • FAX (518) 873-3732

Page -2-

General Loretta Simon with exhibits A-K, and Sarah Reynolds, Esq. with exhibits A-G, both dated April 22, 2008.

Motion to Consolidate and Cross Motion to Transfer - Notice of Motion dated April 14, 2008 and Affirmation of John J. Privitera, Esq. dated April 14, 2008, with exhibits A and B. Notice of Cross Motion dated April 21, 2008 and Affirmation of Assistant Attorney General Loretta Simon dated April 21, 2008, with exhibits A-J. Affirmation of John J. Privitera, Esq. dated April 23, 2008, with exhibits A-D, in opposition to cross motion.

The motion to consolidate both proceedings is granted. Nothing in the papers submitted by counsel for the Adirondack Park Agency indicates opposition to the motion. Moreover, by seeking transfer of both cases to the Acting Supreme Court Justice who decided the prior action in 2007, the Adirondack Park Agency impliedly concedes that consolidation is proper and appropriate here.

The cross motion to transfer is denied. The prior action between the parties was finally disposed of by a Decision and Order dated August 16, 2007 and filed in the Essex County Clerk's Office on August 29, 2007. Although counsel for Lewis Family Farm stated at oral argument that this decision had been appealed, the transcript of the March 13, 2008 hearing before the Adirondack Park Agency enforcement committee indicates that no appeal had been taken (see Exhibit F to Affirmation of Sarah Reynolds, Esq. dated April 22, 2008 at page 44, line 24 through page 45, line 2). A review of the records of the Essex County Clerk regarding this prior action (Index No. 498-07) reveals that a notice of appeal was filed on October 1, 2007. Whether such was timely is unknown at this time and, if timely, jurisdiction of that action lies with the Appellate Division, Third Department. The assignment of the two pending actions now before this Court was made pursuant to the Administrative Order dated December 20, 2007 established by the Hon. Ann T. Pfau, Chief Administrative Judge of the Courts, and approved by the Hon. Anthony V. Cardona, presiding justice of the Appellate Division, Third Judicial Department. As a result, assignment to this Court of both proceedings complied in all respects with 22 NYCRR §202.3 (see also 22 NYCRR §80.1[b][2]), particularly since there is no related action now pending before the Hon. Kevin K. Ryan.

Counsel for Lewis Family Farm, Inc. is hereby directed to submit an order, on notice to Assistant Attorney General Simon, granting the motion for consolidation and denying the cross motion for transfer, all without costs.

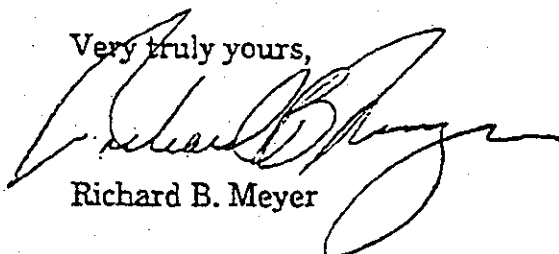
The combined motion by Lewis Family Farm, Inc. to reargue and renew (CPLR §221[f]) is granted, and upon such reargument and renewal, the decision and order of this Court dated April 11, 2008 is adhered to. The "new facts," alleged in support of a stay of the APA's prohibition against use or occupancy of the subject dwelling units,

Page -3-

were available at the time of the prior motion. Even upon considering those facts, granting a stay for the purposes requested - so that the subject dwelling units could be used and occupied pending final judgment - would go beyond the purposes of a stay, namely to maintain the *status quo* (see State -v- Town of Haverstraw, 219 AD2d 64, 641 NYS2d 879). The arguments advanced by Lewis Family Farm, Inc. in its motion to reargue in support of a stay would similarly go beyond the purpose of a stay.

The other arguments advanced by Lewis Family Farm in support of its motion to reargue, to the effect that payment of the fine would constitute a deprivation of constitutional rights since the time for challenging the March 25, 2008 determination under statute (Executive Law §818 [1]) would not have expired by the due date of payment, are without merit. Payment of the fine would not preclude Lewis Family Farm, Inc., from seeking judicial review, and does not constitute an admission or a concession to the March 25, 2008 determination now under review. No irreparable harm has been shown by Lewis Family Farm, Inc., to payment of the fine at this time. Assistant Attorney General Simon is to submit an order on notice to Mr. Privitera, without costs.

Very truly yours,

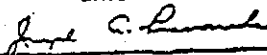


Richard B. Meyer

RBM:jhd

cc: Clerk

ENTERED


JOSEPH A. PROVACHNA
ESSEX COUNTY CLERKDATED: 5/30/11

RECEIVED
ESSEX COUNTY CLERK
08 MAY 30 PM 3:09
ELIZABETH, N.J. 07208

**Exhibit B: Application dated 2/15/07 (Reply Aff. -
6/10/08)**

[Reproduced at pp. 995-1006]

Exhibit C: Certificate of Incorporation dated 9/23/85

[Reproduced at pp. 534-542]

STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

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

Defendants.

VERIFIED ANSWER

Index No.: 332-08

RJI No.: 15-1-2008-0117

Hon. Richard B. Meyer

Defendant Lewis Family Farm, Inc. ("Defendant"), through its attorneys, McNamee, Lochner, Titus & Williams, P.C., for its Verified Answer to the Verified Amended Complaint ("Complaint"), hereby states as follows:

1. Defendant admits that it constructed certain structures on land located in the Town of Essex, County of Essex, and further admits that the Adirondack Park Agency ("Agency") issued an administrative determination dated March 25, 2008, but denies the remaining allegations set forth in paragraph 1 of the Complaint.

2. Defendant denies that it has knowledge or information sufficient to form a belief as to what the Agency seeks, as set forth in the allegations of paragraph 2 of the Complaint.

3. Defendant admits that this Court has jurisdiction over actions commenced pursuant to N.Y. Executive Law § 813 and N.Y. Environmental Conservation Law § 15-2705, as alleged in paragraph 3 of the Complaint.

4. Defendant admits that venue is proper in Essex County, but denies the remaining allegations set forth in paragraph 4 of the Complaint.

5. Defendant denies that it has knowledge or information sufficient to form a belief as to the allegations set forth in paragraph 5 of the Complaint.

6. Defendant admits the allegations set forth in paragraph 6 of the Complaint.

7. Defendant admits the allegations set forth in paragraph 7 of the Complaint.

8. Defendant admits the allegations set forth in paragraph 8 of the Complaint.

9. To the degree that the allegations of paragraph 9 of the Complaint refer to a principle of law or recite statutory authority, the Defendant leaves to the Court the resolution of those matters, and denies the remaining allegations therein.

10. To the degree that the allegations of paragraph 10 of the Complaint refer to a principle of law or recite statutory authority, the Defendant leaves to the Court the resolution of those matters, and denies the remaining allegations therein.

11. To the degree that the allegations of paragraph 11 of the Complaint refer to a principle of law or recite statutory authority, the Defendant leaves to the Court the resolution of those matters, and denies the remaining allegations therein.

12. To the degree that the allegations of paragraph 12 of the Complaint refer to a principle of law or recite statutory authority, the Defendant leaves to the Court the resolution of those matters, and denies the remaining allegations therein.

13. To the degree that the allegations of paragraph 13 of the Complaint refer to a principle of law or recite statutory authority, the Defendant leaves to the Court the resolution of those matters, and denies the remaining allegations therein.

14. To the degree that the allegations of paragraph 14 of the Complaint refer to a principle of law or recite statutory authority, the Defendant leaves to the Court the resolution of those matters, and denies the remaining allegations therein.

15. To the degree that the allegations of paragraph 15 of the Complaint refer to a principle of law or recite statutory authority, the Defendant leaves to the Court the resolution of those matters, and denies the remaining allegations therein.

16. To the degree that the allegations of paragraph 16 of the Complaint refer to a principle of law or recite statutory authority, the Defendant leaves to the Court the resolution of those matters, and denies the remaining allegations therein.

17. To the degree that the allegations of paragraph 17 of the Complaint refer to a principle of law or recite statutory authority, the Defendant leaves to the Court the resolution of those matters, and denies the remaining allegations therein.

18. To the degree that the allegations of paragraph 18 of the Complaint refer to a principle of law or recite statutory authority, the Defendant leaves to the Court the resolution of those matters, and denies the remaining allegations therein.

19. To the degree that the allegations of paragraph 19 of the Complaint refer to a principle of law or recite statutory authority, the Defendant leaves to the Court the resolution of those matters, and denies the remaining allegations therein.

20. To the degree that the allegations of paragraph 20 of the Complaint refer to a principle of law or recite statutory authority, the Defendant leaves to the Court the resolution of those matters, and denies the remaining allegations therein.

21. To the degree that the allegations of paragraph 21 of the Complaint refer to a principle of law or recite statutory authority, the Defendant leaves to the Court the resolution of those matters, and denies the remaining allegations therein.

22. To the degree that the allegations of paragraph 22 of the Complaint refer to a principle of law or recite statutory authority, the Defendant leaves to the Court the resolution of those matters, and denies the remaining allegations therein.

23. To the degree that the allegations of paragraph 23 of the Complaint refer to a principle of law or recite statutory authority, the Defendant leaves to the Court the resolution of those matters, and denies the remaining allegations therein.

24. To the degree that the allegations of paragraph 24 of the Complaint refer to a principle of law or recite statutory authority, the Defendant leaves to the Court the resolution of those matters, and denies the remaining allegations therein.

25. To the degree that the allegations of paragraph 25 of the Complaint refer to a principle of law or recite statutory authority, the Defendant leaves to the Court the resolution of those matters, and denies the remaining allegations therein.

26. Defendant admits the allegations set forth in paragraph 26 of the Complaint.
27. Defendant denies that all of its land is located on Whallons Bay Road in Essex, New York, and denies that it has knowledge or information sufficient to form a belief as to the remaining allegations set forth in paragraph 27 of the Complaint.
28. Defendant admits that it operates an organic farm, but denies the remaining allegations set forth in paragraph 28 of the Complaint.
29. Defendant admits that the Agency's Director, Counsel, and Deputy Director of Regulatory Programs visited the Lewis Family Farm at the long-standing invitation by Sandy Lewis, but denies the remaining allegations set forth in paragraph 29 of the Complaint.
30. Defendant denies that S.B. Lewis submitted a permit application to the Agency, admits that Barbara Lewis submitted an application to establish the fact that the houses are farm buildings, and denies that she applied for subdivision approval as alleged in paragraph 30 of the Complaint.
31. Defendant admits that a Notice of Incomplete Permit Application is attached as Exhibit D to the Complaint, but denies that it has knowledge or information sufficient to form a belief as to the remaining allegations set forth in paragraph 31 of the Complaint.
32. Defendant admits that Barbara Lewis contacted the Agency in mid-March 2007 concerning the three farm worker dwellings, but denies that it has knowledge or information sufficient to form a belief as to the remaining allegations set forth in paragraph 32 of the Complaint.
33. Defendant denies that it has knowledge or information sufficient to form a belief as to the allegations set forth in paragraph 33 of the Complaint.
34. Defendant admits that it did not obtain an Agency permit prior to the commencement of construction of its farm worker housing, as alleged in paragraph 34 of the Complaint.
35. Defendant denies that it has knowledge or information sufficient to form a belief as to the allegations set forth in paragraph 35 of the Complaint.

36. Defendant admits that Agency staff sent a letter and proposed settlement to the Lewis Family Farm on or about May 14, 2007, but denies the remaining allegations set forth in paragraph 36 of the Complaint.

37. Defendant admits that it requested the Agency to remove the proposed civil penalty and that Agency staff declined to do so, but denies that it has knowledge or information sufficient to form a belief as to the remaining allegations set forth in paragraph 37 of the Complaint.

38. Defendant admits that the Agency purported to issue a "Cease and Desist Order" on June 27, 2007, but denies that it has knowledge or information sufficient to form a belief as to the remaining allegations set forth in paragraph 38 of the Complaint.

39. Defendant admits the allegations set forth in paragraph 39 of the Complaint, except Defendant denies that it commenced its action "on or about June 28, 2007". In truth, Defendant commenced its action on June 26, 2007—*before* the Agency issued its purported "Cease and Desist Order". Date-stamped copies of the Index Number Application and Request for Judicial Intervention, dated June 26, 2007, which were obtained from the Essex County Clerk, are attached hereto as **Exhibit "A"**.

40. Defendant denies that it has knowledge or information sufficient to form a belief as to the allegations set forth in paragraph 40 of the Complaint.

41. Defendant admits that Acting Supreme Court Justice Kevin J. Ryan issued a decision on August 16, 2007, but to the degree that the allegations of paragraph 41 of the Complaint seek to interpret that decision, Defendant leaves to the Court the resolution of those matters, and denies the remaining allegations therein.

42. Defendants admit that there is a purported letter from Paul Van Cott dated August 31, 2007 attached as Exhibit "F" to the Complaint, but denies that it has knowledge or information sufficient to form a belief as to the remaining allegations set forth in paragraph 42 of the Complaint.

43. Defendant admits that the Agency served a Notice of Apparent Violation dated September 5, 2007, and further admits that it removed a pre-existing dwelling which had been located at the new farm worker housing, but denies that it has knowledge or information sufficient to form a belief as to the remaining allegations set forth in paragraph 43 of the Complaint.

44. Defendant admits the allegations set forth in paragraph 44 of the Complaint.

45. Defendant admits that the Agency's Enforcement Committee issued a determination on March 25, 2008, but to the degree that the allegations of paragraph 45 of the Complaint seek to interpret that decision, Defendant leaves to the Court the resolution of those matters, and denies the remaining allegations therein.

46. Defendant admits the allegations set forth in paragraph 46 of the Complaint.

47. Defendant admits the allegations set forth in paragraph 47 of the Complaint.

48. Defendant admits that the Agency issued a purported "correct determination" on April 18, 2008, but denies that this document has any legal effect and denies the remaining allegations set forth in paragraph 48 of the Complaint.

FIRST CAUSE OF ACTION

(Failure to obtain an Agency permit for construction of three new single family dwellings under the APA Act)

49. To the degree that the allegations of paragraph 49 of the Complaint refer to a principle of law or recite statutory authority, the Defendant leaves to the Court the resolution of those matters, and denies the remaining allegations therein.

50. Defendant denies the allegations set forth in paragraph 50 of the Complaint.

SECOND CAUSE OF ACTION

(Failure to obtain Agency permits for construction of three new single family dwellings under the Rivers Act)

51. To the degree that the allegations of paragraph 51 of the Complaint refer to a principle of law or recite statutory authority, the Defendant leaves to the Court the resolution of those matters, and denies the remaining allegations therein.

52. Defendant denies the allegations set forth in paragraph 52 of the Complaint.

THIRD CAUSE OF ACTION

(Failure to obtain an Agency permit for subdivision of land under the APA Act)

53. To the degree that the allegations of paragraph 53 of the Complaint refer to a principle of law or recite statutory authority, the Defendant leaves to the Court the resolution of those matters, and denies the remaining allegations therein.

54. Defendant denies the allegations set forth in paragraph 54 of the Complaint.

FOURTH CAUSE OF ACTION

(Failure to obtain an Agency permit for subdivision of land under the Rivers Act)

55. To the degree that the allegations of paragraph 55 of the Complaint refer to a principle of law or recite statutory authority, the Defendant leaves to the Court the resolution of those matters, and denies the remaining allegations therein.

56. Defendant denies the allegations set forth in paragraph 56 of the Complaint.

FIFTH CAUSE OF ACTION

(compliance with Agency determination as amended April 18, 2008)

57. Defendant admits the allegations set forth in paragraph 57 of the Complaint.

58. Defendant admits that the Agency's Enforcement Committee issued a determination on March 25, 2008, but to the degree that the allegations of paragraph 58 of the Complaint seek to interpret that decision, Defendant leaves to the Court the resolution of those matters, and denies the remaining allegations therein.

59. Defendant admits that the Agency issued a purported "correct determination" on April 18, 2008, but denies that this document has any legal effect and denies the remaining allegations set forth in paragraph 59 of the Complaint.

60. Defendant denies that it has knowledge or information sufficient to form a belief as to the allegations set forth in paragraph 60 of the Complaint.

61. Defendant denies that plaintiff Adirondack Park Agency is entitled to the relief sought in the WHEREFORE clause of the Complaint or any relief whatsoever.

FIRST AFFIRMATIVE DEFENSE

62. The Complaint fails to state a cause of action against Defendant.

SECOND AFFIRMATIVE DEFENSE

63. The Complaint is premature, not ripe, and fails to plead conditions precedent.

THIRD AFFIRMATIVE DEFENSE

64. The Agency's March 25, 2008 Determination was improperly rendered and this enforcement case violates New York law because the Agency has not fulfilled its constitutional duty to encourage the development and improvement of agricultural lands pursuant to Section 4 of Article 14 of the New York State Constitution.

FOURTH AFFIRMATIVE DEFENSE

65. The Agency's March 25, 2008 Determination was improperly rendered and this enforcement case violates New York law because the Agency has not fulfilled its statutory duty to modify its administrative procedures and regulations to encourage the maintenance of viable farming in agricultural districts pursuant to Section 305 of the Agriculture and Markets Law.

FIFTH AFFIRMATIVE DEFENSE

66. The Agency's March 25, 2008 Determination was improperly rendered and this enforcement case violates New York law because the Agency failed to adhere to the Court of Appeals' teachings of Town of Lysander v. Hafner, 96 N.Y.2d 558 (2001), by unreasonably restricting and/or regulating farm operations within agricultural districts.

SIXTH AFFIRMATIVE DEFENSE

67. The Agency's March 25, 2008 Determination is *ultra vires* and beyond the Agency's jurisdiction and this enforcement case violates New York law because the Agency has no delegated authority to regulate farm worker housing and other agricultural use structures under the Adirondack Park Agency Act or the Wild, Scenic and Recreational River System Act.

SEVENTH AFFIRMATIVE DEFENSE

68. The Agency's March 25, 2008 Determination is *ultra vires* and beyond the Agency's jurisdiction and this enforcement case violates New York law because the Lewis Family Farm did not subdivide its land under either the Adirondack Park Agency Act or the Wild, Scenic and Recreational River System Act.

EIGHTH AFFIRMATIVE DEFENSE

69. The Agency's March 25, 2008 Determination is *ultra vires* and beyond the Agency's jurisdiction and this enforcement case violates New York law because the Agency has no delegated authority to regulate farm worker housing and other agricultural use structures on Resource Management lands that are more than 150 feet from the mean high water mark of a recreational river under the under the Wild, Scenic and Recreational River System Act.

NINTH AFFIRMATIVE DEFENSE

70. The Agency's March 25, 2008 Determination is improper and this enforcement case violates New York law because the Agency failed to consider the March 4, 2008 Resolution of the Adirondack Park Local Government Review Board.

TENTH AFFIRMATIVE DEFENSE

71. This enforcement action is barred by the doctrine of *res judicata* because, as pleaded in the Complaint, the allegations were resolved administratively on March 25, 2008.

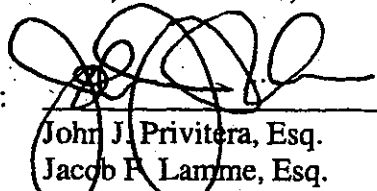
ELEVENTH AFFIRMATIVE DEFENSE

72. The effort to amend the March 25, 2008 Determination violates SAPA and the defendant's rights to due process.

WHEREFORE, Defendant Lewis Family Farm, Inc. demands judgment dismissing the Complaint herein as against Defendant, together with an award of attorneys' fees, costs and disbursements of this action, and for such other and further relief as to this Court may seem just and proper.

Dated: July 30, 2008
Albany, New York

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

By: 

John J. Privitera, Esq.

Jacob P. Lamme, Esq.

Attorneys for Lewis Family Farm, Inc.

677 Broadway

Albany, New York 12207

Tel. No. (518) 447-3200

Fax No. (518) 426-4260

TO: Loretta Simon, Esq.
Assistant Attorney General
State of New York
Office of the Attorney General
The Capitol
Albany, New York 12224-0341

Cynthia Feathers, Esq.
Arroyo Copland & Associates, PLLC
Great Oaks Office Park
219 Great Oaks Blvd.
Albany, New York 12203

VERIFICATION

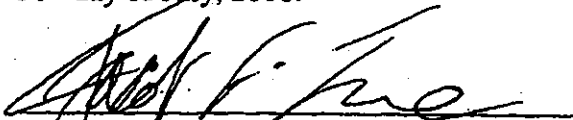
STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

JOHN J. PRIVITERA, being duly sworn, states that he is the attorney for defendant, LEWIS FAMILY FARM, INC. in this action; that he believes the matters set forth herein to be true; and that the reason why this verification is not made by defendant is that defendant does not have an office in the County of Albany wherein your deponent maintains his office.



John J. Privitera

Sworn to before me this
30th day of July, 2008.



Notary Public

JACOB F. LAMME
Notary Public, State of New York
Qualified in Albany County
No. 02LA8150759
Commission Expires Aug. 7, 2010

JUL 3 2008 12:32PM

ESSEX COUNTY CLERK

NO. 459

P. 1

Application For Index Number



PAID
2.10

ESSEX COUNTY CLERK
Application for INDEX NUMBER
pursuant to CPLR §8018(a).
FEE \$210.00

INDEX NUMBER

000498-7

Spaces below to be TYPED OR PRINTED by applicant.

DO NOT WRITE IN THIS
SPACE

Title of Action or Proceeding

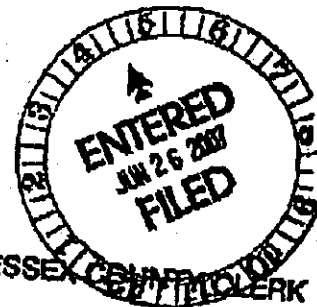
LEWIS FAMILY FARM, INC.,

Plaintiff,

vs.

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Defendant.



TYPE BELOW NAME AND ADDRESS OF ATTORNEY(S) FOR PLAINTIFF(S)

Jane Rothelm, Esq.
NIXON PEABODY LLP
30 South Pearl Street
Albany, NY 12207
(518) 427-2650

TYPE BELOW NAME AND ADDRESS OF ATTORNEY(S) FOR DEFENDANT(S)

REQUEST FOR JUDICIAL INTERVENTION

SUPREME COURT

ESSEX COUNTY

INDEX #:

DATE PURCHASED:

000-498-20**Plaintiffs:**

LEWIS FAMILY FARM, INC.,

-against-

**PAID**

For Clerk Only

IAS ENTRY DATE

JUDGE ASSIGNED

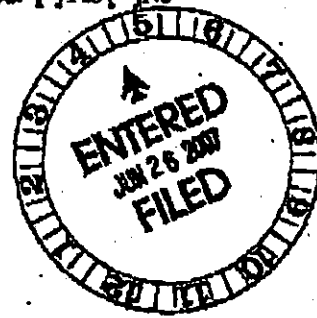
RJ DATE

Respondents:NEW YORK STATE ADIRONDACK
PARK AGENCY,

Date issue joined:

Bill of particulars served: ☐ Yes ☒ No**NATURE OF JUDICIAL INTERVENTION** (check ONE box only and enter information)

- ☐ Request for preliminary conference
☐ Note of issue and/or certificate of readiness
☐ Notice of motion
 Relief sought Dismiss Complaint (enter return date _____)
☒ Order to show cause (return date _____)
 Relief sought: Injunctive Relief and Declaratory Judgment
☐ Other ex parte application (specify _____)
☐ Notice of petition (return date _____)
 Relief sought _____
☐ Notice of medical or dental malpractice action (specify _____)
☐ Statement of net worth
☐ Writ of habeas corpus
☐ Other (specify _____)

**ESSEX COUNTY CLERK****NATURE OF ACTION OR PROCEEDING** (check ONE box only)**MATRIMONIAL**

- ☐ Contested - CM
☐ Uncontested - UM

COMMERCIAL

- ☐ Contract - CONT
☐ Corporate - CORP
☐ Insurance (where insurer is a party, except arbitration) - INS
☐ UCC (including sales, negotiable instruments) - UCC
☐ *Other Commercial - OC

TORTS**Malpractice**

- ☐ Medical/Podiatric - MM
☐ Dental - DM
☐ *Other Professional - OPM
☐ Motor Vehicle - MV
☐ *Products Liability - PL
☐ Environmental - EN
☐ Asbestos - ASB
☐ Breast Implants - BI
☐ *Other Negligence - OTN
☐ *Other Tort (incl intentional) - OT

REAL PROPERTY

- ☐ Tax Certificates - TAX
☐ Foreclosure - FOR
☐ Condemnation - COND
☐ Landlord/Tenant - LT
☒ *Other Real Property - ORP

Declaratory Judgment

OTHER MATTERS - Employment Discrimination**SPECIAL PROCEEDINGS**

- ☐ Art. 75 (Arbitration) - ART 75
☐ Art. 77 (Trusts) - ART 77
☐ Article 78 - ART 78
☐ Election Law - ELEC
☐ Guardianship (MHL Art. 81) - GUARD 81
☐ *Other Mental Hygiene - MHY
☐ *Other Special Proceeding - OSP

Check "YES" or "NO" for each of the following questions.

FILINGS

Is this action/proceeding against a:

YES NO

☐ ☒ Municipality:

(specify _____)

☒ ☐ Does this action/proceeding seek equitable relief?☐ ☒ Does this action/proceeding seek recovery for personal injury?☐ ☒ Does this action/proceeding seek recovery for property damage?

YES

STAMPED 6/26/07

INDEXED _____

ORDERS/JUD _____

☐☒ Public Authority:

(specify _____)

COURT COPY 6/26/07

READ _____

BOOK 6/26/07

SCANNED _____

VERIFIED _____

Pre-Note Time Frame:

(This applies to all cases except contested matrimonial and tax certiorari cases)

Estimated time period for case to be ready for trial (from filing of RJI to filing of Note of Issue):

☒ Expedited: 0-8 months☐ Standard: 9-12 months☐ Complex: 12-15 monthsContested Matrimonial Cases Only: (Check and give date)

Has summons been served?

☐ No ☐ Yes, Date _____

Was a Notice of No Necessity filed?

☐ No ☐ Yes, Date _____ATTORNEY(S) FOR PLAINTIFF(S):

Self Rep.*	Name	Address	Phone
☐	NIXON PEABODY LLP JENA ROTHEIM, ESQ.	30 South Pearl Street, Suite 900 Albany, New York 11753	(518) 427-2650

ATTORNEY(S) FOR DEFENDANT(S):

Self Rep.*	Name	Address	Phone
☐			

* Self Represented: parties representing themselves, without an attorney, should check the "Self Rep." box and enter their name, address, and phone # in the space provided above for attorneys.

INSURANCE CARRIERS:

N/A

RELATED CASES: (IF NONE, write "NONE" below)TitleIndex #CourtNature of Relationship

NONE

FILINGS

I AFFIRM UNDER PENALTY OF PERJURY THAT, TO MY KNOWLEDGE, OTHER THAN AS NOTED ABOVE, THERE ARE AND HAVE BEEN NO RELATED ACTIONS OR PROCEEDINGS NOR HAS A REQUEST FOR JUDICIAL INTERVENTION PREVIOUSLY BEEN FILED IN THIS ACTION OR PROCEEDING.

Dated: June 26, 2007

COURT COPY 6/26/07

READ _____

BOOK 6/26/07

VERIFIED _____

Jena Rotheim, Esq.

Nixon Peabody LLP

30 South Pearl Street, Suite 900

Albany, New York 11753

(518) 427-2650

Attorneys for Plaintiff

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,
Petitioner,

NOTICE OF
MOTION

-against-

Index No. 315-08
Hon. Richard B. Meyer

ADIRONDACK PARK AGENCY,
Respondent.

ADIRONDACK PARK AGENCY,
Plaintiff,

-against-

Index No. 221-08
Hon. Richard B. Meyer

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

PLEASE TAKE NOTICE that upon the annexed affirmation of Elizabeth Corron Dribusch, Esq., dated the 28th day of May, 2008, upon the proceedings in the above-entitled CPLR Article 78 proceeding, and upon the *amicus curiae* brief annexed hereto, the undersigned will move this Court at an Individual Assignment Term to be held in and for the County of Essex at the County Court House in Elizabethtown, New York, on June 12, 2008 at 9:30 a.m. of that day or as soon thereafter as counsel can be heard, for an order granting New York Farm Bureau, Inc. ("Farm Bureau") permission to submit an *amicus curiae* brief, on the ground that the movant is an agricultural membership organization with a vital interest in this case and with vital information regarding the subject matter of this case, and for such other and further relief as the Court deems just and proper.

Date: May 29, 2008
Albany, New York

NEW YORK FARM BUREAU, INC.



By: **Elizabeth Corron Dribusch, Esq.**

General Counsel

New York Farm Bureau, Inc.

Amicus curiae

159 Wolf Road, P.O. Box 5330

Albany, NY 12205-8465

(518) 436-8485

TO: John J. Privitera, Esq.

McNamee, Lochner, Titus & Williams, P.C.

677 Broadway

Albany, NY 12207

Loretta Simon, Esq.

New York State Attorney General

The Capitol

Albany, NY 12224

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,
Petitioner,

-against-

ADIRONDACK PARK AGENCY,
Respondent.

AFFIRMATION IN
SUPPORT OF MOTION
TO FILE AN *AMICUS*
CURIAE BRIEF

(And Another Related Action.)

ELIZABETH CORRON DRIBUSCH, an attorney at law duly admitted to practice in the courts of the State of New York, swears and affirms under penalty of perjury as follows:

1. I am the General Counsel and Director of Legal Affairs for New York Farm Bureau, Inc., ("Farm Bureau"), a not-for-profit, voluntary, general farm organization.
2. Farm Bureau is dedicated to promoting, protecting, and representing the economic, social, and educational interests of New York farmers and encouraging the development and preservation of agriculture within the state.
3. Farm Bureau seeks to strengthen legislation recognizing the unique nature of the agricultural industry and to ensure adherence with state policies and laws regarding agriculture.

4. Farm Bureau has a statewide membership of approximately 30,000 farmers in 52 counties, and the Essex County Farm Bureau is among the affiliate organizations.

5. On behalf of Farm Bureau's members, I make this affirmation in support of this motion for permission to submit the *amicus curiae* brief annexed hereto.

6. The instant dispute concerns farm worker housing on farm premises in a county-created, state-certified Agricultural District within the Adirondack Park and in an area classified by the Adirondack Park Agency as a resource management area, where agriculture is a primary use.

7. At issue here is Executive Law § 802 (8), a provision of the Adirondack Park Act ("Park Act") governing whether farm worker housing built on farm premises is an integral part of farm operations.

8. The only reasonable interpretation of the subject provision that would harmonize with existing law and the realities of farm life is that the subject farm worker housing is outside Adirondack Park Agency jurisdiction and control. However, the Park Agency has concluded that it may regulate such housing, even in an Agricultural District.

9. This interpretation dishonors the command in the State Constitution (Article XIV, § 4) that agriculture must be promoted throughout the state –

including in the Adirondack Park; ignores salient provisions of the Agriculture and Markets Law regarding farm worker housing; and contravenes a decision of the Court of Appeals, *Town of Lysander v. Hafner*, 96 NY2d 558 (2001). (Farm Bureau appeared *amicus curiae* in the Court of Appeals in that seminal case.)

10. The challenged determination also betrays a dangerous ignorance about the integral role that farm worker housing plays on farm premises, given the need for farmers to accommodate the long work day, address the shortage of nearby rental housing and available transportation in rural areas, and provide ease of access to farm buildings and operations.

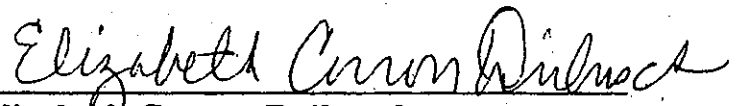
11. Since many of Farm Bureau's members within the Adirondack Park must provide housing for workers on farm premises, they stand to be directly and significantly affected by the decision of this Court in this matter.

12. Farm Bureau can provide pertinent information and analysis regarding the proper interpretation of provisions within the overlapping statutory schemes that affect agriculture and farm worker housing; the importance of agriculture in the Adirondack Park; and the broader potential impact of the erroneous interpretation by the Park Agency – factors which should be considered by this Court in its deliberations and might not otherwise be known to the Court.

13. In sum, considering the direct impact that this case could have upon New York farmers in Essex County and beyond, and the important information and insights that Farm Bureau can provide, such organization respectfully seeks permission to submit the annexed *amicus curiae* brief.

WHEREFORE, on behalf of Farm Bureau, the undersigned respectfully requests that this motion for leave to file an *amicus curiae* brief be granted.

Dated: May 28, 2008


Elizabeth Corron Dribusch
General Counsel
New York Farm Bureau, Inc.
159 Wolf Road, P.O. Box 5330
Albany, NY 12205-8465
(518) 436-8495



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ANDREW M. CUOMO
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

June 5, 2008

By Fax and Regular Mail

Honorable Richard B. Meyer
Essex County Supreme Court
7559 Court Street
P.O. Box 247
Elizabethtown, New York 12932

Re: Lewis Family Farm, Inc. v. Adirondack Park Agency
Index No. 315-08

Adirondack Park Agency v. Lewis Family Farm, Inc.
Index No. 332-08

Dear Judge Meyer:

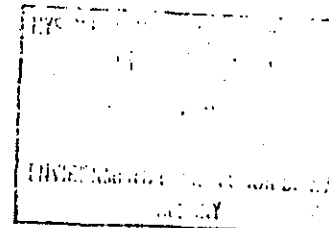
The State Office of the Attorney General was served a Notice of Motion from Cynthia Feathers representing the Farm Bureau, for permission to file an amicus curiae brief in the above-captioned consolidated cases. The return date on the motion is Thursday, June 12, 2008 at 9:30 am. The Office of the Attorney General does not object to the motion and will not appear for oral argument on Thursday, June 12th.

Sincerely,

A handwritten signature in cursive script, appearing to read "Loretta Simon".

Loretta Simon
(518) 402-2724

cc: Cynthia Feathers, Esq.
John J. Privitera, Esq.
Jacob Lamme, Esq.
Paul Van Cott, Esq.



STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ADIRONDACK PARK AGENCY,

Respondent.

NOTICE OF MOTION

ACTION NO. 1

Index No. 315-08

Hon. Richard B. Meyer

STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

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

Defendants.

ACTION NO. 2 /
COUNTERCLAIM

Index No.: 332-08

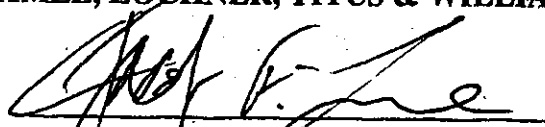
Hon. Richard B. Meyer

PLEASE TAKE NOTICE that upon the annexed Affirmation of John J. Privitera, Esq., dated August 1, 2008, the Memorandum of Law in Support of Summary Judgment, dated August 1, 2008, and upon all prior papers and proceedings had in these consolidated actions, the undersigned will move this Court at an Individual Assignment Term to be held in and for the County of Essex, at the County Court House in Elizabethtown, New York, on August 18, 2008, at 9:30 a.m. of that day, or as soon thereafter as counsel can be heard, for an order pursuant to CPLR 3212 granting summary judgment for the Lewis Family Farm in the Agency's enforcement action / counterclaim (Index No. 332-08), and granting such other or further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR 2214(b), answering affidavits and cross-motions, if any, shall be served at least seven (7) days before the hearing date.

