STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

LEWIS FAMILY FARM, INC.,

Petitioner,

v.

NEW YORK STATE ADIRONDACK PARK AGENCY,

Respondent.

INDEX No. 315-08
RJI No. 15-1-2008-0109
Hon. Richard B. Meyer

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

LEWIS FAMILY FARM, INC., SALIM B. LEWIS, and BARBARA LEWIS,

Defendants.

INDEX No. 332-08
RJI No. 15-1-2008-0117

NEW YORK STATE ADIRONDACK PARK AGENCY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE ARTICLE 78 PROCEEDING IN PART, AND ANSWER IN PART

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PRELIMINARY STATEMENT

Plaintiff, the New York State Adirondack Park Agency ("APA" or "Agency") submits this memorandum of law in support of its motion to dismiss petitioner Lewis Family Farms, Inc.'s ("Lewis Farm") April 14, 2008 Amended Petition, in part, and in support of its answer on the remaining portions of the Amended Petition. The underlying dispute centers on Lewis Farm's construction of three single-family dwellings without an APA permit, on land located in the Town of Essex, Essex County within the Adirondack Park, in violation of the Adirondack Park Agency Act ("APA Act"), Executive Law 801, et seq., and the Wild, Scenic, and Recreational River System Act (the "Rivers Act"), Environmental Conservation Law 15-2701, et seq..

Of the fifteen (15) claims in the Amended Petition, seven should be dismissed as barred by collateral estoppel because the jurisdictional issues were previously decided in Lewis Family Farm, Inc. v. APA, Index No. 498-07 ("Lewis Farm I"), a declaratory judgment action filed by Lewis Farm in June 2007 (Causes of Action 3, 5, 6, 7, 8, 9 and 10). Two claims should be dismissed for failure to state a cause of action (Causes of Action 4 and 11). The remainder of the Amended petition should be denied.

The issues before the Court are significant, with the protection of the Park and the encouragement of agriculture there of equal and paramount importance. Petitioner seeks to interject

and capitalize on policy conflict between the State's agencies where it is not appropriate, warranted or real. Here, the Agency - in consultation with the Division of Agriculture and Markets and consideration of that agency's regulatory authority - balanced its constitutional mandate and statutory mission to protect the Park. The balance struck was measured, rational and should be upheld by the Court.

APPLICABLE STATUTES AND REGULATIONS

The Adirondack Park Agency Act ("Act") requires an Agency permit for subdivisions and placement of single-family dwellings in Resource Management areas within the Adirondack Park. See Executive Law §§ 809(2)(a), 810(1)(e)(3) and 810(2)(d)(1). The Wild, Scenic, and Recreational River System Act (the "Rivers Act"), Environmental Conservation Law ("ECL") § 15-2701, which is implemented within the Adirondack Park pursuant to the Agency's regulations set forth at 9 NYCRR Part 577, also requires an Agency permit for subdivisions and placement of single family dwellings on Resource Management lands in Recreational River Areas.

The Official Adirondack Park Land Use and Development Plan Map classifies private lands in the Adirondack Park under the following land use categories: "Hamlet," "Moderate Intensity Use," "Low Intensity Use," "Rural Use," "Resource Management,"

and "Industrial Use."[1] See Executive Law § 805. Class A regional projects and Class B projects in a town without APA-approved local land use require a permit under Executive Law § 809(2)(a).[2] The Town of Essex does not have an Agency-approved local land use program.

Executive Law § 810(1)(e) lists the Class A regional projects in a Resource Management land use area that require an Agency permit pursuant to Executive Law § 809(2)(a). These

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[1] Resource Management areas, defined in Executive Law § 805(3)(g)(1), provide for the protection of forest, agricultural, recreational and open space resources because of overriding natural resource and public considerations. Executive Law § 805(3)(g)(2) instructs the Agency on the purposes, policies and objectives for land use on Resource Management lands in the Adirondack Park:

> "The basic purposes and objectives of resource management area are to protect the delicate physical and biological resources, encourage proper and economic management of forest, agricultural and recreational resources and preserve the open spaces that are essential and basic to the unique character of the park...." [Emphasis supplied.]

Executive Law § 805(3)(g)(4)(1) classifies agricultural uses as a primary compatible use on Resource Management lands.

