

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 :

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Appearing on behalf of Petitioner/Defendants
Lewis Family Farm, Inc., Salim Lewis and Barbara
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Holly A. Santspree, Official Court Reporter
Fourth Judicial District

A P P E A R A N C E S : (Cont'd)

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Farm Bureau, Amicus Curiae

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THE COURT: All right. This is the matter of Lewis Family Farm, Incorporated and Adirondack Park Agency to consolidate a proceeding, an Article 78 proceeding, by Lewis Family Farm and an enforcement action by the Agency against the farm and it's two principals, Salim Lewis and Barbara Lewis.

Let's get the appearances starting with Mr. Privitera.

MR. PRIVITERA: Good afternoon, your Honor. John Privitera, on behalf of the Lewis Family Farm. I'm here with my associate, Jacob Lamme, and with me at counsel table is Sandy Lewis and Barbara Lewis.

THE COURT: Thank you.

Ms. Simon.

MS. SIMON: Good afternoon, your Honor. Loretta Simon, with the Attorney General's Office. And with me is Paul Van Cott, with the Adirondack Park Agency.

MS. FEATHERS: Good afternoon. Cynthia Feathers, for the Farm Bureau, amicus curiae.

THE COURT: Thank you.

I've reviewed the papers and it seems to me, 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

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find the record citations.

Your Honor, if I may, the primary argument by the Agency which dulls their approach on the merits, frankly, is that Judge Ryan has already decided what is before your Honor.

THE COURT: Well, didn't he decide in his decision that these were not agricultural use structures?

MR. PRIVITERA: No, your Honor. As a matter of fact, he says that they are agri- -- well, he's all over the place, your Honor. There is a reference in his opinion in the record to his finding that they are agricultural use structures as a matter of fact, and that the Agency does not dispute the fact that they are agricultural use structures.

But more importantly, your Honor, as a matter of fundamental collateral estoppel and res judicata law, your Honor, he did not decide the merits of the case. What he decided was that the whole case was premature. He sent it back under 7806 of the CPLR. He sentenced it back for the Agency to handle the matter. He said that he was not going to prejudge matters. He said that 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?

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THE COURT: Judge Lewis.

MR. PRIVITERA: Okay. We are collaterally estopped in part, as any litigant is, by that judge's decision. We were collaterally estopped from relitigating a preliminary injunction. We were collaterally estopped from relitigating whether or not a final decision had been made. Yes, that case is binding in those respects. But he didn't reach the merits because the merits weren't at issue and that's the essence of his opinion.

The amicus brief takes the same position with respect to that, your Honor, and I just don't see in any of the cases they have cited that a case that is essentially remanded to an agency can't then be heard on the merits when a court earlier has decided that the case is premature.

So, your Honor, I think in all due respect to Judge Ryan, his language, which is all over the place, is dicta, it was not necessary to his determination, a fundamental element of collateral estoppel in all of the cases that are cited by both parties, and therefore it is not binding and your Honor is free, just as you were

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free to decide the stay here, to decide in your own judgment the merits of this case.

THE COURT: Aren't you collaterally estopped on the Agricultural and Markets Law 305-a claim?

MR. PRIVITERA: No, your Honor, because he didn't decide that on the merits either.

THE COURT: Didn't you assert that -- not you, you weren't counsel then. Wasn't it asserted before Judge Ryan that 305-a precludes the Agency from exercising jurisdiction?

MR. PRIVITERA: Yes, your Honor.

THE COURT: And aren't you now claiming that 305-a precludes the Agency from exercising jurisdiction?

MR. PRIVITERA: Yes, your Honor.

THE COURT: So how is it different?

MR. PRIVITERA: It's different because now we're here before you on the merits, and when he decided that matter he said it was premature. The only thing that was necessary to his decision was a remand to the Agency. He did not decide the merits of that claim. In the context of the dispute before him at that time, the most he could have decided was that we were not likely to 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

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challenging.

THE COURT: But isn't it a factual issue as to whether or not this project constitutes an agricultural use that may be exempt from certain jurisdiction of the Agency? Isn't it a factual issue as to where this project was located, whether or not it was within the setback of the Rivers Act or not? Aren't all these factual issues that Judge Ryan indicated were for the Agency to determine first?

MS. SIMON: I think, your Honor, the affidavits that we submitted in Judge Ryan's court addressed the location and identified the homes. The Agency had already identified the homes as being within one-quarter mile of the Bouquet River -- sorry if I'm pronouncing it wrong. That made it jurisdictional, and in addition, in a Resource Management Area, which is already part of a map that is the official map of the Adirondack Park. And Judge Ryan had some affidavits showing that there was -- the actual location of these homes.