Dated: August 1, 2008
Albany, New York

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

By: 

John J. Privitera, Esq.

Jacob F. Lamme, Esq.

Attorneys for Lewis Family Farm, Inc.,

Salim B. "Sandy" Lewis and Barbara A. Lewis

677 Broadway

Albany, New York 12207

Tel. No. (518) 447-3200

Fax No. (518) 426-4260

TO: Loretta Simon, Esq.
Assistant Attorney General
State of New York
Office of the Attorney General
The Capitol
Albany, New York 12224-0341

Cynthia Feathers, Esq.
Arroyo Copland & Associates, PLLC
Great Oaks Office Park
219 Great Oaks Blvd.
Albany, New York 12203

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ADIRONDACK PARK AGENCY,

Respondent.

AFFIRMATION

ACTION NO. 1

Index No. 315-08

Hon. Richard B. Meyer

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ESSEX

ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

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

Defendants.

ACTION NO. 2 /
COUNTERCLAIM

Index No.: 332-08

Hon. Richard B. Meyer

AFFIRMATION IN SUPPORT OF LEWIS FAMILY FARM'S
MOTION FOR SUMMARY JUDGMENT IN ACTION NO. 2

JOHN J. PRIVITERA, an attorney at law duly admitted to practice in the courts of the State of New York, swears and affirms under penalty of perjury as follows:

1. I am duly licensed and admitted to practice law in the State of New York, and I am a principal with the law firm of McNamee, Lochner, Titus & Williams, P.C., attorneys for defendant Lewis Family Farm, Inc. ("Lewis Family Farm"). As such, I am fully familiar with the pleadings and proceedings had in this action, and with the matters set forth herein.

2. I make this affirmation in support of the Lewis Family Farm's motion for summary judgment in the enforcement action commenced by the Adirondack Park Agency (hereafter "Agency") (Index No. 332-08), which this Court has deemed a counterclaim to the Lewis Family Farm's Article 78 proceeding (Index No. 315-08).

3. The Agency commenced this action on April 11, 2008, a mere seventeen days after the Agency issued its administrative determination on March 25, 2008 ("Determination"). The action named Lewis Family Farm, Inc. ("Lewis Family Farm"), Salim B. Lewis, and Barbara Lewis as defendants.

4. On May 14, 2008, the Agency served a Verified Amended Complaint, a copy of which is attached hereto as **Exhibit "A"**.

5. On July 2, 2008, this Court issued a Decision and Order dismissing the Verified Amended Complaint as against defendants Salim B. Lewis and Barbara Lewis. A copy of the July 2, 2008 Decision and Order is attached hereto as **Exhibit "B"**.

6. On July 30, 2008, the Lewis Family Farm served its Verified Answer on the Agency, a copy of which is attached hereto as **Exhibit "C"**.

7. On June 13, 2008, the Agency filed the administrative record in Action No. 1 (Index No. 315-08) pursuant to CPLR 7804(e). However, the Agency neglected to Bates Stamp the return so that the documents could be easily referenced by the parties and the Court in these consolidated actions. Because the Lewis Family Farm relies on the affidavits and materials already submitted in the record on this motion, a Bates Stamped version of the administrative record is attached hereto as **Exhibit "D"** for the convenience of the Court.

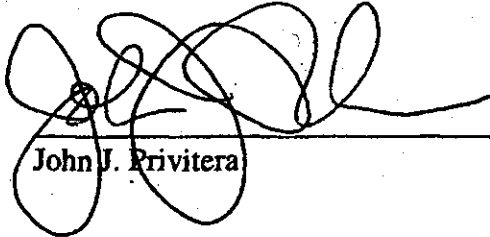
8. This enforcement action should be dismissed because it is wholly duplicative of the Agency's administrative enforcement proceeding, which culminated in the Agency's issuance

of the Determination. Indeed, this action was commenced before the timeframe for the Agency's directives in the Determination had expired, and it seeks no greater relief than the Determination itself.

9. The Agency has alleged that the Lewis Family Farm has subdivided its land without a permit in violation of both the Adirondack Park Agency Act (see Verified Amended Compl., ¶¶ 53-54) and the Wild, Scenic and Recreational Rivers Act (see Verified Amended Compl., ¶¶ 55-56). However, the Agency's own "Subdivision Enforcement Process" demonstrates that the Lewis Family Farm did not subdivide its land because it did not create any new lots or file any new deeds with the County Clerk. A copy of an Agency memorandum entitled "Subdivision Enforcement Process", dated February 2, 2005, is attached hereto as Exhibit "E". The Agency has manufactured the causes of action pertaining to subdivision to end-run the agricultural protections in the Act in violation of its own processes.

10. Based on the foregoing, and on the reasons set forth in the accompanying memorandum of law, the Lewis Family Farm respectfully asks this Court to enter an order granting summary judgment in favor of the Lewis Family Farm and dismissing the Agency's duplicative enforcement action, and granting such other and further relief as the Court deems just and proper.

I hereby swear and affirm the above under penalty of perjury this 1st day of August, 2008.



John J. Privitera

**Exhibit A: Verified Amended Complaint dated
5/14/08 (Privitera Aff. - 8/1/08)
[Reproduced at pp. 571-587]**

**Exhibit B: Decision and Order dated 7/2/08
(Privitera Aff. - 8/1/08)
[Reproduced at pp. 234-246]**

Exhibit C: Verified Answer dated 7/30/08
(Privitera Aff. - 8/1/08)
[Reproduced at pp. 618-628]

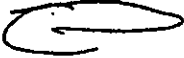
**Exhibit D: Administrative Record (Privitera Aff. -
8/1/08 see, Return and Record of Proceeding
reproduced at Record Vol. III, pp. 844 - 1462**

pp. 648-649



Adirondack
parkagency

MEMORANDUM

To: John Banta
From: Paul Van Cott 
Re: Subdivision Enforcement Process
Date: February 2, 2005

In furtherance of our discussions at the Enforcement Committee's November meeting, this memorandum outlines some of the steps that Agency staff are pursuing to improve our subdivision enforcement process.

Subdivision enforcement cases are tough to resolve and involve parties with diverse interests and varying degrees of responsibility. Clearly, the centerpiece of any improvements to our enforcement process for subdivisions must be stepped-up efforts to prevent violations from occurring in the first instance.

To prevent violations from occurring, we have to make sure that we get our prevention message to property owners and their agents as early in the subdivision process as possible - before their contractor constructs a subdivision road; before their surveyor completes a survey map; before their realtor puts a contract in front of them to sign; and before their lawyer puts a deed in front of them to sign.

We believe that one of the best opportunities we have to prevent subdivision violations is to actively seek out the contractors, surveyors, realtors and lawyers in and near the Adirondack Park, and to take our prevention message directly to them. The contractors and professionals in the Adirondack Park who are involved in illegal subdivisions are often dealing with clients that may not fully understand our jurisdiction over subdivisions. We need the help of local contractors and professionals to prevent their clients from committing subdivision violations that adversely affect themselves, other parties, the Agency, and the Adirondack Park.

R00648

John Banta
February 2, 2005
Page 2

Unfortunately, many of the lawyers who do land transactions involving lands in the Adirondack Park do not practice in or near the Park. To make all attorneys who do real estate transactions more aware of potential Agency subdivision jurisdiction, staff are pursuing the idea of adding a check box to real property transfer forms to answer a question along the lines of: "Is this subdivision subject to APA jurisdiction?" Since such forms are completed prior to closing for all real estate transactions, this reminder would flag potential Agency jurisdiction for all subdivisions within the Adirondack Park.

The other, related measure that staff are working on is to obtain timely notice of subdivisions that occur within the Adirondack Park. Obviously, if we can find out about subdivision violations right away, we will be better situated to undo the violation, and to take appropriate enforcement action against the parties involved.

Finally, Agency staff must continue to build their relationships with local planning boards and code enforcement officers, educating them about Agency jurisdiction and encouraging them to advise people who are planning to subdivide their land to seek an Agency jurisdictional determination before they actually subdivide.

This summarizes the steps that staff are taking now to begin to more effectively prevent subdivision violations from occurring. This is an ongoing effort and we are seeking additional ideas from Agency staff. We welcome any input or additional ideas, and will keep you and Dan informed of actions that we take in furtherance of this initiative.

cc: Daniel T. Fitts

STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

LEWIS FAMILY FARM, INC.,

Petitioner,

v.

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Respondent.

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

NOTICE OF CROSS-MOTION
FOR SUMMARY JUDGMENT AND
TO STRIKE SECOND RECORD

Hon. Richard B. Meyer

INDEX No. 315-08
RJI No. 15-1-2008-0109

INDEX No. 332-08
RJI No. 15-1-2008-0117

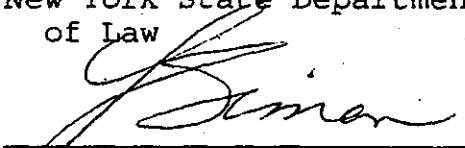
PLEASE TAKE NOTICE that upon the amended summons and verified complaint (Index No. 332-08), the affidavit of Paul Van Cott, dated August 8, 2008, and exhibits attached thereto, and the Adirondack Park Agency's memorandum of law dated August 8, 2008, in support of its cross-motion for summary judgment, and to strike the second record submitted by Lewis Family Farm, Inc.; the Adirondack Park Agency (the "APA") will move this Court at a Special Term thereof, to be held at the Essex County Courthouse, 7559 Court Street, Elizabethtown, New York 12932, on August 18, 2008, pursuant to CPLR 3212, granting summary judgment against

defendant Lewis Family Farm, Inc, in favor of plaintiff APA, and
for such other and further relief as to this Court may deem just
and equitable.

Dated: August 8, 2008

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for Adirondack Park Agency
Adirondack Park Agency
New York State Department
of Law

By


Loretta Simon
Assistant Attorney General
(518) 402-2724

TO: John J. Privitera, Esq.
McNamee, Lochner, Titus
& Williams, P.C.
677 Broadway
Albany, New York 12207-2503

STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

LEWIS FAMILY FARM, INC.,

Petitioner,

v.

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Respondent.

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

STATE OF NEW YORK)
) ss:
COUNTY OF ESSEX)

PAUL VAN COTT, having been duly sworn, deposes and says:

1. I am an Associate Attorney for the Adirondack Park Agency (the "Agency" or "APA") and have served as the Agency's Enforcement Attorney since 2001. I supervise the Agency's enforcement program, and am responsible for administrative enforcement of the Agency's laws and regulations, including in the Town of Essex, Essex County.

AFFIDAVIT OF
PAUL VAN COTT

INDEX No. 315-08
RJI No. 15-1-2008-0109

INDEX No. 332-08
RJI No. 15-1-2008-0117

2. I am familiar with the file and the record in this matter and make this affidavit in support of the APA's Cross-motion for Summary Judgment and to strike Lewis Family Farm, Inc.'s ("Lewis Farm") Second Record in its enforcement action (Essex County Index No. 332-08), and in opposition to Lewis Farm's Motion for Summary Judgment.

Material Facts Supporting APA's Motion for Summary Judgment

3. In March, 2007, Lewis Farm submitted an application to the Agency for a permit to construct three single family dwellings on its property in the Town of Essex, Essex County. See Record Item¹ 5 (July 23, 2007 Affidavit of John Quinn ["Quinn Aff."], ¶ 4, Exhibit A); see also Record Item 1 (APA Enforcement Committee Determination, dated March 25, 2008 ["Determination"], ¶ 3).

4. On or about March 19, 2007, Lewis Farm notified the Agency that it had already constructed the foundations and septic systems for the dwellings. See Record Item 5 (Quinn Aff., ¶¶ 6-7); see also Record Item 1 (Determination, ¶ 5).

¹ "Record Item" refers to the Agency-certified return and record previously submitted to this Court. Counsel for Lewis Farm reproduced the Agency's record with Bates stamped pages, and submitted it with its motion for summary judgment. However, the Agency has not certified Lewis Farm's copy of the record, nor was it provided a copy for review before submission. Therefore, references herein are made to the Agency's Record Items and documents.

5. The three single family dwellings were being constructed on Resource Management lands and within $\frac{1}{4}$ of a mile of the Bouquet River, a designated recreational river area.² See Record Item 5 (July 20, 2007 Affidavit of Douglas Miller, ¶¶ 7-10 and Exhibit E); see also Record Item 12 (March 4, 2008 Affidavit of Douglas Miller, Exhibit A); see also Record Item 1 (Determination, ¶7).

6. Based on this information, APA commenced enforcement action against Lewis Farm pursuant to 9 NYCRR Part 581. See Record Item 1 (Determination, ¶ 5).

7. Settlement negotiations failed when Lewis Farm agreed to obtain after-the-fact permits for the dwellings but refused to pay a penalty or to undertake an environmental benefit project as a result of the violation. See Record Item 5 (July 20, 2007 Affidavit of Sarah Reynolds ("Reynolds Aff.") ¶¶ 23-28); see also Record Item 1 (Determination, ¶¶ 9, 10).

8. On June 27, 2007, Lewis Farm installed the three single family dwellings on Resource Management lands and within the Bouquet River recreational river area (extending $\frac{1}{4}$ mile from each bank of the Bouquet River) without an APA permit. See

² Lewis Farm has never disputed that the three single family dwellings at issue are located in Resource Management and in a designated river area.

Record Item 5 (July 20, 2007 Affidavit of Douglas Miller, ¶¶ 15-21, Exhibit F); see also Record Item 1 (Determination, ¶ 11).

9. During the installation of the dwellings, APA staff served a Cease and Desist Order on Lewis Farm pursuant to 9 NYCRR § 581-2.4³. See Record Item 5 (July 20, 2007 Affidavit of Douglas Miller, ¶ 18-19, Exhibit G); see also Record Item 1 (Determination, ¶ 11). The Cease and Desist Order gave Lewis Farm notice of the alleged violations, and ordered Lewis Farm to stop construction until the violations were resolved.

10. Two dwellings were installed prior to the Cease and Desist Order and the third was installed after the Order was served. See Record Item 5 (July 20, 2007 Affidavit of Douglas Miller ¶¶ 17-20).

11. Subsequently, Lewis Farm served APA with a declaratory judgment action commenced by order to show cause in Supreme Court, Essex County, seeking a determination on APA jurisdiction over the dwellings and a restraining order against the Agency's enforcement action. See Record Item 5 (December 13, 2007 Affirmation of Paul Van Cott ["Van Cott Aff."], ¶ 3).

3 "In the case of an apparent violation involving ongoing construction, land disturbance or subdivision of land, the landowner and all lessees, contractors, builders, and other agents may be ordered in writing to cease and desist such activities until the apparent violation is resolved according to the provisions of this Part or by a Court."

12. APA moved to dismiss the action, and the Court determined that the APA had jurisdiction and granted the Agency's motion in a Decision and Order issued August 16, 2007. See Record Item 5 (Van Cott Aff., ¶ 4; Exhibit B); see also Record Item 1 (Determination, ¶ 14).

13. The Decision and Order was served on Lewis Farm on or about August 31, 2007. See Record Item 5 (Van Cott Aff., ¶ 4).

14. On August 31, 2007, APA found that Lewis Farm had resumed construction work on the three single family dwellings. See Record Item 6 (December 12, 2007 Affidavit of Douglas Miller, ¶ 3 and Exhibit A); see also Record Item 1 (Determination, ¶ 15).

15. By telefaxed letter of that same date, I advised Lewis Farm's lawyers of the ongoing construction and that the June 27, 2007 Cease and Desist Order remained in effect. See Record Item 5 (Van Cott Aff., ¶ 5; Exhibit C); see also Record Item 1 (Determination, ¶ 15). Counsel for Lewis Farm did not respond.

16. On September 5, 2007, a follow-up inspection by Agency staff revealed that Lewis Farm was continuing construction work on the dwellings. See Record Item 6 (December 12, 2007 Affidavit of Douglas Miller, ¶ 4; Exhibit B); see also Record Item 1 (Determination, ¶ 15).

17. Agency staff served Lewis Farm by a Notice of Apparent Violation ("NAV") on or about September 5, 2007 pursuant to 9 NYCRR § 581-2.6(a). See Record Item 3.

18. In September and October, APA staff attempted further settlement negotiations with Lewis Farm, to no avail. Lewis Farm answered APA staff's NAV on October 4, 2007. See Record Item 4.

19. By letter of October 31, 2007, I wrote to Lewis Farm's attorney, expressing the Agency's continuing interest in trying to resolve the matter by settlement. Lewis Farm's attorney never responded to my letter.

20. On December 7, 2007, Agency staff inspected Lewis Farm's property from off-premises and found that, since September 5, 2007, Lewis Farm had undertaken additional construction work on the three single family dwellings. See Record Item 6 (December 12, 2007 Affidavit of Douglas Miller, ¶ 5; Exhibit C); see also Record Item 1 (Determination, ¶ 15).

21. On December 17, 2007, Agency staff served a Notice of Request for an Enforcement Committee Determination on Lewis Farm's attorney, arguing that a hearing was unnecessary because there were no material facts in dispute. See Record Item 5 (December 17, 2007 Notice of Request for Enforcement Committee Determination). Lewis Farm was given 30 days to respond to the Request for an Enforcement Committee Determination, and responded on January 17, 2008. See Record Item 9 (The Right to Farm in the Champlain Valley).

22. The administrative enforcement matter was scheduled to be considered by the APA Enforcement Committee at its next regular, monthly meeting on February 7, 2008, but was adjourned to the Committee's March 13, 2008 meeting at the request of Lewis Farm's attorney.

23. On March 13, 2008, Agency staff and Lewis Farm's counsel appeared before the APA Enforcement Committee. See Record Item 2 (March 13, 2008 Transcript of APA Proceeding In the Matter of Lewis Family Farms, Inc.).

24. On March 25, 2008, APA's Enforcement Committee issued its Determination pursuant to 9 NYCRR § 581-2.6(d), finding Lewis Farm in violation of the Adirondack Park Agency Act and the Wild, Scenic and Recreational Rivers Act, requiring Lewis Farm to: obtain after-the-fact permits for its three single family dwellings and subdivision into sites; provide a professional engineer's evaluation as to whether its installed septic system complies with New York State Department of Health and Agency standards and guidelines; and pay a civil penalty in the amount of \$50,000 for the violations. See Record Item 1 (Determination, Pages 12-13)⁴.

⁴ In its Determination, the Enforcement Committee considered, inter alia, an exchange of correspondence between the NYS Department of Agriculture and Markets and Agency staff (Record Item 10, Exhibit A) involving a consultation between the two agencies concerning Agency staff's interpretation of the APA Act in this matter.

25. The March 25, 2008 Determination also found that all three single family dwellings were constructed in violation of the Adirondack Park Agency Act and the Rivers Act, even though Agency staff had thought only two of the three dwellings to be violations. See Record Item 1 (Determination, p. 11, ¶¶ 46, 48). The Committee found that none of the three dwellings met the regulatory requirements for a lawful replacement of a pre-existing single-family dwelling that would not require a permit.⁵ Id. The Enforcement Committee did not include the third single family dwelling in its penalty determination, but did require Lewis Farm to obtain a permit for all three single family dwellings. Id.

26. Agency Associate Counsel Barbara Rottier transmitted the March 25, 2008 Determination to Lewis Farm's attorney by telefax on March 26, 2008. The Determination was also served on Lewis Farm by certified mail, return receipt requested.

27. On April 18, 2008, the Chairman of the Agency's Board and the Chairman of the Agency's Enforcement Committee transmitted to counsel for Lewis Farm a revised Enforcement

⁵ A fourth single family dwelling that was built by Lewis Farm in 2007 on Resource Management lands but outside the designated recreational river area was found by Agency staff to be a lawful replacement of a pre-1973 single family dwelling and, as such, not subject to APA permitting requirements or the March 13, 2008 proceeding before the Enforcement Committee. See Record Item 12 (March 4, 2008 Affidavit of Douglas Miller, ¶ 7).

Committee Determination striking Paragraph 4, Page 12 of the original Determination. See Record Item 1.

28. Attached is a timeline of Agency Enforcement actions. See Exhibit 1.

29. The APA's Amended Complaint (Essex County Index No. 332-08) is attached hereto as Exhibit 2. The action alleges violations of the APA Act and Rivers Act, and seeks enforcement of the APA's March 25, 2008 Determination. Lewis Farm's Answer is attached hereto as Exhibit 3.

Material Law Supporting APA's Summary Judgment Motion

Adirondack Park Agency Act ("APA Act")

30. The APA Act establishes permitting jurisdiction over certain types of specifically defined land uses and development in the Adirondack Park. Permits are required by APA Act § 809 for all new land uses and development listed in § 810 as either class A regional projects or class B regional projects. Many of the new land uses and development listed in § 810 are specific uses that are expressly defined in § 802.

31. APA Act § 809(1) provides that:

"The agency shall have jurisdiction to review and approve all class A regional projects, including those proposed to be located in a land use area governed by an approved local land use program, and all class B regional projects in any land use area not governed by an approved and validly enacted or adopted local land use program." (Emphasis added).

32. APA Act § 809(2) (a) provides that:

"Any person proposing to undertake a class A regional project in any land use area, or a class B regional project in any land use area not governed by an approved and validly enacted or adopted local land use program, shall make application to the agency for approval of such project and receive an agency permit therefore prior to undertaking the project."

See Record Item 1 (Determination, ¶ 17).

33. The Town of Essex does not have an approved local land use program, so the Agency has permitting jurisdiction over all of the new land uses and development listed in Section 810 proposed to be undertaken there. See Record Item 1 (Determination, ¶ 7).

34. APA Act § 810(1) (e) lists the Class A regional projects in a Resource Management land use area that require an Agency permit. These projects include, inter alia, all subdivisions of land (and all land uses and development related thereto) involving two or more lots, parcels or sites. See APA Act § 810(1) (e) (3); see also Record Item 1 (Determination, ¶ 19).

35. A "subdivision" is defined in APA Act § 802(63) as:

"any division of land into two or more lots, parcels, or sites for the purpose of any form of separate ownership or occupancy (including any grading, road construction, installation of utilities or other improvements or any

other land use and development preparatory or incidental to any such division)"
(Emphasis added).

See Record Item 1 (Determination, ¶ 20).

36. The Agency's regulations define "subdivision into sites" as occurring:

"where one or more new dwelling(s) or other principal building(s) is to be constructed on a parcel already containing at least one existing dwelling or other principal building, and regardless of whether the existing building is proposed to be removed after completion of the new building(s)."

See 9 NYCRR § 570.3(ah)(3); see also Record Item 1 (Determination, ¶ 21).

37. All subdivisions into sites of Resource Management lands require an Agency permit pursuant to APA Act §§ 809(2)(a) and 810(1)(e)(3). The APA's Enforcement Committee found in the Determination that Lewis Farm had undertaken a subdivision into sites and violated these provisions by constructing three new single family dwellings on the Resource Management portion of the Lewis Farm. See Record Item 1 (Determination, ¶¶ 6, 41 and 42).

38. APA Act § 810(2)(d) lists the Class B regional projects in a Resource Management land use area that require an Agency permit in the Town of Essex. See Record Item 1 (Determination, ¶ 23). These projects include, inter alia, all single family dwellings. See APA Act § 810(2)(d)(1); see also Record Item 1 (Determination, ¶ 23).

39. "Single family dwelling" is defined in APA Act § 802(58) as:

"any detached building containing one dwelling unit, not including a mobile home."

See Record Item 1 (Determination, ¶ 24).

40. All new single family dwellings (except for lawful replacements of pre-1973 dwellings) on Resource Management lands require an Agency permit pursuant to §§ 809(2)(a) and 810(2)(d)(1).⁶ The APA Enforcement Committee found in its Determination that Lewis Farm had violated these provisions by constructing its three new single family dwellings on the Resource Management portion of the Lewis Farm. See Record Item 1 (Determination, ¶¶ 6, 45 and 46).

Wild, Scenic and Recreational Rivers Act ("Rivers Act")

41. The Rivers Act was enacted pursuant to a legislative finding that:

"many rivers of the state, with their immediate environs, possess outstanding natural, scenic, historic, ecological and recreational values."

See ECL § 15-2701(1); see also Record Item 1 (Determination, ¶ 27).

⁶ For a more detailed explanation of why Lewis Farm's single family dwellings are not "agricultural use structures" as alleged by Lewis Farm, see the July 30, 2008 Affidavit of Paul Van Cott, ¶¶ 25-34; see also Record Item 1 (Determination, ¶¶ 37, 38).

42. The Rivers Act reflects a public policy that:

"certain selected rivers of the state which, with their immediate environs, possess the aforementioned characteristics, shall be preserved in free-flowing condition and that they and their immediate environs shall be protected for the benefit and enjoyment of present and future generations."

See ECL § 15-2701(3).

43. Section 15-2705 of the Rivers Act charges the Adirondack Park Agency with responsibility for administration and enforcement of the Rivers Act on private lands within the Adirondack Park, and the Agency has promulgated regulations in 9 NYCRR Part 577:

"for the management, protection, and enhancement of and control of land use and development in the wild, scenic and recreational river areas."

See ECL § 15-2709(1); see also, Record Item 1 (Determination, ¶ 29).

44. The Bouquet River is designated as a recreational river in 9 NYCRR Appendix Q-6 (See Item 5a. [Recreational Rivers]). The recreational river area associated with the Bouquet River in the Town of Essex, Essex County, extends one-quarter of a mile from each bank of the river. Id.; see also Record Item 1 (Determination, ¶ 6).

45. Pursuant to 9 NYCRR § 577.4(a):

"No person shall undertake a rivers project without first obtaining an agency permit."

See Record Item 1 (Determination, ¶ 30).

46. In recreational river areas, rivers projects include, inter alia, all subdivisions of land, including but not limited to subdivisions into sites for purposes of separate occupancy, in Resource Management land use areas. See 9 NYCRR § 577.5(c)(1); see also R 9 (Determination, ¶ 31). In the Determination, the APA Enforcement Committee found that Lewis Farm had undertaken a subdivision into sites on Resource Management lands in a recreational river area in violation of 9 NYCRR Part 577. See Record Item 1 (Determination, ¶¶ 43, 44).

47. In recreational river areas, unless otherwise provided, rivers projects that require an Agency permit also include all land uses and developments classified as "compatible uses" by the Adirondack Park land use and development plan in Resource Management land use areas. See 9 NYCRR § 577.5(c)(1); see also Record Item 1 (Determination, ¶ 32).

48. Section 805(3)(g)(4) of the APA Act lists the compatible uses on Resource Management lands in the Adirondack Park that constitute "rivers projects" under 9 NYCRR Part 577. See Record Item 1 (Determination, ¶ 32).

49. Pursuant to APA Act § 805(3)(g)(4)(1), single family dwellings are listed as "secondary compatible uses" in Resource Management land use areas. Thus, all single family dwellings (except lawful replacements of pre-1973 dwellings) require Agency permits as "rivers projects" pursuant to 9 NYCRR § 577.4(a). See Record Item 1 (Determination, ¶¶ 33, 38). In its Determination, the APA Enforcement Committee found Lewis Farm in violation of 9 NYCRR Part 577 by failing to obtain a permit from the Agency prior to constructing its three new single family dwellings on Resource Management lands in the Bouquet River recreational river area. See Record Item 1 (Determination, ¶¶ 43, 44, 47 and 48).

Enforcement Authority under the APA Act and Rivers Act

50. APA Act § 813 states in part:

"1. Any person who violates any provision of this article or any rule or regulation promulgated by the agency, or the terms or conditions of any order or permit issued by the agency pursuant to this article shall be liable to a civil penalty of not more than five hundred dollars for each day or part thereof during which such violation continues. The civil penalties provided by this subdivision shall be recoverable in an action instituted in the name of the agency by the attorney general on his own initiative or at the request of the agency.

2. Alternatively or in addition to an action to recover the civil penalties provided by subdivision one of this section, the attorney general may institute in the name of the agency any appropriate action or proceeding to prevent, restrain, enjoin, correct or abate any violation of, or to

enforce any provision of this article or any rule or regulation promulgated by the agency, or the terms of conditions of any order or permit issued by the agency pursuant to this article." (Emphasis added).

51. Section 15-2723 of the Rivers Act states in part:

"Any person who violates any provision of this title or any regulation or order issued pursuant to this act by the commissioner or the agency may be compelled to comply with or obey the same by injunction, mandamus or other appropriate remedy. In addition, any such person shall pay a civil penalty of not less than one hundred dollars or more than one thousand dollars for each day of such violation." (Emphasis added.)

Facts in Opposition to August 1, 2008 Affirmation of John Privitera

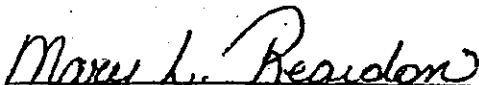
52. In his August 1, 2008 Affirmation, Lewis Farm's attorney inaccurately portrays the Agency's clear jurisdiction over subdivisions, using a February 2, 2005 memorandum that I wrote concerning Agency staff efforts to prevent illegal subdivisions from occurring to make his argument. See August 1, 2008 Affirmation of John Privitera, ¶ 9, Exhibit E. My memorandum only pertained to subdivisions that occur by deed and create separately-owned parcels. It did not purport to address violations involving a "subdivision into sites" as that term is defined in the Agency's regulations at 9 NYCRR § 570.3(ah), or the Agency's permitting jurisdiction over such subdivisions pursuant to the APA Act and the Rivers Act. See ¶¶ 34-37 and 45-46 above.

53. The APA Act and the Rivers Act provide no exemptions from Agency permitting jurisdiction for a subdivision, including a subdivision into sites for purposes of separate occupancy, on the basis that the subdivision involves lands in agricultural use. In the context of clear Agency jurisdiction and no exemption from that jurisdiction, as well as undisputed material facts, the Agency is entitled to summary judgment.

DATED: Ray Brook, New York
August 8, 2008


Paul Van Cott, Esq.

Sworn to before me this
8th day of August, 2008


Notary Public

MARY L. REARDON
Notary Public - State of New York
Qualified in Essex County
No. 01RE6114798
Commission Expires Aug. 23, 20 12

Exhibit 1: Timeline (Van Cott Aff. - 8/8/08)

[Reproduced at pp. 387-390]

**Exhibit 2: Amended Summons and Complaint dated
5/14/08 (Van Cott Aff. - 8/8/08)
[Reproduced at pp. 571-587]**

**Exhibit 3: Answer dated 7/30/08 (Van Cott Aff. -
8/8/08)**

[Reproduced at pp. 618-628]

STATE OF NEW YORK,
SUPREME COURT

COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ADIRONDACK PARK AGENCY,

Respondent.

REPLY AFFIRMATION

ACTION NO. 1

Index No. 315-08

Hon. Richard B. Meyer

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ESSEX

ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

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

Defendants.

ACTION NO. 2 /
COUNTERCLAIM

Index No.: 332-08

Hon. Richard B. Meyer

REPLY AFFIRMATION IN SUPPORT OF LEWIS FAMILY FARM'S
MOTION FOR SUMMARY JUDGMENT IN ACTION NO. 2

JACOB F. LAMME, an attorney at law duly admitted to practice in the courts of the
State of New York, swears and affirms under penalty of perjury as follows:

1. I am duly licensed and admitted to practice law in the State of New York, and I
am an associate with the law firm of McNamee, Lochner, Titus & Williams, P.C., attorneys for
defendant Lewis Family Farm, Inc. ("Lewis Family Farm"). As such, I am fully familiar with
the pleadings and proceedings had in this action, and with the matters set forth herein.

2. I make this reply affirmation in further support of the Lewis Family Farm's motion for summary judgment in the enforcement action commenced by the Adirondack Park Agency (hereafter "Agency") (Index No. 332-08), which this Court has deemed a counterclaim to the Lewis Family Farm's Article 78 proceeding (Index No. 315-08), and in opposition to the Agency's cross-motion for summary judgment and to strike the "second" record.

3. The Agency seeks to strike the "second" record that is attached as Exhibit "D" to the Affirmation of John J. Privitera, dated August 1, 2008. This exhibit is nothing more than a page-numbered version of the record that the Agency submitted to the Court on June 13, 2008 in connection with the related Article 78 proceeding, which was prepared for the convenience for the Court and parties on this motion.

4. In May 2008, I had several conversations with the Agency's counsel for the purpose of attempting to work out a briefing schedule for the Article 78 proceeding. During these conversations on May 13, 2008, May 21, 2008, and May 29, 2008, I specifically inquired about when the administrative record would be ready and further requested that the Agency's counsel bates stamp the record.

5. On June 13, 2008, the Agency submitted the record without having numbered the pages in accordance with my requests. Instead, the Agency crammed the record, which consists of approximately 600 pages, into seventeen (17) vague document categories, some of which contain many items and dozens of papers. This was confusing and made it nearly impossible to make specific references to the record.

6. Remarkably, in its August 8, 2008 Memorandum of Law, the Agency claims that: "If the Agency had been consulted regarding the Lewis Farm's interest in providing a Bates-

indexed copy of the APA's certified Return and Record, perhaps this problem could have been avoided." (See Agency's Memorandum of Law, dated August 8, 2008, pg. 37).

7. The Agency failed to inform the Court of my repeated requests for a page-numbered record.

8. On August 11, 2008, I wrote an e-mail to the Agency's counsel requesting that it withdraw its baseless objection to Exhibit D of the Privitera Affirmation for these very reasons. This request went unanswered.

9. The Agency also points out that Exhibit D failed to contain page "R00189". A review of Exhibit D reveals that this is correct. However, this reference page was not part of the administrative record before the Agency and was merely a document that the Agency's counsel created and inserted into its version of the record that was submitted to the Court on June 13, 2008. This reference page, although immaterial, is attached hereto as Exhibit "A".

10. Turning to the merits of this motion for summary judgment, the Agency all but admits that the Lewis Family Farm's farm worker houses are "agricultural use structures". The Agency recently released its 2007 Annual Report, which states as follows:

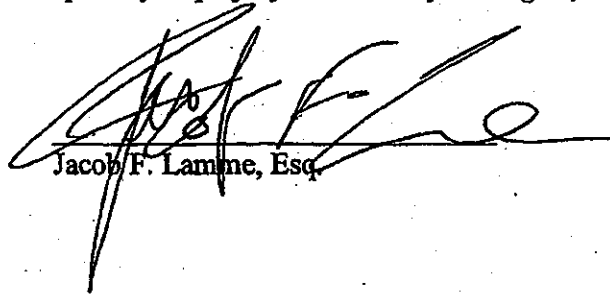
2007 Major Litigation Underway or Resolved

Lewis Family Farm, Inc. v APA: This case upheld Agency jurisdiction over the construction of single-family dwellings for agricultural worker housing based upon the location of the structures in a Resource Management area and a designated River Area. This important decision clarifies that the overall intensity guideline exception granted by the APA Act for agricultural housing does not also create an exemption from permit review jurisdiction in the Resource Management and Rivers Act areas of the Park.