[2] Pursuant to 9 NYCRR § 570.3(ai)(1), "undertake" is defined as the:

> commencement of a material disturbance of land, including ... clearing of building sites, excavation (including excavation for the installation of foundations, footings and septic systems), ... or any other material disturbance of land preparatory or incidental to a proposed land use or development or subdivision.

projects include any subdivision of land (and all related land uses and development) involving two or more lots, parcels or sites. Executive Law § 810(1)(e)(3). "Subdivision" under the Act is defined as:

> any division of land into two or more lots, parcels, or sites ... for the purpose of ... any form of separate ownership or occupancy (including any grading, road construction, installation of utilities or other improvements or any other land use and development preparatory or incidental to any such division) . . . .

Executive Law § 802(63)(emphasis added). 9 NYCRR § 570.3(ah)(3) further defines a subdivision into sites as occurring "where one or more new dwelling(s) or other principal building(s) is to be constructed on a parcel already containing at least one existing dwelling or other principal building, and regardless of whether the existing building is proposed to be removed after completion of the new building(s)."

Single-Family Dwelling Jurisdiction

Executive Law § 810(2)(d) lists the Class B regional projects in a Resource Management land use area that are subject to Agency review in the Town of Essex. These projects include the construction of any new single-family dwelling. Executive Law § 810(2)(d)(1). Executive Law § 802(58) defines a "single-family dwelling" as "any detached building containing one dwelling unit, not including a mobile home."

Distinguishing Single-Family Dwelling Jurisdiction From Agricultural Use Structure Jurisdiction

The Act expressly considers and defines an "agricultural use structure" as "any barn, stable, shed, silo, garage, fruit and vegetable stand or other building or structure directly and customarily associated with agricultural use." Executive Law § 802(8). Agricultural use structures and single-family dwellings, including dwellings used for farmworker housing, are separately defined structures for Agency jurisdictional purposes under the definition of "principal building":

> all agricultural use structures **and** single family dwellings or mobile homes occupied by a farmer of land in agricultural use, his employees engaged in such use and members of their respective immediate families, will together constitute and count as a single principal building.

Executive Law § 802(50)(g)(emphasis added). While they require a permit, single-family dwellings constructed for farmworker housing are more easily approvable by the Agency than dwellings used for non-agricultural purposes, as the approval requirements of Executive Law §§ 805(3) and 809(10) are lessened when dwellings are to be used for farmworker housing. Executive Law § 802(50)(g). Agricultural use structures other than single-family dwellings are exempt from Agency jurisdiction and omitted from the list of jurisdictional projects in Executive Law § 810. Other provisions in the Act which encourage agriculture in the Park are agricultural uses and development in various critical

environmental areas and exemption from height restrictions for agricultural use structures. See Executive Law § 810(1).

The Rivers Act and 9 NYCRR § 577

The Rivers Act was enacted to implement a public policy "that certain selected rivers of the state which, with their immediate environs, possess the aforementioned characteristics, shall be preserved in free-flowing condition and that they and their immediate environs shall be protected for the benefit and enjoyment of present and future generations." ECL § 15-2701(3). Section 15-2705 of the Rivers Act places regulatory jurisdiction in Agency in the Park, and Section 15-2709(1) directs the Agency to "make and enforce regulations necessary for the management, protection, and enhancement of and control of land use and development in the wild, scenic and recreational river areas." Under that delegated authority, the APA requires permits for projects in river areas, which include all subdivisions of land in Resource Management land use areas. See 9 NYCRR §§ 577.4(a); 577.5(c)(1). Rivers projects in recreational river areas do not include agricultural uses or agricultural use structures and no Agency permit is required for such uses or structures. 9 NYCRR § 577.4(b)(3)(ii). However, they do include all land uses and developments classified compatible uses by the Adirondack Park land use and development plan in Resource Management land use areas, which in turn include single-family dwellings. See

Executive Law 805(3)(g)(4);9 NYCRR § 577.5(c)(1). The Bouquet River is a New York State designated recreational river. See 9 NYCRR § 577, Appendix Q-6, 5a.