THE COURT: Didn't he determine, if anything, that these are agricultural use structures?

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MS. SIMON: Did he determine that?

THE COURT: Yeah, did he determine that.

MS. SIMON: He determined that the agricultural use structures in this -- I'd be better off reading from it myself. Can I?

THE COURT: Certainly. Please tell me what you're reading from so I can --

MS. SIMON: Yes. I'm going to go back to about page 5, I think. "The plaintiff argues that the houses are agricultural use buildings.... However, when read in its entirety, that section does not support plaintiff's interpretation." And I'm on page 5. I think that's Judge Ryan saying these are not agricultural use structures pursuant to the APA Act.

What's raised in this lawsuit that I think is a question still, your Honor, is what applicability does the Agriculture and Markets Law definition have to this project.

THE COURT: Well, wasn't he making a factual determination then?

MS. SIMON: I'm not following your question.

THE COURT: How can he make a determination 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

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determination in Hunt Brothers on whether the Mine Lands Reclamation Law and the APA Act triggered jurisdiction in that situation. So I think it was appropriate.

And if I might add, your Honor, they filed a Notice of Appeal which is now before -- will be before the Appellate Division, if they perfect it by July 28th. This issue that you are raising is now going to be dealt with in the Appellate Division, if they perfect. If they do not perfect, then I believe it becomes the law of the case here. They had ample opportunity to perfect. They had nine months to perfect, and they failed to perfect. They asked for an extension until September and the court said if they fail to perfect by July 28th, it will be dismissed.

THE COURT: Well, let me go back to the oral argument and maybe you can explain this statement by you to Judge Ryan. Page 26 of the oral argument, the first full paragraph down. You state: "... the issue of the final determination, the jurisdiction, the Agency has not acted yet as an agency, and there's no 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, well, 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.

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It had already been used by farm workers. It's the only house that's finished, your Honor. This farm is suffocating because the other two houses have just been shells for 15 months. The dormitory has plumbing, electrical and furniture. It's finished out, it's been used. So I think, more than anything else, the Appellate Division found that the status quo meant -- particularly when we were hoping to fill that building with farm workers from another country -- that the status quo meant that it could be used, just a slightly different sense of what the status quo meant, your Honor.

But to return, the Agency's own affidavits say that at least one of the houses, and we think it's the dormitory building, is on the footprint of a farmhouse. Oddly enough, the determination of the Agency found that all three houses were illegal, and there's nothing in the record in that regard. Toward the end of our brief we say there's no substantial evidence in support of that issue. However, you don't have to reach it if your decision turns on the bigger issues that are a part of our fundamental claims with respect 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

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central theme of the farm how dense a farm gets. They are not principal buildings.

There's one principal building on the Lewis Family Farm and there's one principal building on any farm, and that's the farm owner's farmhouse and that is a single family dwelling and that is regulated as a single family dwelling and that's why you need a definition of a single family dwelling. And you know what? The legislature is consistent on that too because the Commissioner of Ag & Markets says, oh, the farm workers's house, oh, that's not protected by the Lysander case, that's not protected by the Right to Farm Law. That's regulated by any local town in accordance with their zoning laws. You can regulate the farmer's house.

Similarly, the Commissioner of Taxation says and we have cited all of these matters throughout our brief, all of the sections of the tax law that apply here. The Commissioner of Taxation says, yes, that farmer's house, that farmer's house can be taxed for its full value like any other single family dwelling, but the farm worker's houses, they have to be treated as an 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

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construe the statute.

You also have to construe the entire fabric of New York State law *imperi materia*. In other words, you have to assume that the legislature knew what it was doing with respect to the entire approach to farm worker housing in every aspect of the law.

And so where, your Honor, where does it say that the legislature has said in the Right to Farm Law that farm worker housing is protected? Where the Court of Appeals has said that all on-farm buildings are within the protective reach of our embrace of farming.

Where does it say in the Park Act that notwithstanding all these warning signs and even though the buildings are invisible and not material to the plan, where does the legislature say except you can regulate them as single family dwellings, except you can decide whether or not they exist, you can decide how big that farm gets, you can decide where the homes are built, you can regulate the size and growth of that farm? It doesn't say that, your Honor.

And, therefore, in the face of the tax laws 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

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review is done, which has been said here.

THE COURT: But in Plato's Cave didn't they look at the Penal Law provision because there was no provision in the ABC law to define gambling?

MR. PRIVITERA: Yes. And there's none here that says that single family dwellings are to be regulated if they are farm structures.

THE COURT: But there is a provision in the Act which says what agricultural use structures are.