(See 2007 Annual Report, pg. 20) (emphasis added). The Court should take notice that the Agency admits that the structures at issue here are "agricultural worker housing". Id. A copy of the Agency's 2007 Annual Report is attached hereto as Exhibit "B".

11. Based on the foregoing, and on the reasons set forth in memorandums of law submitted on these motions, the Lewis Family Farm respectfully asks this Court to enter an order (1) granting summary judgment in favor of the Lewis Family Farm and dismissing the Agency's duplicative enforcement action, (2) denying the Agency's cross-motion for summary judgment, (3) denying the Agency's motion to strike the "second" record, and (4) granting such other and further relief as the Court deems just and proper.

I hereby swear and affirm the above under penalty of perjury this 15th day of August, 2008.



Jacob F. Lamme, Esq.

Lamme Reply Affirmation dated 8/15/07 - Exhibit A

This exhibit is omitted as irrelevant by agreement of the parties

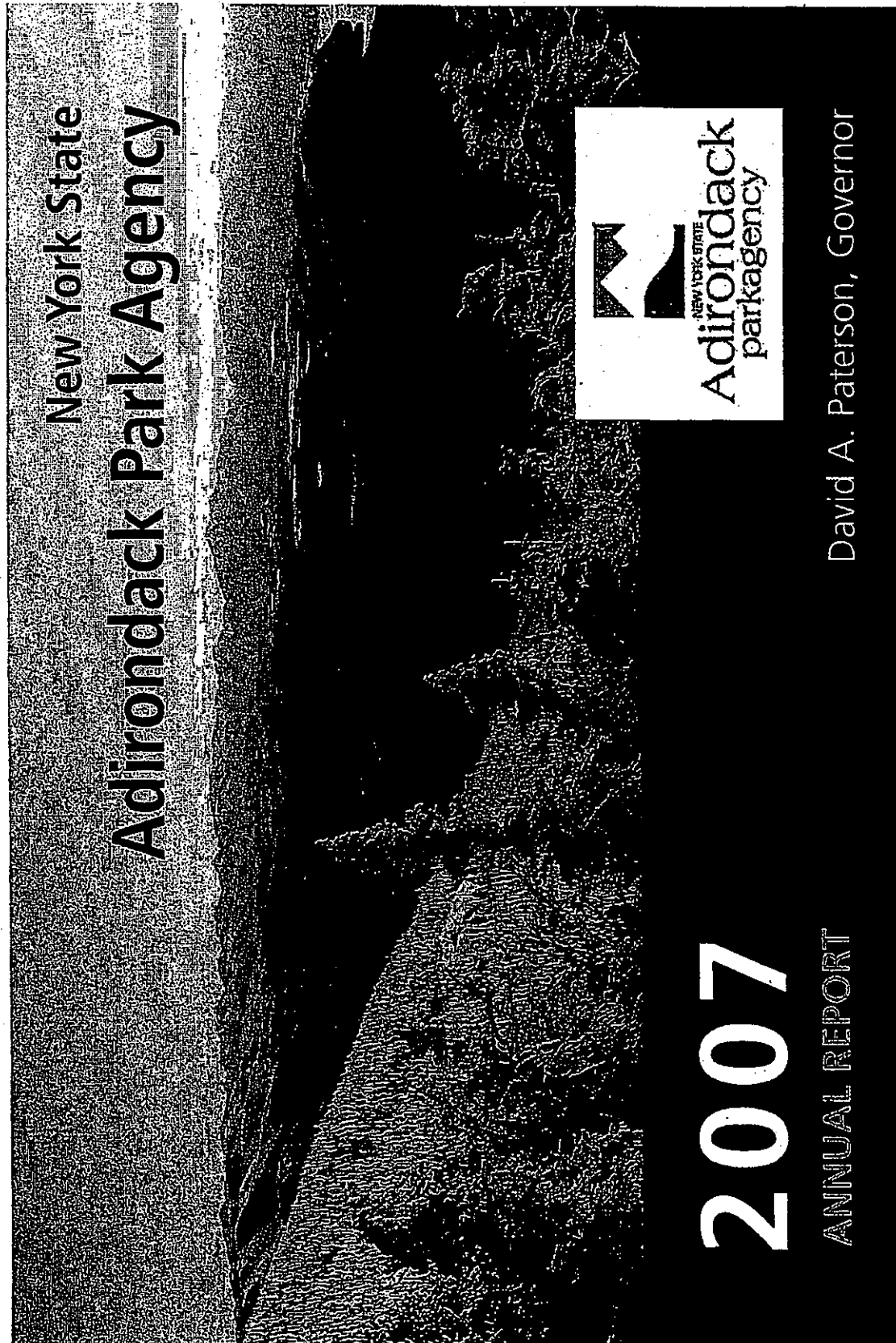
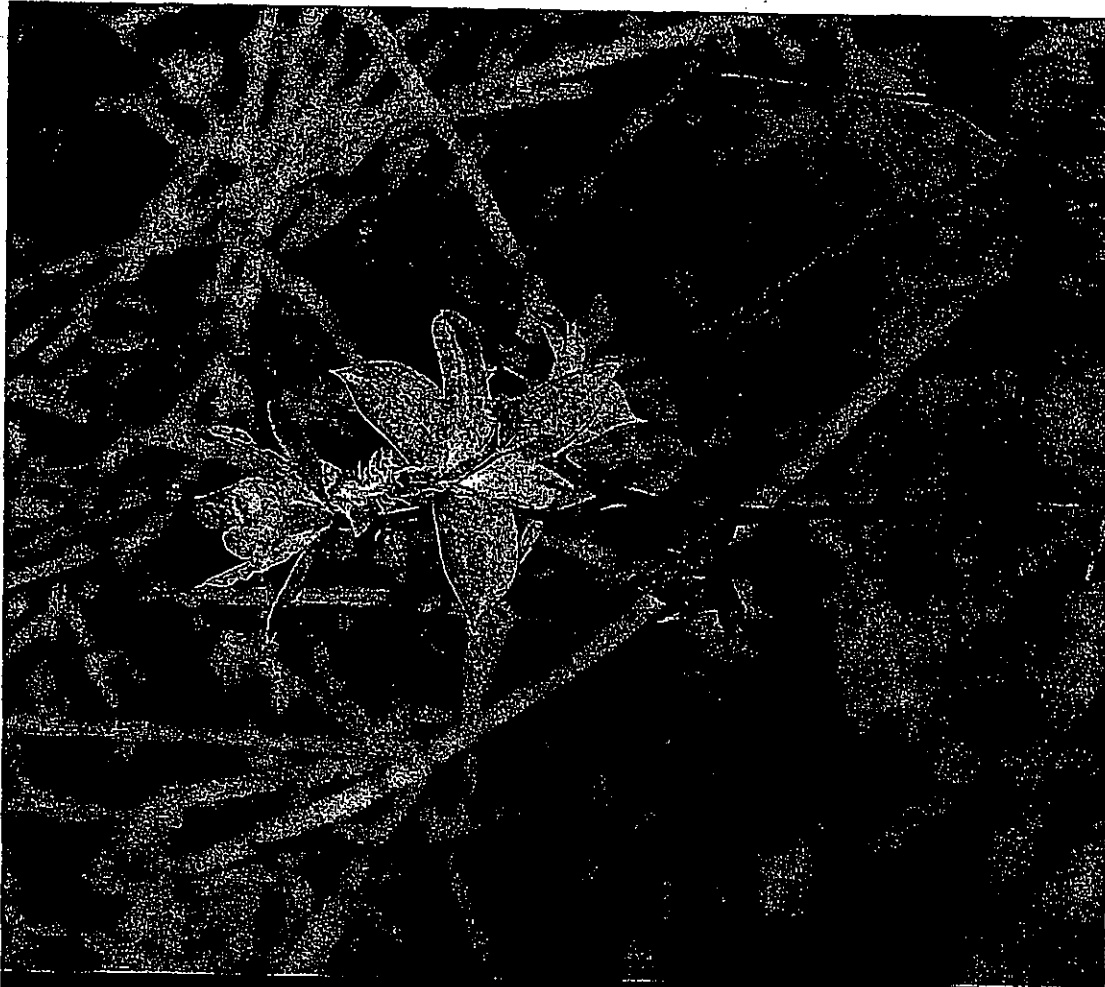


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Cover photo of the High Peaks region as seen from Whiteface Mountain by Keith McKeever. At right, photo of a Calopogon, or Grass-Pink, orchid on the Boreal Life Trail at the Adirondack Park Agency Visitor Interpretive Center in Paul Smiths by Andy Flynn.



Dear Friends and Colleagues:

All New Yorkers should take great pride in the vitality and beauty of the Empire State's landscape. From Montauk to Chautauqua to Rouses Point, our state is a mix of wonderful places, each with its own history and special character.

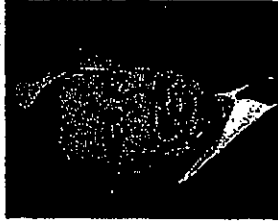
Our Adirondack Park is one of New York's very special places. This was recognized well over a century ago with the creation of the Forest Preserve and the Park itself. A managed landscape of public and private lands, the Adirondack Park is home to 135,000 people who recognize the importance of living in harmony with nature and a destination for millions of others who want to experience, for even a short while, the region's solitude and beauty.

The important work of the State's Adirondack Park Agency is highlighted in this 2007 annual report. I commend the Agency for its efforts and trust you will find this report of interest.

Respectfully,

David A. Paterson
Governor

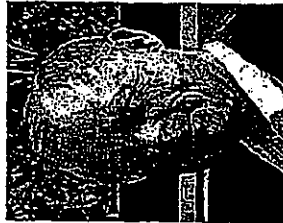
Message from the Governor



David A. Paterson, Governor

2007 ANNUAL REPORT

Message from the Chairman



Curtis F. Stiles, Chairman

Dear Friends,

The challenges and opportunities that face the Adirondack Park today have never been greater. Invasive species, climate change and acid rain adversely affect the natural resources of the Park. Aging community infrastructure, inadequate access to broadband, and limited health care options pose obstacles to sustainable Adirondack communities and appropriate economic development.

However, there is ever-increasing agreement on common issues which are now bringing diverse constituencies together to address these economic and environmental challenges. Implementation of smart growth principles and innovative approaches to providing affordable housing are underway. In 2007, the Town of Johnsburg was the 18th local government to prepare an Agency-approved local land use program. Many more municipalities are embracing local land use laws to retain their authentic community character while still encouraging growth.

The Park is valued as a tourist destination, a location with unsurpassed public and private open space and recreational opportunity, and has long been recognized as a model for the coexistence of strong communities and the protection of wilderness. Working together, we will achieve a balanced agenda that protects natural resources, respects the integrity of the State Land Master Plan and the Adirondack Park Agency Act and ensures economic development for the common good.

It is my pleasure to provide you our 2007 annual report. I look forward to serving all the stakeholders of the Adirondack Park.

Respectfully,

Curtis F. Stiles
Chairman

BY THE NUMBERS	
FUNDING STATE 2007-2008	
Total Operating Funds	\$15,448,000
Total Government New Bond Issues	\$1,000,000
Remaining 1/1/2008	\$1,000,000

Dear Friends and Colleagues,

It is a pleasure to provide you with our 2007 annual report. The Adirondack Park Agency had a very successful year balancing the Agency's mandate to protect the natural resources of the Park with the economic needs of its communities. Staff continue to work diligently as our workload remains demanding and complex.

The new administration has increased Agency staff with emphasis on enforcement, regulatory programs and planning. These new resources will help us continue to improve on our timeliness, ensure compliance and increase our responsiveness to all stakeholders.

I am proud that critical capital improvements were also undertaken in 2007. The Agency conducted energy audits at all its facilities and accepted bids for energy conservation improvements. We are extremely excited about securing funding to install photovoltaic solar panels at our Ray Brook headquarters. The photovoltaic arrays will generate approximately 25 percent of our electrical energy needs, reducing our reliance on fossil fuels.

Serving as Interim Executive Director has been a rewarding challenge. I am confident that as you peruse these pages you will get a better understanding of the diverse responsibilities of the Adirondack Park Agency.

Sincerely,

Mark E. Sengenberger
Interim Executive Director

Message from the Director



Mark E. Sengenberger, Interim Executive Director

Adirondack Park Agency Board

The Adirondack Park Agency (APA) was created in 1971 by the New York State Legislature to develop long-range land use plans for both public and private lands within the boundary of the Park. The APA is a New York State government agency with an eleven-member board and a staff consisting of 72 people. The Agency Board meets monthly to act on Park policy issues and permit applications. Agency Board meetings take place the second Thursday and Friday of each month and are open to the public.



Back row (from left): Cecil Wray, James T. Townsend, Richard Booth, Randy Beach (Department of Economic Development Designee), Richard L. Hoffman (Department of State Designee), Frederick Monroe (Adirondack Park Local Government Review Board Executive Director), and Frank Mezzano. Front row (from left): Arthur Lussi, Leilani C. Ulrich, Curtis F. Stiles, Elizabeth Lowe (Department of Environmental Conservation Designee) and William H. Thomas.

The Adirondack Park Agency is an independent agency in the Executive Department.

The Board consists of 11 members, five of whom must reside inside the Park. The Governor appoints eight, and three are ex-officio members: the Commissioner of the Department of Environmental Conservation, the Secretary of State, and the Commissioner of the Department of Economic Development. This Board represents a careful balance of local, regional and statewide interests.

The Adirondack Park Agency Act gives the Agency broad authority over private and public land use policy. The Agency conducts its business at regular monthly public meetings and does so through specialized committees charged with responsibilities in specific issue areas.

The Agency has further defined those tasks that are most appropriately handled by staff under the direction of the Executive Director with the guidance of a delegation resolution. Staff members develop technical information and conduct analysis that is necessary to make informed decisions and to develop policy direction. The staff exercises broad authority to conduct certain aspects of the Agency's business. A careful balance of activities between the Agency Board and its staff is a matter of ongoing dialogue and close attention.

AGENCY BOARD

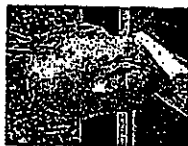
Curtis F. Stiles, *Chairman, Franklin County*
 Richard Booth, *Tompkins County*
 Arthur Lussi, *Essex County*
 Frank Mezzano, *Hamilton County*
 William H. Thomas, *Warren County*
 James T. Townsend, *Monroe County*
 Lellani C. Ulrich, *Herkimer County*
 Cedl Wray, *New York County*
 Daniel Gundersen, *Commissioner Department of Economic Development*
 Christopher Walsh, *Designee Department of Economic Development*
 Pete Giannis, *Commissioner Department of Environmental Conservation*
 Elizabeth Lowe, *Designee Department of Environmental Conservation*
 Lorraine Cortés-Vázquez, *Secretary of State*
 Richard L. Hoffman, *Designee Department of State*



Coltsfoot

Meet the Board Members

Curtis F. Stiles Chairman



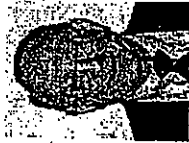
Curtis F. Stiles was named chairman in October 2007. He served with the U.S. Marines as a Naval Flight Officer during the Vietnam War and worked for Xerox Corporation for over 30 years. As President of the Upper Saranac Lake Foundation, he led an effort to raise \$1.5 million for the removal of Eurasian water milfoil. His past board memberships include Upper Saranac Lake Foundation, Upper Saranac Lake Association, Adirondack Council, Trudeau Institute, Town of Harrietstown Planning Board, Adirondack Medical Center, Paul Smith's College and the Adirondack Explorer. He and his wife live on Upper Saranac Lake.

Arthur Lussi Member



Arthur Lussi was appointed to the Agency in June 2006. He joined the New York State Bar in 1989 and the District of Columbia Bar in 1990 and spent time coaching ski racing in Colorado, returning to Lake Placid in 1991 to help his family manage and operate the Holiday Inn (now Crowne Plaza Hotel). He worked on the Village of Lake Placid's Comprehensive Plan in the mid 1990s. Mr. Lussi resides in Lake Placid with his wife, son and two daughters.

Frank Mezzano Member



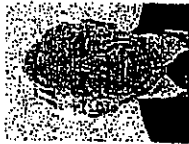
Frank Mezzano was appointed to the Agency in February 1998. He is Supervisor of the Town of Lake Pleasant, a member of Hamilton County Board of Supervisors, and President of the Speculator/Lake Pleasant Consolidated Health District. Commissioner Mezzano also served as the County representative to the Region 5 Open Space Committee. He owned the Speculator Department Store and lives with his wife in Speculator.

Richard Booth Member

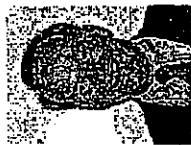


Richard Booth was appointed to the Agency in October 2007. He is a professor in the City and Regional Planning Department at Cornell University and has served on the Tompkins County Legislature, Ithaca's Common Council, NYS Low Level Radioactive Waste Siting Commission and the Environmental Planning Lobby. A Plattsburgh native, he worked as an attorney in the Agency and the DEC. He is married with two children.

William H. Thomas Member



William H. Thomas was appointed to the Agency in December 2006. He worked at Montgomery's Department Store in Pottersville, the State Bank of Albany and NL Industries in Newcomb. In 1990, Mr. Thomas was elected Supervisor of the Town of Johnsburg. He has served as the Warren County Budget Officer from 1996 to 2000, then in 2001 he was elected by his fellow supervisors as Chairman of the Warren County Board of Supervisors.



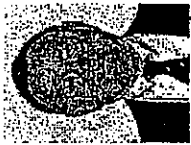
James T. Townsend
Member

James T. Townsend was appointed to the Agency in June 1999. He is a partner with the Rochester, New York, law firm of Remington, Gifford, Williams & Colicchio, LLP, a general practice firm concentrating in corporate, business and real estate matters. He was Counsel to the Monroe County Industrial Development Corporation and an Assistant Corporation Counsel to the City of Rochester. He lives in Rochester.



Leilani C. Ulrich
Member

Leilani C. Ulrich was appointed to the Agency in November 2004. In 1997, she began coordination of community discussions which grew into CAP-21 (the Central Adirondack Partnership for the 21st Century), a community development organization serving hamlets in Long Lake, Inlet, Webb and Forestport. She has received the Adirondack North Country Association Citizen of the Year Award. She and her husband reside in Old Forge.



Cecil Wray
Member

Cecil Wray was appointed to the Agency in June 1999. He is a retired senior partner with the law firm of Debevoise & Plimpton, retiring in 1997. His practice has focused on general corporate matters, including domestic and international corporate finance transactions, securities matters and acquisitions. Also, he served as a Law Clerk to United States Supreme Court Justice Tom C. Clark. He lives with his wife in New York City.



Christopher Walsh
Department of Economic Development, Designee

Christopher Walsh is the Designee for the Commissioner of the Department of Economic Development.



Elizabeth Lowe
Department of Environmental Conservation, Designee

Betsy Lowe is the Designee for the Commissioner of the Department of Environmental Conservation.



Richard L. Hoffman
Department of State, Designee

Richard L. Hoffman is the Designee for the Secretary of State.

About the Adirondack Park

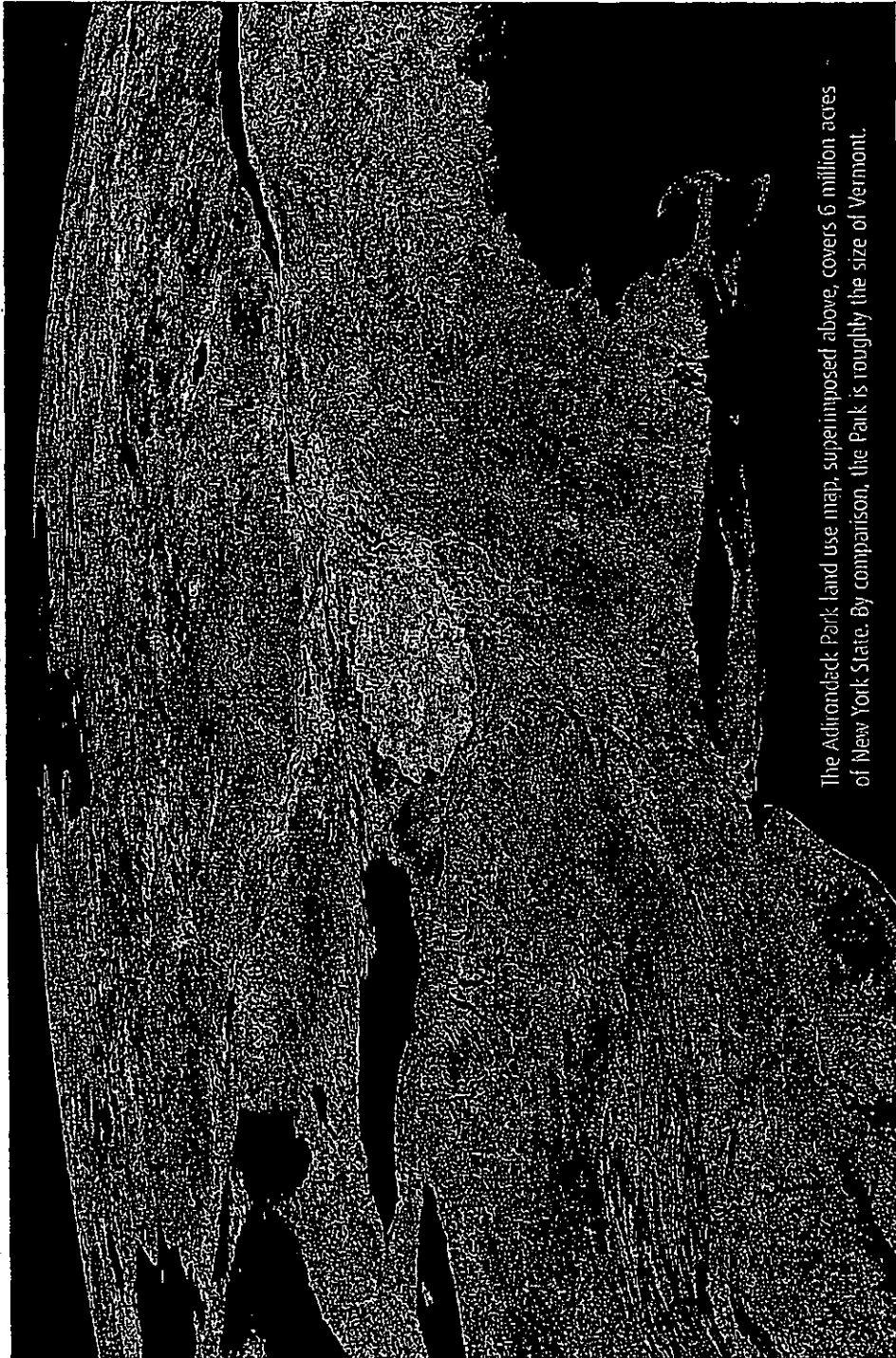
The Adirondack Park State Land Master Plan sets policy for the management of the State-owned lands. Developed by the Adirondack Park Agency in cooperation with the Department of Environmental Conservation (DEC) and approved by the Governor of New York State, the Master Plan was first adopted in 1972. The actual management of the State Lands is carried out by DEC forest rangers, foresters, environmental conservation officers, and other State personnel.

The Adirondack Park was created in 1892 by the State of New York and is the largest public land in the United States. It is the largest public land in the United States, covering 26,000 square miles in the Adirondack region of New York State. The park is the largest public land in the United States, covering 26,000 square miles in the Adirondack region of New York State.

The Adirondack region boasts over 6,000 lakes, 30,000 miles of river and stream, and a wide variety of habitats, including globally unique wetlands, bogs, and old-growth forests. The heart of the Adirondack Park is the Forest Preserve, which was declared by an act of the New York State Legislature in 1885, which stated, "The lands now or hereafter constituting the Forest Reserve shall be forever kept as wild forest-lands. They shall not be sold nor shall they be leased or taken by any person or corporation, public or private."

The boundary of the Park encompasses about 60 million acres, 90 percent of which belongs to the people of New York State and is constitutionally protected. Over 100,000 acres of land are owned by the State, and 50 percent is private land, including 2,000 towns and villages, farms, timberland, businesses, homes, and ranches.

The land is owned by the people of New York State and is constitutionally protected. The land is owned by the people of New York State and is constitutionally protected. The land is owned by the people of New York State and is constitutionally protected.



The Adirondack Park land use map, superimposed above, covers 6 million acres of New York State. By comparison, the Park is roughly the size of Vermont.

About the Adirondack Park Agency

The Adirondack Park Agency (APA) was created in 1971 by the New York State Legislature to develop long-range land use plans for both public and private lands within the boundary of the Park, commonly referred to as the "Blue Line." The APA is responsible for maintaining the protection of the State Forest Preserve, and overseeing development proposals of the privately owned lands.

The mission of the APA is to protect the public and private resources of the Park through the exercise of the powers and duties provided by law. The Agency strives to balance the complementary needs of all the people of the State for the preservation of the Park's resources and open space character with the needs of the Park's permanent, seasonal and transient populations for growth and service areas, employment, and a strong economic base.

The Agency's mission to conserve the Park's natural resources and assure that development is well-planned in the Park is guided through the administration of:

- the Adirondack Park Agency Act and the Land Use and Development Plan;
- the New York State Freshwater Wetlands Act;
- the New York State Wild, Scenic, and Recreational Rivers System Act; and
- the Adirondack Park State Land Master Plan.

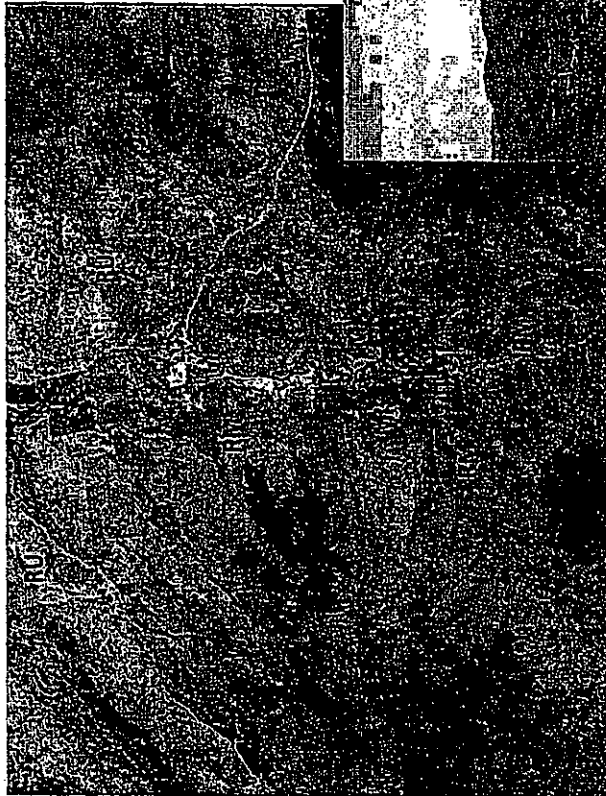
The Adirondack Park Land Use and Development Plan applies to the private land in the Park. The Plan is designed to conserve the Park's natural resources and open space character by directing and clustering development to minimize impact. Under the Plan, all private lands are mapped into six land use classifications: Hamlet, Moderate Intensity Use, Low Intensity Use, Rural Use, Resource Management and Industrial Use.

Prior to undertaking any land use and development, the Adirondack Park Agency strongly advises landowners and their representatives to contact staff for a jurisdictional determination.

The Agency prepared the State Land Master Plan, which was signed into law in 1972, followed by the Adirondack Park Land Use and Development Plan in 1973. Both plans are periodically revised to reflect the changes and current trends and conditions of the Park.

Land Use Map KEY

H = Hamlet
 MI = Moderate Intensity
 LI = Low Intensity
 RU = Rural Use
 RM = Resource Management
 P = Primitive
 W = Wilderness



Above is a map of the Adirondack Park Land Use and Development Plan land classifications in the Essex County Town of Keene, looking north from the hamlet of Keene Valley along the Route 73 corridor to the hamlet of Keene. The photo at right is Keene Valley, as seen from Rooster Comb Mountain looking north.

The goal of the land use plan is to channel growth where it is best supported and minimize the spread of development to areas less suited to sustain growth.



Administration

The Administration Services Division is responsible for all fiscal management, contract administration, personnel management, physical plan management, and office support. This includes fiscal matters such as: preparation of purchase orders and vouchers, determination of division allocations, fiscal record keeping, determination of availability of funds for the Agency's division programs, and computerization of fiscal records. Staff are also responsible for media relations, community relations and outreach.

The Administration Services Division and the Agency experienced a year of transition in 2007. Judith Smith retired from her position as Office Services Manager and was replaced in April 2007 by Elaine Caldwell, Chief Administrative Officer, who was immediately challenged with implementing significant staff re-organization. With assistance from administrative staff, the following accomplishments were achieved in 2007:

Personnel

- Five positions created under the Governor's initiative to increase the enforcement program were filled. Three positions were assigned to enforcement, and two positions were added to regulatory programs.
- The retirement of the Senior Natural Resources Planner created a vacancy that was filled in March 2007. The Agency back-filled another Senior Natural Resources position in August 2007.
- The Agency hired a Land Use Training Specialist in the Planning Division to work with local governments in June 2007.
- A secretarial vacancy was filled in June 2007.

Fiscal Management

The Administration Services Division:

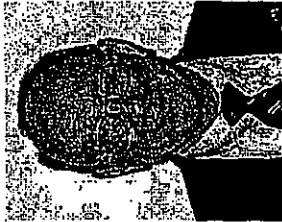
- prepared bi-weekly payroll for staff of 72 permanent, 15 temporary (including Agency members) and three seasonal employees through the PayServ system.
- prepared all documentation, fiscal analysis, and expenditure projections as required by the Division of the Budget and Office of the State Comptroller.
- prepared and administered grants and contracts, including contracts for building maintenance, maintenance of telephone system, computers, copying equipment, publications and other miscellaneous services.
- administered a grant from the U.S. EPA, providing for completion of a pilot Wetland Demonstration Program. This grant will reimburse up to \$699,000 over a three-year period. Staff also coordinated grant funding for two ongoing EPA grants.

Facilities

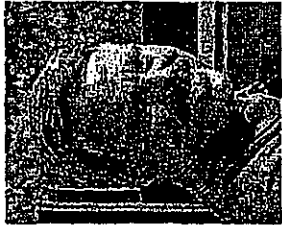
- Staff coordinated energy audits conducted at Agency headquarters and the Paul Smiths and Newcomb VICs. As a result, the Agency accepted bids on energy conservation measures for the Ray Brook headquarters, including the installation of foundation insulation, replacing interior lights with energy-efficient designs and automatic shut-offs, and implementing heating and cooling improvements.
- The Agency also received funding to install photovoltaic solar panels at its Ray Brook headquarters. The photovoltaic arrays could generate approximately 25 percent of the Agency's Ray Brook electrical energy needs.
- Staff managed a 25-vehicle fleet — which tallies in excess of 300,000 miles per year — including processing NYS Office of General Services semi-annual reports, monitoring and computerizing records of the use, mileage and maintenance.
- Staff maintained Agency building and grounds at headquarters in Ray Brook and assisted in the maintenance of the Paul Smiths and Newcomb VICs.

Information Services and Records Management

- Staff upgraded computer resources and software and coordinated efforts to expand and integrate Agencywide computer records management.
- Staff supervised refinements to computerized Agency records, including enforcement cases, jurisdictional inquiries and project applications, and established a cross-referencing system based on tax map numbers and a Look-Up system for all parcels within the Adirondack Park.
- Staff supervised the Agency's ongoing effort to scan project and enforcement maps dating from 1971 to the present into digital CD format to allow for integration with existing project/enforcement files.
- Staff oversaw the operation of the Agency's library, including the preparation of microfiche records of all Agency files dating back to 1971.



Frank Mezzano, Chair Administration Services
Mark E. Sengenberger, Interim Executive Director

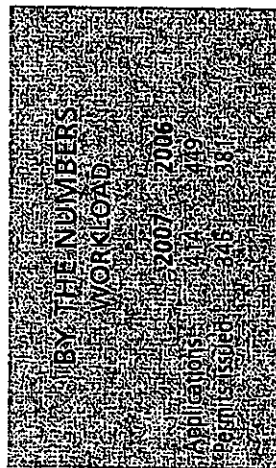


ADMINISTRATION STAFF

Mark E. Sengenberger, Interim Executive Director
Deborah A. Lester, Secretary to Exec. Director
Elaine M. Caldwell, Chief Administrative Officer
Stephen M. Ertan, Special Assistant-Economic Affairs
Keith P. McKeever, Public Information Director
Robert P. Kreider, Sr. Computer Programmer / Analyst
Patrick R. Farrell, General Mechanic
Susan A. Carey, Principal Clerk
Rachel A. Platt, Keyboard Specialist
Stephanie S. Segard, Maintenance
Norma Howard, Administration
Howard Baker, Green Thumb volunteer
Cheri Phillips, Green Thumb volunteer

Regulatory Programs

The Regulatory Programs Division is responsible for the review and the recommendations or determination of all project permit applications subject to Adirondack Park Agency jurisdiction.



The Agency considered a diverse variety of regional projects during the year and took the following actions with respect to some of them:

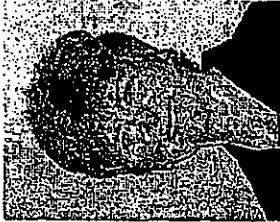
- The Elizabethtown-Lewis Emergency Squad was issued a permit for the construction of a new ambulance hall for two ambulances and a medic car. The facility will provide improved space for training, meetings and equipment storage.
- The Natural History Museum of the Adirondacks located in Tupper Lake, Franklin County, secured a permit to construct an observation tower referred to as the "Skywalk Observation Tower" and new educational and recreational connector trails. The Skywalk Observation Tower will provide a unique opportunity for visitors to access the tree canopy to view perching birds and will be used for special evening programs for stargazing, nocturnal wildlife viewing and guided tours.
- Trudeau Institute, Inc., a not-for-profit corporation in Saranac Lake, Franklin County, was granted a permit for a greater than 25 percent expansion of an existing 40-foot-high research laboratory building. The expansion includes construction of a three-story 11,133-square-foot brick/masonry addition and a one-story 575-square-foot boiler room. The three-story addition will provide additional scientific research space for animal housing, procedures rooms and support facilities.
- The Town of Keene and the New York State Department of Transportation were granted a Permit and Order authorizing the construction of a 500,000-gallon water storage tank, a 12-by-14-foot water storage tank control building and generator, and the replacement of water lines involving regulated wetlands.
- The Town of Chester was granted a permit for a five-year program to control Eurasian watermilfoil, *Myriophyllum spicatum*, by hand harvesting and use of benthic barriers at 26 sites in Loon Lake, Warren County. Goals are to eliminate as much milfoil as possible from the lake and to prevent its spread to other areas of the lake.
- Bruce J. Kilgore and Nancy J. Dow were granted a permit authorizing a new 101.5-foot-high wind-powered turbine for residential electricity generation for a previously authorized single-family dwelling, located in the Town of Saranac, Clinton County. The power generation output of the proposed tower/wind turbine is 1000 watts, or 1kW per hour. Other than its limited visibility from local roads

within a half mile of the project site, the tower/wind turbine is substantially screened from other public viewing areas by intervening topography and forested vegetation.