STATEMENT OF FACTS

On or about March 14, 2007 Barbara and S.B. Lewis applied to the APA for a permit to construct three single-family dwellings, on their farm in Essex County, New York.[3] See Record Item 5, Affirmation of Paul Van Cott dated December 13, 2007 ("Van Cott Aff. December 13, 2007"), Exhibit A [Affidavit of John Quinn dated July 23, 2007 ("Quinn Aff July 23, 2007"), Ex. A]). On March 15, 2007, the APA informed Lewis Farm that the application was incomplete. See Record Item 5 (Van Cott Aff., December 13, 2008, Exhibit A [Quinn Aff. July 23, 2007, Ex. B]). On or about March 19, 2007, the Agency learned from Barbara Lewis that construction on the foundations and septic systems for the houses was underway. See Record Item 5 (Van Cott Aff., December 13, 2008, Exhibit A [Quinn Aff. July 23, 2007, ¶6]). Upon learning that construction had commenced, the matter was referred to the Agency's enforcement section for resolution. Agency staff

[3] The three single-family dwellings valued at approximately $300,000 each, are two story dwellings with attached garages. See Record Item 9 (Affidavit of Barbara Lewis dated January 17, 2008, Exhibit B, Building Permit Applications, Town of Essex, A-698 ["Project Cost Estimate" #6], A-701 [#6], A-700 [#6]); Record Item 6 (Affidavit of Douglas Miller dated December 12, 2007 ("Miller Aff. dated December 12, 2007") ¶ 6).

visited the site and determined that the three dwelling foundations were installed on lands designated as "Resource Management" and also lie within a protected river corridor of the Boquet River, designated under New York State's Wild and Scenic River System Act. Record Item 5 (Affidavit of Douglas Miller dated July 20, 2007 ["Miller Aff. dated July 20, 2007"], ¶¶ 9, 10).

On or about May 14, 2007, Agency staff proposed to resolve the matter with Lewis Farm through settlement, which proposal included an after the fact permit and a $10,000 penalty. Despite numerous contacts, Agency staff and Lewis Farm did not resolve the issues. Record Item 5 (Affirmation fo Sarah Reynolds dated July 20, 2007 ["Reynolds Aff."] ¶¶ 27-39.

On June 27, 2007, the Agency received a report that Lewis Farm had resumed construction of the dwellings. That day, Agency staff visited the site and observed that three modular single-family dwellings were being installed. Agency staff personally served a Cease and Desist Order on Barbara Lewis during the site visit. Record Item 5 (Miller Aff. July 20, 2007 ¶¶ 9, 15-21).

Lewis Family Farm, Inc. v. APA, Index No. 498-07 ("Lewis Farm I")

On or about June 28, 2007, while the underlying APA administrative proceedings continued, Lewis Farm filed a declaratory judgment action in Supreme Court, Essex County seeking to restrain the Agency's administrative enforcement on

the grounds that the APA lacked jurisdiction over their construction of "farm worker housing" project. Lewis Family Farm, Inc. v. APA, Index No. 498-07 ("Lewis Farm I"). Alternatively, Lewis Farm argued that the Agency lacked jurisdiction over the dwellings because the Agriculture and Markets Law § 305-a superceded the APA Act and divested the APA of jurisdiction. Lewis Farm I was randomly assigned to Acting Justice Kevin K. Ryan as IAS Judge. See Simon Aff., Exhibit B (Order to Show Cause dated July 3, 2007 and Amended Complaint dated July 2007, Index No. 498-07). The State moved to convert the complaint to a CPLR Article 78 and dismiss for lack of ripeness, as the administrative enforcement proceeding was ongoing. Oral argument was held on the motion to dismiss before Justice Ryan on August 8, 2007. See Affirmation of Loretta Simon, dated June 13, 2008 ("Simon Aff."), Exhibit C.

On August 16, 2007, Justice Ryan issued a Decision and Order denying Lewis Farm's application for a restraining order and determining that the APA had regulatory jurisdiction over the Lewis Farm single family residences. The court found that the three dwellings were not exempt "agricultural use structures" under APA Act, nor were they exempt from Agency regulation under the Rivers Act. Addressing Lewis Farm's further jurisdictional argument, the court found that Agriculture and Markets Law Section 305-a applied only to local governments and, thus, did not preempt APA jurisdiction. Finding the APA to be acting

within its jurisdictional scope, Justice Ryan dismissed Lewis Farm's challenge to the APA's ongoing administrative enforcement proceeding as premature and unripe for judicial intervention. See Simon Aff., Exhibit D (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.[4] See Simon Aff., Exhibit E (Notice of Appeal).

