

CA 504626

On submission

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : THIRD DEPARTMENT

LEWIS FAMILY FARM, INC.,

Petitioner-Appellant,

v.

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Respondent-Respondent.

RESPONDENT'S MEMORANDUM OF LAW
IN OPPOSITION TO LEWIS FARM'S MOTION
TO ENJOIN ENFORCEMENT OF APA'S DETERMINATION
PENDING A DECISION ON APPEAL

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PRELIMINARY STATEMENT

The Respondent New York State Adirondack Park Agency ("APA" or "the Agency") submits this memorandum in opposition to petitioner Lewis Family Farm, Inc.'s ("Lewis Farm") motion for a stay of enforcement of a determination of the Adirondack Park Agency¹ pending resolution of its permissive appeal of the interim order of Supreme Court Justice, Essex County (Meyer, Acting S.J.C.), dated April 11, 2008.² In that determination, the APA found that Lewis Farm constructed three single-family dwellings on land located in the Town of Essex, Essex County in violation of the Adirondack Park Agency Act ("the APA Act"), Executive Law §§ 809, 810, and the Wild, Scenic and Recreational Rivers Act, ECL § 15-2701 ("Rivers Act"). The APA directed Lewis Farm to submit a permit application for the three dwellings, accompanied by detailed information about their septic system; directed that the dwellings not be occupied until a permit was issued; and assessed a civil penalty of \$50,000. Supreme Court's April 11, 2008 order granted the stay with respect to certain portions of the APA's enforcement determination, but denied a stay of the APA's \$50,000 penalty and the requirement that the

¹ See April 28, 2008 Affirmation of John J. Privitera ("Privitera Aff."), Exhibit C, for a copy of the March 25, 2008 APA determination.

² See Privitera Aff., Exhibit A, for a copy of the April 11, 2008 order.

dwellings not be occupied until a permit is issued and the penalty is paid.

This Court should likewise deny Lewis Farm's motion to enjoin these aspects of APA's enforcement determination. Petitioner has failed to demonstrate that it meets the criteria for injunctive relief pending appeal. Moreover, petitioner seeks to alter, rather maintain, the status quo in seeking to enjoin the APA's determination that the dwellings remain unoccupied until a permit is issued. For that reason alone, petitioner's motion in this respect should be denied.

Respondent APA also seeks amendment of Justice Stein's April 28, 2008 order to the extent that it allowed occupancy of one of the dwellings pending resolution of this appeal. Counsel for Lewis Farm represented at oral argument before Justice Stein that the septic system approvals were operational and local approvals had been obtained. See Simon Aff. ¶ 24. That information appears to be incorrect. According to new information provided by the Code Enforcement Officer for the Town of Essex, the new septic system for the dwellings is not operational, and one of the new residences is actually connected to the old, preexisting septic system. See Affirmation of Paul Van Cott dated May 2, 2008 ("Van Cott Aff. 5/2/08"), ¶ 2-8. The APA has not reviewed this older septic system; its administrative determination was based on submissions of Lewis Farm for a new septic system. See Van Cott Aff. 5/2/08, ¶ 7, see also 3/25/08 APA Determination

p. 4 ¶ 5, p. 12 ¶ 2(b). Accordingly, any and all occupancy should be denied pending this appeal. Respondent has no objection, however, to continuing the directive in Justice Stein's order of April 28, 2008, requiring Lewis Farm to deposit the \$50,000 penalty (or an undertaking for that amount) with the Essex County Treasurer by May 5, 2008, pending this appeal.

STATEMENT OF FACTS³

On or about March 14, 2007 Lewis Farm applied to the APA for a permit to construct three single-family dwellings⁴. On March 15, 2007, the APA informed Lewis Farm that the application was incomplete. See Simon Aff., Exhibit 2 (Affirmation of Paul Van Cott dated April 10, 2008 ["Van Cott Aff. 4/10/08"] ¶ 8-9). Notwithstanding the lack of an APA permit, in June 2007 Lewis Farm continued to install and constructed the three single-family dwellings. See Simon Aff. Exhibit 2 (Van Cott Aff. 4/10/08, ¶¶ 4, 5, 14); see also Affidavit of Douglas Miller dated July 20, 2007 ("Miller Aff. 7/20/07") ¶¶ 9, 15-21) at Privitera Aff., Exhibit M.