- Susan J. Moody was granted a permit authorizing a structure in excess of 40 feet in height with variances of the statutory shoreline structure setback and shoreline cutting restrictions to allow a new use at the mean high water mark of the Saranac River in the Village of Saranac Lake, Franklin County. Two pre-existing abandoned structures on the site will be demolished and replaced with a 5,100-square-foot mixed-use building to include four residential units, a 35-seat restaurant and retail space. Indoor parking for four cars is incorporated in the building design. The building will be constructed in accordance with green building LEED-certification requirements ("Leadership in Energy and Environmental Design") and will incorporate solar panels, energy-efficient utilities and low-wattage lighting, among other features.

- Nextel Partners Inc., Jon H. Close, and National Grid were granted a permit authorizing, after the fact, a temporary subdivision into sites and installation of a 60-foot-high temporary telecommunications tower (Communication on Wheels, COW) and related equipment powered by an existing National Grid utility line. Agency Enforcement determined Nextel Partners Inc. installed the COW on the project site without receiving a new or amended permit from the Agency. Resolution of the enforcement action deemed the proposed tower was a material change to Agency Permit 2005-335, and required Nextel to seek an amended permit from the Agency, and required the payment of a \$10,000 civil penalty. This permit is a result of the settlement agreement.

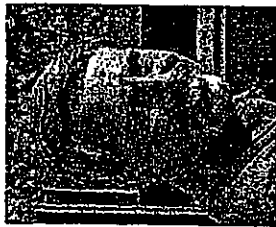
- RCC Atlantic, Inc., David E. Baker and Jean R. Baker were authorized a General Permit to co-locate three cellular antennas on the existing 28-foot-high roof of the Ledge Rock at Whiteface Motel. The project site is located along New York State Route 86 across the road from the Whiteface Mountain Ski Center in Town of Wilmington, Essex County.



Lellani C. Ulrich, Chair Regulatory Programs



Environmental Program Specialist Leigh R. Walrath, far left, conducts a site visit in 2007. Staff members conduct at least one site visit for each project they review.



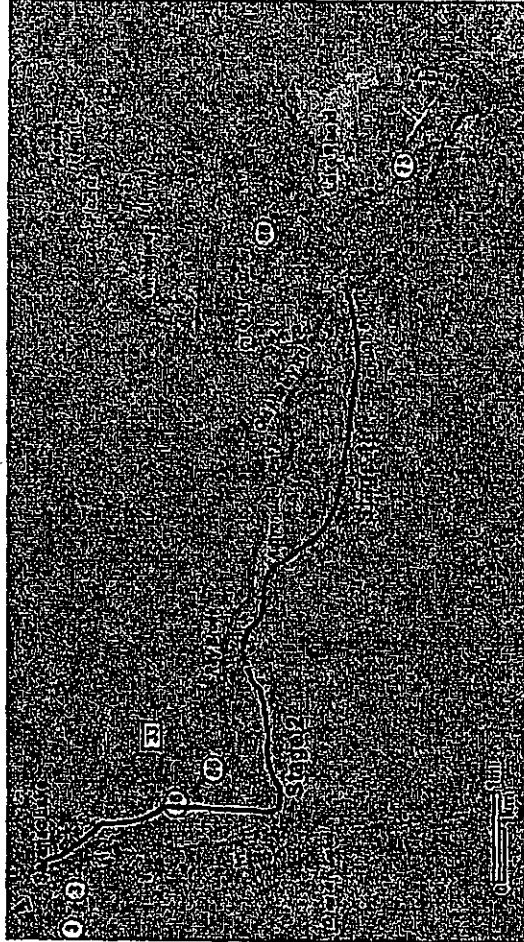
Mark E. Sengenberger, Deputy Director

REGULATORY PROGRAMS STAFF

Mark E. Sengenberger, Deputy Director
 Holly E. Kneeshaw, Assistant Director
 Mary L. Reardon, Secretary
 Stephanie C. Summeis, Keyboard Specialist
 John L. Quinn, Environmental Prog. Spec.
 George V. Outcalt, Environmental Prog. Spec.
 Colleen C. Parker, Environmental Prog. Spec.
 Thomas Saehrig, Environmental Prog. Spec.
 Michael Hannon, Environmental Prog. Spec.
 Susan Parker, Environmental Prog. Spec.
 Suzanne B. McSherry, Environmental Prog. Spec.
 Virginia Yamrick, Environmental Prog. Spec.
 Leigh R. Walrath, Environmental Prog. Spec.
 Tracy J. Darrah, Environmental Prog. Spec.
 Ariel A. Diggory, Environmental Prog. Spec.

• Verizon Wireless, John E. Gokey and Jean E. Gokey were granted a permit authorizing the installation of a new telecommunications tower, a major public utility use. The project involves the construction of a new 84-foot-high telecommunications tower with a 12-panel antenna array. The overall height of the proposed tower will be 94 feet. The project site is located on the east side of U.S. Route 9, in the Town of North Hudson, Essex County, in close proximity to exit 29 of the Adirondack Northway. The approved tower is part of Verizon's proposal to provide cellular telephone coverage to the Adirondack Northway Corridor between Lake George and Keeseville. Verizon's proposal involves 18 sites (towers), including five existing sites and 13 proposed sites.

• The Town of North Elba, the Village of Lake Placid and the New York State Department of Transportation were granted a permit and order for the construction of the first of a two-phase shared-use recreation path project located along and



Map of the proposed shared-use recreation path between Saranac Lake and Lake Placid

within the State-owned Remsen to Lake Placid Railroad (Adirondack Scenic Railroad) right-of-way. The path will be used by pedestrians, bicyclists, cross-country skiers and snowmobilers (including tracked-vehicle groomers). The first phase will extend approximately 4.5 miles from Old Military Road to its intersection with the Scarface Mountain Trail near the community of Ray Brook.

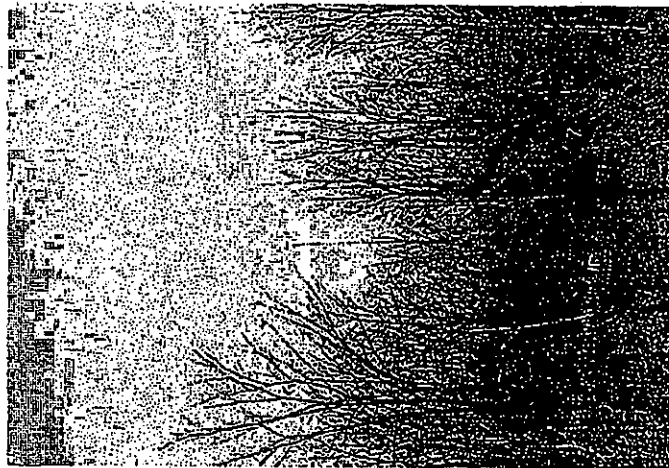
Adirondack Club and Resort

The Adirondack Club and Resort is a proposed large-scale resort/residential project located on and around Mount Morris in the Town of Tupper Lake, Franklin County. It includes a ski center, marina, 60-unit inn, 675 single-family and multiple-family residential dwelling units, and 24 "great camp" lots.

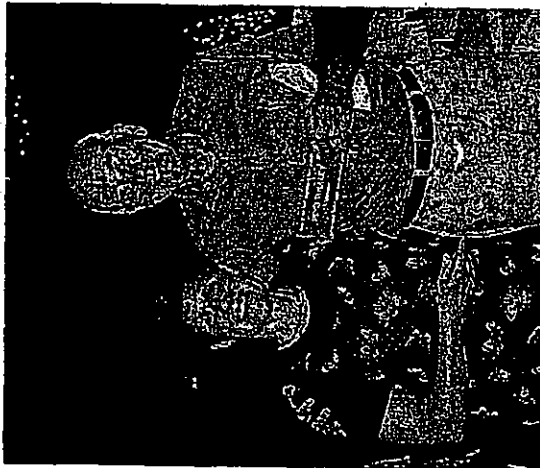
Staff deemed the application complete in December 2006. The Agency held a legislative hearing in January 2007 to brief agency members, stakeholders and the public on the proposal. Written public comments were accepted and included as part of the project record. In February, Agency staff presented the project to the board with a recommendation to proceed to an adjudicatory hearing. After two days of presentations and discussion, the Agency Board unanimously voted to proceed to an adjudicatory public hearing, identifying 10 issues for consideration.

The pre-hearing conference commenced in April 2007 to determine party status, discovery and any additional issues. The applicant requested a delay in scheduling further meetings while they addressed DEC permit issues.

In October 2007, the pre-hearing conference resumed with the applicant requesting a mediation process be considered. Stakeholders agreed to discuss how mediation could be utilized. Progress was made on party status, and the next meeting was scheduled for January of 2008.



An important residential wind tower project was approved in the Town of Saranac, Clinton County. The use of existing vegetation and topography when selecting the site location helped the applicant secure project approval.



Chairman Ross Whaley, who resigned in September, served with an agenda to respect the law, be courteous to all stakeholders and work to ensure that the Adirondack Park remains a model of sustainable development.

Paul Smiths VIC Volunteer Services Coordinator Lydia Wright presents Chairman Whaley with an honorary volunteer badge at the Volunteer Recognition Dinner held in August at the Paul Smiths VIC.



Interim Executive Director Mark Sengenberger welcomes Chairman Curtis F. Stiles. Chairman Stiles was confirmed by the Senate on October 22, 2007 and presided as Chairman at the November 2007 Agency meeting. His goals for the Agency include achieving a balanced agenda that protects the natural resources, respecting the integrity of the State Land Master Plan and the Adirondack Park Agency Act, and ensuring economic development for the common good.

Legal Division

The Legal Division is responsible for legal review of Agency documents, enforcement and litigation, as well as public advice regarding Agency jurisdiction. It is also responsible for application of related statutes such as the State Environmental Quality Review Act (SEQRA) (Environmental Conservation Law, Article 8); the State Administrative Procedures Act (SAPA); the Open Meetings Law (Public Officers Law, Article 7); and the Freedom of Information Law (Public Officers Law, Article 6). The Legal Division consists of three major components: the Office of Counsel, the Jurisdictional Inquiry Unit and the Enforcement Unit.

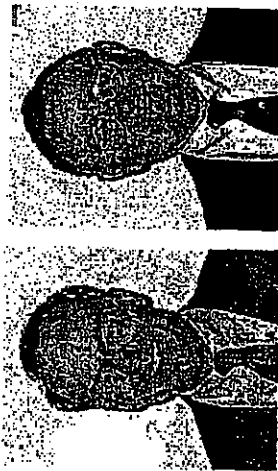
Office of Counsel

Three Senior Attorneys, the Associate Counsel and Counsel provide legal services and advice to all Agency programs and the Board. Services include review of documents for significant permits including notices of incomplete permit application and permits and orders themselves. When the Agency directs a matter to an administrative hearing, an Agency attorney helps to ensure a complete record as directed by Agency regulations. Similarly, Agency attorneys assist the Attorney General with litigation to both defend the Agency and enforce its legal authorities. This may include drafting pleadings and affidavits as well as organizing the record of the Agency decision involved in the litigation.

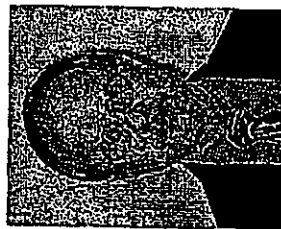
The Associate Counsel actively monitors legal advice provided by staff in different programs to communicate important guidance in general terms to the Legal Affairs Committee and the public, and to help assure consistent decision making by Agency staff. Counsel and Associate Counsel work with the Board, the Governor's Counsel and the various offices that oversee legislative and regulatory reform to advance the Agency's interests in legislation and regulatory updates. Finally, the Agency's Enforcement Program is managed by an Associate Attorney with the assistance of a Senior Attorney.

Legal

The Legal Division's attorneys provide legal advice to the Agency Board and staff on most issues. The Division also oversees the Jurisdictional Inquiry and Enforcement Offices.



James I. Townsend, Chair Legal Affairs
Cecil Wray, Chair Enforcement



John S. Banta, Counsel

Regulatory Reform

With new Agency Board appointments in place, dialogue resumed addressing Agency rules and regulations. In December 2007, Agency legal staff met with members of a technical advisory group known as the TAL, a multi-disciplinary, multi-interest volunteer group created to assist the Agency in reviewing proposed regulations. The group received a status report on pending regulatory proposals, reviewed specific priorities identified by the Agency's Legal Affairs Committee, and participated in a roundtable discussion of regulatory needs and opportunities.

2007 Major Litigation Underway or Resolved

• **Lewis Family Farm, Inc. v APA:** This case upheld Agency jurisdiction over the construction of single-family dwellings for agricultural worker housing based upon the location of the structures in a Resource Management area and a designated River Area. This important decision clarifies that the overall intensity guideline exception granted by the APA Act for agricultural housing does not also create an exemption from permit review jurisdiction in the Resource Management and Rivers Act areas of the Park.

• **RCPA v APA and Town of Chester:** This case upheld Agency approval of the Town's local land use program, affirming two major legal issues. The decision affirmed the Agency's authority to allow the Town to add as "permitted uses" in Resource Management areas certain uses which are not "compatible" under the APA Act for that land use area, provided there was no transfer of Agency Class B jurisdiction over such projects. This affirms that the Town and Agency have discretion to create approved local land use programs tailored to the local needs. It also affirmed the Agency's long-standing practice, as mandated by its regulations, to review separately two important components of a proposed local land use program: a) amendments to the APA map and b) the terms of the land use program itself. While SEQRA prohibits segmented review of one project, the Court recognized these Agency actions as necessarily independent, as the regulatory review criteria for one action prohibits consideration of the facts and criteria relevant to the other.

• **APA v Spiegel:** The Spiegel enforcement case continues the Park Agency's concerted efforts to ensure compliance with Agency permits and statutory criteria. It follows a series of successful enforcement cases (e.g. Bucci, Noonan, Hickey, Hamu, Doner), and continues the message to the public that the Agency will not ignore violations of the basic and well-established parameters of the Adirondack Park Agency Act.

• **Sierra Club et al v APA and Hutchison:** The Agency prevailed in a challenge to its discretion to determine the appropriate process and its substantive determination in approving a 20-lot subdivision.

• **Jessup River Wild Forest UMP Case:** Litigation brought by Adirondack Mountain Club, Residents' Committee to Protect the Adirondacks, Inc., The Adirondack Council and The Association For the Protection of the Adirondacks, Inc. challenging the Agency and DEC approval of the Jessup River Wild Forest Unit Management Plan was dismissed in 2007. The Agency and DEC agreed to withdraw new snowmobile trail and grooming proposals proposed in the UMP, to preserve the status quo, and to resolve significant Adirondack Park State Land Master Plan snowmobile issues prior to developing any new snowmobile trail and grooming proposals in pending Wild Forest unit management plans.

Jurisdictional Inquiry Office

The public's first point of contact with the Agency is often a letter or phone call handled by the Jurisdictional Inquiry Office at the Agency. The Jurisdictional Inquiry Unit consists of three individuals who advise landowners and others whether an Agency permit or variance is required for a proposed land use or subdivision of land within the Park. The determination often requires a full deed history from Adirondack Park Agency Act implementation in 1973, and other legal and factual research developed in communications with landowners and from Agency technical resources. This is the Agency's initial and most common point of contact with the public; hence, staff places a high priority on prompt responses.

LEGAL STAFF

Office of Counsel

John S. Banta, *Counsel*
Barbara A. Rottier, *Associate Counsel*
Richard R. Terry, *Senior Attorney*
Mitchell J. Goroski, *Senior Attorney*
Ellen Egan George, *Senior Attorney*
Mary B. Palmer, *Keyboard Specialist*

Jurisdictional Inquiry Office

Rita G. Quinn, *Environmental Prog. Spec.*
Nancy M. Heath, *Environmental Prog. Spec.*
Brian M. Ford, *Environmental Prog. Spec., FOIL*

Enforcement

Paul Van Cott, *Associate Attorney*
Sarah H. Reynolds, *Attorney*
Jill L. Lawrence, *Keyboard Specialist*
Emily M. Tyner, *Environmental Prog. Spec.*
Douglas W. Miller, *Environmental Prog. Spec.*
Trevor S. Fravor, *Environmental Prog. Spec.*
John M. Burth, *Environmental Prog. Spec.*
Joseph Thoulin, *Environmental Prog. Spec.*
Theresa A. LeBaron, *Environmental Prog. Spec.*

BY THE NUMBERS	
WORKLOAD	
2007	2006
Jurisdictional Determinations	
Written Inquiries	1,114
Responses	1,114
Phone Calls	6,322
Referrals	1,163
FOI Requests	167
Enforcement Cases	
Open	38
Closed	405

The Agency received 1,114 written requests for formal jurisdictional determinations in 2007, with an average response time of nine days. Jurisdictional staff addressed 6,322 telephone contacts and met with 394 walk-in members of the public. In addition, staff handled 1,163 referrals from other agencies.

In 2007, the average response time decreased by two days. This is the third year in a row that the JIF staff decreased the average response time. The Agency attributes this to continued training, improved automation, and, most importantly, the dedication of the Jurisdictional staff.

The Agency's Records Access Officer in this Office is responsible for responding to requests for access to and/or copies of records pursuant to the Freedom of Information Law (FOIL). In 2007, the Agency received 167 such requests. In response to changes in the law, the Agency's Records Access Officer established an electronic database to monitor all FOIL transactions, established a mechanism to provide responses electronically when requested by the applicant, and with the Administrative Division set up an accounting and tracking system to insure complete compliance and financial accountability for the FOIL program.

Enforcement

The Enforcement Unit was increased to six enforcement officers in an effort to improve the agency's ability to resolve and prevent violations. The addition of staff had an immediate positive impact on enforcing the three statutes administered by the Agency. These six officers are knowledgeable in the legal requirements of the Agency statute and regulations and supported by a Senior Attorney and a supervising Associate Attorney. The Enforcement Unit also has primary responsibility for undertaking educational initiatives to prevent violations before they occur.

In 2007, the Enforcement Program continued to focus on environmentally significant violations. Priorities include violations involving wetlands, shorelines, river

areas, critical environmental areas, open space resources and subdivisions. At year's end, 473 cases were unresolved, including 243 cases opened in 2007. The active case backlog increased by 64 cases in 2007.

Despite this increase, the majority of open cases are less than two years old, and staff completed most of their investigations on environmental priority cases. Of the open cases, approximately half involved alleged shoreline, wetlands, rivers and permit violations. Subdivision violations comprise the other half — almost all of which are older subdivisions that were undertaken without as Agency permit.

In 2007, 269 settlement agreements were prepared with 156 accepted and returned.

Notable Agency-Resolved 2007 Enforcement Cases

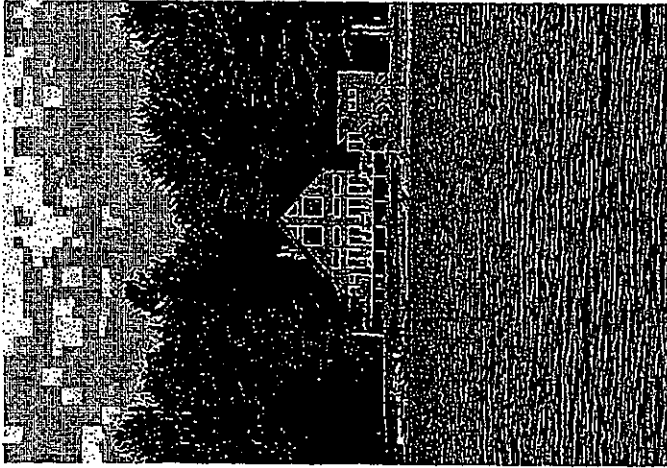
- **Matter of Champlain Stone, Ltd.** (Town of Warrensburg, Warren County): Unpermitted construction of mineral extraction structures resolved by settlement imposing \$10,000 penalty and requiring an after-the-fact permit for the structures.

- **Matter of Nextel Partners, Inc.** (Town of Mayfield, Fulton County): Illegal temporary cell tower providing emergency services resolved by settlement imposing \$10,000 penalty and requiring removal of the tower if not approved by after-the-fact permit. The permit was issued.

- **Matter of Hamm** (Town of Corinth, Saratoga County): Illegal subdivision and two illegal mobile homes resolved by Supreme Court Order requiring rescission of the subdivision, removal of mobile homes and payment of a \$5,000 penalty.

- **Matter of Hickey** (Town of Harrietstown, Franklin County): Illegal subdivision and single-family dwelling on shoreline of Lake Clear resolved by Enforcement Committee decision requiring removal of illegal deck, extensive vegetative planting and a \$50,000 penalty.

- **Matter of Beneke** (Town of Santa Clara, Franklin County): Illegal boathouse in wetland on Upper Saranac Lake resolved by removal of the boathouse from the wetland pursuant to court order obtained by the Town. Penalty to be determined.



The owners of this house on Lake Clear were required to remove an illegal deck, plant significant vegetation and pay a civil penalty to resolve violations of the APA Act.

Resource Analysis & Scientific Services

In 2007, the RASS staff spent the majority of its time in support of the Regulatory Programs Division's permitting program, the Legal Division's jurisdictional determination and enforcement programs, and rules revision efforts. Staff involvement with these divisions has increased in recent years due to significant building constraints found on proposed development sites. Steep slopes and limited soils require sound planning to prevent impacts to wetlands, water quality and visual resources. Engineered plans are extremely critical to protect fragile natural resources and to ensure adjacent landowners are not adversely impacted.

Staff also developed two Supplemental Information Request (SIR) documents to assist project applicants in providing the necessary information for completing permit applications. The two SIR documents are "SIR-Application for Excavated Pond" and "SIR-Application for Use of Pesticides to Control Aquatic Plants."

The Resource Analysis and Scientific Services (RASS) unit provides the scientific and technical data supporting most Agency matters, including project review, enforcement and state land activities. The Agency's scientists provide daily guidance on septic systems and stormwater runoff, soils analysis, forestry, invasive species and wildlife habitat. Staff also conducts wetland delineations.

RASS contributed to the extensive review of several major projects including:

- Adirondack Club and Resort (Tupper Lake)
- Ski Bowl Village at Gore Mountain North Creek Snowbowl (Johnsburg)
- Whiteface UMP: New Trail Construction (Wilmington)
- Tall Timbers (Johnsburg)
- Rensen-Lake Placid Travel Corridor Vegetation Management Plan (North Elba)

RASS staff also spent time on large projects which were either withdrawn or remain incomplete. Examples include an ATV Park in Johnsburg, a 133-lot subdivision in the Town of Webb and a 21-lot subdivision adjacent to Lake George.

Additional staff activities included:

- Providing engineering and soil science technical assistance for Town of Westport and Inlet map amendments
- Public outreach
- Technical review of Unit Management Plans as requested

Engineering and Soil Science: Engineering staff provided 365 written documents in support of all Divisions within the Agency. Engineering and Soil Science staff conducted approximately 260 site visits and prepared and implemented a Local Government Technical Outreach for Onsite Wastewater Treatment System function, design and construction. RASS staff described soil profile descriptions from 152 deep hole test pits and reviewed data from an additional 205 test pits. Deep hole test pit investigations ensure Onsite Wastewater Treatment Systems are placed in the correct location so they will function properly.



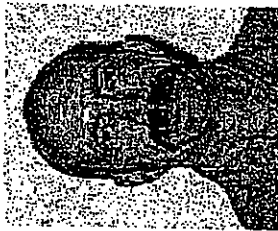
Elizabeth Lowe, Chair Park Ecology

Aquatics: Staff reviewed 21 permit applications (including general permits and permit amendments), wrote and issued 18 aquatic permits, and reviewed 17 other projects, pre-applications and consultations with Regulatory Programs, Legal Division and State Lands Planning staff involving aquatic systems.

Invasive species: Staff represent the Agency for the Adirondack Park Invasive Plant Program; the NYS Invasive Species Task Force and Steering Committee; the Adirondack Park Aquatic Nuisance Species Committee; the Lake Champlain Basin Program Rapid Response Team and Aquatic Nuisance Species Committee; and the Northeast Aquatic Plant Management Society. Responsibilities include implementation of the Adirondack Aquatic Nuisance Species Work plan; coordinating efforts to monitor and control the spread of non-native aquatic species in the Park; assisting in the management of aquatic vegetation; providing scientific and educational advancement; promoting scientific research of aquatic plant management; and promoting the exchange of information among members.

Ecological influence zones: Staff, in cooperation with Wildlife Conservation Society and SUNY College of Environmental Science and Forestry researchers, are developing a GIS model to analyze the effects of large-lot subdivisions and low-density residential development (exurban development) on wildlife habitat. This model uses the concept of "ecological influence zones" surrounding development.

BY THE NUMBERS	
WORKLOAD	
	2007 - 2006
Waterland	44
Deliverables	142
Soil test pits	152
Field visits	260



Daniel M. Spada, Supervisor-Natural Resource Analysis

RASS STAFF

Daniel M. Spada, Supervisor-Natural Resource Analysis

Shaun E. Lalonde, Soil and Water Engineering Specialist

Greg A. Bendell, Environmental Engineer

Lawrence P. Phillips, Assoc. A.P. Project Analyst, Forest Resources

W. Mark Rooks, Assoc. A.P. Project Analyst, Biological Resources

Edward S. Snizek, Assoc. A.P. Project Analyst, Fresh Water Resources

Mary A. O'Dell, Biologist (Ecology)

Stephanie L. Petith, Keyboard Specialist

Wetlands: The Unit is charged with most duties related to the Agency's administration of the Statewide Freshwater Wetlands Act. This includes wetland determinations, delineations, mapping and testifying at public hearings. Staff also assists in drafting permit conditions for projects involving wetlands. In 2007, staff completed 333 wetland delineations. The majority of wetland delineations occurred in Essex and Warren Counties. Staff conducted approximately 67 percent of wetland field visits on lands classified as Moderate Intensity (79), Rural Use (73) or Low Intensity (71).

EPA Grants: RASS staff continue to secure funding from the United States Environmental Protection Agency to conduct data collection, study and map wetlands with the goal to improve resource protection efforts in major watersheds of the Park. In 2006, RASS staff worked on the Au Sable-Boquet Watershed EPA project identifying historic converted wetlands. This project was a partnership with the Au Sable and Boquet River Associations, the New York Natural Heritage Program, and the Remote Sensing Lab at SUNY Plattsburgh. Ariel Diggory coordinated the project as part of a Master's degree program at SUNY ESF.

RASS successfully secured additional EPA grant funding to complete wetland and watershed mapping to inventory and manage aquatic and terrestrial invasive plants in the Mohawk Watershed. This project includes a partnership with the Adirondack Park Invasive Plant Program.

The Agency received EPA funds for a project awarded in 2005 to complete wetland mapping in the Saranac River and Lake George basins and to develop a systematic permit compliance effort. Three independent contractors were hired in 2006 to act as the Project Coordinator and two Project Compliance Officers.

Interagency Coordination

RASS staff participated in or served in leadership roles in interagency groups

including the Lake Champlain Ecosystem Team, Adirondack Research Consortium, Wetlands Forum, Interagency Wetlands Group, Bicknell's Thrush Habitat Conservation Steering Committee and Two Countries One Forest. These groups are critical for staying current on issues and forming and maintaining working relationships with other organizations.

Outreach

The Agency worked with the Ticonderoga Central School District to develop a three-day curriculum that introduces high school seniors to Agency rules and regulations. The course is titled "APA 401, You and the Adirondack Park Agency." RASS staff plan on improving the program for future use.



RASS staff was critical in support of the Bicknell's Thrush Mitigation Plans included in the Whiteface Mountain UMP. Adirondack Community Trust Executive Director Cali Brooks and ORDA Chief Executive Officer Ted Blazer announce the creation of the Bicknell's Thrush Habitat Protection Fund. The fund will support land protection, improved enforcement, education and scientific research.



As part of an EPA wetlands grant, the Agency hired three independent contractors to develop a new project compliance monitoring program. Goals of this program include avoidance of permit violations and improved wetlands conservation. From left are Tom Colarusso, Kathy Regan (Project Manager) and Aaron Ziemann.

APA Web site

www.apa.state.ny.us

Significant Content Added in 2007

- A sample municipal resolution, training certification form and other information to promote Annual Training for Planning Board and Zoning Board of Appeals Members

- Local Government Day 2007 information

- All job vacancies

- A List of Land Use Planning Consultants Who Have Practiced in the Adirondacks

- Information about Proposed New York Air National Guard Adirondack Range Airspace Modifications to the Current Activities page and information from the NYS Division of Military and Naval Affairs on Low-Flying Military Aircraft in the Adirondacks

- The 2006 Annual Report

- The revised Agency Public Comment Policy

- A new Access to Records page and the Application for Access to Agency Records form for Freedom of Information Law compliance

- Information on the 2007 Adirondack Park Community Smart Growth Program

- General Enforcement Guidelines

- New statistics for Land Use Classification Acreage and Percent by County and the whole Park on the Maps/GIS page

- Easy access on our home page to all current Agency actions involving towers in the Park

- A link on the Current Activities page to The Town of Johnsburg Web site, where their proposed Town Land Use Program, the Comprehensive Plan and proposed request for amendments to the Adirondack Park Land Use and Development Plan Map

The Adirondack Park Agency's main Web site generated more than 25,000 visits each month in 2007.

The five most frequently visited pages for 2007 included the home page, the press releases page, the job vacancy page, About the Adirondack Park page, and the Maps and GIS page.

The most frequently downloaded documents in 2007 included the Rules & Regulations, the State Land Master Plan, the Citizen's Guide and the APA Act.

The Planning Division during 2007 continued its long history and leadership role in developing and maintaining the Agency's GIS and mapped data, progressing the scenic byways improvements, managing the Agency's records systems, and providing essential support to the functions of the other Agency divisions.

Notable Planning Division accomplishments for 2007:

Scenic Byways Program

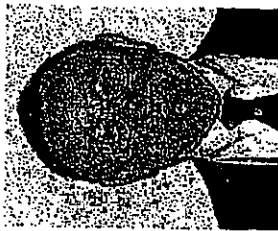
- Staff developed a request for proposals to initiate a Scenic Byways project for Route 86 and the West Branch of the Ausable River Corridor. The project will involve creating parking access improvements, improved signage, and the development and installation of interpretive signs.
- Staff completed a vegetation remediation project for State Route 73 under the direction of Park Agency staff. Seven areas along the road were planted with native wildflowers, shrubs and grasses. Staff developed four interpretive roadside exhibits on the topics of wildflowers and invasive plant species in consultation with DOT and the Nature Conservancy.
- Staff processed the Town of Keene's final payment request for a Hamlet Improvement project for a \$220,000 Scenic Byways project which included the placement of electric speed-recording devices for traffic control, creation of a new public parking lot, development of a small roadside park, streetscape plantings, installation of sidewalks and curbing, and other visual/safety improvements.
- Staff participated in a DOT Advisory Committee to plan improvements to vegetation along the Cascade Lakes. DOT has been working to plant salt-tolerant native shrubs and grasses in the area in accordance with a Clarkson University study on winter road management for the area.

GIS and Map Amendments

- Staff reviewed/developed responses to preliminary proposals and/or initial draft SEQOR documents for proposed amendments to the official Adirondack Park

Park Policy & Planning

The Agency's Planning Division is responsible for Local Government Services, Adirondack Park Land Use and Development Plan Map Updates and Map Amendments, Scenic Byways Program Development and Management, State Lands, Park Policy Research & Analysis, Geographic Information System (GIS), Cartographic Services, Records Management & Library Services, and Web Site Management.



Cedl Wray, Chair Park Policy and Planning

Land Use and Development Plan map requested by the Towns of Inlet, Minerva, Westport and Johnsburg.

- Staff completed the review of a map amendment request for 4.4 acres from a private individual in the Town of Putnam, Washington County.

- Staff completed technical map amendments in the Towns of Minerva and Schroon.

- Staff edited GIS data for parcels in the Towns of Jay, Keene, Elizabethtown and Lewis in order to bring the data into agreement with DEC Real Property geo-data and tax parcel boundaries.

- Staff assisted in organizing a meeting of GIS stakeholders to develop suggestions and recommendations for the New York State GIS Strategic Plan. The meeting included representatives from Clinton, Lewis and St. Lawrence Counties and staff from various State and Federal agencies including the DEC, DOH, ORPS, FEMA and USGS.

- Staff conducted a field investigation to verify State land boundaries for the Blue Ridge Wilderness, Sargent Pond Wild Forest and Horseshoe Lake Wild Forest.

- Staff obtained new data for Agricultural District Boundaries within the Park and included it in the Agency's GIS system.

- Staff added new detailed USGS soils data for Essex, Fulton and Warren Counties to the Agency's GIS system.

- Staff obtained updated tax parcel boundary data for Fulton, Lewis and Washington Counties and added it to the Agency's GIS system. Plus, they added updated NYS Office of Real Property tax map and parcel ownership information to the system.

- Staff developed and provided graphics showing Park boundaries for the NYS Division of Military and Naval Affairs Web site. A map showing locations for low-level military training in the Park was developed/added to the Agency Web site.

- Staff added information on land use planning and environmental consulting firms to the Agency Web site.

- Provided guidance on spatial models to members of a Unit Management Plan

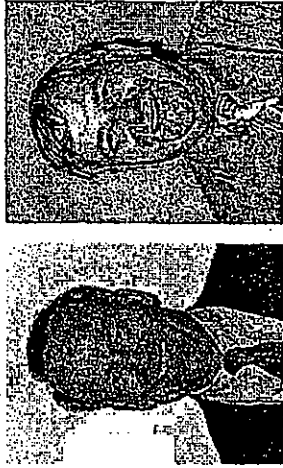
GIS work group and Adirondack Ecological Center staff who have been working on improvements to GIS data for Forest Preserve Unit Management Planning.

State Lands

State Land staff of the Agency's Planning Division are responsible for working with the Department of Environmental Conservation (DEC) to prepare Unit Management Plans (UMPs) consistent with the Adirondack Park State Land Master Plan (SLMP); providing guidance and interpretation regarding the SLMP to the Agency's Board; reviewing projects on State lands to ensure conformance with the SLMP; and working with DEC to classify or re-classify State lands.

In 2007, staff also reviewed and provided advice on various State land policy and planning issues. Due to the significance of major travel corridors to the integrity of the Park and in response to management concerns for the lands along Route 3, the Agency, DOT and DEC jointly reviewed the "New York State DOT Guidelines for the Adirondack Park," which serves as the interagency guide for design, construction and maintenance of State highways in the Park. Staff continues to work with DEC and DOT to draft a memorandum of understanding for the development and implementation of Travel Corridor Management Plans.

Following approval of the Adirondack Park Snowmobile Plan by DEC and OPRHP in 2006, APA's role in interpreting relevant SLMP guidelines (particularly concerning "no material increase" of trail mileage, definition of trail character and administrative use of tracked groomers) came to the forefront of the State land planning agenda. Agency staff worked diligently in 2007 to comprehensively document, through a mapping approach, the approximate mileage of snowmobile trails that existed at the time of adoption of the SLMP in 1972 — this a necessary step in interpreting whether or not current DEC policy (limiting snowmobile trail mileage on Wild Forest lands in the Park to 848.88 miles) is compliant with the SLMP.