APA's Administrative Enforcement Proceeding

Following Judge Ryan's decision, in September 2007 the Agency issued a Notice of Apparent Violation, to which Lewis Farm responded in October 2007. Agency staff issued a Notice of Request for Enforcement Committee Determination in December 2007. In January 2008, Lewis Farm submitted a reply to the Agency. The Agency originally scheduled the matter to be heard before its Enforcement Committee in February, 2008 but Lewis Farm's counsel requested an extension. See Affidavit of Paul Van Cott, dated June 13, 2008 ("Van Cott Aff. dated June 13, 2008") Exhibit C.

[4] Although the Notice of Appeal was filed on October 1, 2007, Lewis Farm did not perfect its appeal to the Appellate Division, Third Department. Anticipating dismissal of the appeal, by Motion dated May 8, 2008, Lewis Farm sought to extend its time to appeal beyond the nine month abandonment deadline of June 26, 2008. In a Decision and Order on Motion dated May 29, 2008, the Appellate Division, granted Lewis Farm's Motion to extend but ordered the appeal dismissed, unless the appellant filed and served its record and brief on or before July 28, 2008. See Simon Aff., Exhibit E.

The Agency consented to the extension and the Agency's Enforcement Committee heard oral argument on March 13, 2008, at which Lewis Farm was represented by counsel. See Return and Record Item 2 (transcript dated March 13, 2008).

On March 25, 2008, the Agency issued a determination that Lewis Farm was subject to the 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 APA permits. See Return Item 1(Agency determination). The APA directed Lewis Farm to apply for an after-the-fact permit by April 14, 2008, and by April 28, 2008 submit septic system information and pay a $50,000 civil penalty. 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 Record Item 1 (APA determination p. 12). The Agency issued a corrected determination on or about April 18, 2008, deleting a provision that purported to limit petitioner's ability to challenge APA jurisdiction. See Record Item 1 (dated April 18, 2008). Id.

Lewis Family Farm, Inc. v. APA, Index No. 315-08 ("Lewis Farm II")

On April 8, 2008, Lewis Farm commenced this Article 78 proceeding by order to show cause and obtained an ex parte stay of enforcement of the Agency's March 25, 2008 determination. See Simon Aff., Exhibit F (ex parte OSC, Lewis Family Farm, Inc. v.

APA, Index No. 315-08 ("Lewis Farm II"). The Lewis Farm II petition, like the earlier declaratory judgment action, challenged the APA's regulatory jurisdiction over the three dwelling units. See Simon Aff., Exhibit F(Petition dated April 7, 2008). On or about April 9, 2008, after objection from the Office of the Attorney General, the ex parte stay was vacated and the order to show cause amended to allow the parties to address a stay of the APA determination. See Simon Aff., Exhibit F (Amended OSC dated April 9, 2009). After oral argument on April 11, 2008, this 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 Agency's requirement that Lewis Farm pay the $50,000 civil penalty.[5] See Simon Aff., Exhibit I (transcript dated April 11, 2008); Exhibit J (April 11, 2008 Order, p. 5).

On or about April 14, 2008, Lewis Farm moved for leave to reargue and renew regarding this Court's April 11, 2008 order, and also filed an amended petition which was served on the Office of the Attorney General on April 17, 2008. See Simon Aff., Exhibit G (amended petition dated April 14, 2008). On April 25,

[5] This Court's April 11, 2008 order granted a partial stay of the APA order, specifically the requirement that Lewis Farm submit a permit application and septic information to the APA. The Court also stayed a provision regarding Lewis Farm's right to challenge APA's jurisdiction; the APA amended its determination on April 18. 2008 to remove that provision. See Simon Aff., Ex. J(April 11, 2008 Order of Justice Meyer, p. 5); see also Return Item 1.

2008, the Court issued a letter Decision and Order granting reargument and renewal, but adhering to its April 11, 2008 Order. See Simon Aff., Exhibit K. On April 28, 2008, by order to show cause to the Appellate Division, Third Department, Lewis Farm sought 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, the Honorable Leslie Stein ordered a limited and conditional stay of enforcement pending determination by the Appellate Division of the motion.[6] See Simon Aff., Exhibit L (April 28, 2008 Order of Justice Stein). On May 19, 2008, the Appellate Division issued a Decision and Order granting Lewis Farm's motion for permission to appeal the Order of Justice Meyer dated April 11, 2008; and extending the partial stay as provided in its Order to Show Cause dated April 28, 2008. See Simon Aff., Exhibit M.

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[6] Specifically, Justice Stein'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 L (April 28, 2008 Order of Justice Stein).