³Appended to this Memorandum for the Court's convenience is a chronology of exhibit documents referenced herein, which identifies the affirmation and exhibit and where they can be found.

⁴ The three single-family dwellings valued at approximately \$300,000 each, are two story dwellings with attached garages. See Affidavit of Douglas Miller dated December 12, 2007 ¶ 6 (Exhibit N to Privitera Aff.); and Exhibits C and D to Van Cott Aff. 5/2/08.

**Lewis Farm's Declaratory Judgment Action Against the APA
in 2007 (Index No. 498-07)**

In June 2007, while the underlying APA administrative proceedings continued, Lewis Farm commenced a declaratory judgment action in Supreme Court, Essex County, seeking a restraining order on APA's enforcement activities and declaration that the Agency lacked jurisdiction over construction of "farm worker housing." Alternatively, Lewis Farm argued that the Agriculture and Markets Law § 305-a superceded the APA Act and divested the APA of jurisdiction over the dwellings. See Simon Aff., Exhibit 4 (OSC and Amended Complaint #498-07).

On August 16, 2007, Supreme Court (Ryan, Acting S.J.C.) issued a Decision and Order denying Lewis Farm's application for a restraining order and rejecting Lewis Farms' argument that the three dwellings are exempt "agricultural use structures." The court concluded that neither the APA Act, nor the regulations implementing the Rivers Act, exempted the dwellings from the APA's jurisdiction. Addressing Lewis Farm's alternative argument, the court also found that Agriculture and Markets Law Section 305-a did not preempt APA jurisdiction. The court therefore dismissed the action as premature and unripe for judicial intervention. See Exhibit 6 (Decision and Order, Lewis Family Farm, Inc. v. APA, Index No. 498-07 (Sup. Ct. Essex Co., August 16, 2007) p. 5-6 (hereafter "the 2007 Order"). Lewis Farm filed a notice of appeal on or about October 1, 2007. See Simon

Aff., Exhibit 7. Lewis Farm has not perfected that appeal.

APA's Administrative Enforcement Proceedings and Determination

The APA continued with its enforcement proceedings against Lewis Farm. The Agency served Lewis Farm with a Notice of Incomplete Application, a Cease and Desist Order, a Notice of Apparent Violation, and a Notice of Request for Enforcement Committee Determination. The Agency's Enforcement Committee heard oral argument on March 13, 2008, at which Lewis Farm was represented by counsel. Issues presented for the Enforcement Committees' consideration included any relevant factual information and affirmative defenses regarding the alleged violations. See Exhibit 2 (Affirmation of Sarah Reynolds, dated April 22, 2008 ("Reynolds Aff.") ¶¶ 4-9, Exhibits B-F).

On March 25, 2005 the Agency determined that Lewis Farm was subject to APA's jurisdiction, and had violated the APA Act and Rivers Act by constructing three single-family dwellings and subdividing property within the meaning of the APA Act without permits. The APA directed Lewis Farm to apply for a permit by April 14, 2008, and pay a \$50,000 civil penalty, and submit septic system information by April 28, 2008. The determination also prohibited Lewis Farm from occupying the structures until the APA could review its complete permit application and ensure protection of the environment. See Simon Aff., Exhibit 2 (Van Cott Aff. 4/10/08, ¶ 27, Exhibit A, APA determination p. 12).

The Instant Article 78 Proceeding (Index No. 315-08)

On April 8, 2008, Lewis Farm commenced this C.P.L.R. article 78 proceeding by order to show cause, and obtained an ex parte stay of enforcement. See Simon Aff., Exhibit 8. The petition, like the earlier declaratory judgment complaint, continues to challenge APA's jurisdiction over the three dwelling units. See Simon Aff., Exhibit 8.