James T. Townsend, Chair State Lands

James E. Connolly, Deputy Director, Planning

PARK POLICY & PLANNING STAFF

James E. Connolly, Deputy Director, Planning

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Brian F. Gisi, Local Planning Assistance

Specialist

Lauretta Bullis, Secretary

Susan Van Wormer, Calculations Clerk

Matthew S. Kendall, Senior Natural Resources

Planner

Kevin G. Prickett, Senior Natural Resources

Planner

Richard E. Weber III, Supervisor, A.P. Regional

Planning

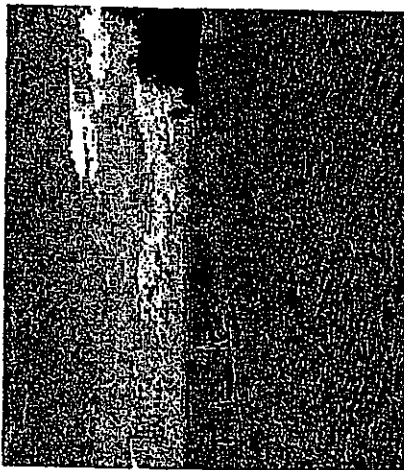
John W. Barge, Mapping Technologist

Robyn E. Burgess, Environmental Program

Specialist

Walter W. Linck, Project Specialist (State Land

Planning)



The Agency reviewed and determined that the Ausable Point Public Campground UMP was compliant with the State Land Master Plan. This busy state campground is located where the Ausable River enters Lake Champlain. The campground supports diverse populations of flora and fauna as well as unique recreational opportunities.



In a short list of other achievements, Agency staff participated in review of proposed final actions by the FAA to restructure military airspace over the Park through continued involvement in the Governor's Ad Hoc Committee on Low-Level Flights; assisted the North Country Trail Association and DEC in the effort to finalize a route through the Adirondacks for the North Country National Scenic Trail; and evaluated proposed projects for development by DEC in the Moose River Plains and Lake George Wild Forests that are intended to increase opportunities in those areas for persons with disabilities.

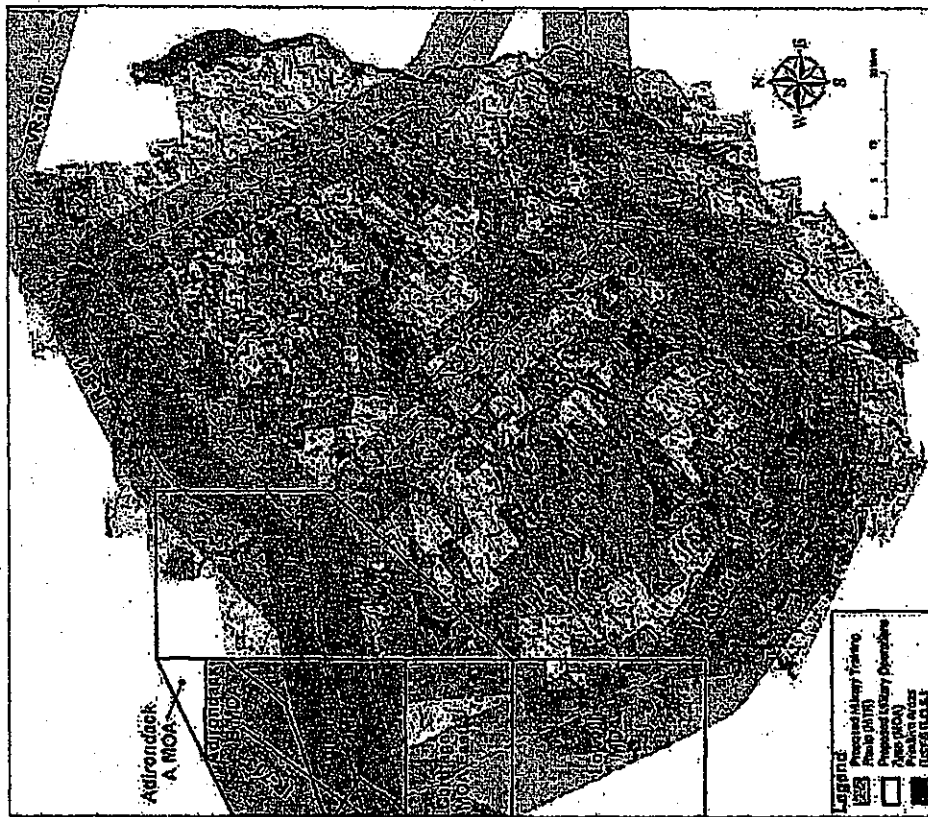
Involvement in Unit Management Planning in 2007 included providing guidance for the Agency's review and approval of the UMP for the Ausable Point Public Campground. The plan outlines actions including the control of invasive species, repairing and resurfacing roadway and parking areas and bringing facilities into conformance with the SLMP. Agency staff also worked with the Department of Transportation (DOT) and the DEC to revise proposed vegetation management approaches for the Remsen-Placid Travel Corridor Management Plan. The proposed changes will be brought to the Agency as a plan amendment early in 2008.

Professional development for staff remains an important objective. In 2007, staff participated in a multi-day, first module of a "Wildlands Training" program — one developed and taught by Chad Dawson and Rudy Schuster of the SUNY College of Environmental Science and Forestry. This training (sponsored by DEC and extended as an opportunity for APA staff) is designed to provide State land managers in the Adirondack and Catskill Parks with a curriculum focused on managing recreation impacts and adapting management and planning to the Forest Preserve.

Other State Land Activities

- Agency staff moderated a panel discussion on Wilderness Management at the Adirondack Research Consortium meeting held at the Natural History Museum of the Adirondacks. Speakers included Agency staff, SUNY College of Environmental

State Land staff provided advice and guidance to the New York Air National Guard as part of their efforts to re-design the Adirondack Range-Airspace. The Air National Guard modified Military Operation Areas (MOAs) to avoid wilderness areas and populated places.



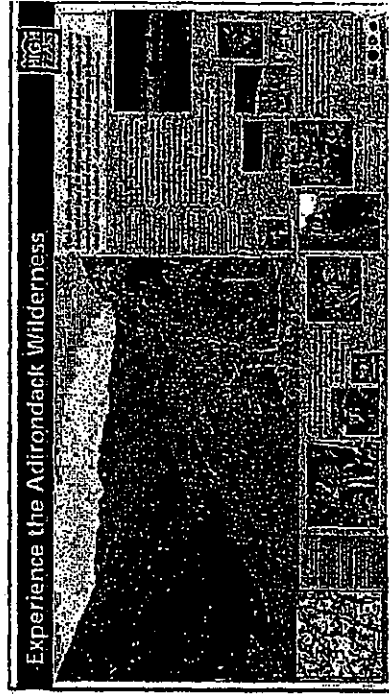


DOT staff install a new Cascade Mountain trailhead sign along the High Peaks Scenic Byway (State Route 73)

Science and Forestry researchers, and representatives of various environmental organizations.

- Staff consulted with DEC and staff from the North Country Trail Association Program on the development of a long-distance trail, which will include development of new and existing trails in the southern portion of the Park. The ultimate goal of the planning project is to create an east/west hiking trail between North Dakota and Crown Point, N.Y. Three public input meetings were held in December 2007 in Warrensburg, Boonville and Albany.

- Staff conducted field investigations in conjunction with Unit Plan Development and facility and trail proposals for Watson's East Triangle, Wilmington, Ferris Lake, Shaker Mountain, Wilcox Lake and Moose River Plains Wild Forests; Dix Mountain, Pharaoh Lake, Siamese Ponds and West Canada Lakes Wilderness areas; and the Champlain Islands complex. Discussions were held with DEC on integrating Wilderness and Wild Forest management principles into management of the Administrative Campground for the Indian Lake Islands. Campsite locations managed by DEC Operations Division are located in the Siamese Pond Wilderness and Jessup River Wild Forest.



High Peaks Byways Sign: These interpretive signs identify flora and fauna, as well as recreational opportunities in the area.

In 2007, Agency planning staff spent significant time working with the Town of Johnsburg on the preparation of their Agency-approved local land use program. In July, the Park Agency approved Johnsburg's local program. The Town officially adopted its program in October. The Agency transfers jurisdiction for Class B regional projects and variances to towns with approved programs. Prior to transfer, staff conducted three training sessions with Johnsburg officials to support program administration efforts. Johnsburg was the 18th municipality in the Adirondack Park with an Agency-approved local land use program.

Increasing development pressures have encouraged many communities to consider improving their local land use programs. Some communities without any local land use regulations are for the first time contemplating land use controls. Many communities expressed a desire to engage in planning efforts but indicated they lacked the financial resources to undertake an often complicated and controversial task.

In July 2007, the Governor launched a \$1 million Adirondack Park Smart Growth Grant Program. This program will provide funding to assist Park communities develop local land use plans that foster sustainable development, environmental protection and community livability. Agency planning staff in partnership with the Department of Environmental Conservation and the Department of State worked cooperatively on the Smart Growth program. Staff participated in informational workshops during the summer and fall and assisted with application review.

The Adirondack Park Local Government Day Conference continued to grow with 230 people in attendance at the Crowne Plaza Resort and Golf Club in Lake Placid in March 2007. This was the largest participation in the event's 10-year history. Planning staff devoted considerable time working with local officials in preparing the conference agenda and organizing the event. Every year, issues of local concern are discussed through workshops and presentations.

Local Government Services

The Local Government Services Division works with individual towns in the Park to assist them in planning and zoning and administering Agency-approved local land use programs. The staff also assists communities by attending community meetings, providing written advice, designing workshops and providing plan and code review.



Richard L. Hoffman, Chair Local Government Services

Brian Grisi, Local Planning Assistant Specialist

In addition to these major efforts, staff:

- attended 17 town planning and zoning board meetings in 2007. During these meetings, staff provided Agency program overviews, gave advice on land use planning and zoning actions, and conducted training workshops.
- reviewed and the Agency approved 32 local land use amendments from the Towns of Newcomb, Caroga and Day. These three towns have Agency-approved local land use programs.
- reviewed 80 local variance referrals from municipalities with Agency-approved local land use programs. The Agency reversed four locally approved variances.
- responded to 668 inquiries from Town officials on land use issues.

In October, Robyn Burgess joined the Local Government Services staff. She will provide outreach and training to communities and review local program materials.

BY THE NUMBERS WORKLOAD		
	2007	Total to date
Local Land Use Program		
Approvals	18	8
Local Land Use Programs	2007	2006
Amendments	132	133
Variances	180	105
Community Meetings	17	17
Public Hearings	20	20
Workshops	20	20



Agency Local Planning Assistant Brian Grisi addresses the Agency Board during deliberations on the Town of Johnsburg's Agency-approved local land use program.

With New York's renewed focus on improving the economy of all of Upstate, including the Adirondack Park, 2007 began with a challenge of how best to protect the Park's open space character and environmental quality while building a sustainable economic future for Park communities. These compatible goals are advanced through the Agency's Economic Affairs Committee and its staff-level Economic Services Unit in partnership with regional stakeholders, including local governments.

In 2007, the Economic Affairs Committee focused its attention on energy issues in the Adirondack Park and on tourism planning and marketing along designated Scenic Byways. In October, the Committee sponsored a panel discussion on Primary Health Care in the Adirondack Park. The discussion focused on a serious economic and community development matter: the continued availability and affordability of basic health care for Adirondack Park residents. An expert panel, which discussed physician demographics and medical service delivery and finance issues, included representatives of the Center for Health Workforce Studies at the School of Public Health, SUNY Albany; Hudson Headwaters Health Network; Adirondack Medical Center; and the New York State Department of Health.

On a staff level, affordable housing, improved broadband service, and further diversification of the Park's economy continued to be of high priority. The Agency, through its Special Assistant for Economic Affairs, provided support to the Department of Economic Development's "Regional Blueprint" planning sessions. In partnership with Empire State Development, the Agency is working to define practical strategies to improve economic conditions and quality of life within the Adirondack Park. This includes discussion of the critical relationship between successful tourism marketing and the creation of economic activities in the tourism- and non-tourism-based businesses. There are a range of small businesses in the Park that essentially exist because of the quality-of-life goals of entrepreneurs. This recognition is one key to building a sustainable economic future. There are also

Economic Services

The Economic Services unit provides expertise in real estate and financial feasibility analysis, economic and fiscal impact analysis and economic

development planning. It also provides general public guidance on development sites and assists project sponsors, economic developers and planners in the evaluation of specific business development sites.



Arthur Lusi, Chair Economic Affairs
Stephen M. Erman, Special Assistant-Economic Affairs

great opportunities for marketing a wide range of products "Made in the Adirondack Park" based on the region's strong natural image.

Building a sustainable economic future also involves support for local planning and community infrastructure improvements. Staff has assisted the Adirondack North Country Association (ANCA), the Adirondack Association of Towns and Villages (AATV), the Town of Chester, and the Town of Arietta in a State-funded research effort to assess municipal infrastructure, inventory other economic assets, and define quality-of-life features in all 103 Adirondack towns and villages.

The Economic Services Unit continued to provide entrepreneurs with information to assist their planning of projects that could be approved by the Adirondack Park Agency. Economic staff also provided the Agency's Regulatory Programs Division with expertise on economic and fiscal impact analysis and assisted Planning Division staff with the 10th annual Local Government Day conference.

The Agency is proud of its increased attention to community and economic issues in the Park and to the quest for a more vibrant and sustainable economic future.



The Economic Affairs Committee served as a regional forum in October regarding Primary Health Care in the Adirondack Park. Experts in the field provided testimony on issues facing the region and provided advice on how to proceed. From left, the panelists included: Sandra McGinnis, School of Public Health, SUNY Albany; Dr. John Rugge, M.D. Chief Operating Officer, Hudson Headwaters Health Network; Stephen Erman, APA Special Assistant for Economic Affairs; Chandler Ralph, President, Adirondack Medical Center; and Barry Gray, Director Workforce Development, NYS Department of Health.

The year 2007 was a productive one for the Interpretive Programs Division, which provided excellent service to more than 92,000 visitors in 2007. With 28,373 visitors, the Newcomb VIC tallied its highest visitation since opening in 1990.

Paul Smiths

The Interpretive Programs Division launched its new Web site — www.adkvic.org — on March 1, 2007, with Senior Public Information Specialist Andy Flynn as its Webmaster. Flynn worked with Cathy Tevlin, of In the Woods Design Studio, to make the site more user-friendly and rich with content. The site includes a calendar of programs, a press room, trail conditions, weather information, a resource guide for teachers, and traveler information.

Maintenance and program staff added a vestibule to the Native Species Butterfly House in June 2007, creating a separate room at the entryway so butterflies and moths do not escape. A solar-powered water feature was also included in the improvement project. The 30-by-55-foot structure duplicates the natural environment of the region and contains plants and trees used by butterflies and moths.

Environmental Educator Mike Brennan attended The Climate Project's workshop in Nashville, where former Vice President Al Gore trained him in global-warming education. Brennan has developed his own PowerPoint program — "An Inconvenient Truth and You: Local Solutions to the Climate Crisis" — and began teaching people about the effects of global warming on the regional ecosystem.

Staff at the Paul Smiths VIC continued to upgrade the facility in 2007, including reconstruction of the back porch deck.

Newcomb

Newcomb VIC staff members welcomed the center's newest employee, Joyce King, who filled the vacant Keyboard Specialist position.

Interpretive Programs

The Interpretive Programs Division oversees two Visitor Interpretive Centers (VICs) in the Adirondack Park located in Paul Smiths and Newcomb. They offer environmental education and visitor orientation services. Both facilities feature exhibits, indoor and outdoor public programs and miles of scenic, surfaced trails where people can learn about the Park's ecology. They are open daily from 9 a.m. to 5 p.m. year round, except Thanksgiving and Christmas.

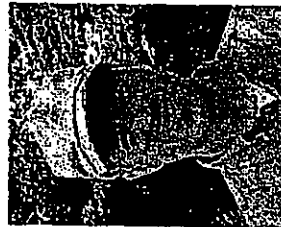
Admission is free.



Elizabeth Lowe, Chair
Interpretive
Programs



Rynda McCray, Environmental Educator and
Center Director, Newcomb VIC
Michael Brennan, Environmental Educator and
Center Director, Paul Smiths VIC



Environmental Educator Milt Adams holds the bottom of a sign as Maintenance Supervisor George Hare secures it to the front of the Native Species Butterfly House at the Paul Smiths VIC. Staff added a vestibule to the Butterfly House in 2007 to prevent butterflies and moths from escaping.

BY THE NUMBERS			
VISITATION			
VIC	2007	2008	
Newcomb	28,371	29,768	
Paul Smiths	17,607	20,776	

Improvements were made to the interpretive exhibits at the Newcomb VIC in 2007, including the addition of the Browsing Botanist and Wildlife Watch panels in the lobby. Also, staff created a children's area in the small room off of lobby.

In July 2007, New York State Department of Environmental Conservation crews finished the Connector Trail from the R.W. Sage Jr. Memorial Trail to the road at the Camp Santanoni Historic Area. The new trail created a 12-mile round-trip from the Newcomb VIC to Great Camp Santanoni. This gave the staff the opportunity to add ski trails at the Newcomb VIC for the first time in the facility's 17-year history. On Dec. 15, 2007, 1.5 miles of ski trails were opened to the public along a portion of the Sucker Brook Trail and the entire length of the Sage Trail, allowing skiers to travel to Camp Santanoni in the winter via the Connector Trail.

Volunteers

Let's hear it for the volunteers! Without them, we would not be as successful. The VIC volunteers assist in many areas both on and off the centers' properties. In 2007, about 4,566 volunteer hours were donated at Paul Smiths, and 575 were donated at Newcomb. In addition, inmate crews from the Department of Correctional Services facility at Camp Gabriels in the town of Brighton provided invaluable assistance to maintenance staff at the Paul Smiths VIC, totaling about 900 hours of work barking the trail system



PAUL SMITHS STAFF

Michael Brennan, Environmental Educator
Milton B. Adams, Environmental Educator
Joanne B. MacDowell, Administrative Aide
Cara McCann, Artist Designer
Andy Flynn, Sr. Public Information Specialist
C. George Hare, Maintenance Supervisor
Kyle Martin, Maintenance Assistant/Laborer
Lydia Wright, Volunteer Services Coordinator
Penny Dufrane, Maintenance Assistant
Camille Burns, Student Aide

NEWCOMB STAFF

Rynda McCray, Environmental Educator
Ellen Rathbone, Environmental Educator
Michael Tracy, Maintenance Assistant
Joyce M. King, Keyboard Specialist
Ann LaRose, Volunteer Services Coordinator
Mary Tisi, Student Aide
Brian Poulton, Laborer

2007 ANNUAL REPORT

BY THE NUMBERS
OUTREACH

VIC	2007	2006
Newcomb	583	583
Paul Smiths	1,741	1,680

BY THE NUMBERS
PROGRAMS GROUPS & SCHOOLS

VIC	2007	2006
Newcomb	153	177
Paul Smiths	866	908

Adirondack Park Institute



VIC Naturalist Camille Burns tends to a painted lady in the Native Species Butterfly House at the Paul Smiths VIC. The Adirondack Park Institute helps fund the Butterfly House, which is open from mid-June to Labor Day every year.

The Adirondack Park Institute, Inc. (API) was created in 1989 as a 501(c) 3 not-for-profit corporation to provide enhanced environmental educational and interpretive opportunities to schools, area visitors, children and their families. The API accomplishes this mission through a partnership with the two Visitor Interpretive Centers (VICs) operated by the Adirondack Park Agency. The API motto, "Teaching a Generation to Care," reflects this important mission.

The API's primary source of funding comes from the annual contributions of its membership, a very dedicated group. The API also administers grants for the benefit of program development at the VICs. With the members' help, the API can continue to support the VICs' effort to teach the importance of caring for the world around us and help preserve the natural beauty of our environment.

The API supports environment education programs, special events, publications and curricula at the Paul Smiths and Newcomb VICs. Some current examples of API-funded programs are the: Adirondack Wildlife Festival, Chilly Ski Festival, Adirondack Raptor Celebration, Saturdays are for Kids, Exploring Nature with Little People, school field trips and the Native Species Butterfly House.

Learn more about the API by contacting its office at (518) 327-3376 or going online to www.adirondackparkinstitute.org.

Officers and Executive Director

President, Valerie L. Trudeau
Secretary, Thad P. Collum
Treasurer, Edmund E. Lynch
Vice President Development, Charles F. Monzeglio Jr.
Vice President Membership, Stuart H. Angert
Executive Director, Jennifer Fregoe-Fifield

Section 803-a of the Adirondack Park Agency Act provides for the establishment of the Adirondack Park Local Government Review Board. As provided by law, the purpose of the Review Board is to advise and assist the Agency in carrying out its mission. The Agency enjoys a strong working relationship with the Review Board through open discussion and dialogue focused on local government perspectives.

Agency Members and staff regularly attend the Review Board meetings, which are held monthly throughout the Adirondack Park. At the monthly Adirondack Park Agency meetings, Review Board Executive Director Frederick Monroe plays a prominent and active role in all deliberations. The Park Agency's efforts to achieve balanced decision making are greatly enhanced by this dialogue.

The State of New York provides \$100,000 in operating funds for the Local Government Review Board in the Agency's budget.

Chairman and Officers

Chairman, Lloyd Moore, St. Lawrence County
Executive Director, Frederick Monroe
Counsel, John C. McDonald
Secretary, Carol A. Monroe

Adirondack Park Local Government Review Board



LGRB Executive Director Fred Monroe (far right) attends the monthly Agency meetings and advises the Agency regarding local government concerns.



Giant Mountain in the Essex County Town of Keene

ADIRONDACK PARK AGENCY



CREDITS

The APA would like to thank its staff for contributing text and photographs to the 2007 Annual Report.

This report was produced by Agency Public Information Director Keith P. McKeever and Senior Public Information Specialist Andy Flynn.

At left, painted lady butterflies feed on chives in the Native Species Butterfly House at the Adirondack Park Agency Visitor Interpretive Center at Paul Smiths VIC. Photos by Andy Flynn.



State of New York Adirondack Park Agency

Route 86, P.O. Box 99, Ray Brook, NY 12977, (518) 891-4050, www.apa.state.ny.us
Paul Smiths Visitor Interpretive Center, Route 30, P.O. Box 3000, Paul Smiths, NY 12970, (518) 327-3000
Newcomb Visitor Interpretive Center, Route 28N, P.O. Box 101, Newcomb, NY 12852, (518) 582-2000
www.adkvic.org

David A. Paterson, Governor • Curtis F. Stiles, Chairman • Mark E. Sengenberger, Interim Executive Director

STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

LEWIS FAMILY FARM, INC.,

Petitioner,

v.

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Respondent.

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

REPLY AFFIRMATION
OF LORETTA SIMON IN APA'S
CROSS-MOTION FOR SUMMARY
JUDGMENT AND TO STRIKE
SECOND RECORD

Hon. Richard B. Meyer

INDEX No. 315-08
RJI No. 15-1-2008-0109

INDEX No. 332-08
RJI No. 15-1-2008-0117

ENTERED AND FILED
ESSEX COUNTY CLERK
08 AUG 20 PM 2:30
ELIZABETH TOWN, NY 12932

LORETTA SIMON, an attorney admitted to practice before the
courts of the State of New York, duly affirms under penalty of
perjury that:

1. I am an Assistant Attorney General, of counsel to
Andrew M. Cuomo, Attorney General of the State of New York,
attorney for the Adirondack Park Agency ("APA") in above-
captioned consolidated matters.

Reply Affirmation of
Loretta Simon dated
August 19, 2008

2. I make this reply affirmation pursuant to C.P.L.R. § 2214(b) in further support of the APA's cross-motion for summary judgment and to strike the second record submitted by Lewis Farm. This reply affirmation is submitted after the Return date of August 18, 2008, because the Office of the Attorney General received Lewis Farm's answering papers on the Return date.

3. Regarding the merits of its motion for summary judgment, Lewis Farm asserts that the Agency's 2007 Annual Report "all but admits" that the three single family dwellings at issue in this litigation are "agricultural use structures". See Affidavit Of Jacob Lamme ("Lamme Aff.") dated August 15, 2008 ¶ 10. The Agency has never characterized Lewis Farm's single family dwellings as "agricultural use structures." On the contrary, the Agency specifically found that the APA Act's definition of "agricultural use structure" does not include single family dwellings, which are separately defined in the Act, and found that "farm worker dwellings are "single family dwellings" . . . and not "agricultural use structures." See Record Item I (APA Determination) ¶ 37; see also Executive Law 802 (6) and (58). Further, under the APA Act and Rivers Act, permits are expressly required for all single family dwellings in Resource Management and a designated recreational river area. See Executive Law §§ 810(2)(d)(1) and 805(3)(g)(4) (Secondary uses)(1); see also 9 NYCRR Sections 577.4(a) and 577.5(c)(1).

Reply Affirmation of
Loretta Simon dated
August 19, 2008

4. In fact, the APA's 2007 Annual Report, summarizing Justice Kevin K. Ryan's Supreme Court Decision and Order dated August 16, 2007, simply summarizes Lewis Farm I. As this Court is aware the Decision and Order of Justice Ryan confirmed the APA's jurisdiction over the three single family dwellings. See Record Item 5, Exhibit B to Van Cott Aff. (Decision and Order of Justice Ryan pp. 5-6), see also Lamme Aff. dated August 15, 2008, Exhibit B, p. 20.

5. Seeking to capitalize on Lewis Farm's intended use of the three single family dwellings, Lewis Farm asks this Court to take judicial notice that the Agency admits that the structures are "agricultural worker housing". See Lamme Aff. dated August 15, 2008 ¶10. The question of end-use is, for purposes of the APA Act and APA jurisdiction, not legally relevant. Moreover, the Agency's Determination specifically found that "farm worker dwellings" are "single family dwellings". . . . and not "agricultural use structures." See Record Item I (APA Determination), ¶ 37. Accordingly the Court should decline Lewis Farm's request.

6. The issue before the Court is whether these dwellings are subject to the APA Act and the Rivers Act, specifically whether "agricultural use structures" under the APA Act include "single family dwellings." As the APA has maintained throughout this controversy, and as the APA rationally determined, as did

Reply Affirmation of
Loretta Simon dated
August 19, 2008

Justice Ryan, the three "single family dwellings" to be used for farm workers are not "agriculture use structures" as defined by the APA Act. See Record Item I (APA Determination), ¶ 37.

The types of structures specifically listed in the definition of "agriculture use structures" are accessory in nature and related to the storage of agricultural equipment, animals and products . . . or the on-site accessory use sale of farm products ("fruit and vegetable stand"). . . . [T]he definition of "agricultural use structure" does not include and was not intended to include, the farm owners' dwelling and farm workers' dwellings.

See Record Item I (APA Determination), ¶ 37. (emphasis added).

7. In its motion for summary judgment Lewis Farm appended a Bates stamped version of the APA's Administrative Record. See Affidavit of John J. Privitera dated August 1, 2008 Exhibit D.¹ The APA moved to strike this second record reproduced by Lewis Farm's counsel because the Agency submitted a certified record dated June 13, 2008, and has not certified Lewis Farm's reproduction, which certification is required by C.P.L.R 7804 (e), nor was a copy of the reproduced record provided to the Agency for review prior to submission to the Court. See Affirmation of Paul Van Cott dated, dated August 8, 2008, p. 2, footnote 1.

¹ Lewis Farm's assertion that the Agency neglected to Bates stamp the record raises no issues of law, but rather is simply their preference as to how the record should be reproduced. See Affidavit of John J. Privitera dated August 1, 2008, ¶ 7.

Reply Affirmation of
Loretta Simon dated
August 19, 2008

8. The APA's motion to strike Lewis Farm's second record should be granted. The Agency has authority and responsibility to certify its own administrative record, which Return and Record was already certified and submitted to this Court pursuant to C.P.L.R. 7804. See Certification of Barbara Rottier dated June 13, 2008 (submitted with the Agency's Answer in Part, Record and Objections in Point of Law dated June 13, 2008). Lewis Farm is without legal authority to produce a second Agency administrative record.

9. Lewis Farm argues that the second record should be allowed because Mr. Lamme had several phone conversations with me requesting that the record be Bates stamped. Notably, Mr. Lamme does not deny the fact that he failed to notify me that a second Bates stamped copy of the record would be submitted, nor does he deny that he failed to provide a copy to me for review prior to submission. His assertion that he sent me an e-mail demanding that I withdraw my motion to strike the second record is correct, but irrelevant. See Lamme Aff. ¶ 8. His e-mail of August 11, 2008 said "your objection to this "second" record is improper", and notified me that if I would like to reconsider my position and withdraw my motion I should do so by "end of business today." I was unaware of his August 11th e-mail as I was out of town, upon my return to the office, I did not answer the e-mail as there was no issue to which I needed to respond.

Reply Affirmation of
Loretta Simon dated
August 19, 2008

10. The issue before the Court is whether the record submitted by Lewis Farm can replace the Agency's certified Return and Record without the Agency's consent, review or certification. Pursuant to CPLR Article 7804(e) it cannot. Lewis Farm's arguments about conversations in May 2008, are a distraction and not legally relevant.²

11. A preliminary review of the second record reveals the following errors: the cover page to the July 20, 2007 Miller Affidavit is missing and the numbering skips from page 188 to page 190. In addition, the following pages are inserted in reverse order: pages 396 and 395, pages 398 and 397, pages 402 and 401, pages 462 and 461, and pages 464 and 463. The APA cannot certify this inaccurate record.

12. Accordingly, Lewis Farm's unilateral reproduction of an uncertified "copy" of the record, failure to provide its copy to

² See Affidavit of Jacob Lamme dated August 15, 2008, ¶ 4 where Mr. Lamme alleges that on May 13, 21, and 29, 2008, he specifically requested that the Agency Bates stamp the record. My record of our May 13, 2008 phone conversation indicates we discussed the APA's agreement to extend Lewis Farm's time to answer the complaint, the APA's agreement to extend the return date to accommodate Lewis Farm's counsel, and confirming that counsel's firm would accept service on behalf of the Lewis' individually. This conversation was confirmed to the Court by letters from Mr. Lamme dated May 13, and May 14, 2008. Similarly my notes of conversations with Mr. Lamme later in May do not indicate a request by him for a Bates stamped record. While I do not recall if Mr. Lamme repeatedly asked for a numbered record, I do recall he repeatedly asked that I produce the record earlier than required by C.P.L.R. § 7804.

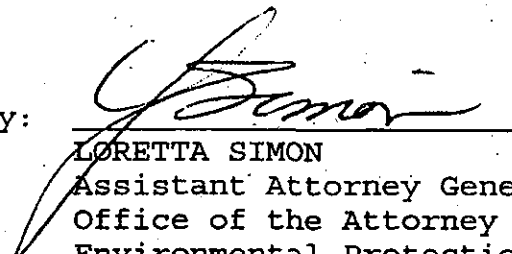
Reply Affirmation of
Loretta Simon dated
August 19, 2008

the APA for review prior to submission to the Court, and
inaccurate reproduction should be rejected by the Court and the
"second," inaccurate record stricken.

Dated: Albany, New York
August 19, 2008

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for Adirondack Park Agency

By:


LORETTA SIMON
Assistant Attorney General
Office of the Attorney General
Environmental Protection Bureau
The Capitol
Albany, New York 12224-0341
(518)402-2724

Reply Affirmation of
Loretta Simon dated
August 19, 2008

STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

Index No. 315-08
RJI No. 15-1-2008-010

- against -

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Defendant.

----- ORAL ARGUMENT

ADIRONDACK PARK AGENCY,

Plaintiff,

Index No. 332-08
RJI No. 15-1-2008-0117

- against -

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

Defendants.

Essex County Courthouse
Elizabethtown, New York
June 19, 2008

B E F O R E :

HONORABLE RICHARD B. MEYER
Acting Supreme Court Judge, Presiding

A P P E A R A N C E S :

MCNAMEE, LOCHNER, TITUS & WILLIAMS, P.C.
677 Broadway
Albany, New York 12207
BY: JOHN J. PRIVITERA, ESQ.
And: JACOB F. LAMME, ESQ.
Appearing on behalf of Petitioner/Defendants
Lewis Family Farm, Inc., Salim Lewis and Barbara
Lewis

Holly A. Santsprey, Official Court Reporter
Fourth Judicial District

R00732

A P P E A R A N C E S : (Cont'd)

HON. ANDREW M. CUOMO
STATE OF NEW YORK
OFFICE OF ATTORNEY GENERAL
Environmental Protection Bureau
The Capitol
Albany, New York 12224-0341
BY: LORETTA SIMON, ESQ.
Assistant Attorney General
Appearing on behalf of Respondent/Plaintiff
Adirondack Park Agency

ADIRONDACK PARK AGENCY
STATE OF NEW YORK EXECUTIVE DEPARTMENT
Post Office Box 99
Ray Brook, NY 12977
BY: PAUL VAN COTT, ESQ.
Appearing on behalf of Respondent/Plaintiff
Adirondack Park Agency

ARROYO COPLAND & ASSOCIATES, PLLC
Great Oaks Office Park
219 Great Oaks Boulevard
Albany, New York 12203
BY: CYNTHIA FEATHERS, ESQ.
Appearing on behalf of the New York State
Farm Bureau, Amicus Curiae

- o o o -

1 THE COURT: All right. This is the matter
2 of Lewis Family Farm, Incorporated and Adirondack
3 Park Agency to consolidate a proceeding, an
4 Article 78 proceeding, by Lewis Family Farm and
5 an enforcement action by the Agency against the
6 farm and it's two principals, Salim Lewis and
7 Barbara Lewis.

8 Let's get the appearances starting with
9 Mr. Privitera.

10 MR. PRIVITERA: Good afternoon, your Honor.
11 John Privitera, on behalf of the Lewis Family
12 Farm. I'm here with my associate, Jacob Lamme,
13 and with me at counsel table is Sandy Lewis and
14 Barbara Lewis.

15 THE COURT: Thank you.

16 Ms. Simon.

17 MS. SIMON: Good afternoon, your Honor.
18 Loretta Simon, with the Attorney General's
19 Office. And with me is Paul Van Cott, with the
20 Adirondack Park Agency.

21 MS. FEATHERS: Good afternoon. Cynthia
22 Feathers, for the Farm Bureau, amicus curiae.

23 THE COURT: Thank you.

24 I've reviewed the papers and it seems to me,
25 frankly, that the initial issue before me at this

1 time is the motion by the Agency to dismiss based
2 on collateral estoppel grounds.

3 Mr. Privitera, do you want to address those
4 issues?

5 MR. PRIVITERA: Yes, your Honor. If I
6 may --

7 THE COURT: You don't have to use the podium
8 if you don't want to. It's up to you.

9 MR. PRIVITERA: I would rather, your Honor,
10 if I may.

11 First of all, for purposes of clarifying the
12 record, your Honor, you may have noticed that our
13 opening brief had blank record citations because
14 we did not yet have the return. If your Honor
15 please, and if I may approach, we have filled in
16 the records citations, not changed anything else
17 to the best we could. We had hoped for a Bates
18 stamped record but it's sort of just tabbed. We
19 still have filled in those references. I have
20 provided a copy to amicus counsel and, if
21 your Honor please, for the record, a conformed
22 copy of the brief -- may I approach?