MR. PRIVITERA: Yes, your Honor, yes, yes. And agricultural use structures have a very broad brush paragraph that I just read to you.

THE COURT: Right. And isn't that provision -- don't I have to review the statutes in the Act, the APA Act, to understand that, and then, only if it's not clear, then go outside of it?

MR. PRIVITERA: No, your Honor. I think the case law is such that you always have to keep legislative intent in mind.

THE COURT: Well, I always do. But don't I do it first from the four corners of the Act and then, if it's unclear, don't I then refer to 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.

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Anything else?

MS. SIMON: If I might have a few minutes to rebut, your Honor?

THE COURT: Ms. Simon, I know we haven't gotten to Ms. Feathers yet.

MS. SIMON: Surely.

THE COURT: Ms. Feathers.

MS. FEATHERS: Judge Meyer, thank you very much for granting the Farm Bureau legal status and letting us appear here today.

I think it's very fitting here in the home of the High Peaks that the Adirondack Park Agency folks have shown themselves to be a bunch of bushwhackers. They are blazing a brave new trail in the law. But as an Adirondack hiker, I can tell you we find it strange when there's a well marked trail and it's ignored and the hiker goes off in another direction. The same goes here where we're dealing with a State agency that has marked trails to follow but has ignored those trails in the case the law.

Farm worker housing is defined. It has a very specific definition. It's arbitrary and capricious to not consult the well developed body 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 reed 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 ho 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?

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MS. FEATHERS: But there has to be some rational basis for that, especially when there's such a rich and relevant body of law to consult.

Yes, it's an advisory opinion and they do them case by case, as they say. But he's the agriculture commissioner. Who better knows what farm worker housing is and what the reality is? The Court of Appeals said in Lysander, where the Farm Bureau was amicus, We give deference to the opinion of the commissioner on what agriculture housing is.

THE COURT: Didn't the Agency say it's farm worker housing but under our own statutory scheme it's not an agricultural use structure for our purposes? Isn't that what they decided? It's no question it's farm worker housing, but under the Agency's own statutory definition it's not an agricultural use structure.

MS. FEATHERS: Are you talking about in the Lysander decision?

THE COURT: I'm talking about here.

MS. FEATHERS: I think they said here it's not an agricultural use structure.

THE COURT: But didn't they say it was farm 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.

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Ms. Simon.

MS. SIMON: Well, on that note,
your Honor --

THE COURT: Are you conceding?

MS. SIMON: -- I would say that neither the record nor anything that I'm aware of in this proceeding has demonstrated any bullying by the Adirondack Park Agency or any contempt for farmers and, in fact, the Adirondack Park Agency has done what it is mandated to do by law and issued a determination in this matter.

But putting that aside, I want to put to rest a few things quickly before I get to my argument. In interpreting 305-a of Ag & Markets Law and as to the issue of the Court of Appeals saying, according to Mr. Privitera, that the Hunt Brothers determination says that the Adirondack Park Agency is a local government planning agency which might then subject it to Lysander, I would say that it did not say that. It said, and I'm quoting, that it is "a superagency to regulate development in the Adirondack park region," and it uses the words "thus resemble" those of local governments. I'm just clarifying the record on 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?

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MS. SIMON: I believe the answer is yes, agricultural use structures are exempt.

THE COURT: So you're saying it can't be. You're saying a single family dwelling can't be an agricultural use structure.

MS. SIMON: Because it is separately defined.

THE COURT: Let me ask you this: Are all agricultural use structures single family dwellings? No. And are all single family dwellings agricultural use structures?

MS. SIMON: We think they are not related.

THE COURT: They are not, are they?

MS. SIMON: Are all single family dwellings agricultural use structures? No.

THE COURT: So wouldn't it be reasonable to assume that that's why the legislature, in setting out 810, made a separate provision for agricultural use structures and a separate provision for single family dwellings, because they are not always the same thing?

MS. SIMON: I think the Agency's interpretation of their own statute is they are separately defined because they are separately 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.

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MS. SIMON: -- we believe Justice Ryan already made the decision and the Appellate Division will be addressing it if they perfect their appeal. So we have been over that, and I would like to address the rest of the items.

One is -- and I'll just say briefly on the issue of subdivision, I'm reading from Justice Ryan's decision, Under the APA regulations, this building project constitutes a subdivision, even though it is not a typical suburban subdivision. I'm reading from page 5, Exhibit D of my affidavit, affirmation, excuse me. So we believe they are barred by collateral estoppel from raising this a second time before you, your Honor, because that was part of the issue of collateral estoppel.

Your Honor, I think I'd like to get back to the main point here and that is this case has been made out to be a case of the Adirondack Park Agency Law versus Agriculture and Markets Law. We don't believe that this is an actual controversy, in the sense that there are two definitions within each of these laws dealing with agricultural structures, they are separate 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.