On or about April 9, 2008, after objection from the Office of the Attorney General, the improperly granted stay was vacated and the order to show cause amended to allow the parties to address a stay of the APA determination. See Privitera Aff., Exhibit E. After oral argument on April 11, 2008, Supreme Court granted Lewis Farm's application for a stay in part, but denied its request to stay the APA's prohibition against occupancy of the dwellings and the requirement that Lewis Farm pay the \$50,000 civil penalty.⁵ See Privitera Aff., Exhibit A (4/11/08 Order, p. 5).

On or about April 14, 2008, Lewis Farm moved for leave to reargue and renew Supreme Court's April 11, 2008 order. On or

⁵ The April 11, 2008 order granted a stay of the APA order to the extent Lewis Farm did not have to submit a permit application or septic information to the APA. The Court also stayed a provision regarding Lewis Farm's right to challenge the APA determination. The APA subsequently amended its determination to remove that later provision. See Privitera Aff., Exhibit A (4/11/08 Order of Justice Meyer, p. 5); see also Simon Aff., Exhibit 2 (Reynolds Aff., Exhibit G).

about April 14, 2008, Lewis Farm also filed an amended petition, which was served on the Office of the Attorney General on April 17, 2008. On April 25, 2008, the court issued a letter Decision and Order granting reargument and renewal, but adhering to his April 11, 2008 Order. See Privitera Aff., Exhibit B.

The State's Enforcement Action (Index No. 332-08)

On April 11, 2008, the Office of the Attorney General, on behalf of the APA, filed a summons and complaint against Lewis Farm, Salim Lewis and Barbara Lewis to enforce Executive Law §§ 809 and 810, ECL § 15-2701, and 9 NYCRR Part 577. See APA v. Lewis Family Farm, Inc., Salim B. Lewis, and Barbara Lewis, Supreme Court Essex County, Index No. 332-08 (State's Complaint). On April 14, 2008, Lewis Farm filed a motion to consolidate its article 78 proceeding with the APA enforcement action.⁶ The APA filed a cross motion to transfer them both to the IAS judge assigned to the 2007 declaratory judgment action. On April 25, 2008, the lower court consolidated the proceedings but denied the cross motion to transfer the matters to the other justice. See Privitera Aff., Exhibit B.

⁶When Lewis Farm filed Request for Judicial Intervention (RJI) forms for civil actions No. 332-08, and No. 315-08, Lewis Farm failed to alert the lower Court to the 2007 related case, heard by Justice Ryan; Lewis Family Farm, Inc. v. APA, Index No. 498-07. See Simon Aff., Exhibit 10 (RJI's).

**Lewis Farm's Application for Permission to Appeal
and Injunctive Relief Pending Appeal**

On April 28, 2008, Lewis Farm sought, by order to show cause, an application for permission to appeal the April 11, 2008 order and to enjoin enforcement of the APA determination in its entirety. After oral argument, Honorable Leslie Stein ordered a limited and conditional stay of enforcement pending determination by this Court of the motion. Specifically, the Court's interim order: (1) granted a conditional stay of the APA's assessment of a \$50,000 civil penalty to be paid by April 28, 2008, provided that Lewis Farm pay that amount to the Essex County Treasurer's office or post an undertaking on or before May 5, 2008, pursuant to CPLR § 5519(a)(2); and (2) enjoined enforcement of APA's prohibition regarding occupancy of one single-family dwelling - the "dormitory" - on the condition that petitioner-appellant submit as-built septic plans and an evaluation by a NYS licensed engineer as to whether the septic system complies with NYS Department of Health and Agency standards by May 5, 2008. See Simon Aff., Exhibit 11 (April 28, 2008 Order of Justice Stein).