Adirondack Park Agency v. Lewis Family Farm, Inc., et al, Index No. 332-08("Lewis Farm III")

On April 11, 2008, the Office of the Attorney General, on behalf of the APA, filed a summons and complaint against Lewis Farm, Salim B. 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, Index No. 332-08 (Lewis Farm III). On April 14, 2008, Lewis Farm filed a motion to consolidate its Article 78 proceeding with the APA enforcement action. The APA filed a cross-motion to transfer as related matters both cases to Justice Ryan, the IAS judge assigned to Lewis Farm I. On April 25, 2008, this Court consolidated the proceedings but denied the APA's cross motion to transfer. See Simon Aff., Exhibit K. On May 15, 2008 the APA filed an Amended Complaint.

ARGUMENT

POINT I

THE DOCTRINE OF COLLATERAL ESTOPPEL BARS RELITIGATION OF JURISDICTIONAL ISSUES ALREADY DECIDED IN LEWIS FARM I, THEREFORE, CLAIM 3 AND CLAIMS 5-10 MUST BE DISMISSED

Lewis Farm seeks to relitigate Justice Ryan's August 16, 2007 fundamental jurisdictional determinations in Lewis Farm I, raising the same issues before this Court. In Lewis Farm I, Lewis Farm challenged the jurisdiction of the APA to require a permit for the construction of three single-family dwellings and

subdivision of land pursuant to the APA Act and the Rivers Act; and also alleged the APA administrative enforcement violated Section 305-a of Agriculture and Markets Law. See Simon Aff., Exhibit A (Complaint dated June 26, 2007, ¶¶ 28, 29) and Exhibit B (Amended Complaint dated July 2007, ¶¶ 31, 32, 34, 35). Petitioner is barred by the doctrine of collateral estoppel from relitigating claims 3, 5, 6, 7, 8, 9, and 10 of its April 14, 2008 Amended Petition. Justice Ryan expressly considered and rejected petitioner's jurisdictional challenges in 2007, thus, Lewis Farm may not seek a second, more favorable ruling on these same claims now. The Court should dismiss them pursuant to CPLR § 3211(a)(5).

"The doctrine of collateral estoppel is based on the notion that it is not fair to permit a party to relitigate an issue which has previously been decided against him in a proceeding in which he had fair opportunity to fully litigate the point." Gilberg v. Barbieri, 53 N.Y.2d 285, 291 (1981); Buechel v. Bain, 97 N.Y.2d 295, 303-304 (2001), cert. denied, 535 U.S. 1096 (2002). There are two requirements for invoking collateral estoppel: (1) the party seeking to invoke the doctrine must demonstrate that the same issue was raised and necessarily decided in the prior action; and (2) the party against whom the

doctrine is to be invoked must have had a full and fair opportunity to litigate the issue.[7] Id. at 306.

There is no question that Lewis Farm raised and Justice Ryan necessarily decided in Lewis Farm I precisely the same jurisdictional issues currently before this Court in Lewis Farm II: whether the APA has jurisdiction to require permits for the construction of three-single family dwellings on the Lewis Farm property near the Bouquet River, and whether that jurisdiction has been preempted by the Agriculture and Markets Law. While Lewis Farm raises several additional issues here and recasts the jurisdictional claims in varied ways, Lewis Farm's fundamental jurisdictional and preemption arguments are essentially identical.

In Lewis Farm I, Lewis Farm argued that the APA lacked jurisdiction to require a permit for the construction of the three single-family dwellings because they are "agricultural use structures" under the Act. See Simon Aff., Exhibit B (July 2007 Amended Complaint, pp. 13, 31) and Exhibit C (August 8, 2007

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[7] Lewis Farm's notice of appeal in Lewis Farm I does not prevent the use of that order or judgment to collaterally estop a party from relitigating an issue in a subsequent proceeding. See Parkhurst v. Berdell, 110 N.Y. 386, 392-93 (1888); Matter of Capoccia, 272 A.D.2d 838, 846 (3d Dep't), app. dismissed, 95 N.Y.2d 887 (2000); Samhammer v. Home Mut. Ins. Co. of Binghamton, 120 A.D.2d 59, 64 (1986). Thus, the fact that an appeal is pending in Lewis Farm I does not give Lewis Farm license to relitigate in Lewis Farm II issues already decided in Lewis Farm I that otherwise meet the two requirements for the application of collateral estoppel.