23 THE COURT: Certainly.

24 MR. PRIVITERA: Thank you, your Honor. That
25 should make it more convenient for the Court to

1 find the record citations.

2 Your Honor, if I may, the primary argument
3 by the Agency which dulls their approach on the
4 merits, frankly, is that Judge Ryan has already
5 decided what is before your Honor.

6 THE COURT: Well, didn't he decide in his
7 decision that these were not agricultural use
8 structures?

9 MR. PRIVITERA: No, your Honor. As a matter
10 of fact, he says that they are agri- -- well,
11 he's all over the place, your Honor. There is a
12 reference in his opinion in the record to his
13 finding that they are agricultural use structures
14 as a matter of fact, and that the Agency does not
15 dispute the fact that they are agricultural use
16 structures.

17 But more importantly, your Honor, as a
18 matter of fundamental collateral estoppel and
19 res judicata law, your Honor, he did not decide
20 the merits of the case. What he decided was that
21 the whole case was premature. He sent it back
22 under 7806 of the CPLR. He sentenced it back for
23 the Agency to handle the matter. He said that he
24 was not going to prejudge matters. He said that
25 it was premature and he was not going to

1 interfere with the internal matters of the
2 Agency, essentially saying that the Lewis Family
3 Farm had decided to sue too early when they saw
4 that the letter indicating an effort to cease and
5 desist was forthcoming. To the extent he decided
6 anything, your Honor, he decided something
7 similar to what you've already decided. What he
8 said was --

9 THE COURT: Let me ask you this: Are you
10 saying that he dismissed the proceeding with
11 leave to renew in some respect?

12 MR. PRIVITERA: Absolutely, your Honor.
13 That's exactly what 7806 says.

14 THE COURT: Well, that's one of the things
15 that it says.

16 MR. PRIVITERA: That's right. It says that
17 a court, just as you are sitting here today, can
18 dismiss with leave to amend, you can dismiss --
19 you can determine that the Agency's decision is
20 null and void, you can direct the Agency to
21 prohibit it from taking further actions that are
22 covered by the petition. You have a fair bit of
23 discretion under 7806.

24 The fundamental analysis of collateral
25 estoppel is that you look to what the court had

1 to do. All the court had to do and all that was
2 necessary to his decision was his determination
3 that the Agency had not yet made a final
4 determination. Everything else is advisory,
5 everything else is dicta, everything else is not
6 necessary to his determination. And, you know,
7 the reason that we have these strong doctrines,
8 as covered by the NYPIRG case that we have cited
9 and the many other cases that we have cited on
10 collateral estoppel, the reason is that unless
11 something is fully joined in the adversarial
12 process where the merits of something are at
13 stake, a court is at risk of not finding the
14 truth through the adversarial process. This is
15 clear from the way Judge Ryan's decision bounces
16 around, sometimes finding as a matter of fact
17 that they are agricultural use structures;
18 sometimes indicating that he thinks as a matter
19 of law they are probably not, and also making a
20 fundamental mistake in saying that if the
21 petitioner here was right, we could build a
22 pigpen next to the river. Well, we can't. The
23 Rivers Act says -- and this, you know, it wasn't
24 fully litigated. The Rivers Act says that a
25 pigpen has to be 151 feet from the river, just as

1 a barn does, just as a farm worker's house does.
2 And so as he went through his thought process and
3 dicta in determining the matter, your Honor, he
4 failed to fully inform himself through the
5 adversarial process when the merits were at
6 stake. If that was the case, your Honor, I guess
7 we lost before we started. I guess if the Agency
8 is right, it doesn't matter what the Agency did.

9 THE COURT: Isn't that what they are
10 claiming, that you now can't challenge the
11 determination of the Agency because they have
12 essentially litigated those issues before
13 Judge Ryan and now you're precluded from
14 challenging their determination?

15 MR. PRIVITERA: Except he sent it to the
16 Agency to make a final determination. There's no
17 indication that what Judge Ryan was doing was
18 ending the dispute on the matter. Rather, what
19 he said was, Agency, you decide it now and,
20 petitioner, you come back if you're not satisfied
21 with that.

22 Take a look at what your Honor did on the
23 stay. When your Honor decided the stay issue,
24 you had to apply the preliminary injunction
25 tests. An element of what was before Judge Ryan

1 was an effort to stop the cease and desist order.
2 I really don't know what happened there because
3 the Agency didn't cross-move to enforce the cease
4 and desist order. But the Lewises, with other --

5 THE COURT: Maybe that's because it wasn't a
6 final determination.

7 MR. PRIVITERA: I guess. Although their
8 position would be that the cease and desist order
9 itself, although not the decision on the merits,
10 was final. That's how their papers read.

11 But nonetheless, your Honor, what the
12 Lewises sought was a preliminary injunction against
13 the cease and desist order, and he said it wasn't
14 ready. And in so doing, and it's not clear from
15 his analysis, but I guess what he was saying is
16 that the Lewises were not likely to prevail on
17 the merits of their claim that the houses here at
18 issue were not agricultural use structures --
19 were agricultural use structures, that he was
20 expressing an opinion with respect to whether or
21 not we were likely to prevail on the merits. I
22 agree, your Honor, that we are collaterally
23 estopped by Judge Lewis's decision --

24 THE COURT: Judge Ryan, you mean?

25 MR. PRIVITERA: I'm sorry. What did I say?

1 THE COURT: Judge Lewis.

2 MR. PRIVITERA: Okay. We are collaterally
3 estopped in part, as any litigant is, by that
4 judge's decision. We were collaterally estopped
5 from relitigating a preliminary injunction. We
6 were collaterally estopped from relitigating
7 whether or not a final decision had been made.
8 Yes, that case is binding in those respects. But
9 he didn't reach the merits because the merits
10 weren't at issue and that's the essence of his
11 opinion.

12 The amicus brief takes the same position
13 with respect to that, your Honor, and I just
14 don't see in any of the cases they have cited
15 that a case that is essentially remanded to an
16 agency can't then be heard on the merits when a
17 court earlier has decided that the case is
18 premature.

19 So, your Honor, I think in all due respect
20 to Judge Ryan, his language, which is all over
21 the place, is dicta, it was not necessary to his
22 determination, a fundamental element of
23 collateral estoppel in all of the cases that are
24 cited by both parties, and therefore it is not
25 binding and your Honor is free, just as you were

1 free to decide the stay here, to decide in your
2 own judgment the merits of this case.

3 THE COURT: Aren't you collaterally estopped
4 on the Agricultural and Markets Law 305-a claim?

5 MR. PRIVITERA: No, your Honor, because he
6 didn't decide that on the merits either.

7 THE COURT: Didn't you assert that -- not
8 you, you weren't counsel then. Wasn't it
9 asserted before Judge Ryan that 305-a precludes
10 the Agency from exercising jurisdiction?

11 MR. PRIVITERA: Yes, your Honor.

12 THE COURT: And aren't you now claiming that
13 305-a precludes the Agency from exercising
14 jurisdiction?

15 MR. PRIVITERA: Yes, your Honor.

16 THE COURT: So how is it different?

17 MR. PRIVITERA: It's different because now
18 we're here before you on the merits, and when he
19 decided that matter he said it was premature.
20 The only thing that was necessary to his decision
21 was a remand to the Agency. He did not decide
22 the merits of that claim. In the context of the
23 dispute before him at that time, the most he
24 could have decided was that we were not likely to
25 prevail on the merits.

1 THE COURT: In his decision -- I guess I'm
2 not sure I read it the same way you do. But I'm
3 not convinced one way or the other. But in his
4 decision, page 6, doesn't he address the purely
5 legal question of whether 305-a supersedes the
6 APA authority, and he finds that it does not?
7 That's not a factual determination, whereas all
8 the other issues, including whether the
9 structures were agricultural use structures or
10 single family dwellings or whatever they are,
11 those are factual determinations for which the
12 Agency had not acted. But isn't this a purely
13 legal issue?

14 MR. PRIVITERA: This is a purely legal issue
15 as to which Judge Ryan clearly expressed an
16 opinion which was not necessary to his decision
17 and therefore not binding. There's no question
18 that he said what he said, your Honor.

19 THE COURT: Well, if he had found that 305-a
20 superseded Agency jurisdiction, wouldn't he have
21 granted you judgment and said they don't have
22 jurisdiction?

23 MR. PRIVITERA: If he had found that,
24 your Honor, he may have entered a preliminary
25 injunction against the enforcement and then that

1 would have been binding on both parties.
2 Instead, what he did was denied a preliminary
3 injunction and remanded it for a hearing on the
4 merits.

5 THE COURT: All right. Let's address this
6 issue before we move on to the others, how's
7 that?

8 MR. PRIVITERA: That's fine, your Honor.

9 THE COURT: Because I want to find out from
10 Ms. Simon not only her position on this but what
11 the effect is of her partial answer. That's a
12 new one for me, I've never seen that before in my
13 23 years of my civil practice, so I'm intrigued.

14 MS. SIMON: I'm smiling, but I'll start with
15 the issue of dismissal. And I'm reading from the
16 Amended Complaint in 2007 of Lewis Farm where
17 they specifically ask for a judgment in the form
18 of a declaration that the APA does not have
19 jurisdiction and that it is in direct conflict
20 with Agriculture and Markets Law. They clearly
21 sought such a declaration. They clearly got the
22 declaration from Judge Ryan. What they did not
23 get and what they did not like is the answer.
24 Judge Ryan said there is jurisdiction here.
25 Otherwise, why would he have sent it back to the

1 Agency for further administrative proceedings, if
2 there was no jurisdiction? This is clearly
3 collaterally estopped. It is fundamentally
4 unfair to compel the Adirondack Park Agency to
5 argue again in the same court the exact same
6 issue of jurisdiction.

7 THE COURT: Well, let me ask you this --

8 MS. SIMON: Yes.

9 THE COURT: -- looking at the transcript of
10 the oral argument before Judge Ryan on page --
11 starting at 14 over to 15 -- you were arguing or
12 presenting argument to Judge Ryan and you said
13 there were a number of issues raised, and then
14 you went on, on page 15, to say this: "Yes. All
15 of these issues, whether they are really single
16 family homes, whether they are agricultural use,
17 whether they are resource or class A, class B,
18 these are all particular decisions that have to
19 be made."

20 MS. SIMON: Yes, your Honor.

21 THE COURT: Hold on.

22 "Staff has started the process but they have
23 not made a final determination. The
24 commissioners don't all ultimately agree with
25 what the staff forwards to them, so it's

1 premature for us to debate this because the
2 Agency hasn't decided yet."

3 And then you went on, and didn't you argue
4 that someone would have to wait for the Agency to
5 act and then they could bring a lawsuit to
6 challenge the determination of the Agency?

7 MS. SIMON: Yes. Yes, your Honor.

8 THE COURT: So why can't they challenge the
9 determination of the Agency now?

10 MS. SIMON: They absolutely can. I'm only
11 asking ing for dismissal of claims three and five
12 through ten, all of which are purely
13 jurisdictional questions. We cannot revisit
14 those issues because they were previously
15 decided. Everything else can be addressed,
16 although I am moving to dismiss two other claims
17 for other grounds. So yes, your Honor, to be
18 clear, they have every right to be here in the
19 Article 78 proceeding, challenging this
20 determination is appropriate. The parts of it
21 that are not appropriate are purely the issues of
22 whether the APA has jurisdiction and whether
23 Agriculture and Markets Law Section 305-a
24 supersedes the APA Act. Those two things were
25 determined by Judge Ryan already.

1 THE COURT: But hold on. In his decision at
2 page 7 he says, "If after receiving a
3 determination from the commissioners, the
4 plaintiff" -- meaning Lewis Family Farm -- "is
5 still dissatisfied, they are free to file an
6 Article 78 proceeding at which time this Court
7 may review the actions of the APA. Until that
8 time, this matter constitutes an internal matter
9 in which the Court will not interfere."

10 Where in that determination does he limit
11 Lewis Family Farm to nonjurisdictional issues to
12 be reviewed?

13 MS. SIMON: I think by the plain language of
14 his earlier pages in the Order, where he
15 specifically -- it was essential and necessary,
16 as the case law requires, for him to make a
17 jurisdictional determination. Otherwise, there
18 was no point of sending it back to an agency that
19 did not have jurisdiction. So my answer would be
20 similar to what the Court of Appeals did in Hunt
21 Brothers, which plaintiffs/petitioners Lewis Farm
22 cites in support of their position. The Court of
23 Appeals made several jurisdictional claims in
24 Hunt Brothers and yet still found it premature
25 for review. So if the Court of Appeals could do

1 it in Hunt Brothers, which is very similar here,
2 challenging jurisdiction after they initially
3 submitted to jurisdiction, I think it's
4 appropriate here. And I think it was -- most of
5 the case law says was this part of this essential
6 and necessary, and I think we made that test.

7 THE COURT: Let me ask you: What was
8 pending at the time that this lawsuit was filed
9 and the decision was rendered? Was there any
10 cease and desist ordered issued?

11 MS. SIMON: There was a cease and desist
12 order.

13 THE COURT: Issued by whom?

14 MS. SIMON: The Agency.

15 THE COURT: The entire Agency or staff?

16 MS. SIMON: Staff.

17 THE COURT: All right.

18 MS. SIMON: And a permit application.

19 THE COURT: But wasn't there also a
20 settlement agreement that had been sent by Agency
21 staff to the Farm in which there was a \$10,000
22 proposed civil penalty?

23 MS. SIMON: Yes, your Honor.

24 THE COURT: All right. And how was it --
25 how was it necessary for Judge Ryan to make a

1 determination on jurisdiction over these, over
2 this project, for him to decide whether or not
3 the case should go back to the Agency for a final
4 determination? Because I think you said in front
5 of Judge Ryan that staff can't make these final
6 determinations, only the full Agency can.

7 MS. SIMON: Correct. And I am not
8 questioning their right to challenge the Agency's
9 determination. I am questioning their right to
10 challenge the jurisdiction, the initial
11 jurisdiction that has already been determined by
12 Judge Ryan.

13 THE COURT: And you think that because
14 that's been made, that even though the Agency, at
15 least the enforcement committee to which has been
16 delegated certain authority, that their actions
17 cannot now be challenged on jurisdictional
18 grounds?

19 MS. SIMON: On three jurisdictional grounds
20 only, and only on the claims I cite. The
21 Adirondack Park Agency Act jurisdiction, the
22 Rivers Act jurisdiction, and only Agriculture and
23 Markets Law Section 305-a, not the other
24 agricultural law provisions or the constitution
25 provisions of New York State that they are

1 challenging.

2 THE COURT: But isn't it a factual issue as
3 to whether or not this project constitutes an
4 agricultural use that may be exempt from certain
5 jurisdiction of the Agency? Isn't it a factual
6 issue as to where this project was located,
7 whether or not it was within the setback of the
8 Rivers Act or not? Aren't all these factual
9 issues that Judge Ryan indicated were for the
10 Agency to determine first?

11 MS. SIMON: I think, your Honor, the
12 affidavits that we submitted in Judge Ryan's
13 court addressed the location and identified the
14 homes. The Agency had already identified the
15 homes as being within one-quarter mile of the
16 Bouquet River -- sorry if I'm pronouncing it
17 wrong. That made it jurisdictional, and in
18 addition, in a Resource Management Area, which is
19 already part of a map that is the official map of
20 the Adirondack Park. And Judge Ryan had some
21 affidavits showing that there was -- the actual
22 location of these homes.

23 THE COURT: Didn't he determine, if
24 anything, that these are agricultural use
25 structures?

1 MS. SIMON: Did he determine that?

2 THE COURT: Yeah, did he determine that.

3 MS. SIMON: He determined that the
4 agricultural use structures in this -- I'd be
5 better off reading from it myself. Can I?

6 THE COURT: Certainly. Please tell me what
7 you're reading from so I can --

8 MS. SIMON: Yes. I'm going to go back to
9 about page 5, I think. "The plaintiff argues
10 that the houses are agricultural use
11 buildings.... However, when read in its
12 entirety, that section does not support
13 plaintiff's interpretation." And I'm on page 5.
14 I think that's Judge Ryan saying these are not
15 agricultural use structures pursuant to the APA
16 Act.

17 What's raised in this lawsuit that I think
18 is a question still, your Honor, is what
19 applicability does the Agriculture and Markets
20 Law definition have to this project.

21 THE COURT: Well, wasn't he making a factual
22 determination then?

23 MS. SIMON: I'm not following your question.

24 THE COURT: How can he make a determination
25 as a matter of law without some factual basis? I

1 mean --

2 MS. SIMON: Well, I believe, your Honor, we
3 provided pictures. They were actual homes. They
4 were not barns, they were not silos, they were
5 not sheds.

6 THE COURT: Was your motion to dismiss a
7 summary judgment motion or was it under 3211,
8 failure to state a cause of action?

9 MS. SIMON: No, it was not summary judgment,
10 your Honor, because there was no meeting of
11 the -- what's the term? Not meeting of the
12 minds, but a full answer. There couldn't have
13 been a summary judgment motion. It was a motion
14 to dismiss -- we had a number of grounds
15 actually.

16 THE COURT: Based purely on the pleadings,
17 right?

18 MS. SIMON: We had a number of grounds. And
19 I'd have to look to tell you what all of them
20 were, but one of them was prematurity.

21 THE COURT: All right. Go ahead.

22 MS. SIMON: I believe, your Honor, that it's
23 a legal finding that Judge Ryan made on these
24 three acts -- Rivers Act, APA Act, and 305-a of
25 Ag and Markets. These are legal determinations

1 based on his reading of the statute. And he even
2 says in one section, based on the plain reading,
3 when he's referring to Ag & Markets -- from a
4 plain reading of the section, it applies only to
5 local laws. So I think, your Honor, he was just
6 reading the statute and saying they are located
7 in the Adirondack Park -- there's no doubt about
8 that, no dispute about that -- they are located
9 in a Resource Management Area within one-quarter
10 mile of a river that is protected. The
11 protection of the river is in the statute, in the
12 regulations so --

13 THE COURT: I can see your argument on 305-a
14 because his determination can be made just from
15 the four corners of 305-a. He doesn't have to
16 look anywhere else. He can look at it and say,
17 you know, that really only applies to local
18 governments, it doesn't apply to state agencies
19 it has no application. I can see him doing that.
20 But when you get to deciding whether it's an
21 agricultural structure, you can't just look and
22 say whether or not this particular project falls
23 within that definition. There was no factual or
24 evidentiary hearing here, and so I'm having
25 difficulty trying to figure out how under his

1 decision there's any collateral estoppel effect
2 to his statement regarding whether they are
3 agricultural use structures or not.

4 MS. SIMON: Okay. Your Honor, I think it's
5 instructive to look at -- and I don't have them
6 all in front of me -- the documents that were
7 submitted to Judge Ryan's court, and they
8 included photographs and locations and affidavits
9 of the locations. The Lewises did not dispute
10 where the homes were built. There was no dispute
11 they were within one quarter-mile of the river.
12 The Rivers Act is pretty clear, one quarter of a
13 mile from the river triggers jurisdiction. I
14 think that Judge Ryan looked at the affidavits
15 submitted and rightly said, based on the
16 one-quarter mile rule law, that the APA does have
17 jurisdiction in both instances.

18 THE COURT: Okay. But if he made this
19 determination, then didn't he overstep what I
20 guess has been a fundamental principle of
21 judicial involvement here, which is that a court
22 should defer to an interpretation given by an
23 agency charged with it's enforcement if its
24 interpretation is neither irrational or
25 unreasonable or inconsistent with the governing

1 statute? And at that time there will be no
2 Agency interpretation, correct?

3 MS. SIMON: I appeared for the Agency and
4 provided affidavits from the Agency that their
5 interpretation of this law is that they have
6 jurisdiction.

7 THE COURT: The Agency adopted a resolution
8 or made a determination that these structures did
9 not constitute an agricultural use structure?

10 MS. SIMON: There was no determination,
11 your Honor.

12 THE COURT: That's what I'm getting at. So
13 how could Judge Ryan have made that
14 determination? Didn't he thereby usurp the
15 authority of, and I think the primary authority,
16 of the Agency to make that initial
17 interpretation?

18 MS. SIMON: I was encouraging him on behalf
19 of the Agency to make that determination based on
20 affidavits from the Agency that they verified,
21 your Honor. That was the Agency's position. It
22 still is. So I think Judge Ryan rightly took the
23 Agency's sworn statements of their interpretation
24 of the statute and made a determination fully
25 consistent with the Court of Appeals

1 determination in Hunt Brothers on whether the
2 Mine Lands Reclamation Law and the APA Act
3 triggered jurisdiction in that situation. So I
4 think it was appropriate.

5 And if I might add, your Honor, they filed a
6 Notice of Appeal which is now before -- will be
7 before the Appellate Division, if they perfect it
8 by July 28th. This issue that you are raising is
9 now going to be dealt with in the Appellate
10 Division, if they perfect. If they do not
11 perfect, then I believe it becomes the law of the
12 case here. They had ample opportunity to
13 perfect. They had nine months to perfect, and
14 they failed to perfect. They asked for an
15 extension until September and the court said if
16 they fail to perfect by July 28th, it will be
17 dismissed.

18 THE COURT: Well, let me go back to the oral
19 argument and maybe you can explain this statement
20 by you to Judge Ryan. Page 26 of the oral
21 argument, the first full paragraph down. You
22 state: "... the issue of the final
23 determination, the jurisdiction, the Agency has
24 not acted yet as an agency, and there's no
25 determination, there's no written document that

1 they have presented to say this is the
2 determination. They need to meet all three of
3 these tests, not just one. They fail on that."
4 Aren't you then telling Judge Ryan that the
5 question of jurisdiction is for the Agency and
6 there's been no determination and it's up to the
7 Agency?

8 MS. SIMON: I'm on page 26. Can you tell me
9 where you started reading?

10 THE COURT: The paragraph that begins. "And
11 particularly."

12 MS. SIMON: Okay.
13 (Pause in proceedings.)

14 MS. SIMON: I think that what I'm trying to
15 say there, your Honor, is regarding a
16 determination -- and I think that still meets
17 what I'm saying here today -- and that is
18 everything -- they can challenge anything in this
19 determination. But the primary question of
20 jurisdiction has already been decided. They
21 would not have gone back to the Agency if there
22 was no jurisdiction. Had Judge Ryan said to
23 them, the APA has no jurisdiction, that would
24 have been the end of it, we wouldn't be here.
25 But because they did -- and by necessity, he had

1 to make a decision in order for it to go back to
2 the Agency. It never would have, if he didn't
3 make that jurisdictional determination.

4 And according to the case law that I have
5 cited, I need to prove that that determination
6 was necessary and essential, and I think that I
7 have shown -- and in light of cases like
8 Hunt Brothers, the Court of Appeals has done the
9 same thing, making a determination on
10 jurisdiction and then saying you need to work
11 with the Agency, you need to go through the
12 permit process or go through the determination
13 process. I think that what Judge Ryan did here
14 was reasonable and if the Appellate Division
15 disagrees, they win.

16 THE COURT: I can't wait for the Appellate
17 Division to decide this. I've got to do it.

18 MS. SIMON: Well, your Honor, I actually
19 think that collateral estoppel bars a second
20 determination from a court in concurrent
21 jurisdiction. That's my argument. So I think
22 you can dismiss the claims three and five through
23 ten and just address whether this determination
24 was rational, whether it was arbitrary and
25 capricious or in some other way improper use of

1 discretion or whatever. That is perfectly, you
2 know, within their rights to challenge. And I am
3 prepared to argue those other claims on the
4 merits.

5 THE COURT: Well, we have probably beat this
6 to death, but there are other -- you said in
7 another instance, on page 14, in which you were
8 discussing the Essex County v. Zagata case --
9 which I'm very familiar with Zagata -- you were
10 talking about talking about there being a final
11 determination and that, in Zagata, that there was
12 a jurisdictional issue involved. And then you go
13 on to say on, page 14 at the end of the paragraph
14 right above the one in the middle -- it begins
15 with, "And the courts" -- and you say here: "And
16 the courts said time after time, over every step
17 in the application process, you can't just sue
18 because it's not done, give the Agency a chance,
19 even if you think it's too long to finish the
20 process, and then sue." Weren't you then wrong
21 citing the Zagata case, saying this is an issue
22 of jurisdiction, it's up to the Agency to
23 determine that and then, if they are not happy,
24 they can sue?

25 MS. SIMON: I'm saying this is an issue that

1 needs a final determination, a final decision, if
2 I remember the context of this, not staff sending
3 out a proposed settlement. It's not staff making
4 offers of settlement, it's let the Agency go
5 through the whole process.

6 THE COURT: So let's get back to my point
7 before which is: Isn't, legally, it primarily
8 the Agency's responsibility to determine
9 jurisdiction and then, if somebody contests it,
10 they can have judicial review, right? Are we now
11 in the state -- if I accept your position, aren't
12 I saying that there is now a new procedure in
13 New York State where, if the Agency wants to, it
14 can bring an action before an application against
15 somebody and say we want a determination, Judge,
16 as to whether we have jurisdiction, and if some
17 judge says you have jurisdiction, that forecloses
18 the property owner or developer from ever
19 relitigating that issue again?

20 MS. SIMON: No, your Honor.

21 THE COURT: Why not?

22 MS. SIMON: Because in NYPIRG, which is a
23 case they cite, you can't bring a hypothetical
24 situation, I have to have a real live
25 controversy. And what we had here was a real

1 live three buildings already being put up in
2 violation of the law. The Agency clearly
3 asserted its jurisdiction, they clearly ignored,
4 I guess you would say, the jurisdiction, and
5 that's why the Court needed to make a
6 determination. NYPIRG was a whole hypothetical
7 situation about a future event that may or may
8 not ever occur. And the court said, no good, you
9 can't get an advisory opinion for that. It has
10 to be a real live controversy today.

11 THE COURT: Wasn't the only controversy then
12 though the status of the application and the
13 Agency's settlement offer --

14 MS. SIMON: No, your Honor.

15 THE COURT: -- and the cease and desist
16 order?

17 MS. SIMON: No. Your Honor, on June 27th or
18 thereabouts, on or about -- I believe it's in the
19 record.

20 THE COURT: Right.

21 MS. SIMON: -- they began installing these
22 homes. They brought them in by flatbed trucks
23 and the APA officer went out, observed it, saw
24 that they had placed two homes already and then
25 they were going to -- I don't know, structurally,

1 how they put them together. But they put up the
2 roofs and they then put in shingles or whatever.
3 This was happening at the time. And literally
4 the next day after the Agency issued the cease
5 and desist order we were served, the Attorney
6 General's Office and the Adirondack Park Agency,
7 with the first lawsuit.

8 THE COURT: All right. But again there was
9 no determination at that time of a violation of
10 law. Staff believed there was, staff made their
11 own determination that there was, but there had
12 been be no Agency decision or any court decision,
13 had there?

14 MS. SIMON: I would have to agree that there
15 was no final determination of the Agency. I
16 argue that they had to wait for that. I would
17 also agree that there was no court determination.
18 But now we're in a different place one year
19 later, we have a court determination and we have
20 a final Agency determination. And I think at the
21 time that Judge Ryan made his decision there
22 was -- they claimed imminent harm, there was an
23 imminent controversy that needed resolution.
24 They needed to know if they could keep building
25 these houses or not.

1 THE COURT: Let me ask you this: If the
2 Agency thought that the issue had been determined
3 already, why was there so much argument by
4 Mr. Van Cott eloquently before the enforcement
5 committee as to why the Agency had jurisdiction
6 and why these were in violation? Why was there
7 all that? Why couldn't he have just stood up and
8 said, we have this decision from Judge Ryan that
9 says we have jurisdiction. Why couldn't he have
10 just done that?

11 MS. SIMON: I think, your Honor, it's a
12 result of the allegations that they made. They
13 did not accept Judge Ryan's determination, they
14 did not abide by it. After the determination in
15 the end of September they continued installing
16 these homes. It was the Agency's attempt,
17 saying, we'll, they are not paying attention to
18 the law, they are not abiding by the law, now
19 what do we do, we need this determination to be
20 final from the full Agency, and they proceeded
21 with what they thought was the best and the
22 legally correct way to issue their final
23 determination, give them a full and fair
24 opportunity to be heard during the course of that
25 determination. And now here we are. Again, they

1 have every right to be here, they have every
2 right to sue, but not on the issue that
3 Judge Ryan decided necessarily and essentially,
4 and that is they have jurisdiction. The Agency
5 never would have gone through all that process if
6 Judge Ryan said you do not have jurisdiction.

7 THE COURT: Well, what if he just said --
8 didn't he really say it's up to the Agency to
9 determine?

10 MS. SIMON: Not on the jurisdiction, I don't
11 think, your Honor. I think he said it's up to
12 the Agency to go through the process and decide
13 what they are going to do. Are they going to
14 issue a penalty or are they going to say, look,
15 staff was way off base, we don't think there
16 should be a penalty. There's some discretionary
17 issues there, but the statute is the statute.
18 Judge Ryan said there's jurisdiction. There's no
19 doubt there is jurisdiction.

20 THE COURT: Why didn't the Agency make a
21 determination as to whether or not the
22 agricultural use --

23 MS. SIMON: All they had to do was say
24 Judge Ryan decided. They appealed. They filed a
25 notice of appeal. It could have gotten

1 overturned.

2 THE COURT: So the Agency can make its own
3 determination because the appeal is pending but I
4 can't?

5 MS. SIMON: You, your Honor, can take any
6 action that you deem appropriate. And I am
7 smiling because this is your courtroom and I
8 would never say otherwise. However, I would say
9 this is going to be heard by the Appellate
10 Division in a short period of time, assuming they
11 file and perfect their papers by June 28th.

12 And by the way, if I could just put this on
13 the record, your Honor, when they requested an
14 extension to the Appellate Division to perfect,
15 they argued that they wanted to have an
16 extension 'til at least September to give you
17 time to rule here.

18 THE COURT: The Meyer rule.

19 MS. SIMON: We argued that that would be in
20 violation of collateral estoppel, you should not
21 give them an extension until September, so the
22 Appellate Division didn't grant their
23 extension 'til September, they granted it
24 just 'til June 28th. I say that just for the
25 record and for what it's worth.

1 I think our collateral estoppel argument
2 carries great weight and I urge you to dismiss
3 those claims.

4 THE COURT: All right. Let me, while you're
5 still here and have some breath yet -- the
6 Agency's position, as I understand it, is that if
7 your motion to dismiss on collateral estoppel
8 grounds is denied, that you wish to file a
9 further answer. Is that correct?

10 MS. SIMON: Yes, your Honor.

11 THE COURT: Now, you have filed the record
12 on return except for the answer.

13 MS. SIMON: We have filed, yes, that is, the
14 full record and return.

15 THE COURT: So the only thing that would be
16 filed subsequent to this, should I decide against
17 you on that motion, would be to file an answer,
18 correct?

19 MS. SIMON: The answer is filed in part.
20 What we would like is for the claims three and
21 five through ten, the jurisdictional claims, we
22 would like to be able to make our legal case
23 about those claims, why there is jurisdiction --

24 THE COURT: All right.

25 MS. SIMON: -- in a memorandum of law.

1 THE COURT: Okay. All right.

2 Mr. Privitera, under those circumstances, I
3 guess I should find out whether we want to deal
4 with the merits of those arguments at this time
5 because I have to decide that motion. The same
6 having been made, if I were to decide in the
7 Agency's favor, in whole or in part, that would
8 limit the argument on these other issues. I'll
9 give you the opportunity to argue today or we can
10 put it off 'til later, but I'm not going to have
11 another argument after today.

12 So how do you want to deal with it,
13 Mr. Privitera? Do you want to make your
14 arguments now?

15 MR. PRIVITERA: Yes, your Honor, if I may.

16 THE COURT: All right.

17 MR. PRIVITERA: And if I could just rebut, I
18 know your Honor does feel this matter has been
19 fairly well beaten, but I feel the essence of
20 Judge Ryan's decision is on page 7, the first
21 paragraph, your Honor, where he specifically says
22 he is not going to do what the Agency asked him
23 to do. He said what you just said. "Otherwise,
24 the Court condones a breach of the separation of
25 powers between the branches of government." I do

1 not have concurrent jurisdiction and I'm going to
2 defer on the weight. It also makes clear,
3 your Honor, in the last paragraph that he decided
4 nothing on the merits because he says, "Finally,
5 were the Court to consider the plaintiff's
6 request for a restraining order," and he goes on
7 to express his view with respect to that.
8 Clearly, your Honor, as the Agency had asked and
9 said on page 28 of the transcript, no
10 jurisdictional determination had yet been made.
11 That's what they said. And he therefore refused
12 to make a jurisdictional determination, although
13 there's a lot of dicta, and he sent it back to
14 the Agency and he said he was not going to
15 interfere.

16 Your Honor, they can't have it both ways.
17 They argued before that no determination had been
18 made. Now a determination has been made and,
19 therefore, it is up to the Court to decide the
20 merits.

21 Your Honor, we ask for an annulment of the
22 decision, the determination of March 25th, and we
23 ask that you -- of the Agency -- and we ask that
24 you prohibit the Agency from regulating any
25 aspect of farming, including all farm buildings,

1 all farm worker houses, and we ask that that
2 determination be made consistent with
3 your Honor's power under 7806.

4 THE COURT: On what basis would I make that
5 determination if they have no jurisdiction over
6 all those things? Not just in this particular
7 case but in any case, how could I make that
8 determination, based on what?

9 MR. PRIVITERA: You can make that
10 determination based on the facts and law of this
11 case, your Honor, as I will summarize for you in
12 the next ten minutes.

13 THE COURT: You're not going to cite
14 Article 14 of the constitution, are you?

15 MR. PRIVITERA: No, your Honor. I think
16 that you have a duty, a judicial duty, to avoid
17 that if you can, and I think there's a fair
18 reading of the APA Act that's consistent with the
19 constitution.

20 THE COURT: So you're withdrawing that
21 particular --

22 MR. PRIVITERA: No, your Honor. If
23 your Honor finds that the APA Act allows the
24 Agency to regulate farming in any respect, then
25 the statute is unconstitutional and it's an

1 unconstitutional reading of the statute. The
2 only way to read the statute consistent with the
3 constitution is for your Honor to rule that they
4 have absolutely no jurisdiction over any aspect
5 of farming whatsoever.

6 THE COURT: That's what Article 14 would
7 require?

8 MR. PRIVITERA: Well, your Honor, that's
9 what we think it would require. That's what the
10 Farm Bureau says and thinks it would require.

11 THE COURT: Let me ask you this: Doesn't
12 that constitutional provision just require that
13 the legislature enact statutes which promote
14 farming and all these other things? Isn't it in
15 the discretion of the legislature to do that?