ARGUMENT

APPELLANT HAS FAILED TO DEMONSTRATE THAT IT MEETS THE CRITERIA FOR INJUNCTIVE RELIEF

To obtain preliminary injunctive relief, the moving party must demonstrate: (1) a likelihood of success on the merits; (2) irreparable injury absent a preliminary injunction; and (3) the balancing of the equities in the applicant's favor. Doe v. Axelrod, 73 N.Y.2d 748 (1988); W.T. Grant Co. v. Srogi, 52 N.Y.2d 496, 517 (1981). Lewis Farm has not met and cannot meet these criteria and, therefore, does not qualify for the extraordinary relief sought here barring the enforcement of State law.

A. Lewis Farm is Not Likely to Succeed on the Merits

Lewis Farm has failed to demonstrate a likelihood of success on the merits, the first element required for injunctive relief. The Adirondack Park Agency has broad regulatory authority over land uses and development within the Adirondack Park. This Court recognized the broad and comprehensive authority of the APA over this unique State resource:

As an administrative agency, the APA has those powers expressly conferred by its authorizing statute, as well as those required by necessary implication (citations omitted) "The APA is charged with an awesome responsibility and the Legislature has granted it formidable powers to carry out its task (citations omitted)". Nevertheless, the APA cannot operate outside its lawfully designated sphere, with the propriety of its actions often depending upon the nature of the subject matter and the breadth of the

legislatively conferred authority (citations omitted). Considering the Legislature's comprehensive statement of findings and purposes contained in Executive Law § 801 and the delegation of power to the APA "to do any and all things necessary or convenient to carry out the purposes and policies of this article" (Executive Law § 804[9]), we conclude that the APA did not exceed its authority....

Gerdts v. State, 210 A.D.2d 645, 648-649 (3d Dep't 1994)

(upholding APA's general permitting authority and authority to participate in environmental conference), appeal dismissed, 85 N.Y.2d 857 (1995).

Lewis Farm's attempts to circumscribe the scope of the Agency's authority must be rejected. The APA clearly has authority to regulate the construction of the three dwellings that Lewis Farm built in the Adirondack Park without obtaining a permit. It also has express authority to impose a civil penalty for failure to obtain a permit before commencing construction.

The APA is acting squarely within its statutory authority, as explained in its memorandum to the court below. The Agency has specific authority to regulate single-family dwellings in Resource Management areas of the Adirondack Park under Executive Law §§ 809 and 810, and in protected areas pursuant to the Rivers Act, ECL § 15-2701. See Simon Aff., Exhibit 2 (Reynolds Aff. ¶¶ 12-19, 24-30). Although the APA Act includes specific exemptions from regulation for "agricultural use structures" in the Adirondack Park, these single-family dwellings are not

"agricultural use structures." See Simon Aff., Exhibit 2 (Reynolds Aff., ¶¶ 20-22). Moreover, single-family dwellings in Resource Management areas require permits under the Wild, Scenic and Recreational River System Act (Environmental Conservation Law § 15-2701(1)). See Simon Aff., Exhibit 2 (Reynolds Aff., ¶¶ 18-19).

As the record demonstrates, Lewis Farm brought a similar action in 2007 involving the same violation herein: construction of three single-family dwellings on its property in a resource management area and protected river corridor in the Adirondack Park without the required APA permit. See Simon Aff., Exhibits 3 and 4 (2007 Complaint and Amended Complaint 2007). The Supreme Court in its August 16, 2007 Order held that the APA had regulatory jurisdiction over the dwellings and the subdivisions created by construction of the dwellings. The court rejected Lewis Farm's argument that the dwellings are "agricultural use structures," and determined that Agriculture and Markets Law Section 305-a did not supersede Agency authority. See Simon Aff., Exhibit A, p. 4-5, Decision and Order, Lewis Family Farm, Inc. v. APA, (Sup. Ct. Essex Co., August 16, 2007). Also recognizing APA's broad regulatory authority, Justice Ryan explained in his August 16, 2007 decision:

The Court does not agree with the plaintiff's assertion that the APA has no authority over this building project. The area in which three of the houses, the particular houses

which have been built, is located, is defined as part of the Wild, Scenic and Recreational River System Act (Environmental Conservation Law § 15-2701(1)). Under the Environmental Conservation Law, the APA has authority to make and enforce regulations necessary to enforce the act (Environmental Conservation Law § 15-2709(1)).... Under the APA regulations, this building project constitutes a "subdivision" even though it is not a typical suburban subdivision.

See Simon Aff., Exhibit 6 (August 16, 2007 Decision and Order of Justice Ryan, p. 4-5).

Although Lewis Farm filed a notice of appeal from the August 16, 2007 order, it never perfected its appeal. Nevertheless, it seeks to raise the identical jurisdictional claims here. See Privitera Aff., Exhibit K, ¶¶ 67, 69, 71, 73.⁷ But in light of the fact that the key legal issues raised here were already addressed and rejected by Supreme Court once, there is little likelihood that Lewis Farm will prevail here.

Finally, there is no merit to Lewis Farm's argument that APA lacks authority to prohibit occupancy until it reviews the after-the-fact permit application. APA's authority to include such directive is inherent in its obligation to enforce the provisions of the APA Act and the Rivers Act. APA has broad and permanent authority to protect the State's natural resources in the Park.

⁷While petitioner included an amended petition as an exhibit to his motion, the amended petition was served on the Office of the Attorney General after the court below issued its order on April 11, 2008. See Simon Aff., ¶ 22.

If it were unable to prevent use of buildings before it has a chance to complete review of environmental protection measures, it would seriously undermine the APA's efficacy and the deterrent effect of its orders.

B. Lewis Farm Has Failed to Demonstrate Irreparable Harm

Petitioner claims that it will be irreparably harmed if it cannot use the dwelling units to house its farm-workers in the 2008 growing season. See Privatera Aff. ¶¶ 24-33. Lewis Farm also alleges that it will suffer constitutional harm if it must pay a penalty as required by the APA determination before it has the chance to obtain judicial review. See Pet. Memo 4/7/08, p. 5, see also Simon Aff., Exhibit 2 (Van Cott Aff. 4/10/08, Exhibit A, p. 12, ¶ 6). Lewis Farm's attempts to demonstrate irreparable harm are unavailing.

With respect to its claimed harm that the dwelling units cannot be used during the 2008 growing season, this harm is self created. Lewis Farm knew that it needed a permit from APA as early as 2005, nevertheless is invited the four individuals from Nepal without having secured a permit or timely resolving the jurisdictional issue.

Next, Lewis Farm's claim of irreparable harm with regard to the penalty is also baseless. "[M]onetary damages are simply not irreparable and are insufficient harm to support issuing of an

injunction." See Winkler v. Kingston Hous. Auth., 238 A.D.2d 711, 712 (3d Dep't 1997). Notably, even the court below noted in its April 11, 2008 Decision and Order that Lewis Farm has not alleged that it "lacks sufficient financial resources to pay the penalty." See Privitera Aff., Exhibit A (4/11/08 Order of Justice Meyer).

Nor is there any basis for Lewis Farm's claim that it would be irreparably harmed by the requirement that it pay an administrative penalty before it has a chance to litigate the issue in court. See Privitera Aff., ¶ 34-36. Lewis Farm received all the process that is due in the administrative proceedings before the APA. There is no constitutional requirement for judicial review before an agency can impose penalties.

None of the cases cited in petitioner's papers supports its position. County of Sacramento v. Lewis, 523 U.S. 833 (1998), holding that there is no due process liability under the U.S. Constitution as a result of a high-speed police chase where there is no intent to harm a suspect, is completely inapposite. That case nowhere addressed the imposition of financial penalties and procedural due process requirements attendant to administrative proceedings.

Lewis Farms' reliance on Commissioner of Labor v. Hinman, 103 A.D.2d 886 (3d Dep't 1984), appeal dismissed, 64 N.Y.2d 756 (1984), is also misplaced. In Hinman, this Court found no due

process violation where the plaintiff Commissioner issued an order and civil penalty following an investigation and conference. Id. at 886, 887. The Court determined that Special Term erroneously vacated the judgment based on procedural or substantive due process grounds, noting the requirement for notice and an opportunity to be heard had been met. Id. at 886. Here, as in Hinman, Lewis Farm had notice and an opportunity to be heard before the administrative agency, was represented by counsel during the administrative process, and made an extensive presentations to the agency. See Simon Aff., Exhibit 2 (Reynolds Aff., Exhibit F [transcript]).

People v. Cortlandt Med. Bldg. Assocs., 153 Misc.2d 692 (Cortlandt Town Ct., 1992), upon which petitioner also relies, is distinguishable. In Cortlandt, a town court dismissed charges against the defendant for failure to have a hearing prior to the initial determination, because "officials made their own ex parte determination." Id. at 641. Here, however, APA officials did not make an ex parte determination. On the contrary, Lewis Farm was served written notice of the violation, was provided a full and fair opportunity to be heard at a public proceeding before APA's Enforcement Committee on March 13, 2008, and was represented by counsel who fully participated in the administrative proceeding on petitioner's behalf. The record in this proceeding is clear; between March 15, 2007 and March 26,

2008, Lewis Farm had notice of the APA allegations and had repeated and ample opportunity to challenge them. See Simon Aff., Exhibit 2 (Reynolds Aff., Exhibits A to F). The Agency staff issued a Notice of Incomplete Permit Application and Receipt of Application in response to Lewis Farm's application; served a Cease and Desist Order on Lewis Farm when the homes were being installed; later notified counsel for Lewis Farm that the Cease and Desist Order remained in effect, and commenced an administrative enforcement proceeding against Lewis Farm by service of a Notice of Apparent Violation. See Simon Aff., Exhibit 2 (Reynolds Aff., Exhibits A-F).

In December 2007, Agency staff served a Notice of Request for Enforcement Committee Determination on Petitioner's attorney and on March 13, 2008, the Enforcement Committee considered the Lewis Farm administrative enforcement matter. The Enforcement Committee allowed counsel for Agency staff and Lewis Farm to make extensive oral arguments, and powerpoint presentations on the record. A stenographic transcript of the March 13, 2008 proceeding was made. See Simon Aff., Exhibit 2 (Reynolds Aff., ¶ 9, Exhibit F).

The Enforcement Committee issued a ruling on March 25, 2008, in which it determined inter alia: (1) that Lewis Farm violated the APA Act and the Rivers Act; (2) required Lewis Farms to obtain after-the-fact permits for its single-family dwellings and

subdivisions; and (3) imposed a financial penalty of \$50,000 for the violations. See Simon Aff., Exhibit 2 (Reynolds Aff., Exhibit A [Van Cott Aff., Exhibit therein]). The Agency transmitted the Determination to petitioner's attorney by telefax on March 26, 2008, and also served it on Lewis Farm. See Simon Aff., Exhibit 2 (Reynolds Aff., Exhibit A [Van Cott Aff., ¶ 28]).

Plainly, Lewis Farm had notice and a full and fair opportunity to be heard at the administrative level before the APA issued its determination. What is more, Lewis Farm has been heard in the judicial arena by the Supreme Court in its 2007 declaratory judgment action. Supreme Court held unequivocally that the APA has jurisdiction over the buildings and that there is no conflict with Agricultural and Markets Law § 305(a). See Simon Aff., Exhibit 6. Lewis Farm even had the opportunity for appellate review before the administrative determination was made, but chose not to perfect its appeal expeditiously. Accordingly, there is no basis to stay the APA's enforcement for lack of due process.

Thus, Lewis Farm's claim of irreparable harm is entirely self-created. Lewis Farm chose to proceed with building these structures without completing the permit process with the Agency, installing foundations and septic systems, and even after the APA issued a cease and desist order, continuing installation of the dwellings. See Simon Aff., Exhibit 2, (Van Cott Aff. 4/10/08, ¶¶

4, 10, 12-13, 19, 21, Exhibit A, ¶ 11). Lewis Farm knew as early as December 2005 of the APA's permit requirements (see Van Cott Aff. 4/10/08, ¶ 7), but waited until March 2007 to submit an application to construct the single-family homes. See Simon Aff., Exhibit 2, (Van Cott Aff. 4/10/08, ¶ 8). Lewis Farm was also aware of the APA's jurisdiction as early as 2000, when it entered into a Consent Order with the Agency to resolve its illegal filling and draining of wetlands. See Simon Aff., Exhibit 1. And it did not avail itself of the opportunity to perfect its appeal from the August 16, 2007 order to resolve the jurisdictional issues it now seeks to present in an expeditious manner. See Simon Aff., Exhibit 7 (Notice of Appeal).

C. **The Equities do not Weigh in Favor of Granting a Preliminary Injunction Against APA Enforcement**

In balancing of the equities, the courts must not only weigh the public interest, but must attach "paramount importance" to it. See Mariculture, Ltd. v. Biggane, 48 A.D.2d 295, 298 (3d Dep't 1975), Metropolitan Transp. Auth. v. Village of Tuckahoe, 67 Misc.2d 895, 900 (Westchester Co. Sup. Ct.), aff'd, 38 A.D.2d 570 (2d Dep't 1971). Plainly, the public has a compelling interest regarding construction in protected areas and along recreational rivers of the State, and that any development be protective of the environment and preserve its quality and value for the benefit and enjoyment of future generations. See ECL § 15-2701.

The APA's statutory responsibility to ensure the protection of the environment outweighs any equitable arguments that petitioner may present. See Ryan v. APA, 186 A.D.2d 922 (3d Dep't 1992) (upholding APA's determination to enforce size limitation of newly constructed house which violated permit conditions). In Ryan, this Court noted that:

Supreme Court's conclusion . . . is inconsistent with the function of respondent and purpose of the permit, namely, preservation of the Adirondack Park and its resources together with the environmental and scenic attributes of the area. Respondent's purpose is not to assure the economic success of the developer

Id. at 924-925. Here, Lewis Farm's construction of three single-family dwellings, installation of foundations and septic systems, and subdivision of land - all without APA permits - undermines the Agency's regulatory mandate, and interferes with the protection of sensitive Adirondack Park resource management lands and the scenic corridor along a New York-designated recreational river.

Appellant asserts that there is no threat of harm to the environment here. See Privitera Aff. ¶ 40. However, the Legislature has vested the APA - not Lewis Farm - with a responsibility to protect and preserve lands within the Adirondack Park, including the location of septic systems near protected rivers, and regulating the other impacts of development. This Court should defer to the Act and the APA's

judgment and discretion.

D. The Purpose of A Stay is To Maintain the Status Quo

Lewis Farm should not be allowed to occupy any of the three single-family residences unless and until it obtains an APA permit. The status quo of "no occupancy" should be maintained by the Court in order to prevent potential environmental harm. As noted in the April 11, 2008 Order, the purpose of a stay is to maintain the status quo. See State v. Town of Haverstraw, 219 A.D.2d 64, 65 (2d Dep't 1996). While the court stated that the appellant here "minimally met the requisite elements" for injunctive relief, the Court denied their request to occupy the dwellings because counsel conceded at oral argument that the dwelling units are not occupied. See Privitera Aff., Exhibit A, p. 5 (April 11, 2008 Order). The Supreme Court again noted this impediment in its letter Decision and Order dated April 25, 2008, granting reargument on the stay, where it adhered to its April 11, Order:

[G]ranting a stay for the purposes requested
- so that the subject dwelling units could be
used and occupied pending final judgment -
would go beyond the purposes of a stay,
namely to maintain the *status quo*

See Privitera Aff., Exhibit B, p. 3 (Letter Decision and Order dated April 25, 2008).

After oral argument before Justice Leslie Stein on April 28, 2008, this Court partially and conditionally lifted the stay

issued by Justice Meyer pending a determination on this motion to allow occupancy of one single-family dwelling, on the condition that the appellant provide the specific plans for the septic system as delineated in Justice Meyer's Order, paragraph 2(b). Since that time, the APA has learned from the Town of Essex Code Enforcement officer that the septic system serving the single-family dwelling that appellant seeks to occupy is not the new system designed for the three new dwellings. Rather, the dwelling is connected to an older septic system that served the pre-1973 single family dwelling that has been removed from the property. See Van Cott Aff. 5/08 ¶ 5. According to the Code Enforcement officer, the new septic system for the three new dwellings has not been installed and is not, in fact, operational. See Van Cott Aff. 5/08, ¶¶ 5, 6. In light of this new information this Court should not allow appellants to occupy any of the dwellings until a final judicial determination of the merits of this matter. Judge Stein's April 28, 2008 interim Order should be amended accordingly.

CONCLUSION

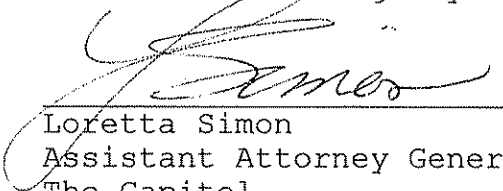
For all of the foregoing reasons, the appellant's request for injunctive relief should be denied.

Dated: May 5, 2008
Albany, New York

Respectfully submitted,

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**CHRONOLOGY OF EXHIBIT DOCUMENTS OF RESPONDENT
ADIRONDACK PARK AGENCY ("APA")**

2000 Consent Order

Simon Affirmation, Exhibit 1

March 14, 2007 APA receives permit application from Barbara Lewis and S.B. Lewis

Van Cott Affirmation dated May 2, 2008, Exhibit C (attached to Quinn Affidavit)

June 26, 2007 Summons and Complaint (Index No. 498-07)

Simon Affirmation, Exhibit 3

July 13, 2007 Order to Show Cause with Amended Complaint (undated)

Simon Affirmation, Exhibit 4

July 20, 2007 Affidavit of Douglas Miller

Privitera Affirmation, Exhibit M

July 23, 2007 Affidavit of John L. Quinn (attached to Affirmation of Paul Van Cott dated May 2, 2008)

Van Cott Affirmation dated May 2, 2008, Exhibit C

August 16, 2007 Decision and Order (J. Ryan), Lewis Family Farm, Inc. v. APA, (Index No. 498-07) and Affidavit of Service dated August 31, 2007

Simon Affirmation, Exhibit 6

September 26, 2007 (dated) and October 1, 2007 (filed) Notice of Appeal (Index No. 498-07)

Simon Affirmation, Exhibit 7

December 12, 2007 Affidavit of Douglas Miller

Privitera Affirmation, Exhibit N

January 17, 2008 Affidavit of Barbara Lewis,

Van Cott Affirmation dated May 2, 2008, Exhibit B

March 25, 2008 Determination of Enforcement Committee of the APA

Simon Affirmation, Exhibit 2 (attachment to Van Cott Affirmation)

Privitera Affirmation, Exhibit C

April 8, 2008 Ex parte Stay and Order to Show Cause

Simon Affirmation, Exhibit 8

April 7, 2008 Request for Judicial Intervention

Simon Affirmation, Exhibit 10

April 9, 2008 Amended Order to Show Cause

Privitera Affirmation, Exhibit E

CHRONOLOGY cont.

April 10, 2008 Affirmation of Paul Van Cott with March 25, 2008 APA determination attached

Simon Affirmation, Exhibit 2

April 11, 2008 Summons and Complaint (Index No. 332-08)

Simon Affirmation, Exhibit 9

April 11, 2008 Transcript of Oral Argument before Justice Meyer

Privitera Affirmation, Exhibit L

April 11, 2008 Decision and Order of Justice Meyer

Privitera Affirmation, Exhibit A

April 14, 2008 Request for Judicial Intervention

Simon Affirmation, Exhibit 10

April 22, 2008 Affirmation of Sarah Reynolds with exhibits

Simon Affirmation, Exhibit 2

April 25, 2008 Letter Decision and Order of Justice Meyer

Privitera Affirmation, Exhibit B

April 28, 2008 Order of the Appellate Division, Third Department (Justice Stein)

Simon Affirmation, Exhibit 11