transcript, p. 10, lines 9-15; p. 25, line 6). This is precisely the claim presented here in Lewis Farm II. See Simon Aff., Exhibit F (April 7, 2008 Petition ¶¶ 38, 39, 42, 65, 67, 69, 73); and Exhibit G (April 14, 2008 Amended Petition, ¶¶ 40, 77, 79, 81, 83, 85). In Lewis Farm I, petitioner further argued that the housing project did not constitute a subdivision of land within the meaning of the APA Act; it makes the same claim here. See Executive Law § 802(63); 9 N.Y.C.R.R. § 570.3(ah)(3); see also Simon Aff., Exhibit C (August 8, 2007 transcript, pg. 22, lines 2-15) and Exhibit G (April 14, 2008 Amended Petition, paragraph 17).

Justice Ryan squarely decided the question of APA jurisdiction over the three single-family dwellings in Lewis Farm I, including whether Lewis Farm's actions constituted an illegal subdivision of land under the APA Act. Rejecting Lewis Farm's arguments that the APA was acting ultra vires, Justice Ryan found that the Agency had specific statutory authority to regulate single-family dwellings, as well as broad authority under the Rivers Act:

> 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 the authority to make and enforce any regulations necessary to enforce the act (Environmental

> Conservation Law § 15-2709(1)). The APA act, Executive Law § 810(2)(d), defines the building project as a class B project, since it involves the construction of a single-family dwelling. Under the APA regulations, this building project constitutes a "subdivision" even though it is not a typical suburban subdivision. The plaintiff put up a dwelling on a parcel of land which already had either a dwelling or building, even though an already existing building might be removed after construction is completed (9 NYCRR 570.3(ah)(3) and 573.6(e)).

See Simon Aff., Exhibit D (August 16, 2007 Order at p. 4-5).

Lewis Farm also seeks to relitigate the issue of whether Agricultural and Markets Law § 305-a preempts APA jurisdiction. See Simon Aff., Exhibit A (June 2007 Complaint, ¶ 28), and Exhibit G (April 14, 2008 Amended Petition, ¶ 73). In both Lewis Farm I and II, petitioners have relied on Town of Lysander v. Hafner, 96 N.Y.2d 558 (2001), for the proposition that the Agricultural and Markets Law precludes any APA regulatory authority over the three residences at issue. See Simon Aff., Exhibit C (August 8, 2007 transcript p. 18, lines 18-20); Exhibit I (April 11, 2008 transcript p. 5, line 2-11; p. 8, line 19-24; p. 23, line 1-6); see also Exhibit G (April 14, 2008 Amended petition ¶ 73). Citing the plain language of the statute, Justice Ryan also rejected Lewis Farm's would-be preemption claim, finding that Agriculture and Markets Law § 305-a] was preclusive only with respect to local laws, having "no application to the Executive Law or the regulations promulgated

by the APA pursuant to that law." See Simon Aff., Exhibit D (August 2007 Order, at p. 6).

The second criteria for applicability of the collateral estoppel doctrine -- a full and fair opportunity to litigate -- is also met here. As the record demonstrates, Lewis Farm chose to litigate these jurisdictional issues in Lewis Farm I in an attempt to block APA's administrative enforcement proceeding. In Lewis Farm I, petitioner was represented by counsel and had ample opportunity to make its case before Justice Ryan. See Simon Aff., Exhibit C (August 8, 2007 transcript, p. 1).

Petitioner seeks to sidestep the obvious collateral estoppel implications of Lewis Farm I by arguing that Justice Ryan's conclusions regarding APA's jurisdiction and its preemption claim were merely "ill advised advisory opinion . . . that is not binding" and somehow unnecessary to his decision. See Record Item 9 (Memo of Law, signed by John J. Privitera dated January 22, 2008 [in support of request for dismissal of enforcement proceeding] p. 38); see also Simon Aff., Exhibit I (April 11, 2008 transcript, pgs. 36-37). The record shows this argument is meritless. Lewis Farm's declaratory judgment complaint expressly requested a determination that the APA lacked jurisdiction over its housing project and, alternatively, that Agriculture and Markets Law 305-a preempted APA jurisdiction. See Simon Aff. Exhibit A (June 2007 Complaint ¶ 1, 28, 29[b]) and Exhibit B (July 2007 Amended Complaint ¶ 1, 31, 34 and p. 8, paragraphs [b]

and [c]). By necessity, Justice Ryan decided these fundamental jurisdictional issues before concluding that the APA should be allowed to proceed with its administrative enforcement against Lewis Farm. See Simon Aff., Exhibit D (August 2007 Order at p. 7).

