STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ADIRONDACK PARK AGENCY,

Respondent.

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF STAY

Index No.

RJI No.

PRELIMINARY STATEMENT

Petitioner Lewis Family Farm, Inc. submits this memorandum of law in support of its motion pursuant to CPLR 7805 for a stay of enforcement of Respondent Adirondack Park Agency's Enforcement Committee Determination dated March 25, 2008 (hereafter "Determination"), pending review of said determination in this Article 78 proceeding.

The Agency's Determination, among other things, directs Petitioner to (1) apply for an Agency permit for a three-home subdivision for three new farm employee housing structures 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.

By attempting to force compliance with the Determination by April 14, 2008, the Agency has effectively slashed Petitioner's time in which to challenge the Determination from sixty (60) days to twenty (20) days. See N.Y. Executive Law § 818. Thus, based on its showing of irreparable harm, the Petitioner is entitled to a stay pursuant to CPLR 7805 pending the review of the Determination in this Article 78 proceeding.

STATEMENT OF FACTS

The relevant facts to this motion are set forth in the Article 78 petition, and accompanying affidavits of Barbara A. Lewis and John J. Privitera.

ARGUMENT

THE LEWIS FAMILY FARM IS ENTITLED TO A STAY PENDING REVIEW OF THE AGENCY'S DETERMINATION

Courts have broad discretion to stay the enforcement of a determination under review in an Article 78 proceeding. CPLR 7805. The court may initiate such a stay on its own accord or on the motion of any party. Id. Also, a stay of a determination under review in an Article 78 proceeding should be used in situations where the stay is "ancillary" to the ultimate relief sought. 36th & Second Tenants Ass'n v. New York State Div. of Hous. & Community Renewal, 243 A.D.2d 321 (1st Dep't 1997). The stay requested here is ancillary because it would only maintain the status quo during judicial review of the Determination.

In the Third Department, the only factor considered on such a motion is whether the movant will suffer irreparable harm if the stay is denied. See Matter of Stewart v. Parker, 41 A.D.2d 785 (3d Dep't 1973); Matter of Town of East Hampton v. Jorling, 181 A.D.2d 781 (2d Dep't 1992). However, some courts apply the traditional three-part test for obtaining preliminary injunctive relief where the movant must show (1) irreparable injury; (2) likelihood of success on the merits; and (3) balance of the equities in its favor. See Matter of Lee v. New York City Dep't of Hous. Pres. and Dev., 162 Misc.2d 901 (New York County Sup. Ct. 1994); Matter of Jarrett v. Westchester County Dep't of Health, 166 Misc.2d 777 (Westchester County Sup. Ct. 1995). Even though it is only required to show irreparable harm, the Petitioner can satisfy the other elements of the preliminary injunction test. Thus, a stay of the Agency's Determination is warranted.

In the instant motion, the Lewis Family Farm can show that it will suffer irreparable harm if a stay is not granted. Moreover, the Lewis Family Farm will demonstrate that its Article 78 proceeding unquestionably has merit. Finally, the Lewis Family farm will show that the Agency will not suffer any prejudice or harm whatsoever if the stay is granted.

A. The Lewis Family Farm Will Suffer Irreparable Harm Without A Stay

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. Irreparable injury means an injury for which a monetary award alone cannot be adequate compensation. See McCall v. State, 215 A.D.2d 1, 5 (3d Dep't 1995); Winkler v. Kingston Hous. Auth., 238 A.D.2d 711, 712 (3rd Dep't 1997). Here, no amount of money can compensate the Lewis Family Farm for the harm it will suffer if it is required to apply for a permit and submit its agricultural use structures to Agency jurisdiction as a non-agricultural housing subdivision.

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. (See Affidavit of John Privitera dated April 7, 2008, ¶ 6). This bell cannot be un-rung; irreparable harm is manifest in this situation.

Moreover, the mere filing of a permit application for a 4-lot subdivision for the placement of single family dwellings will cause additional irreparable harm because it will effectively destroy the financial structure of the farm. The Lewis Family Farm is currently protected by various tax incentives simply because of it utilizes its lands in an agricultural nature. (See Affidavit of Barbara Lewis dated April 7, 2008, ¶ 3). Filing for a subdivision with single family dwellings will revoke these tax incentives. If the Lewis Family Farm files for a permit for

a non-agricultural 4-lot subdivision with single family dwellings, the land and structures can no longer be considered a farm asset.[1] The Town of Essex assessor will then tax the land and buildings at issue as non-agricultural single family dwellings. 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." Once the farm employee houses are treated as a development project rather than a farm asset, 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 buildings 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 state and local authorities if Barbara Lewis is forced 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] Privitera Aff., Ex. A).