16 MR. PRIVITERA: No, your Honor. That is --
17 it hasn't been construed yet. It would be up to
18 your Honor to construe it, if you thought that
19 you had to. But the way that constitutional
20 provision reads, it makes clear, your Honor, that
21 the conservation of farm land is as important as
22 conservation of the forest preserve. It makes
23 clear that every agency in this state has an
24 obligation, a constitutional obligation, to
25 encourage farm development -- to encourage farm

1 development, not just to stay away from farming,
2 but an affirmative obligation to encourage farm
3 development. And that is why we refer to it as
4 the pro farm development clause which is, as yet,
5 to be construed.

6 THE COURT: Are you saying that if the
7 Agency has jurisdiction over farm land and farm
8 structures by reason of the legislative stream
9 enacted under Article 27 of the Executive Law, if
10 that is the case, then the APA Act violates that
11 provision of the constitution to the extent it
12 governs farm land and farm structures?

13 MR. PRIVITERA: Yes, your Honor. And,
14 your Honor, that is because the affirmative
15 obligation to encourage the development and
16 improvement of farm land is imbedded in the
17 constitution itself and it overrides everything.

18 I think, however, your Honor there's a safer
19 way to rule and a safer way to find justice here
20 consistent with the constitution. Because when
21 that constitutional provision was passed in 1971,
22 the legislature then crafted the Adirondack Park
23 Act and then crafted the Right to Farm Law and
24 then crafted all of the powers of the
25 Commissioner of Ag & Markets to protect farm land

1 that is in farm districts as designated by the
2 counties and found to be farm districts and,
3 thus, protected by the farm law by the
4 Commissioner of Ag & Markets. And, your Honor,
5 consistent with our reading of the statute,
6 consistent with the Farm Bureau's reading of the
7 statute, it's clear that no aspect of farming can
8 be touched by the Agency whatsoever.

9 Your Honor, first, as to the facts, because
10 I know your Honor asked about what happened
11 before the Agency. Well, before the Agency there
12 was no dispute at all about the essential facts.
13 They are summarized in pages one through three of
14 our brief. Not a single phrase or turn of a
15 phrase of those three pages was disputed
16 whatsoever. It included photographs that are
17 attached as exhibits to tabs 9 and 13 of the
18 return. It included a substantial affidavit from
19 Barbara Lewis, the farmer here, with respect to
20 the farm worker houses. It included the detailed
21 expert opinion of one of the top organic farmers
22 in the world, not less the state, Mr. Klaas
23 Martens, K-l-a-u-s. And none of this was
24 disputed whatsoever.

25 In fact, those facts show that the Lewis

1 Family Farm razed fifteen old farmhouses that
2 couldn't be lived in and built four on their
3 acreage. And it found that, and the facts are
4 clear, that these are farm worker houses,
5 specifically for farm workers and exclusively for
6 farm workers, and there's no dispute about that.
7 These facts show that these farm worker houses
8 are necessary to the viability of the farm,
9 integral to the viability of the farm, in full
10 compliance with town law, as the town building
11 inspector found, and therefore met the only
12 requirements that one must meet under the
13 Lysander case and all of the policies of the
14 Commissioner of Ag & Markets. And, of course,
15 found also that the three houses are in a cluster
16 by the barns with a common driveway and a common
17 septic and a common well in front of the barns,
18 so you can watch the barns and work like a farmer
19 and even walk to work and save on the gas that is
20 now gold and is crushing farms like everyone
21 else.

22 THE COURT: Where's the dormitory building?

23 MR. PRIVITERA: The dormitory building,
24 your Honor, is the middle of the horseshoe
25 formation with the three houses and the common

1 driveway and common infrastructure on Farm Road
2 right in front of Farm Plaza. They are --

3 THE COURT: Was that built on an existing
4 footprint?

5 MR. PRIVITERA: Your Honor, there were many
6 houses and places where people lived at the old
7 Walker farm. I don't know exactly the
8 relationship between, and there's nothing in the
9 record with respect to the relationship between
10 where the various dwellings were on the old
11 Walker farm and where these three houses are. I
12 will tell you, your Honor that according to the
13 record Mr. Miller, APA employee, filed an
14 affidavit saying that one of the houses was on
15 the footprint of one of the Walker farmhouses and
16 therefore was legal.

17 THE COURT: And is that why the Appellate
18 Division vacated that part of my stay decision
19 which precluded you from using the dormitory? Is
20 that why they did that, because the dormitory was
21 on an existing footprint?

22 MR. PRIVITERA: That was one of the
23 arguments we made, your Honor. I don't know
24 entirely. I think it had more to do with our
25 effort to fill it and maintain the status quo.

1 It had already been used by farm workers. It's
2 the only house that's finished, your Honor. This
3 farm is suffocating because the other two houses
4 have just been shells for 15 months. The
5 dormitory has plumbing, electrical and furniture.
6 It's finished out, it's been used. So I think,
7 more than anything else, the Appellate Division
8 found that the status quo meant -- particularly
9 when we were hoping to fill that building with
10 farm workers from another country -- that the
11 status quo meant that it could be used, just a
12 slightly different sense of what the status quo
13 meant, your Honor.

14 But to return, the Agency's own affidavits
15 say that at least one of the houses, and we think
16 it's the dormitory building, is on the footprint
17 of a farmhouse. Oddly enough, the determination
18 of the Agency found that all three houses were
19 illegal, and there's nothing in the record in
20 that regard. Toward the end of our brief we say
21 there's no substantial evidence in support of
22 that issue. However, you don't have to reach it
23 if your decision turns on the bigger issues that
24 are a part of our fundamental claims with respect
25 to the scope of the statute.

1 But the important thing is, your Honor,
2 there's no dispute about the facts. These are
3 farm worker houses. And the Commissioner of Ag &
4 Markets made a finding, a land use determination,
5 a final land use determination under the Right to
6 Farm Law, after an on-site investigation of the
7 farm as documented in his two letters. They are
8 both sort of buried under tab 11 and tab 10,
9 your Honor. I'm sorry I can't be any more
10 specific than that.

11 THE COURT: Let me ask you with regard to
12 that: He wasn't interpreting the APA statute in
13 that regard, was he?

14 MR. PRIVITERA: No.

15 THE COURT: So isn't it for the Agency to
16 determine itself whether under its own statutory
17 scheme and its own definitions these structures
18 fall within one or more of those definitions?

19 MR. PRIVITERA: If it had any jurisdiction
20 with respect to farming, perhaps, your Honor. As
21 I recall, they had to make a determination
22 whether or not they are agricultural use
23 structures.

24 I'm talking about the facts, your Honor. If
25 you look at that tab, your Honor, they had to

1 make their own determination. But look under
2 tab 11 and take a look at his factual
3 determinations of February 1, 2008. He did an
4 investigation. They don't dispute a word of
5 this, by the way, your Honor. They don't dispute
6 a word of any of his findings of fact. And it is
7 a land use determination, your Honor, it is not
8 just an agricultural determination, because
9 that's what the statute says. 308, subdivision 4
10 is a land use determination. And he, the
11 commissioner, does have land use authority under
12 the Right to Farm Law to make this determination.
13 And he found that these farmhouses were necessary
14 to the viability of this farm, integral to the
15 viability of the farm, that providing farmhouses
16 for workers is a common practice in farming and
17 part of the farm operation, and that no
18 subdivision had taken place and that they could
19 not be subdivided. These were findings of fact,
20 as verified by Ruth Moore, his counsel, and,
21 your Honor, they are indeed findings of fact that
22 were not disputed before the Agency.

23 And therefore the question now is, in the
24 face of all of these undisputed facts, how can a
25 determination be made that these farm buildings

1 are not farm buildings? Because farm buildings
2 and agricultural use structures are clearly
3 synonyms. And his determination was that they
4 are -- whether you call it agricultural use
5 structure or farm buildings, his determination
6 was that these are no different, no different
7 from a barn or a silo or any other agricultural
8 use structure.

9 So let's turn to the law. Your Honor, we
10 presented to the Agency a piece of their own
11 website that says all agricultural use structures
12 are nonjurisdictional. They didn't dispute that.
13 That's part of their own website. So if this is
14 an agricultural use structure, these three
15 houses, then they are nonjurisdictional by their
16 own words. What's the definition of an
17 agricultural use structure under the Park Act?

18 THE COURT: Let me ask you this: Assuming
19 that the website contradicts Article 27 of the
20 Executive Law, wouldn't the statute control?

21 MR. PRIVITERA: Yes. But it doesn't and
22 they don't argue that it does. But it would,
23 your Honor, that's right. They do not dispute
24 that agricultural use structures are
25 nonjurisdictional throughout the park.

1 As a matter of fact, your Honor, the
2 legislature went further than that. When they
3 passed the Park Act at the same time that they
4 passed the Right to Farm Law, two years after
5 this constitutional amendment was made, and you
6 know a constitutional amendment has to go through
7 two legislatures and be voted on by the people,
8 this was fresh in everyone's mind. Because we
9 were losing and -- look at the footnotes to the
10 Farm Bureau's brief -- we were losing, and still
11 are losing, massive amounts of farm land. So
12 what it was all about was conserving farm land
13 and protecting it from further development by
14 giving farmers the elbow room they need to
15 develop. Instead, your Honor, that's not exactly
16 what we have suffered -- encouragement. We have
17 suffered 15 months of complete stagnation of this
18 enterprise. The definition of agricultural use
19 structure, quote, means any barn, stable, shed,
20 silo, garage, fruit and vegetable stand, or other
21 buildings or structure -- a defined term,
22 structure -- directly and customarily associated
23 with agricultural use. So, your Honor, it may be
24 that the Commissioner's February 1 finding was
25 not a finding under the Park Act. It still was a

1 finding as a matter of fact that these three
2 buildings are structures that are directly and
3 customarily associated with agricultural use.
4 That's what he said. And it's a land use
5 determination that he made. He said this is a
6 land use that is customarily done by farmers.
7 It's a common practice, it's integral and it's
8 necessary to the viability of the farm.
9 Remember, the constitution says we're supposed to
10 do everything to make farms viable.

11 Now, what else did the legislature do
12 besides giving the Park Agency this very broad
13 definition of agricultural use structures that
14 encompasses everything that's commonly used in
15 farming? They not only said agricultural use
16 structures are exempt everywhere in the Park,
17 they said they are exempt from the height
18 restrictions and completely unregulated. So,
19 your Honor, a farmer could build an orange and
20 purple barn that's a hundred feet tall and two
21 hundred feet long on the top of a visible ridge
22 and the Agency would have no jurisdiction,
23 notwithstanding whatever particular concerns they
24 might have -- any agricultural use structure, a
25 silo, a grain bin. We have a sixty-foot grain

1 bin. That's more than forty feet, the
2 fundamental height limit that the Agency so often
3 wants to enforce.

4 THE COURT: Is that a preexisting structure?

5 MR. PRIVITERA: No.

6 THE COURT: Did the farm get a permit for
7 that?

8 MR. PRIVITERA: No, we didn't get a permit
9 for that. We didn't get a permit for the entire
10 barn plaza.

11 And, your Honor, look at the barns and barn
12 plaza. And, actually, I'd encourage you to drive
13 by. You could take judicial notice of it. They
14 are actually designed by a well-known landscaping
15 architect, and these houses blend in with them.
16 Nobody says that these houses are ugly. As a
17 matter of fact, the Agency says we're lucky --
18 that's what it says in the transcript of the oral
19 argument -- we're lucky because these houses are
20 situated in such a way and so tasteful that we
21 might even get a permit or we would probably get
22 a permit for them if we would simply submit to
23 jurisdiction, jurisdiction that allows them
24 control for the rest of the farm.

25 I submit, your Honor, constitutional issues

1 are not really supposed to turn on luck, like
2 perhaps a person expressing himself or herself in
3 a way that is lucky enough not to offend other
4 people, being a determination as to whether or
5 not it's protected by the first amendment. But
6 nonetheless, your Honor, these structures here
7 and all agricultural use structures are
8 completely beyond the Agency's jurisdiction.

9 THE COURT: What if they are in a Resource
10 Management Area and within 150 feet of the
11 protected river?

12 MR. PRIVITERA: They do have jurisdiction in
13 wetlands, to protect wetlands. It's really not
14 an ag use structure issue. I can't build a barn
15 in a regulated wetlands and I can't build a barn
16 on the edge of a river, it has to be 150 feet
17 away. So they have some jurisdiction. They have
18 some jurisdiction to protect narrow areas. And
19 specifically, your Honor, by the way, under the
20 Rivers Act, it's even clearer than that. It says
21 no permit is required if you're more than 150
22 feet away, which completely dissolves this
23 strange argument that somehow a subdivision has
24 occurred.

25 But nonetheless, your Honor, all

1 agricultural use structures are beyond the
2 appeal. Under 805-3(g)(1) the legislature
3 recognized that farming is an important and
4 viable matter within Resource Management Areas,
5 important to open space protection, important to
6 the economy of the region. In addition, under
7 815 they said as soon as this Agency is hatched,
8 as soon as it's born, we warn you, do not -- do
9 not -- regulate bona fide management of land for
10 agriculture use unless you promulgate
11 regulations -- another warning to stay away from
12 farming structures, your Honor.

13 THE COURT: Warning in the statute?

14 MR. PRIVITERA: That's in the statute.

15 THE COURT: That's under?

16 MR. PRIVITERA: 815-4 your Honor.

17 THE COURT: 815-4.

18 MR. PRIVITERA: And then perhaps the most
19 important signal to stay completely away from
20 farming -- and it's respected under the
21 constitution and the Right to Farm Law -- they
22 said the buildings didn't count. Look at the
23 definition of 802(50) for principal buildings.

24 Now, your Honor, remember, the Agency can
25 say what they -- you know, they call themselves a

1 State agency. But as the Court of Appeals said
2 in Hunt Brothers, they are the functional
3 equivalent of a local planning agency and a
4 zoning agency combined, that's all. That's all
5 they are. And they, like any other planning
6 board administer, a plan. Some towns have
7 comprehensive plans, some towns have zoning, some
8 towns don't, but whatever they have is what they
9 administer.

10 This land use plan is based on density,
11 that's the core of it. Hamlets can be developed
12 to their full extent and, as you get further out,
13 there are various density levels that are
14 allowed. In a Resource Management Area, it's the
15 most thinly allowed in terms of density and only
16 fifteen principal buildings per square mile are
17 allowed as a matter of law. That's to protect
18 the open space of the Resource Management Areas
19 to allow forestry, and farming if we are to get
20 through this case. Your Honor, that is the theme
21 of the Act.

22 But take a look at what the Agency said
23 about farms. This is the best evident sign that
24 says don't step onto a farm. The definition
25 says: All agricultural use structures and single

1 family dwellings or mobile homes occupied by a
2 farmer of land in agricultural use, his employees
3 engaged in such use and members of their
4 respective immediate families will together
5 constitute and count as a single principal
6 building.

7 What that means, your Honor, is that even
8 though the density requirements apply to all
9 others, all other structures with respect to
10 agricultural use structures, including farm
11 employee houses, they don't count, they are
12 invisible, they are immaterial to the plan, they
13 don't matter. The legislature said don't notice
14 them, they have nothing to do with density, we
15 just passed this constitutional provision and the
16 Right to Farm Law, we know what we're doing, we
17 have a theme here, and we say we don't care how
18 big the farms get, we don't care if they build
19 ten-story lodging for their workers, we don't
20 care how many farmhouses there are, how many farm
21 worker houses there are, how dense it gets, if
22 that's a successful farm, we don't care, it
23 doesn't count, hey, commissioners, don't look at
24 those, don't look over there. That's what that
25 definition says. It doesn't matter to the

1 central theme of the farm how dense a farm gets.
2 They are not principal buildings.

3 There's one principal building on the Lewis
4 Family Farm and there's one principal building on
5 any farm, and that's the farm owner's farmhouse
6 and that is a single family dwelling and that is
7 regulated as a single family dwelling and that's
8 why you need a definition of a single family
9 dwelling. And you know what? The legislature is
10 consistent on that too because the Commissioner
11 of Ag & Markets says, oh, the farm workers's
12 house, oh, that's not protected by the Lysander
13 case, that's not protected by the Right to Farm
14 Law. That's regulated by any local town in
15 accordance with their zoning laws. You can
16 regulate the farmer's house.

17 Similarly, the Commissioner of Taxation says
18 and we have cited all of these matters throughout
19 our brief, all of the sections of the tax law
20 that apply here. The Commissioner of Taxation
21 says, yes, that farmer's house, that farmer's
22 house can be taxed for its full value like any
23 other single family dwelling, but the farm
24 worker's houses, they have to be treated as an
25 agricultural use structure. They are entitled to

1 the ten-year benefit. That's the theme that's
2 throughout New York State law and that is --
3 those are all the things that are in the Park
4 Agency plan that say stay away from agricultural
5 use structures.

6 None of these things were considered by
7 Judge Ryan because the dispute simply wasn't
8 mature, and that's what he said. But
9 nonetheless, your Honor, that's how the Act
10 reads. And the Rivers Act follows the park plan
11 act like night to day because it says that
12 agricultural use structures are exempt and it
13 says that you only have to be 150 feet away from
14 the river with an agricultural use structure and
15 it's protected. And so, your Honor, if you find,
16 as the Commissioner did, as the Farm Bureau
17 finds, as we find, that farm worker housing are
18 agricultural use structures that are necessary
19 and integral and common and therefore covered by
20 the ag use structure definition of the Act, then
21 the farms are protected under the Rivers Act as
22 well and there's no violation there as well.

23 There's a back door argument that there's
24 been a subdivision of lands here, your Honor.
25 That's pleaded in and was found by the

1 commissioners in their determination. That's
2 very simply answered, your Honor. The definition
3 of subdivision says any subdivision of lands.
4 There's been no subdivision here. It's
5 interesting. If you look at the minutes that are
6 in the record, I think under the first or second
7 tab, if you look at the minutes of the very
8 meeting where the commissioners decided this
9 matter in March, March 13, where they heard the
10 matter, there was also a report by the Agency
11 enforcement lawyers as to the status of their
12 effort to call out illegal subdivisions. And
13 they said the way they were doing it was going to
14 the County Clerk's office and determining whether
15 there were any subdivisions on file that did not
16 have Agency permission. That's a common-sense
17 definition of subdivision. That's what the law
18 says -- subdivision of land. The way you
19 determine when a subdivision has occurred is by
20 going to the County Clerk's office and seeing
21 whether a deed was carved out or, perhaps, a
22 lease separately describing some land. But that
23 hasn't occurred here. These are all
24 unsubdividable. They are all occupied only by
25 the farm, and there's no dispute about this and

1 it wasn't challenged. They are clearly -- maybe
2 the Agency thought because these were nice houses
3 that it was a development in the first place and
4 got trapped pursuing the enforcement matter, but
5 clearly, your Honor, at this point in the record
6 there's no doubt that these are exclusively farm
7 worker houses and they cannot be divided and were
8 not divided.

9 Your Honor in the space of that statutory
10 scope of the Park plan how are we to interpret
11 the Park plan with respect to these houses? The
12 Lysander case is instructive, your Honor, on how
13 to approach this more than anything else because
14 the Court of Appeals says that when a statute
15 sets out to have a protective reach, and that's
16 their phrase -- and there's no doubt here in
17 New York State that we have carved out a
18 protective reach with our constitution and our
19 Right to Farm Law to protect farmers so that they
20 can survive without losing these lands that the
21 people need for food, which is what the basis of
22 this conservation clause amendment was, to
23 conserve the land for the people for food.

24 That protective reach, how do we determine
25 whether or not the houses are within that reach?

1 The Court of Appeals says the only way to find
2 that, that an element is not beyond that
3 protective reach, is if the legislature
4 specifically said that it was excluded. That's
5 what they said in Lysander. Because in Lysander
6 they were dealing only with the words on-farm
7 building, on-farm building. And it says in the
8 law that the town cannot regulate on-farm
9 buildings except to make sure they are safe.
10 This town made sure these buildings are safe, but
11 towns cannot do that. That's what Section 305,
12 which your Honor referenced earlier, says: Local
13 governments cannot regulate farmhouses except to
14 make sure they are safe. They can't demand
15 screening in front of them, they can't demand
16 architectural review, they can't demand that they
17 be pretty or in a particular place. All they can
18 do is make sure they are safe and that's the
19 limit. That's how much of a protective reach
20 there is. And the Court of Appeals says in that
21 situation, where the legislature says on-farm
22 buildings are so protected, as long as that
23 definition does not say except for farm worker
24 houses, if it's on the farm and a building, it's
25 within the protective reach. That's how you

1 construe the statute.

2 You also have to construe the entire fabric
3 of New York State law *imperi materia*. In other
4 words, you have to assume that the legislature
5 knew what it was doing with respect to the entire
6 approach to farm worker housing in every aspect
7 of the law.

8 And so where, your Honor, where does it say
9 that the legislature has said in the Right to
10 Farm Law that farm worker housing is protected?
11 Where the Court of Appeals has said that all
12 on-farm buildings are within the protective reach
13 of our embrace of farming.

14 Where does it say in the Park Act that
15 notwithstanding all these warning signs and even
16 though the buildings are invisible and not
17 material to the plan, where does the legislature
18 say except you can regulate them as single family
19 dwellings, except you can decide whether or not
20 they exist, you can decide how big that farm
21 gets, you can decide where the homes are built,
22 you can regulate the size and growth of that
23 farm? It doesn't say that, your Honor.

24 And, therefore, in the face of the tax laws
25 and the Right to Farm Law, assuming the

1 legislature knew what it was doing in thematics
2 and reading them all *imperi materia* and finding
3 no exclusion beyond the protective reach of the
4 Adirondack Park reach that protectively reaches
5 to protect farmers, you simply can't say that the
6 legislature instructed the Agency to regulate
7 these matters. And I must say your Honor,
8 Plato's Cave at 68 N.Y.2d 791-- we also cite that
9 case -- is extremely important in determining
10 legislative intent and following through with
11 *imperi materia*. I know your Honor said and
12 clearly the Commissioner found in his February 1
13 decision that he was making that finding under
14 the Right to Farm Law, not under the Park Act.
15 But, your Honor, in Plato's Cave what the court
16 said was that it's perfectly permissible to
17 decide whether or not somebody breached their
18 liquor license by having a gambling facility in
19 their bar if the Penal Law defines that thing
20 that was in the bar as a gambling machine. What
21 they said was the legislature is thematic, you
22 can look to other statutes to determine what the
23 legislature meant. So the Commissioner's
24 decision has meaning here. He didn't make a
25 legal determination, he didn't say your Honor's

1 review is done, which has been said here.

2 THE COURT: But in Plato's Cave didn't they
3 look at the Penal Law provision because there was
4 no provision in the ABC law to define gambling?

5 MR. PRIVITERA: Yes. And there's none here
6 that says that single family dwellings are to be
7 regulated if they are farm structures.

8 THE COURT: But there is a provision in the
9 Act which says what agricultural use structures
10 are.

11 MR. PRIVITERA: Yes, your Honor, yes, yes.
12 And agricultural use structures have a very broad
13 brush paragraph that I just read to you.

14 THE COURT: Right. And isn't that
15 provision -- don't I have to review the statutes
16 in the Act, the APA Act, to understand that, and
17 then, only if it's not clear, then go outside of
18 it?

19 MR. PRIVITERA: No, your Honor. I think the
20 case law is such that you always have to keep
21 legislative intent in mind.

22 THE COURT: Well, I always do. But don't I
23 do it first from the four corners of the Act and
24 then, if it's unclear, don't I then refer to
25 other provisions?

1 MR. PRIVITERA: No, your Honor. I think
2 that you have a -- I would suggest, respectfully,
3 that one has an obligation to read everything
4 *imperi materia* and to see to what extent you can
5 divine that the legislature meant to regulate
6 housing here where it specifically says in other
7 areas that it intends not to.

8 And, your Honor, if I might, we also have a
9 cause of action under 305-3 of the Ag & Markets
10 Law that specifically says each agency has a duty
11 to modify its regulations and procedures in order
12 to embrace the right to farm.

13 And, your Honor, I would respect
14 respectfully suggest that the fair thing to have
15 done here, since the Agency has said in the
16 Miller affidavit that single family homes can be
17 rebuilt. I'd respectfully suggest that if the
18 Agency had discharged its duty, its statutory
19 duty to modify its procedures here, it would have
20 looked at the big picture and said, look, fifteen
21 substandard houses were knocked down on this farm
22 to create room for decent housing, there's no
23 reason that they have to be rebuilt in the middle
24 of a field where they were, a fair modification
25 of our procedures in accordance with the Right to

1 Farm Law would allow those same fifteen houses at
2 least to be rebuilt on the farm. Here, four were
3 rebuilt. Fifteen were knocked down. It's less
4 dense than it ever was. It's all open space.
5 It's got buried utilities. It's completely
6 consistent with all of the goals of the Resource
7 Management Areas, and yet their procedures are
8 strictly construed contrary to 305-3 and the
9 homes somehow are in the wrong place.

10 Your Honor, productive farm land must be
11 conserved, not destroyed by non-farming
12 influences. The soils in this protected
13 agricultural district are American heritage
14 soils. There's been farms on this ridge for over
15 260 years, your Honor, since before the
16 Revolutionary War. These farm lands, these soils
17 are to be conserved under our constitution, by
18 reading this Act consistent with the
19 constitution.

20 And, your Honor, I do have one thing to say
21 about res judicata. If your Honor rules that
22 these are not agricultural use structures under
23 the Park Act, this farm will not survive, it will
24 die. The reason is that it will be res judicata
25 as against the farm, that they are not farm

1 buildings. And so the town assessor will come
2 along in a depressed town that has fewer than, I
3 think, 700 people in it now, and he will be
4 obliged to maximize the assessment value on all
5 the properties.

6 THE COURT: Wait, wait, wait. Let's stop
7 right there. Doesn't the assessor have to comply
8 with the definitions in the Real Property Tax Law
9 in determining what's a farm building and what is
10 not?

11 MR. PRIVITERA: Yes, your Honor.

12 THE COURT: And a determination by the APA
13 that under its particular definitions it's not a
14 farm building won't effect whether it is under
15 the Real Property Tax Law.

16 MR. PRIVITERA: No, your Honor, but a
17 decision by you will.

18 THE COURT: Why?

19 MR. PRIVITERA: Because it's res judicata
20 that it's not an agricultural use structure.

21 THE COURT: But is that the definition under
22 the tax law?

23 MR. PRIVITERA: It's farm dwelling, or
24 agricultural use structure, it's the same word.

25 THE COURT: I understand your position.

1 Anything else?

2 MS. SIMON: If I might have a few minutes to
3 rebut, your Honor?

4 THE COURT: Ms. Simon, I know we haven't
5 gotten to Ms. Feathers yet.

6 MS. SIMON: Surely.

7 THE COURT: Ms. Feathers.

8 MS. FEATHERS: Judge Meyer, thank you very
9 much for granting the Farm Bureau legal status
10 and letting us appear here today.

11 I think it's very fitting here in the home
12 of the High Peaks that the Adirondack Park Agency
13 folks have shown themselves to be a bunch of
14 bushwhackers. They are blazing a brave new trail
15 in the law. But as an Adirondack hiker, I can
16 tell you we find it strange when there's a well
17 marked trail and it's ignored and the hiker goes
18 off in another direction. The same goes here
19 where we're dealing with a State agency that has
20 marked trails to follow but has ignored those
21 trails in the case the law.

22 Farm worker housing is defined. It has a
23 very specific definition. It's arbitrary and
24 capricious to not consult the well developed body
25 of law that makes it clear just what farm worker

1 housing is. The Agriculture and Markets Law says
2 farm worker housing is part of farm operations.
3 The Lysander case says it's an integral part of
4 farm operations. And doesn't it show the
5 ultimate contempt for farm workers to think it's
6 okay to build mobile homes and government actors
7 have to keep their hands off, but if you build a
8 modular home or any home of high quality out of
9 respect for your workers, then all of a sudden
10 that raises a red flag and you can swoop down and
11 intrude on the farm worker housing and the farmer
12 and farm life?

13 And it is salient that the Real Property Tax
14 Law says farm worker housing is essential to farm
15 operations. And all of these laws that should
16 have been consulted and respected merely reflect
17 life, the life that many of the farmers in this
18 room know about, of long workdays, of the need
19 for easy access to the livestock and the barns
20 and the crops to do the work, and to provide
21 security, and because of the lack of affordable
22 rentals nearby or transportation.

23 What it comes down to is the Park Agency
24 doesn't like these laws, and they don't like the
25 law that says they must liberally interpret any

1 of their laws or regulations about agriculture
2 and in an agricultural district like this one
3 they are supposed to encourage every viable farm.

4 I can't speak for the Lewis family, but I
5 don't think they felt encouraged by the actions
6 of the last 15 months. The Park Agency has acted
7 in a way that doesn't reflect the law, it doesn't
8 reflect real life. They have taken an
9 astonishing position that farm worker housing is
10 not customarily and directly associated with
11 agricultural uses -- everything else to the
12 contrary. And the slender read that they rely
13 upon is a density provision, which Mr. Privitera
14 so aptly explained. They seize on a specific
15 part of it because it lists agricultural use
16 structures and dwellings for farm workers and
17 dwellings for farmers and they say that that
18 shows that the farm worker dwelling is not an
19 agricultural use structure because it's listed
20 separately.

21 But in fact it seems clear that they are
22 making a distinction. There's two kinds of
23 dwellings at issue: One is for the farmer and
24 his family; that's not an agricultural use
25 structure. And one is for the farm workers; that

1 is an agricultural use structure. And if there's
2 any confusion or concern about that provision,
3 then if you look at the statute as a whole it
4 clears up that confusion. The statute includes
5 the emphatic language that in Resource Management
6 Areas farming is paramount and capital investment
7 in agriculture buildings has to be encouraged.
8 Well, that hasn't happened here.

9 THE COURT: So you're saying then that the
10 farmer's own single family dwelling is not an
11 agricultural use structure but farm worker
12 housing is?

13 MS. FEATHERS: Absolutely. The farmer is
14 living there as his residence. He may or may not
15 work the land. But he's hiring workers, without
16 whom his farm can't survive.

17 The Lysander case made it very clear. It
18 said the very existence of the farm is
19 jeopardized without that housing and that's why
20 municipalities couldn't interfere. Why should it
21 be different for a State agency? Would the
22 reality of what a farm is and the role a farm
23 worker plays change if you're dealing with the
24 state versus a local?

25 THE COURT: What if the farmer is the only

1 person working the farm? Isn't it then an
2 agricultural use structure, his own dwelling?

3 MS. FEATHERS: That's an interesting
4 question. Perhaps so. But we don't really have
5 to figure out that interesting hypothetical
6 today. The fact of the matter is the farm
7 workers on the Lewis Family Farm are there only
8 as hired hands to work the land, and it should
9 clearly be considered an agricultural use
10 structure if we believe that the Court of Appeals
11 ruling binds us and if we believe that what the
12 Real Property Tax Law says is relevant and what
13 the Agriculture and Markets Law says is relevant
14 and the way that those laws reflect real life.
15 There's no no definition in the Adirondack Park
16 Act of farm worker housing. But there's so much
17 good relative authority to consult.

18 And, your Honor, you referred earlier to the
19 whole dynamic of deference. When does the Court
20 need to defer to the determination of an agency?
21 And you pointed out it needs to be a final
22 determination. This is one of the most wild
23 trails that has been placed here. One of the
24 central lessons I learned from my years at the
25 AG's office and at the Appeals Bureau is you

1 don't defer at all unless the special expertise
2 of the agency is implicated. It's not implicated
3 here. It's a matter of pure statutory
4 construction. The Park Agency has no
5 demonstrated expertise on farming; quite the
6 contrary. No deference is due.

7 They further seem to indicate they need to
8 defer to no one, not even the Commissioner of
9 Agriculture when he weighs in on a question about
10 whether something is an agricultural use. I
11 mean, if you just step back and think about it,
12 it's really stunning. The commissioner looked at
13 this farm and sent an expert to this farm and he
14 said building those farm worker houses on that
15 land was an agricultural use and it couldn't
16 easily be subdivided. They never even
17 acknowledged the existence of that opinion until
18 forced to, and they are saying it's not binding.

19 Okay. It's not binding. Doesn't it deserve
20 deference? Isn't it their obligation to explain
21 why they don't agree with it, based upon some
22 rational reason?

23 THE COURT: Isn't it their reason that their
24 interpretation of agricultural use structure
25 excludes single family dwellings?

1 MS. FEATHERS: But there has to be some
2 rational basis for that, especially when there's
3 such a rich and relevant body of law to consult.

4 Yes, it's an advisory opinion and they do
5 them case by case, as they say. But he's the
6 agriculture commissioner. Who better knows what
7 farm worker housing is and what the reality is?
8 The Court of Appeals said in Lysander, where the
9 Farm Bureau was amicus, We give deference to the
10 opinion of the commissioner on what agriculture
11 housing is.

12 THE COURT: Didn't the Agency say it's farm
13 worker housing but under our own statutory scheme
14 it's not an agricultural use structure for our
15 purposes? Isn't that what they decided? It's no
16 question it's farm worker housing, but under the
17 Agency's own statutory definition it's not an
18 agricultural use structure.

19 MS. FEATHERS: Are you talking about in the
20 Lysander decision?

21 THE COURT: I'm talking about here.

22 MS. FEATHERS: I think they said here it's
23 not an agricultural use structure.

24 THE COURT: But didn't they say it was farm
25 worker housing?

1 MS. FEATHERS: It's farm worker housing, but
2 farm worker housing doesn't fit within their
3 definition of agricultural use structure. And
4 they went on to say it's a single family dwelling
5 and it's a subdivision, which just flies in the
6 face of reality. These are homes that are
7 clustered around a barn so they can do their job.
8 You're not going to go out and sell them on the
9 market to people who want to raise their children
10 there. They are for the workers there, to
11 provide easy access to the barns and the
12 livestock. It makes no sense. It's a total
13 disconnect from reality.

14 THE COURT: So you're saying they have gone
15 beyond the clear definitions in their statutes to
16 come up with their result? Is that what you're
17 saying?

18 MS. FEATHERS: Absolutely. And I would just
19 like to weigh in on the issue of the dictum,
20 which is another dynamic where they have laid a
21 new path on what deference is due by this court.
22 The court said there's been no final Agency
23 determination so it's not ripe for judicial
24 intervention. Therefore, anything else the court
25 said was not necessary to reach that

1 determination and it wasn't binding on this
2 court. And it's completely irrelevant whether
3 the Lewis Family Farm attorney perfects that
4 appeal, it's dictum, whether it's perfected or
5 not, it's not binding, it's not under the
6 doctrine of law of the case or collateral
7 estoppel or however you want to analyze it.

8 THE COURT: What about the 305-a
9 determination by Judge Ryan? Isn't that a matter
10 of law?

11 MS. FEATHERS: You know, the Farm Bureau
12 looks at 305-a a little differently. We think at
13 the end of the day that has to do with local
14 governments and what can and can't be done. And
15 I think it's a very creative argument that you
16 could regard that the Adirondack Park Agency as
17 acting like a local zoning or planning board, but
18 I think it's neither here nor there. I think it
19 all comes down to the definition of agricultural
20 use structure, that they have improperly
21 interpreted that. And if you properly,
22 rationally interpret what it means, it
23 encompasses farming worker housing. Some of the
24 right words are said in their submissions, like
25 the paramount importance of farming and the need

1 for balance and the harmonious missions of the
2 Agency, but the acts don't match their words.
3 The acts have not been about balance, they have
4 been about bullying a good farm. The acts have
5 not been about promoting agriculture and a viable
6 farm. I don't know what they have been about --
7 personality or politics or power. All I know is
8 that's why we need courts to follow the well
9 marked trail in the law, the constitution, that
10 says agriculture is, in justice, a lofty place,
11 as in the case of the legislature's mandates, in
12 the Agriculture and Markets Law, as well as the
13 Park Act, all the cases, including Lysander, the
14 Commissioner of Agriculture's ruling.

