

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ADIRONDACK PARK AGENCY,

Respondent.

AFFIRMATION

Index No.: 315-08

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 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. Except as to the matters set forth in paragraph 20 below, I make this affirmation rather than submitting an affidavit of a party because the allegations contained herein are based solely on procedural and legal matters within my knowledge.

3. I make this affirmation in support of the Lewis Family Farm's motion for leave to reargue and renew its motion for a stay in order to modify this Court's April 11, 2008 Decision and Order of the Essex County Supreme Court (Hon. Richard B. Meyer) (hereafter "Decision and Order") pursuant to CPLR § 2221(d) in order to implement a full stay of Petitioner's obligation to abide by Respondent Adirondack Park Agency's Enforcement Committee Decision of March 25, 2008 (hereafter "March 25 Determination") until a final judgment is rendered in the

Article 78 proceeding and any appeals thereto. A copy of the April 11, 2008 Decision and Order is attached hereto as **Exhibit "A"**.

4. The procedural history of this case was previously set forth in the Affidavit of John Privitera, sworn to April 7, 2008, which this Court relied on in making the Decision and Order, and in the Petition. An Amended Verified Petition was served on Respondent's counsel on April 14, 2008, and is hereby supplied to the Court in conjunction with this motion, attached as **Exhibit "B"**.

5. The Agency's March 25 Determination against Petitioner Lewis Family Farm, Inc. directs the following:

- (1) Lewis Farm will apply for a permit for the three new dwellings and the 4-lot subdivision into sites (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 the NYS Department of Health and Agency standards and guidelines;
- (3) Lewis Farm will reply to any addition information request within 30 days of receipt.
- (4) Lewis Farm will retain all rights of appeal in the project review process, but forgoes 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 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.

(See Amended Verified Petition, Ex. A)

6. This Court acknowledged that, among other things, "[t]his proceeding involves novel issues of law relating to the interplay of various statutory definitions contained in the [Adirondack Park Agency] 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 State Constitution." (See Decision and Order, pp. 4-5).

7. Pursuant to CPLR § 7805, Petitioner also moved by an Order to Show Cause for a stay of Petitioner's obligation to comply with the March 25 Determination during the pendency of the Article 78 proceeding. A copy of the Amended Order to Show Cause dated April 9, 2008 is attached hereto as **Exhibit "C"**.

8. Petitioner's Order to Show Cause was supported by the Affidavit of Barbara A. Lewis, sworn to April 7, 2008, the Affidavit of John J. Privitera, Esq., sworn to April 7, 2008, and a Memorandum of Law in Support of a Stay, dated April 7, 2008.

9. Respondent opposed the Order to Show Cause by submitting the Affirmation of Loretta Simon, dated April 10, 2008, the Affirmation of Paul Van Cott, dated April 10, 2008, and a Memorandum of Law in Opposition, dated April 10, 2008.

10. This Court's Decision and Order applied the traditional tripartite test for temporary or preliminary injunctive relief: (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. (See Decision and Order, pg. 4) (citing Doe v. Axelrod, 73 N.Y.2d 748, 750, 536 N.Y.S.2d 44, 45, 532 N.E.2d 1272).

11. This Court correctly determined that the Lewis Family Farm "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." (See Decision and Order, pg. 5).

12. This Court also correctly determined that the Lewis Family Farm will suffer an actual and immediate irreparable injury unless its obligation to comply with the March 25 Determination is stayed during the pendency of this Article 78 proceeding. (See Decision and Order, pg. 5).

13. Specifically, this Court found that if the Lewis Family Farm is compelled to obey the Agency's Determination and apply for a permit by April 14, 2008, this entire proceeding becomes moot since the Petitioner will have already submitted to the Agency's jurisdiction, which Petitioner pleads is lacking over the farm houses at issue. (See id.).

14. Accordingly, this Court justly granted a stay as to Paragraphs (1) through (4), and (7) of the March 25 Determination. (See Decision and Order, pg. 5; see also ¶ 5, *supra*).

15. However, this Court denied a stay as to Paragraphs (5) and (6) of the March 25 Determination, which prohibit the Lewis Family Farm to occupy the three farm worker dwellings until and Agency permit is issued and require the Lewis Family Farm to pay a civil penalty of \$50,000 to the Agency by April 28, 2008, because it found that the Lewis Family Farm made an

insufficient showing of irreparable harm as to those Paragraphs. (See Decision and Order, pp. 3, 5; see also ¶ 5, *supra*).

16. Petitioner respectfully requests extension of the stay as to Paragraphs (5) and (6) of the March 25 Determination. Petitioner will be irreparably harmed if a full stay of the March 25 Determination is not granted.

17. This Court denied the stay as to Paragraph (5) of the March 25 Determination, which prohibits the occupancy of the farm worker dwellings, because “Petitioner conceded at oral argument that the dwelling units are not occupied.” (See Decision and Order, pg. 5). It is respectfully submitted that the Lewis Family Farm's obedience of the March 25 Determination until its motion for a stay could be heard by this Court should not be used as a sword against it.

18. Petitioner respectfully requests the Court to re-examine the portions of the uncontested Affidavit of Barbara A. Lewis, filed by Petitioner in support of a stay, which state that farm worker housing is absolutely necessary for the farm to sustain itself, and that the farm worker housing ***must*** be utilized during the imminent 2008 growing season, otherwise the farm will incur unquantifiable damage to farm operations. (See Lewis Aff., ¶¶ 4, 7). Essentially, without farm employees, the farm cannot survive.

19. The Lewis Family Farm has created several jobs solely by being able to offer housing to the farm workers and their families. However, the Lewis Family Farm cannot function or recruit the highly-skilled workers it needs to run New York State's largest organic farm without being able to provide the farm workers and their families with housing. (See id.). Thus, it is respectfully submitted that the Lewis Family Farm is suffering irreparable harm by not being able to utilize the farm worker houses for the 2008 growing season during the pendency of this proceeding.

20. Respectfully, as counsel for the Petitioner, Lewis Family Farm, I failed to fully inform the Court of the facts in the administrative record relating to and the impact of the Determination upon the farm worker housing as follows:

- a. Although I reviewed the Respondent's Determination, having received it a few days before filing the Petition and seeking this Court's Stay, I did not realize until the morning of argument that the Respondent's Determination actually goes far beyond the pleadings that were framed by Respondent Staff in the underlying Administrative Notice of Violation that was the subject of the Determination. Specifically, the Respondent's administrative Notice of Violation pleaded that only two of the three farm worker houses in the horseshoe cluster were illegal, not three. The Respondent's own affidavits pleaded that one of the houses did not require a permit, because it was a replacement of one of the old Walker farm houses. See Affidavit of Douglas Miller, Respondent's Enforcement Officer dated July 20, 2007, paragraph 12. (Our Amended Petition now pleads that there is no evidence to support the finding in the Determination that the Dormitory is illegal.) Petitioner has not understood, for a full year, that the Dormitory building at the top of the horseshoe in the farm worker housing cluster by the barns (See Affidavit of Barbara Lewis Exhibit A) is illegal. The Dormitory is finished on the inside. I am informed and believe that it has a Certificate of Occupancy from the Town of Essex and it has been used periodically for short periods of time since the Certificate of Occupancy was obtained. Now, it is urgent that this house be usable by the farm to house four (4) farm workers. Under a program supported in part by the Government of Nepal, the Lewis Family Farm is due to host four

farmers from Nepal this spring so that they may learn the methods of sustainable, organic farming so that they may teach these methods to other Nepalese farmers upon their return. These farmers have to stay in the Dormitory. These facts are covered in the Affidavit of Barbara Lewis that is part of the administrative record that was before the Respondent prior to its Determination. See Affidavit of Barbara A. Lewis dated January 17, 2008, attached hereto as **Exhibit D**. We respectfully pray that this important employment and teaching opportunity not be aborted *pendente lite*. Upon information and belief the Nepalese farmers are due to arrive on or about May 1, 2008; and

- b. I failed to emphasize at the argument on Friday the nature of farm employee housing in relation to the job itself, in addition to the Nepalese farm workers. The Lewis Family Farm has two open farm employee jobs, but the jobs cannot be offered to applicants and the positions cannot even be advertised until the Lewis Farm is able to honestly confirm that housing is secure, available and part of the compensation package. The North Family Cottage and the South Family Cottage are not yet finished inside because the Respondent's enforcement Determination has been hanging over the farm, keeping the buildings vacant and unfinished for a year. I am informed and believe that the finish work on the inside of these two structures will take several weeks. I am further informed and believe that the Lewis Family Farm is not equipped nor inclined to fund completion of the houses until it knows that this investment will be part of securing one or more farm employees. Thus, we request that the 'vacancy' directive of the Determination be stayed so that at least two good jobs, with new housing included can be offered by

the Lewis Family Farm to the depressed economy of the North Country. Since the Respondent's enforcement efforts here do not seek movement or destruction of the homes, occupancy does not harm the Respondent's efforts here.

21. Further, this Court denied the stay as to Paragraph (6) of the March 25 Determination, which orders the Lewis Family Farm to pay an administrative penalty of \$50,000 by April 28, 2008, because "[n]o allegation has been made that Petitioner lacks sufficient financial resources to pay the penalty." (See Decision and Order, pg. 5).

22. However, we respectfully submit that the Lewis Family Farm will suffer irreparable harm if it pays the penalty in compliance with the March 25 Determination because (i) the Lewis Family Farm will be deprived of its constitutional right to due process, and (ii) by paying the penalty, the Lewis Family Farm will be submitting to Agency jurisdiction and its case will be moot. There is no statutory mechanism for payments in escrow, much less account identities that preserve funds by a bound agent.

23. Further, forcing the Lewis Family Farm to pay the administrative penalty by April 28, 2008, before it has a chance to litigate the matter in this proceeding, deprives the Lewis Family Farm of its constitutional right to due process. It is axiomatic that no state can deprive any person of life, liberty, or property, without due process of law. U.S. CONST. amend. XIV, § 1. The right to due process affords the right to a hearing before the deprivation of life, liberty or a property interest. See Comm'r of Labor v. Hinman, 103 A.D.2d 886 (3d Dep't 1984). "The touchstone of due process is protection of the individual against arbitrary action of government" County of Sacramento v. Lewis, 523 U.S. 833, 845, 118 S. Ct. 1708, 140 L.Ed.2d 1043 (1998). Nothing could be more arbitrary than the imposition of a civil penalty against a party and demand that such penalty be paid before the party has had its day in court. See People v.

Cortlandt Med. Bldg. Assocs., 153 Misc.2d 692 (Cortlandt Town Ct., 1992) (finding a due process violation where a town was seeking to collect a civil penalty before the defendant had a chance to contest the underlying issues of the matter). A stay preserves the Court's inherent judicial power to decide the matter.

24. When an alleged deprivation of a constitutional right is involved, courts hold that no further showing of irreparable injury is necessary. See Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984) (affirming injunction to enjoin the closing of a prison which would deprive inmates of their constitutional rights).

25. Thus, the Agency's attempt to force the Lewis Family Farm to pay a penalty before it has had a chance to litigate the matter is shocking to one's sense of fairness. This is especially true since this Court has already determined that the Lewis Family Farm has "established a likelihood of success on the merits." (See Decision and Order, pg. 5).

26. Further, this case will become moot if the Lewis Family Farm is forced to pay the administrative penalty by April 28, 2008. This Court has already determined that the Lewis Family Farm suffered irreparable harm through the Agency's attempt to force it to submit to jurisdiction by April 14, 2008. (See Decision and Order, pg. 5). Paying the penalty would be no different.

27. "[A]dministrative agencies, as creatures of statute, are without power to exercise any jurisdiction beyond that conferred by statute." Flynn v. State Ethics Comm'n, 208 A.D.2d 91, 93 (3d Dep't 1995); see also Foy v. Schechter, 1 N.Y.2d 604 (1956) (stating that an agency must have jurisdiction in order for its determinations to be valid, and absent such jurisdiction, agency acts are void). Thus, "the APA cannot operate outside its lawfully designated sphere, with the propriety of its actions often depending upon the nature of the subject matter and the

breadth of the legislatively conferred authority." Gerdts v. State, 210 A.D.2d 645, 648-49 (3d Dep't 1994). The Agency lacks the authority to demand a penalty payment before the Court review.

28. We ask the Court to reconsider the vacancy of the farm worker houses in part because the Determination is *ultra vires* in this regard. To this end, the Agency is completely without any enforcement power to order the vacancy of a structure.¹ See N.Y. Exec. Law § 813. The Agency's sole recourse at the administrative stage of the proceeding was to proscribe a monetary penalty. See id. The Agency simply lacks the statutory power to unilaterally enjoin the Lewis Family Farm from occupying the dwellings. Thus, even if this Court determines that the Lewis Family Farm has failed to show irreparable harm, Paragraph (5) of the March 25 Determination should be stayed because it is illegal.

29. Similarly, this Court assumes that "should Petitioner ultimately prevail in this proceeding the penalty would have to be reimbursed in full to Petitioner." (See Decision and Order, pg. 5). However, there is no statutory mechanism whereby the Lewis Family Farm's penalty would be held in escrow by the Agency pending the outcome of this Article 78 proceeding. See generally N.Y. Exec. Law § 801, et seq.

30. Respondent will not be harmed if a full stay of the March 25 Determination is granted. This case is solely about jurisdiction. The Agency has already declared that the farm houses 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).

¹ The power to order the vacancy of a dwelling rests with the local government, and even then the power is limited to those instances when the dwelling is not in compliance with safety or health standards.

This Court has already stated that the Agency cannot claim any prejudice by the passage of time if a stay is granted based on its 'unexplained failure of the Respondent to timely refer the Petitioner's [alleged] noncompliance with the Act to the Attorney General (Executive Law § 813[2]) over a period spanning almost one year.' (See Decision and Order, pg. 5).

31. Based on the foregoing, the Lewis Family Farm respectfully asks this Court to enter an order modifying its April 11, 2008 Decision and Order in order to implement a full stay of the Lewis Family Farm's obligation to comply with the Agency's March 25 Determination pending a final judgment of this Article 78 proceeding, and any appeals thereto.

I hereby swear and affirm the above under penalty of perjury this 14th day of April, 2008.

/s/ John J. Privitera
John J. Privitera