Further, if the Lewis Family Farm's employees are prohibited from occupying the farm employee houses until the Agency issues a permit, the farm will suffer further irreparable harm. The 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. (See Lewis Aff., ¶ 2). 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. (Id., ¶ 4). The farm's employee housing structures must be utilized by these workers for the 2008 growing season, which has nearly arrived. Not having farm employees on the premises will

[1] Requiring the Lewis Family Farm to submit to Agency jurisdiction and apply for the permit is akin to requiring the owners to register the farm's tractors for their personal use.

cause unquantifiable damage to farm operations. (Id.). In fact, ***the Agency recognizes the urgency of this matter*** by directing staff to review the Lewis Family Farm's permit application "towards the goal of issuing the after-the-fact permit in time for farm worker occupancy of the dwellings for the 2008 growing season." (Agency's March 25 Determination, pg. 13, Ex. A to Petition).

Finally, if the Lewis Family Farm does not receive a stay, it will suffer further harm because it faces additional penalties and consequences by acting in contempt of the Agency's Determination. See N.Y. Exec. Law § 813 (establishing a $500 per day penalty for the violation of an Agency order). Without a stay, the Lewis Family Farm runs the risk of accumulating hundreds of thousands of dollars in additional penalties during this appeal of the Agency's Determination. (See Privitera Aff., ¶ 7). Although such damages would be monetary, they are presently unquantifiable and factor into the irreparable harm analysis. See SIEGEL, NEW YORK PRACTICE § 328 (4th ed. 2005) (explaining that strict adherence to the principle that there must not be an adequate remedy at law "would undo some of the benefits wrought by the merger of law and equity"); see also Price Paper & Twine Co. v. Miller, 182 A.D.2d 748, 749 (2d Dep't 1992) (preliminary injunction will be denied where "litigant can *fully* be recompensed by a monetary award.") (emphasis supplied).

B. This Article 78 Proceeding Has Merit

It is undisputed that "agricultural use structures" are outside of the Agency's jurisdiction. However, the Agency is attempting to gain jurisdiction over the Petitioner's agricultural use structures by ignoring the pro-farm development clause of the Constitution and the Right-to-Farm Law. (See Petitioner's *Right to Farm* Memorandum of Law, Privitera Aff., Ex. B).

The Determination also represents a significant misreading the Adirondack Park Agency Act ("Act"). The Agency's Determination baldly states that "single family dwellings" cannot be "agricultural use structures" under the Act. (See Agency's Determination, Ex. A to Petition, pp. 8-9). This conclusion is not supported by law; the New York State Department of Agriculture and Markets maintains that such dwellings are always agricultural structures.

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). The term "structure" is defined 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). Therefore, a "single family dwelling" that is directly or customarily associated with agricultural use must necessarily be an "agricultural use structure" under the Act. See N.Y. Exec. Law § 802(8). The Petitioner 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).

Accordingly, the Agency's Determination was, among other things, absolutely "affected by an error of law" in violation of CPLR § 7803(3). Based on a cursory reading of the Act, it is clear that Petitioner has demonstrated a likelihood of success on the merits. See Karabatos v. Hagopian, 39 A.D.3d 930, 931 (3d Dep't 2007) (declaring that a showing of the mere language of a deed at issue was enough to demonstrate a likelihood of success on the merits).

On February 1, 2008, the Commissioner of the New York State Department of Agriculture & Markets made a formal, binding determination of fact and law under AML § 305-a, concluding that the Lewis Family Farm employee houses are agricultural buildings under the New York Right to Farm Law. (Privitera Reply Aff., ¶ 4, Ex. A).

Thus, on the merits, the Agency's Determination that the Lewis Family Farm employee housing is not agricultural is not likely to survive judicial scrutiny.

C. Balancing The Equities Favors A Stay

Balancing the equities requires that the Petitioner's motion be granted if the harm Petitioner would suffer absent the stay is more than the harm imposed on the Respondent if the stay is granted. See Fisher v. Deitsch, 168 A.D.2d 599 (2d Dep't 1990). Here, the balancing of the equities clearly favors the Petitioner since there is no threat of any harm to the Respondent if the 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. (See Privitera Aff., ¶ 8). Further, there is no harm to the Agency's land use plan, which counts all agricultural use structures including single family dwellings occupied by farm workers and their immediate families as one principal building for intensity purposes. See N.Y. Exec. Law § 802(50)(g). Also, the Agency has already allowed a substantial amount of time to pass (i.e., almost one year) before it made the Determination at issue. Finally, there is no harm to the Agency because it did not direct any type of remediation or enter an order to halt any harmful act. This dispute is solely about jurisdiction and there is no harm to the Respondent in maintaining the status quo while the Agency's Determination is reviewed in this Article 78 proceeding.

CONCLUSION

Based on the foregoing, this Court should enter an order staying the enforcement of the Agency's Determination pending the outcome of this Article 78 proceeding.

Dated: April 7, 2008
Albany, New York

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

/s/ John J. Privitera

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