15 We just want to protect the law and the
16 land. They have not been protected, to date, by
17 the Park Agency's behavior. And we want to
18 protect not only the tourists and the hikers, but
19 the farmers and the residents who are just trying
20 to live here and work here and have a chance to
21 thrive and not be thwarted by bushwhacking
22 bureaucrats who have really gone astray in this
23 case.

24 Thank you.

25 THE COURT: Thank you, Ms. Feathers.

1 Ms. Simon.

2 MS. SIMON: Well, on that note,
3 your Honor --

4 THE COURT: Are you conceding?

5 MS. SIMON: -- I would say that neither the
6 record nor anything that I'm aware of in this
7 proceeding has demonstrated any bullying by the
8 Adirondack Park Agency or any contempt for
9 farmers and, in fact, the Adirondack Park Agency
10 has done what it is mandated to do by law and
11 issued a determination in this matter.

12 But putting that aside, I want to put to
13 rest a few things quickly before I get to my
14 argument. In interpreting 305-a of Ag & Markets
15 Law and as to the issue of the Court of Appeals
16 saying, according to Mr. Privitera, that the Hunt
17 Brothers determination says that the Adirondack
18 Park Agency is a local government planning agency
19 which might then subject it to Lysander, I would
20 say that it did not say that. It said, and I'm
21 quoting, that it is "a superagency to regulate
22 development in the Adirondack park region," and
23 it uses the words "thus resemble" those of local
24 governments. I'm just clarifying the record on
25 that.

1 Secondly, I'm glad that Mr. Privitera
2 acknowledged the February 1st letter of the
3 New York State Department of Agriculture and
4 Markets Commissioner regarding his opinion on 308
5 and Lewis Farm because in his papers he has
6 repeatedly said that the Agency did not consider
7 it and that it was not listed in the
8 determination, and it is and he cited to it and
9 it's in item 11.

10 Sticking with that issue, the opinion of the
11 Department of Ag & Markets on 308 of Ag & Markets
12 Law was considered by the Agency, is part of the
13 record and is advisory. And the affidavit
14 submitted by the Department of Ag & Markets
15 specifically addresses that and says the
16 February 1st, 2008 opinion was advisory. And so
17 I would argue in my motion papers, I argue that
18 there is no cause of action here against the
19 Adirondack Park Agency pursuant to 308 because
20 they haven't violated anything. And for the
21 record, they did consider it and the agencies did
22 consult, and 308 is advisory.

23 And the Agency doesn't dispute anything --
24 let me explain, since we're talking about two
25 agencies -- the Adirondack Park Agency does not

1 dispute anything in the Agriculture and Markets
2 opinion of 308. It's their opinion on their law
3 and they are due deference on that, just as the
4 APA is entitled to deference on interpretation of
5 its own law.

6 I would also add that Mr. Privitera has
7 sought to strike the affidavits that we have
8 submitted, particularly the one of Ag & Markets,
9 on the one hand arguing due deference should be
10 given to Ag & Markets but, on the other hand,
11 saying let's not look at their affidavit, let's
12 strike it because it's outside the record.

13 And I have cited some cases in the reply
14 affirmation I delivered yesterday where it is
15 permissible to submit affidavits and affirmations
16 that are outside the record, and they are proper
17 when necessary to respond to the petition, which
18 here we have to respond to this allegation that
19 we're violating Section 308 of the Ag & Markets
20 Law, so we're providing the opinion of the Agency
21 that issues it. I think that it's appropriately
22 submitted and I hope that the Court will accept
23 it.

24 I'd like to briefly talk about the
25 constitutional provision which is Article 14,

1 Section 4. And I agree with your Honor, I guess,
2 when you said, isn't it incumbent on the
3 legislature to implement this policy? That is
4 the specific language in the constitutional
5 provision, that the legislature, in implementing
6 this policy, shall include these provisions. And
7 to carry that to the next step, the legislature,
8 in implementing that policy within the APA Act,
9 did so by providing specific exemptions for farms
10 and those are statutory protections for farms.
11 The legislature was fully aware of this
12 constitutional provision and Section 305-3 of Ag
13 & Markets Law because both had passed before the
14 definitions of agricultural use structures and
15 single family dwellings statutory provisions in
16 the APA Act. So the legislature was aware of
17 these provisions and, we believe, implemented
18 them in compliance with Agriculture and Markets
19 Law Section 305-3 by the statutory protections.

20 One example which was mentioned by both the
21 Farm Bureau and, I believe, Mr. Privitera is the
22 density issue, although that is not at issue here
23 but it's a good example because it's an exemption
24 within the APA Act that we're in compliance, in
25 fulfillment of this policy, and that is if you're

1 in a Resource Management Area and you are a farm,
2 you're exempted from the density requirements.
3 If you are not a farm, you can only put up one
4 building for every forty-some acres, 42 acres,
5 whatever the precise number is. It's around 42.
6 If you are a farm, you are exempt from that
7 density restriction. So this is a specific
8 exemption for farmers. The APA Act does have
9 specific protections and exemptions for farms,
10 including which was discussed at length,
11 agricultural use structures, in almost every
12 situation except within a certain number of feet
13 of a river.

14 Now, all of that aside, I think it's
15 important to note that the Agency also, in an
16 ongoing way, not just with this case, consults
17 with the Department of Ag & Markets. And this is
18 in their affidavit and in our affidavit --
19 Mr. Van Cott and Mr. Rusnica. And that is how
20 the Agency, the Agency being the Agriculture and
21 Markets agency, views Section 305-3, that they
22 consult. It's not a statute that gives them
23 authority to enforce against other state
24 agencies, but they do interpret it, and they say
25 in the affidavit of Mr. Rusnica that they do

1 consult, and that's their way of fulfilling the
2 obligation of 305-3. So the Department does not
3 believe there's any violations here, nor is there
4 any reason to believe so.

5 The statute is clear. The Agency provides
6 specific exemptions to agricultural lands. And I
7 think actually Mr. Privitera went into it in
8 great detail, providing all the examples. There
9 are numerous, and I don't know the number of
10 buildings, silos or barns on the Lewis family
11 farm. They are numerous. None of them are
12 regulated. Nor has the Agency sought to assert
13 jurisdiction. It does not have jurisdiction over
14 those.

15 We are talking about single family
16 dwellings. And the reason that they are
17 jurisdictional is because of their location --
18 Resource Management -- pursuant to the APA Act,
19 and that is just specifically single family group
20 dwellings. Whether you are the largest, best,
21 organic farm in the Adirondacks or you are a
22 small landowner with a mobile home, if you are
23 within one-quarter mile --

24 THE COURT: A mobile home isn't a single
25 family dwelling?

1 MS. SIMON: Good point. A small owner of a
2 small home, whether it's large or small -- this
3 is not picking on anyone, this is not bullying --
4 you're treated equally if you're a single family
5 dwelling within those jurisdictional areas.

6 THE COURT: But doesn't the definition of
7 agricultural use structure say or other building
8 or structure directly and customarily associated
9 with agricultural use?

10 MS. SIMON: Yes, your Honor.

11 THE COURT: And isn't the word structure,
12 isn't that included to define a single family
13 dwelling?

14 MS. SIMON: Single family dwelling is
15 separately defined, separately jurisdictional,
16 it's separately defined in 802(58) of the
17 Adirondack Park Agency Act. And 810(2) requires
18 a permit for single family dwellings in Resource
19 Management management areas. This is a statutory
20 requirement. This is not just an agency policy
21 interpreting.

22 THE COURT: But what if it's an agricultural
23 use structure? Aren't they exempt from Resource
24 Management Area until they are within 150 feet of
25 a river?

1 MS. SIMON: I believe the answer is yes,
2 agricultural use structures are exempt.

3 THE COURT: So you're saying it can't be.
4 You're saying a single family dwelling can't be
5 an agricultural use structure.

6 MS. SIMON: Because it is separately
7 defined.

8 THE COURT: Let me ask you this: Are all
9 agricultural use structures single family
10 dwellings? No. And are all single family
11 dwellings agricultural use structures?

12 MS. SIMON: We think they are not related.

13 THE COURT: They are not, are they?

14 MS. SIMON: Are all single family dwellings
15 agricultural use structures? No.

16 THE COURT: So wouldn't it be reasonable to
17 assume that that's why the legislature, in
18 setting out 810, made a separate provision for
19 agricultural use structures and a separate
20 provision for single family dwellings, because
21 they are not always the same thing?

22 MS. SIMON: I think the Agency's
23 interpretation of their own statute is they are
24 separately defined because they are separately
25 considered and that the word structures within

1 there, you know, we can get into statutory
2 construction should relate back to the prior
3 words within that phrase and relate to those
4 words, and all of those words are related to farm
5 products.

6 THE COURT: If the legislature had intended
7 single family dwellings to be exempt wouldn't
8 they have used the term accessory structure, for
9 which there's a separate definition in the APA
10 Act?

11 MS. SIMON: I think we could look towards
12 statutory construction. I don't know the answer.
13 I think that the way it is written -- I don't
14 know the hypothetical answer. But the way it is
15 written is it is separately defined and it's very
16 clear in 810(2)(d)(1) that the APA -- the
17 legislature intended there to be jurisdiction for
18 single family dwellings in Resource Management
19 Areas. It's not clear which they assert. And we
20 disagree on this point, that single family
21 dwellings are part of Ag and Market structurally.

22 THE COURT: Isn't that the crux of the case?

23 MS. SIMON: Yes, your Honor. However, not
24 to belabor the point --

25 THE COURT: I guess we are.

1 MS. SIMON: -- we believe Justice Ryan
2 already made the decision and the Appellate
3 Division will be addressing it if they perfect
4 their appeal. So we have been over that, and I
5 would like to address the rest of the items.

6 One is -- and I'll just say briefly on the
7 issue of subdivision, I'm reading from
8 Justice Ryan's decision, Under the APA
9 regulations, this building project constitutes a
10 subdivision, even though it is not a typical
11 suburban subdivision. I'm reading from page 5,
12 Exhibit D of my affidavit, affirmation, excuse
13 me. So we believe they are barred by collateral
14 estoppel from raising this a second time before
15 you, your Honor, because that was part of the
16 issue of collateral estoppel.

17 Your Honor, I think I'd like to get back to
18 the main point here and that is this case has
19 been made out to be a case of the Adirondack Park
20 Agency Law versus Agriculture and Markets Law.
21 We don't believe that this is an actual
22 controversy, in the sense that there are two
23 definitions within each of these laws dealing
24 with agricultural structures, they are separate
25 and distinct, they serve different purposes.

1 The Adirondack Park is a unique protected
2 area and the purpose of the APA's jurisdiction
3 there is to protect the natural resources, which
4 includes open space, farming, rivers. And on top
5 of that, you know, this is an unusual situation,
6 I think, because not every river is protected by
7 the Rivers Act. There are specific designated
8 rivers that the legislature decides are protected
9 for various reasons. This is a river that's
10 protected.

11 So we have, you know, I think, no conflict,
12 in the sense that the APA should have deference
13 to interpret its statute, Ag & Markets should
14 have deference to interpret their statute. They
15 do consult where there's conflict.

16 And the APA is not in violation of 305-3 of
17 Ag & Markets Law because it is and does promote
18 agricultural uses in the Park. But it does not
19 provide an exemption for single family dwellings.
20 That's the crux of it. It does not, and we
21 believe the statute is clear that it does not.

22 And, you know, we're sorry that there's so
23 much disorder here, and I really don't think that
24 the Agency has deserved all the comments it has
25 gotten. But we ask that you take a look at these

1 issues and address them because the definitions
2 are clear in the statute, and I dare say that the
3 APA Act definitions are very extensive, very
4 detailed, and that the legislature knew what they
5 were doing when they created these exemptions
6 because they all came -- relating to this issue
7 on agricultural use -- they all came after Ag &
8 Markets Law 305-3 was passed. So we believe that
9 it was taken into consideration at that time.

10 Your Honor, I know we have covered a lot
11 here today. However, there are a few items still
12 outstanding. We have not addressed my proposed
13 dismissal of the claim relating to the local
14 government review board. However, we think that
15 the statute is clear that it's advisory. I will
16 leave it at that. I don't have anything to add.
17 I just wanted to raise it.

18 There are also three claims relating to due
19 process. They claim that their due process
20 rights have been violated. There were three
21 grounds that they allege for that violation.

22 Let me first say on the issue of delay, they
23 allege that the Agency delayed enforcement in
24 this matter. However, they measure the time
25 period starting from sometime in 2006 when they,

1 I assume, actually commenced this construction
2 project. The Agency did not learn about it until
3 March of 2007 and at and from that time all of
4 these other events came to pass. They have been
5 outlined in the affidavit of Paul Van Cott most
6 recently submitted in his first exhibit. There's
7 a time line there. Again, Mr. Privitera, argues
8 it should not be part of the record because it's
9 a new submission. I submitted case law saying,
10 again, if this is alleged in the petition and we
11 have to respond to it, this should be permitted.
12 It's not introducing new facts, it's summarizing
13 the activities of the Agency in that time period.
14 And we believe, as the United States Supreme
15 Court has said, due process requires notice and
16 an opportunity to be heard, and we think the
17 record demonstrates clearly that those both have
18 been achieved here.

19 THE COURT: Let me get back to the review
20 board situation. The fact that it was not
21 consulted, are you contending therefore that the
22 Agency can, in its discretion, avoid consulting
23 with the review board whenever it wants?

24 MS. SIMON: I think the way the Act reads is
25 that the review board will advise the Agency.

1 And they did. I mean, this resolution is also
2 part of the record, considered but not accepted
3 by the APA.

4 THE COURT: Okay.

5 MS. SIMON: Finally, on due process, the
6 other item I wanted to address -- and I don't
7 know if the Court has any concerns -- they allege
8 they were deprived due process rights because
9 they did not get an adjudicatory hearing with an
10 administrative law judge. Pursuant to the APA
11 regulations, they are not entitled to it. There
12 are two situations where they automatically or,
13 if they requested it, they would automatically
14 get a hearing. They did not meet those two
15 situations. And that is in part because they
16 didn't apply and get a permit. If they had
17 gotten a permit and it was to be revoked,
18 modified or suspended, they would be entitled to
19 a hearing. They didn't do that here. They are
20 not entitled to it.

21 THE COURT: There's no provision for that
22 under the enforcement committee regulations, is
23 there?

24 MS. SIMON: Provision for an adjudicatory
25 hearing? There are several situations where you

1 can get an adjudicatory hearing. Am I
2 understanding your question?

3 THE COURT: Under the enforcement
4 procedures.

5 MS. SIMON: If it is an enforcement
6 committee proceeding -- how they pursued it --
7 pursuant to the regulations here, you do not get
8 an administrative law judge, correct. And one of
9 the reasons -- they requested it, that's for
10 sure. But one of the reasons they also didn't
11 get it is because there were no issues of fact,
12 at least that's how the Agency determined it,
13 because of their own affidavits and their own
14 admissions, and the Agency's own findings
15 established that the houses were built. There
16 was no question that the house were there. So
17 they were not entitled and were not deprived of
18 their due process rights because of that.

19 Your Honor, may I save my closing arguments?

20 THE COURT: Until after rebuttal? Is that
21 what your asking?

22 MS. SIMON: I don't know if you want me to
23 finish or let Mr. --

24 THE COURT: I'll give you another shot after
25 Mr. Privitera.

1 All right. Mr. Privitera.

2 MS. SIMON: And then can I have another
3 shot.

4 MR. PRIVITERA: Thank you, your Honor for
5 allowing me rebuttal.

6 We're now in a real nonsense situation
7 because the Agency agrees with our interpretation
8 of the definition of principal building and
9 agrees that the farm worker houses here do not
10 count and agrees they are invisible to the
11 density plan, yet they insist on asserting
12 jurisdiction over them. What for? Where is the
13 expression of legislative intent after saying the
14 buildings don't count? Where in the Act does it
15 say assert jurisdiction over buildings that don't
16 count? There are no other buildings that they
17 review that don't count. It's a completely
18 nonsense situation. And I think it goes to some
19 of the things that Ms. Feathers says, we don't
20 really know what the motivation for this is, that
21 it's an effort to assert jurisdiction over
22 buildings that don't count, and they agree that
23 the buildings don't count.

24 Again, we have to return to the Court of
25 Appeals discussion of how to interpret this

1 statute, just the way they interpret the
2 definition of on-farm buildings in another
3 context, and you have to find that the
4 legislature specifically intended to reach farm
5 worker housing when they have this broad
6 protective reach, and they have pointed to none.
7 Indeed, everything points in the other direction.

8 I just want comment on two other matters.
9 The Agency insists that the record is clear that
10 the Commissioners considered the February 1
11 decision of the Commissioner of Ag & Markets and
12 the record is clear that the Agency paid
13 deference to and considered the written
14 resolution in the record before you of the
15 Adirondack Park local government review board
16 because it's in the record.

17 Your Honor, quite the opposite is true.
18 There is nothing in the determination by the
19 Agency that indicated they gave a hoot about any
20 of that. The February 1 -- and this goes to
21 considering how you consider the discretion of
22 somebody who has a specific delegated authority,
23 unlike here where there's no delegated authority
24 under farming. The decision here made no
25 reference to and did not distinction and did not

1 explain away and did not rationalize the decision
2 of the Commissioner. It's ignored, entirely
3 ignored. Yes, it's in the record 'cause I put it
4 in the record, but they ignored it, they didn't
5 distinguish it, they don't care about State farm
6 policy and they made that clear. They didn't
7 even rationalize it with their own law.

8 THE COURT: Didn't you submit that to the
9 enforcement committee when you had oral argument?
10 Wasn't that before them?

11 MR. PRIVITERA: It was before them way
12 before that in a reply affidavit. Yes, it was
13 before them.

14 THE COURT: But aren't they required to
15 specifically reference it when they issue a
16 determination?

17 MR. PRIVITERA: I think so, when it's an
18 expression -- when it's a land use opinion about
19 buildings that are agriculture in nature, they at
20 least have to give it due consideration. It's an
21 indication that they didn't care what he said.
22 They didn't even explain it. They didn't
23 rationalize it away.

24 Similarly, when the Adirondack Park local
25 government review board passed a resolution

1 saying that this was wrong -- and these towns
2 work on these matters -- that's an active board
3 that was completely ignored too. It wasn't
4 distinguished, it wasn't explained, it wasn't
5 fairly considered, even though that's a statutory
6 body that's within the Act itself that's supposed
7 to give advice to the Agency. Now, do they have
8 to follow that advice? No. Did they have to
9 consider it? Yes. When the legislature says
10 this is part of how you make decisions, take
11 advice from the towns, you have to at least
12 consider it. They ignored it, they didn't even
13 distinguish it, they didn't mention it. Yes,
14 it's in the record. It was not considered.

15 And, your Honor, I think you were on to
16 something very specific when you look at the
17 definition of agricultural use structure because
18 it uses the word structure, and the definition of
19 structure includes single family dwelling. So
20 where is the legislative intent to carve out
21 single family dwellings from that definition?
22 Clearly, the legislative intent was to include it
23 because it's a borrowed term that includes single
24 family dwellings. Of course, the Act needs a
25 separate definition for single family

1 dwellings 'cause they are primary principal
2 buildings. That's what most people build up
3 here. It would be an illogical, unmanageable,
4 unimplementable act if it didn't have a
5 definition of single family dwelling.

6 The judicial inquiry is: Where is the
7 indication that the legislature meant that
8 buildings that don't count, that they say don't
9 count, are meant to be jurisdictional,
10 particularly when they are included in the
11 definition of agricultural use structure, and
12 particularly when all the findings of fact here
13 and the complete record before you is that
14 there's no doubt that these are important,
15 customary, ordinary, regular buildings within the
16 flesh language of the definition of agricultural
17 use structure?

18 Your Honor, we did not move to strike the
19 Rusnica affidavit. And I'm sorry, but the Agency
20 speaks out of both sides of their mouth on this
21 issue. On page 30 of their first brief they say
22 judicial review is limited to the record before
23 the Agency. When it made its determination, I
24 guess that's in a string cite they didn't catch
25 because they filed the reply brief -- I don't

1 know if it's filed yet, but we received a reply
2 brief yesterday where they say that your Honor
3 can go beyond the record. I think there are a
4 few cases where you can, but not when there are
5 no facts in dispute and not when you have an
6 Agency determination on a record and the record
7 is filed in the regular course of an Article 78
8 proceeding.

9 We didn't move to strike it. What we said
10 was if your Honor is to consider it at all,
11 consider it for what it says, not what they say
12 it says. And what it says, it's not even in
13 support of their motion to dismiss. It says
14 that, it explains the Department's role with
15 respect to the Right to Farm Law. You know, most
16 affidavits in support of a motion say they are in
17 support of the motion. It's neutral on the
18 motion. It says, it explains the Department's
19 role.

20 If you look at it, your Honor, if you feel
21 compelled to look at it, you'll see that the
22 Department of Ag & Markets stuck to its guns
23 here. It said that the Department's approach
24 regarding all regulations regarding farm
25 operations are consistent with the February 1

1 letter. It says that all on-farm buildings are
2 protected by the Right to Farm Law. It says that
3 the February 1 letter is consistent with, and I
4 quote, "... is consistent with the Department's
5 long-standing policy that farm labor housing used
6 for on-farm housing of pertinent and seasonal
7 employees is part of a farming operation and
8 protected by law." And it holds firm to its
9 November 26th letter, your Honor, that is also in
10 the record, where it was much firmer. This was
11 when the proceeding was just commenced. You'll
12 find that in the record, your Honor. The first
13 Commissioner letter, I think, can be found in the
14 record under -- again, it's not well set up,
15 your Honor. It's deep under tab 10. And there,
16 your Honor, the November 26th letter of the
17 Commissioner says quite firmly that you're
18 misinterpreting your own statute, you have to
19 look at it consistent with the Right to Farm Law,
20 and we ask you to beg off here.

21 Your Honor, there was a little discussion
22 here about the protection of the river under the
23 Rivers Act. And I have to ask, your Honor, since
24 you can build a barn of any size or color within
25 151 feet of the river, what interests are

1 protected by saying that you can't build a
2 farmhouse there? It makes no sense, your Honor.
3 Agricultural use structure throughout has to
4 apply to farm worker housing. It's the only way
5 to read the statute. Structures includes houses.
6 And indeed, your Honor, there is no expression of
7 legislative intent to the contrary.

8 As to the counterclaim here, your Honor, it
9 looks like piling on. It's certainly not fair or
10 reasonable to go after Barbara Lewis and Sandy
11 Lewis as defendants here. If you look at --
12 except in an effort to intimidate perhaps.

13 If you look at the papers that the Agency
14 filed in support of their position in the
15 collateral civil case, they say quite clearly in
16 two places that the only purpose of that case is
17 to enforce the March 25 determination, that's the
18 only purpose to it. If you look at what the
19 Agency asked the enforcement committee to do,
20 they said make these determinations, these aren't
21 agricultural use structures, and refer it to the
22 Attorney General's Office to enforce it. There's
23 no basis. It's a premature case. There are a
24 lot of times when agency orders are disobeyed and
25 they have to be enforced, and the way you plead

1 it is: Here's a final agency determination, it
2 can't be challenged anymore; or it's final, they
3 didn't obey it, and therefore we ask the Court to
4 intervene and enforce it, and if we need sheriffs
5 to do, that we will do it. That's an enforcement
6 case.

7 THE COURT: Don't they have to show more to
8 go after the private individuals?

9 MR. PRIVITERA: Absolutely, your Honor. And
10 we rest on our brief in that regard.

11 Your Honor, the dismissal of that case is
12 necessary because it's based on the exact same
13 cause of action and it's premature. If
14 your Honor disposes of this case, of the
15 Article 78, based on the fundamental core concern
16 that agricultural use structures include single
17 family dwellings, everything else follows,
18 everything else is easily met and that case is
19 dismissed because it's the same theory.

20 THE COURT: All right. Thank you.
21 Ms. Simon -- I'm sorry. Ms. Feathers, did you
22 have anything else?

23 MS. FEATHERS: No.

24 THE COURT: Ms. Simon.

25 MS. SIMON: Thank you, your Honor. Just to

1 clarify for the record, I did not submit a brief
2 yesterday, I submitted a reply affirmation, and I
3 think everyone has it.

4 Regarding the February 1st letter, just for
5 the record, this was a letter to Mr. and
6 Mrs. Lewis, not to the Adirondack Park Agency.
7 It would not have automatically gone to the
8 Agency unless someone provided it.

9 THE COURT: And that was done, it was
10 provided, right?

11 MS. SIMON: It was provided and it was part
12 of the record and it's not binding.

13 With regard to single family dwelling
14 definitions, Mr. Privitera said where in the Act
15 is it? For the record, 802-50(a) and (g) and
16 802(58).

17 And I want to specifically note that 810 of
18 the Adirondack Park Agency Act requires permits
19 for single family dwellings. Okay. We have
20 known that, we have talked about that. 810 also
21 says it does not require permits for agricultural
22 use structures. The legislature had to have
23 intended that these be separate to make those two
24 provisions.

25 With regard to --

1 THE COURT: Don't we get back to my two
2 questions to you: Whether all agricultural use
3 structures are single family dwellings and vice
4 versa? Can't that explain why they are listed
5 separately? Because someone who's got a single
6 family dwelling that they are putting up on their
7 residential property in a Resource Management
8 Area or something else that's not a farm, then
9 they would have to the a permit, correct?

10 MS. SIMON: Yes.

11 THE COURT: But if it's an agricultural use
12 structure and a single family dwelling but it
13 meets the definitions of both, couldn't that be
14 exempt?

15 MS. SIMON: Then why would the legislature
16 have separately said one is jurisdictional in
17 Resource Management and one is not?

18 THE COURT: Because not all single family
19 dwellings are agricultural use structures, that's
20 why, because they couldn't just say that
21 agricultural use structures are exempt if they
22 want to have jurisdiction over the single family
23 dwellings that are not agricultural use
24 structures.

25 MS. SIMON: However -- and this gets into

1 statutory construction -- and if you give us an
2 opportunity to answer because you reject our
3 motion to dismiss on this point, I would argue
4 that you look to the words in the full
5 definition. First off, you look to the
6 definition of what is specific and what is
7 general. This is a specific definition for
8 single family dwelling. In agricultural use
9 structures, the word structures should refer back
10 to the beginning of the phrase or relate to or be
11 of the same kind as those words. And all of
12 those words either are words that involve holding
13 crops, structures that holds crops or animals,
14 not people.

15 THE COURT: Then wouldn't the legislature
16 then have used the words similar building or
17 structure, or wouldn't it have used the accessory
18 structure definition that is in 802, subdivision
19 5? If that's what they intended, words were
20 there for them to use to do that. Why wouldn't
21 they have done that if that's what they intended?

22 MS. SIMON: I think -- and we have, you
23 know, to defer to the Agency's interpretation of
24 its own statute -- but I think that it is because
25 the Agency is looking at the separate definition

1 of single family dwelling within Resource
2 Management. Otherwise, there would be no
3 jurisdiction over this structure in Resource
4 Management, except for that the Act says that
5 there is, regardless of whether it's a farmhouse
6 or not.

7 THE COURT: I understand your point.

8 MS. SIMON: Okay. I was going to point out
9 also in Hunt Brothers -- and again this is, I
10 think instructive here -- where the Mind Lands
11 Reclamation Law was supposedly in conflict with
12 the APA Act, the Court said, even though that
13 said that it supersedes all the other laws, the
14 court said that the APA still has jurisdiction.

15 With regard to dismissal of the State's
16 complaint the State has a basic law enforcement
17 right, there is no doubt about that. And I think
18 that it's without merit to say that the State
19 cannot enforce the Rivers Act, the APA Act or a
20 determination, and I disagree with Mr. Privitera
21 on that.

22 In conclusion, your Honor, there's an
23 instructive example on your same point, I guess,
24 within Resource Management, where certain other
25 structures, like structures in excess of forty

1 feet in height, except agricultural use
2 structures and residential radio and television
3 antennas. 810, we're looking at, your Honor,
4 (e) -- I'm sorry -- 810(1)(e). I think it's
5 instructive on your point, in how you may
6 find that -- you may believe that these are not
7 crystal clear, but I think if you look at the
8 statute as a whole and the various definitions,
9 as Judge Ryan, I believe, did, these structures
10 were intended to be regulated, the single family
11 dwellings I'm referring to.

12 Your Honor, I would just like to close with
13 the fact that the APA has not sought to regulate
14 what they interpret to be agricultural use
15 structures on the Lewis Farm or anywhere. They
16 do not intend to, the Act doesn't allow them to,
17 and they have not.

18 The Agency has worked to resolve the matter,
19 has given them a full and fair opportunity to be
20 heard and they made a determination.

21 And on the issue of individual liability of
22 Barbara and Salim Lewis, I've cited cases. We
23 argue that when an individual's acts are a
24 violation of law they can be held personally
25 liable. We're not talking about a corporation

1 with hundreds of employees and some distant
2 employee did an act that was illegal. We're
3 talking about individuals. And they consciously
4 bypassed the jurisdiction of the APA. And in
5 item nine, there's an affidavit of Barbara Lewis
6 where I think it's kind of telling, referring to
7 the installation of these houses, and I quote,
8 "Since I concluded that this dispute relates only
9 to whether or not a fine is authorized, I decided
10 to accept delivery and installation," and there's
11 more language in there. So it was a conscious
12 decisions. And even after Judge Ryan's decision
13 saying there was jurisdiction, into August and
14 the fall of -- in September they continued to
15 finalize construction with roofing, and those
16 things are in the record. I think that this is a
17 flagrant disregard and that they are both
18 individually liable and as a corporation and they
19 should be held accountable.

20 THE COURT: Shouldn't the enforcement
21 committee have brought an enforcement action
22 against the individuals as well as the
23 corporation then, for them to enforce it?

24 MS. SIMON: I would say they could have and
25 it is still within the right of the Agency when

1 they bring it to Supreme Court if they feel those
2 individual acts --

3 THE COURT: What notice did the Lewises have
4 that you were going to go after them
5 individually?

6 MS. SIMON: When we filed the lawsuit,
7 your Honor.

8 THE COURT: So they didn't have an
9 opportunity to be heard.

10 MS. SIMON: In the administrative
11 determination, I would agree with you,
12 your Honor.

13 THE COURT: Don't you have to -- in order to
14 go after a cooperate officer or shareholder,
15 don't you have to show that they pierced the
16 corporate veil in some respect? Don't you have
17 to do that.

18 MS. SIMON: I think no, not in every
19 situation, not if the individual acts were a
20 violation of the law, you know, when you have
21 individual acts.

22 THE COURT: Even though they did it as an
23 officer of the corporation?

24 MS. SIMON: Yes. I supplied some case law,
25 your Honor, to that effect. We believe that they

1 knew and planned and went forward with the
2 construction of these houses, knowing that the
3 APA had jurisdiction because Judge Ryan's
4 decision had told them, but also the Agency had
5 asserted it, but they made a conscious decision
6 to go forward anyway.

7 THE COURT: Don't you think this is somewhat
8 unfair, to go through the APA enforcement action
9 in the name of the corporation only and all of a
10 sudden, a couple months later, they find they are
11 being sued individually?

12 MS. SIMON: Your Honor, again, I say that
13 the APA, as any State agency, has the right to
14 enforce its laws and if they believe that they
15 did it both as individuals and as part of the
16 corporation, I think that their ability to appear
17 in court and have their position defended happens
18 when they hire an attorney and appear here just
19 like anybody else.

20 THE COURT: But isn't the point that the
21 Agency, the enforcement committee, has made no
22 determination that Barbara Lewis or Salim Lewis
23 violated the Act? They haven't made that
24 determination. They only determined that the
25 corporation did.

1 MS. SIMON: Yes, your Honor.

2 THE COURT: Doesn't there have to be a
3 determination by the Agency itself for you to
4 enforce it against the Lewises?

5 MS. SIMON: Your Honor, I would say that
6 even if there had not been an agency
7 determination, if there was a violation that
8 both -- violations of two statutes would be
9 enough for the state to bring an action, but
10 we're not in that situation. I think you're
11 asking me a hypothetical. I'm not sure.

12 The State has the right to enforce its laws.
13 It also has the right to enforce a determination.

14 THE COURT: But there's been no
15 determination made against the Lewises.

16 MS. SIMON: By the Agency -- individually,
17 yes, I'm conceding that, your Honor.

18 THE COURT: So how can you enforce the
19 determination against the corporation against its
20 individuals?

21 MS. SIMON: Our complaint is brought based
22 on both the statutes and the determination.

23 THE COURT: So from now on, any corporate
24 officer or shareholder who may have had some
25 involvement in the actions of the corporation

1 with reference to the Agency are fair game for
2 the Agency to seek redress; is that right?

3 MS. SIMON: I don't think I would make a
4 broad statement like that, your Honor. I think
5 it depends on the individual actions and other
6 factors -- the size of the corporation and
7 whether there are employees that were acting or
8 other people, or they were not aware of it. I
9 think part of the factual considerations are
10 relevant.

11 THE COURT: All right. Anything else?

12 MS. SIMON: Just to conclude, your Honor,
13 that the whole point here is, you know, there's
14 some dispute between the definitions with two
15 acts. But the APA has a clear mandate here to
16 protect and to serve the Park. It is not
17 violating that mandate, it is enforcing the
18 mandate. And the Third Department in Gertz v.
19 State said the APA is charged with an awesome
20 responsibility and the legislature has granted it
21 formidable powers to carry out its task. These
22 three single family dwellings should not have
23 been built without a permit. The septic systems
24 within a quarter of a mile of the river should
25 not have been built without a permit. We ask

1 that this Article 78 be denied, and we submit
2 that the Agency's determination was rational and
3 it was in compliance with both statutes it's
4 charged with enforcing your Honor.

5 Thank you.

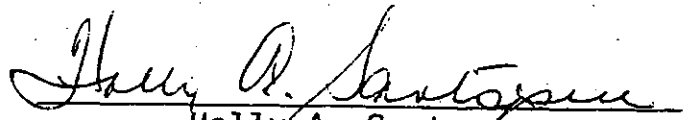
6 THE COURT: Thank you.

7
8 (Whereupon, the proceedings held in the above-
9 entitled matter were adjourned.)
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C E R T I F I C A T I O N

I, HOLLY A. SANTSPREE, an Official Court Reporter in the Fourth Judicial District of the State of New York, do hereby certify that I attended at the time and place noted in the heading hereof and took a stenographic record of the proceedings in the above-entitled matter, and that the foregoing is a true and accurate computer-aided transcript, to the best of my knowledge and belief.


Holly A. Santspree

Dated:

