STATE OF NEW YORK
SUPREME COURT : COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

v.

NEW YORK STATE ADIRONDACK PARK AGENCY,

Respondent.

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

RESPONDENT ADIRONDACK PARK AGENCY'S MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER LEWIS FARM'S MOTION TO REARGUE AND RENEW

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Dated: April 22, 2008

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PRELIMINARY STATEMENT

The New York State Adirondack Park Agency ("APA" or "the Agency") respectfully submits this memorandum of law in opposition to petitioner Lewis Farm's motion to reargue and renew its previous application to stay a determination of the APA, which this Court adjudicated on dated April 11, 2008. This Court's April 11, 2008 Decision and Order stayed a portion of APA's March 25, 2008 determination, but also declined to stay another portion of the APA determination.

The Court should deny the motion because it fails to meet the standard for reargument or renewal pursuant to CPLR § 2221(d) and (e). Petitioner had a full and fair opportunity to be heard on its previous application. Petitioner's new motion fails to show how this court overlooked or misapprehended the facts or law to support a reargument, and petitioner's motion raises no new issue of fact nor justifiable excuse for renewal, therefore it should be denied.

STATEMENT OF FACTS

The relevant facts are set forth in the Affirmations of Sarah Reynolds and Paul Van Cott. See Reynolds Affirmation, dated April 22, 2008 ("Reynolds Aff.") ¶¶ 4-11, Exhibits A-G; Van Cott Affirmation, dated April 10, 2008 ("Van Cott Aff.").

ARGUMENT

POINT I

THE COURT SHOULD DENY LEWIS FARM'S MOTION FOR LEAVE TO REARGUE AND RENEW BECAUSE IT FAILS TO MEET THE REQUIREMENTS OF CPLR §§ 2221 (d) AND (e)

The petitioner's motion to reargue and renew should be denied for failure to meet the standard for reargument and renewal pursuant to CPLR § 2221 (d) and (e). Effective in 1999, the CPLR was amended with regard to the leave for reargument and renewal. A Motion for leave to reargue:

> ...shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion...

CPLR § 2221(d)(2). A motion for leave to renew:

> ...shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination ...

CPLR § 2221(e)(2). See Poag v. Atkins, 3 Misc. 3d 1109A (Sup. Ct. New York County 2004) (court noted discretion to grant a motion for leave to renew unaccompanied by a reasonable justification for the failure to include facts on a prior motion had been eliminated).

Petitioner seeks a motion to reargue and renew to "clarify the facts and law before the Court." See Petitioner's Memo of Law dated April 14, 2008 ("Pet. Memo"), p. 3. However, "clarification" is not grounds for reargument or renewal.

A. No Basis Exists to Grant Petitioner's Motion for Leave to Reargue it Previous Application

A motion for leave to reargue must show that the Court overlooked or somehow misconstrued the facts or misapplied the law. See DeSoignies v. Cornasesk House Tenants' Corp., 21 A.D.3d 715 (1st Dep't 2005) (reargument not available where a movant sought only to urge a new theory of liability not previously advanced, and failed to show how the court misconstrued facts or law); see also Andrea v. E.I. du Pont de Nemours & Co., 289 A.D.2d 1039 (4th Dep't 2001), appeal denied, 97 N.Y.2d 609 (2002)(motion to reargue may be granted only upon a showing that the court overlooked or misapprehended the facts or the law, or for some reason mistakenly arrived at its earlier decision).

Petitioner makes no showing here of how the Court overlooked facts or the law. Rather, petitioner recycles factual arguments that were already heard by the Court: petitioner needs the unpermitted housing for visiting farmers from Nepal. See Petitioner's Memo of Law, p. 3, see also Affirmation of John Privitera dated April 14, 2008 ("Privitera Aff.,") Exhibit D, (Affidavit of Barbara Lewis dated January 17, 2008 ¶ 9).

Petitioner's motion cites two cases in support of leave to reargue. In the first, Long v. Long, 251 A.D.2d 631 (2d Dep't 1998), the court granted reargument in a matrimonial matter since the Court failed to make a determination on child support arrears. Here, there is no matter that the court failed to

address. The Court specifically addressed each of the items the petitioner sought to stay in the determination of the APA, identifying each paragraph of the determination that was stayed and each that was not. The second case cited by petitioner involved a misapprehension of the law by a court. See Dixon v. NY Cent. Mut. Fire Insur. Co., 265 A.D.2d 914 (4th Dep't 1999). Petitioner here fails to specify how this Court misapprehended the law regarding the criteria for a stay herein. Petitioner's request for reargument should therefore be denied.

B. No New Facts Exist To Support Petitioner's Motion for Leave to Renew Its Previous Application

Lewis Farm must show new facts or a change in the law to support the motion for renewal. It does neither, and the motion should be denied.

Petitioner's sole basis for claiming "new" facts exist is that Lewis Farm is expecting Nepalese farmers who will be arriving in a few weeks and need housing. See Pet. Memo, p. 3. A motion to renew must be based upon newly discovered evidence that was not available when the original motion was made, and must also include a justifiable excuse for not placing such new and arguably material facts before the court in the first instance. See Grassel v. Albany Medical Center Hosp., 223 A.D.2d 803, 804 (3d Dep't), lv. dismissed in part, denied in part, 88 N.Y.2d 842 (1996); Wagman v. Village of Catskill, 213 A.D.2d 775, 775-76 (3d Dep't 1995)(motion to renew denied where defendant

failed to proffer justifiable excuse for failure to have offered evidence at time of original motion). Petitioner fails to satisfy this controlling legal standard.

In January of 2008, long before petitioner filed this proceeding, petitioner knew that it would "host" Nepalese farmers who would be arriving in the spring of 2008. In an affidavit of Barbara Lewis dated January 17, 2008, discussing the farmers expected visit, Ms. Lewis states "These farmers had been scheduled to arrive in the fall of 2007 and now plan to arrive in late spring 2008." See Privitera Aff., Exhibit D (Affidavit of Barbara Lewis dated January 17, 2008, ¶ 9). Indeed, petitioner acknowledges that this information is not new and was before the Court during the April 11, 2008 hearing on petitioner's Order to Show Cause and Motion for Stay on, in Supreme Court Essex County. See Pet. Memo p. 3. Accordingly, petitioner fails to meet the requirement of CPLR § 2221(e)(2), that the motion be based on new facts.

C. Petitioner Presents No Reasonable Justification To Warrant Renewal

Petitioner also must include a justifiable excuse for not placing new and arguably material facts before the court in the first instance. See CPLR 2221(e)(3); see also Wagman at 775. A "justifiable excuse" for not initially presenting facts to the court is deemed absent where the new facts presented were capable of being discovered at the time the original motion was made.

Dyer v. Planning Bd. of Town of Schaghticoke, 251 A.D.2d 907 (3d Dep't), appeal dismissed, 92 N.Y.2d 1026 (1998), lv. to appeal dismissed, 93 N.Y.2d 1000 (1999); Town of Poestenkill v. New York State Dep't of Envt'l Conservation, 229 A.D.2d 650, 651 (3d Dep't 1996).

As discussed above, petitioner clearly knew in January of 2008 that the Nepalese farmers would be arriving in spring of 2008. See Privitera Aff., Exhibit D (Affidavit of Barbara Lewis dated January 17, 2008, ¶ 9). Perhaps recognizing that the information is not "new," petitioner's attorney attempts to avoid this weakness by affirming: "I failed to fully inform the Court of the facts..." and "I failed to emphasize at the argument...the nature of farm employee housing..." See Privitera Aff., ¶ 20. A motion for leave to renew is not a "second chance freely given to parties who have not exercised due diligence in making their first factual presentation." Carota v. Wu, 284 A.D.2d 614, 617 (3d Dep't 2001)(citations omitted) (unsworn medical notes from examination after return date not "new evidence" warranting renewal). While the test has been viewed as "flexible," in accordance with a court's underlying discretion, the standard must still be met. See Ramsco, Inc. v. Riozzi, 210 A.D.2d 592, 593 (3d Dep't 1994) (recognizing inherent court discretion, but denial of renewal upheld when circumstances warranted denial); Hooker v. Town Bd. of Town of Guilderland, 60 A.D.2d 684, 685 (3d

Dep't 1977)(where "new facts" were available to petitioners at commencement of the proceeding, and the record lacked an explanation for why those facts had been omitted, denial of motion to renew not an abuse of discretion). Petitioner's failure to emphasize certain facts, when given a full and fair opportunity by this Court to do so, does not justify renewal. In short, Lewis Farm is not entitled to a "Do Over" because it did not emphasize an available fact during its first presentation to this Court.

D. Petitioner is Not Permitted to Try Out a New Legal Theory Via a Motion for Leave to Renew

A motion for renewal is available where there is a change in applicable law that would change the determination, but not for asserting new legal theories. See CPLR 2221 (e)(2); see also Albany Community Dev. Agency v. Abdelgader, 205 A.D.2d 905, 905-906 (3d Dep't 1994)(renewal not available where party moves to proceed on a different legal theory). Petitioner argues in its motion for renewal, that Lewis Farm will suffer irreparable harm if it pays the APA penalty because it "will be deprived of constitutional due process rights." See Privitera Aff., ¶ 22. Petitioner failed to make this argument in its April 7, 2008 Memorandum of Law in Support of a Stay or in the April 7, 2008 Affidavit of John J. Privitera in Support of Stay. This is a new legal theory and is therefore not grounds for granting a motion to reargue or renew.

E. In Any Event, No Due Process Violation Exists Here

Moreover, even if the Court were to consider petitioner's newly-minted procedural due process argument, it is unavailing. Petitioner bases this claim on the United States Constitution Amendment XIV, §1, asserting that the Lewis Farm will suffer irreparable harm if it pays the APA penalty because it will be deprived of its constitutional due process rights. See Privitera Aff., ¶ 22-23. Petitioner relies on County of Sacramento v. Lewis, 523 U.S. 833 (1998)(no due process liability under the U.S. Constitution amendment XIV, as a result of a high-speed police chase where there is no intent to harm a suspect) in support of its due process claim. Although Sacramento addressed the due process clause, the decision is readily distinguishable since it did not involve imposition of financial penalties and procedural due process requirements attendant to administrative proceedings. Id. at 853.

Petitioner also relies on Commissioner of Labor v. Hinman, 103 A.D.2d 886 (3d Dep't 1984), appeal dismissed, 64 N.Y.2d 756 (1984), in support of its procedural due process claim. In Hinman, the Court found for the NYS Commissioner of Labor, determining that there was no due process violation where, following an investigation and conference, the plaintiff Commissioner issued an order and civil penalty. Id. at 886, 887. The Appellate Division determined that Special Term erroneously

vacated the judgment based on procedural or substantive due process, noting the requirement for notice and an opportunity to be heard had been met. Id. at 886. Here, as in Hinman, petitioner had notice and an opportunity to be heard before the administrative agency, was represented by counsel during the administrative process, and made an oral presentation to the agency. See Reynolds Aff., Exhibit F (transcript).

Finally, petitioner cites People v. Cortlandt Med. Bldg. Assocs., 153 Misc. 2d 692 (Cortlandt Town Ct., 1992) in support of its due process argument. In Cortlandt, (citing Hinman supra), 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. Cortlandt is unavailing here because, APA officials did not make an ex parte determination. On the contrary, Lewis Farm was served written notice of the violation, and was provided a full and fair opportunity to be heard at a proceeding before APA's Enforcement Committee on March 13, 2008, and was represented by counsel who vigorously participated in the administrative proceeding. See Reynolds Aff., ¶¶ 7-10, Exhibits D (Notice of Apparent Violation), E (Notice of Request for Enforcement Committee Determination), and F (transcript).

It is irrefutable that the Lewis Farm had notice and a full and fair opportunity to be heard before the APA issued its

determination. The record in this proceeding is clear:

1) On or about March 15, 2007, the Agency issued a Notice of Incomplete Permit Application and Receipt of Application in response to Petitioner's application. See Reynolds Aff., Exhibit A (Van Cott Aff., dated April 10, 2008, ¶ 9).

2) On June 27, 2007, upon learning the dwellings were being installed, Agency staff immediately served a Cease and Desist Order on Petitioner. See Reynolds Aff., ¶ 5, Exhibit B.

3) On August 31, 2007, Agency staff notified petitioner by telefaxed letter that the June 27, 2007 Cease and Desist Order remained in effect. See Reynolds Aff., ¶ 6, Exhibit C.

4) Agency staff commenced an administrative enforcement proceeding against Petitioner by Notice of Apparent Violation ("NAV") served on September 5, 2007. See Reynolds Aff., ¶ 7, Exhibit D. The NAV included the following notice to Petitioner:

> "**PLEASE ALSO TAKE NOTICE THAT** prior to consideration of this matter by the Enforcement Committee, a record consisting of relevant documents, testimony, evidence and any legal briefs must be developed for the Enforcement Committee to consider. If there are no facts in dispute, that record may be developed by stipulation or at the request of either party for a determination pursuant to 9 NYCRR § 581-2.6(d). If there are facts in dispute, a hearing will be held to develop the record for consideration by the Enforcement Committee."

The APA provided Lewis Farm and its counsel one month to prepare an answer. Lewis Farm drafted and filed a substantive answer to the NAV in October 2007.

5) On December 17, 2007, Agency staff served a Notice of Request for Enforcement Committee Determination on Petitioner's attorney, arguing that an evidentiary hearing was unnecessary because there were no material facts in dispute. See Reynolds Aff., ¶ 8, Exhibit E.

6) On March 13, 2008, the Enforcement Committee considered the Lewis Farm administrative enforcement matter. During the proceeding, the Enforcement Committee allowed counsel for Agency staff and Petitioner to make extensive oral arguments. The Enforcement Committee also permitted counsels to make a powerpoint presentations on the record. A stenographic transcript of the March 13, 2008 proceeding was made. See Reynolds Aff., ¶9, Exhibit F. Both the oral argument and powerpoint presentation were included in the formal administrative record.

7) On March 25, 2008, the Enforcement Committee issued a ruling in which it determined: (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 Reynolds Aff., Exhibit A (Van Cott Aff., Exhibit therein).

8) The Agency transmitted the Determination to petitioner's attorney by telefax on March 26, 2008. The

Determination was also served on Lewis Farm. See Reynolds Aff., Exhibit A (Van Cott Aff., ¶ 28).

F. No Conflict Exists Between the Agricultural and Markets Law and the Adirondack Park Agency Act

In addition to receiving ample notice and opportunity in 2007 to be heard on various legal theories throughout the Agency proceedings, Lewis Farm had an opportunity to be heard before this Court, which stated that the APA had jurisdiction over the dwellings and subdivision, and that there was no conflict with Agricultural and Markets Law § 305-a and the APA Act:

> Since the APA does have authority over this building project, the next issue is whether Agricultural and Markets Law § 305-a supercedes the APA authority. It does not. From a plain reading of that section, it applies only to local laws.

See Simon Aff., Exhibit D, p. 6. Furthermore, the APA Act includes specific exemptions from regulation for "agricultural use structures" in the Adirondack Park. See Reynolds Aff., ¶¶ 20-22. However, single-family dwellings in Resource Management areas require permits. See Reynolds Aff., ¶¶ 18-19.

G. APA Has Jurisdiction To Impose Civil Penalties

Petitioner recycles its old argument that the APA lacks authority to demand payment of a penalty before Court review, citing Gertz v. State, 210 A.D.2d 645 (3d Dep't 1994), appeal dismissed 85 N.Y.2d 857 (1995). See Privitera Aff., ¶ 27. While Gertz, does not address civil penalties it sets forth the broad and comprehensive authority of the APA:

> 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 the 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...

Gertz at 648-649.

Even while the APA has broad authority as outlined in Gertz, the APA also has specific authority to assess civil penalties. See Executive Law § 813, see also Reynolds Aff., ¶¶ 23, 31. Petitioner's remaining arguments regarding the Agency's jurisdiction are misplaced because the APA is not acting outside its authority here. As set forth in Gertz, the APA's authority is broad, and as set forth in the State's original papers in opposition to the stay, the Agency has specific authority over single family dwellings in Resource Management areas of the Adirondack Park, and in protected areas pursuant to the Rivers Act. See Reynolds Aff. ¶¶ 12-19, 24-30.

Finally, as this Court noted in its April 11, 2008 Decision and Order regarding the civil penalty: "No allegation has been made that Petitioner lacks sufficient financial resources to pay

the penalty, and should Petitioner ultimately prevail in this proceeding the penalty would have to be reimbursed in full to Petitioner."

H. The Legislature Has Charged the APA, Not Petitioner, With Preservation of the Adirondack Park and its Resources

Petitioner asserts that there is no threat to the environment here. See Privitera Aff. ¶ 30. The Legislature has vested the APA with a responsibility to protect and preserve lands within the Adirondack Park, including the location of septic systems near protected rivers, and including scenic impacts of development. As indicated in the State's response papers to petitioner's previous request in this proceeding for a stay, the APA's statutory responsibilities 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). In Ryan, where a new dwelling violated an APA permit, the 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. The construction of three single-family dwellings, installation of foundations and septic systems, and subdivision of land, all without APA permits, interferes with the

protection of Adirondack Park lands and the scenic view-shed along a New York designated recreational river. Lewis Farm's unilateral and conscious decision to by-pass the regulatory process also undermines the Agency's regulatory mandate.

POINT II

RECENT APA ACTION OBVIATES THE NEED FOR THE CONTINUATION OF THIS COURT'S STAY ORDER

The Order of this Court dated April 11, 2008 granting the petitioner's stay in part and denying it in part, referred to a provision (paragraph 4) in the March 25, 2008 APA determination which precluded Lewis Farm from challenging the APA's jurisdiction over the development activities at the farm if Lewis Farm submitted a completed application for APA land use permits:

> ...since the challenged determination requires Petitioner to forgo its right to challenge the Respondent's jurisdiction here if it proceeds to apply for an the after-the-fact permit(s), it is the determination of this Court that a stay should be, and is, granted as to the remaining enforcement determinations in the March 25, 2008 determination, namely paragraphs (1)through (4), and (7). Petitioner's motion is denied as to paragraphs (5) and (6).

On April 18, 2008, the APA amended and revised its March 25, 2008 determination and deleted paragraph 4 of that determination. See Reynolds Aff., ¶ 11, Exhibit G. If the Court decides to grant petitioner's motion for leave to renew, the APA respectfully

suggests that, given the deletion of paragraph 4, the Court consider lifting the April 11, 2008 stay order as moot.

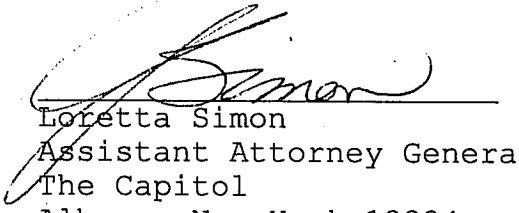
CONCLUSION

Petitioner's motion for leave to reargue and renew fails to satisfy the requirements of CPLR § 2221. Petitioner has failed to make a showing that this Court overlooked any facts, or misapplied the law. There are no new facts that were not offered on the prior motion that would change the prior determination, nor has there been a change in the law since the time of the application to this Court. Accordingly, petitioner's motion for reargument and renewal should be denied.

Dated: April 22, 2008
Albany, New York

Respectfully submitted,

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

By: 

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