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And they did. I mean, this resolution is also part of the record, considered but not accepted by the APA.

THE COURT: Okay.

MS. SIMON: Finally, on due process, the other item I wanted to address -- and I don't know if the Court has any concerns -- they allege they were deprived due process rights because they did not get an adjudicatory hearing with an administrative law judge. Pursuant to the APA regulations, they are not entitled to it. There are two situations where they automatically or, if they requested it, they would automatically get a hearing. They did not meet those two situations. And that is in part because they didn't apply and get a permit. If they had gotten a permit and it was to be revoked, modified or suspended, they would be entitled to a hearing. They didn't do that here. They are not entitled to it.

THE COURT: There's no provision for that under the enforcement committee regulations, is there?

MS. SIMON: Provision for an adjudicatory hearing? There are several situations where you

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can get an adjudicatory hearing. Am I understanding your question?

THE COURT: Under the enforcement procedures.

MS. SIMON: If it is an enforcement committee proceeding -- how they pursued it -- pursuant to the regulations here, you do not get an administrative law judge, correct. And one of the reasons -- they requested it, that's for sure. But one of the reasons they also didn't get it is because there were no issues of fact, at least that's how the Agency determined it, because of their own affidavits and their own admissions, and the Agency's own findings established that the houses were built. There was no question that the house were there. So they were not entitled and were not deprived of their due process rights because of that.

Your Honor, may I save my closing arguments?

THE COURT: Until after rebuttal? Is that what your asking?

MS. SIMON: I don't know if you want me to finish or let Mr. --

THE COURT: I'll give you another shot after Mr. Privitera.

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All right. Mr. Privitera.

MS. SIMON: And then can I have another shot.

MR. PRIVITERA: Thank you, your Honor for allowing me rebuttal.

We're now in a real nonsense situation because the Agency agrees with our interpretation of the definition of principal building and agrees that the farm worker houses here do not count and agrees they are invisible to the density plan, yet they insist on asserting jurisdiction over them. What for? Where is the expression of legislative intent after saying the buildings don't count? Where in the Act does it say assert jurisdiction over buildings that don't count? There are no other buildings that they review that don't count. It's a completely nonsense situation. And I think it goes to some of the things that Ms. Feathers says, we don't really know what the motivation for this is, that it's an effort to assert jurisdiction over buildings that don't count, and they agree that the buildings don't count.

Again, we have to return to the Court of 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

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clarify for the record, I did not submit a brief yesterday, I submitted a reply affirmation, and I think everyone has it.

Regarding the February 1st letter, just for the record, this was a letter to Mr. and Mrs. Lewis, not to the Adirondack Park Agency. It would not have automatically gone to the Agency unless someone provided it.

THE COURT: And that was done, it was provided, right?

MS. SIMON: It was provided and it was part of the record and it's not binding.

With regard to single family dwelling definitions, Mr. Privitera said where in the Act is it? For the record, 802-50(a) and (g) and 802(58).

And I want to specifically note that 810 of the Adirondack Park Agency Act requires permits for single family dwellings. Okay. We have known that, we have talked about that. 810 also says it does not require permits for agricultural use structures. The legislature had to have intended that these be separate to make those two provisions.

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

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with reference to the Agency are fair game for the Agency to seek redress; is that right?

MS. SIMON: I don't think I would make a broad statement like that, your Honor. I think it depends on the individual actions and other factors -- the size of the corporation and whether there are employees that were acting or other people, or they were not aware of it. I think part of the factual considerations are relevant.

THE COURT: All right. Anything else?

MS. SIMON: Just to conclude, your Honor, that the whole point here is, you know, there's some dispute between the definitions with two acts. But the APA has a clear mandate here to protect and to serve the Park. It is not violating that mandate, it is enforcing the mandate. And the Third Department in Gertz v. State said the APA is charged with an awesome responsibility and the legislature has granted it formidable powers to carry out its task. These three single family dwellings should not have been built without a permit. The septic systems within a quarter of a mile of the river should not have been built without a permit. We ask

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that this Article 78 be denied, and we submit that the Agency's determination was rational and it was in compliance with both statutes it's charged with enforcing your Honor.

Thank you.

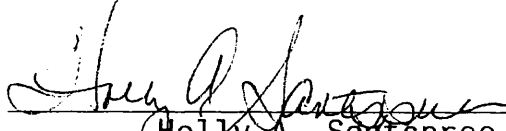
THE COURT: Thank you.

(Whereupon, the proceedings held in the above-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: Oct. 14, 2008