Contrary to Lewis Farm's argument that Justice Ryan made an error of law in reaching the merits of the APA's jurisdictional issues[8], Justice Ryan's jurisdictional determination was integral, necessary and appropriate. He did not - and could not - decide whether the APA's enforcement was rational because the Agency's administrative process was not complete. However, Justice Ryan had to address APA's regulatory jurisdiction because Lewis Farm put it directly in issue. See e.g. Ryan v. New York Tel. Co., 62 N.Y.2d 494, 505 (1984) (finding that an administrative determination was not an unsolicited advisory opinion and that giving it preclusive effect sought was a necessary step in fixing the legal rights of the parties); Lehigh Portland Cement Co. v, New York State Dep't of Environmental Conservation, 87 N.Y.2d 136, 140 (1995)(where a party challenges an agency's action as ultra vires, "exhaustion of administrative remedies is not required). Because Lewis Farm claimed that the APA was acting in excess of its jurisdiction, Justice Ryan properly reached the

[8] The amicus curiae of the Farm Bureau similarly argues that Justice Ryan's findings are dicta. See Brief of Amicus Curiae New York Farm Bureau, Inc. dated May 29, 2008, footnote p. 11.

jurisdictional issues, fixing the legal rights of the parties before concluding that the court had no authority to intervene in the Agency's administrative proceedings. See Simon Aff., Exhibit D (August 2007 Order p. 4-6).

There can be no question that a live controversy existed when Lewis Farm challenged the APA's jurisdiction. These three dwelling units were already well under construction when the APA asserted jurisdiction and issued its Cease and Desist Order in June 2007. Contrary to Lewis Farm's implication that Judge Ryan's jurisdictional determinations were "advisory" or functionally dicta, the fact remains that APA's jurisdiction was "front and center" in Lewis Farms I, raised by petitioner's declaratory judgment complaint. Justice Ryan could not address the complaint without ruling on the active jurisdictional controversy. See e.g. James v. Alderton Dock Yards, 256 N.Y. 279 (1931) (declaratory judgment purpose is to serve a practical end in quieting or stabilizing an uncertain or disputed legal issues); Dun & Bradstreet, Inc. v. City of New York, 276 N.Y. 198, 206 (1937) (declaratory judgment should be granted where there is a constitutional question or the legality or meaning of a statute is in question, without any questions of fact); see also Delaware Co. Bd. of Supervisors v. NYS Dept. of Health, 81 A.D.2d 968 (3d Dep't 1981) (following Dun and Bradstreet supra).

Seeking to defeat the collateral estoppel effect of Lewis Farm I, petitioner relies on NYPIRG v. Carey, 42 N.Y.2d 527

(1977), apparently with the intention of drawing a parallel because of the Court's finding that the matter was premature. However, NYPIRG v. Carey actually supports the application of collateral estoppel here. Acknowledging that courts should refrain from advisory opinions, and that an essential "function of the courts is to determine controversies between litigants," the Court found that a decision regarding the constitutionality of proposed legislation, pending a voter referendum, was not appropriate. Id. At 531. As the Court observed, "a request for a declaratory judgment is premature if the future event is beyond the control of the parties and may never occur." Id. at 529. In contrast, in Lewis Farm I Justice Ryan did not have a hypothetical dispute before him - there were in fact three very real and substantial single-family dwellings at issue, which were under construction in violation of State law and over which the APA had unambiguously asserted its statutory jurisdiction.

Petitioner's reliance on Danali Enterprises v. Staub 154 A.D. 2d 864 (3d Dep't 1989), is similarly misplaced. In Danali, the Third Department noted that a definitive interpretation of the guarantee clause at issue was not "necessarily determined" when Supreme Court dismissed the action as premature, and therefore collateral estoppel did not apply. Id. at 866-867. However, unlike Danali, Justice Ryan in Lewis Farm I necessarily reached and decided the jurisdictional issues in order to resolve whether the APA could properly conduct further administrative

proceedings. See Simon Aff., Exhibit D p. 7 (August 2007 Order). Like Danali, Longton v. Village of Corinth, 49 A.D.3d 995 (3d Dep't 2008),is factually distinguishable for the same reasons - in Lewis Farm I, issues of jurisdiction were both decided in and essential to Justice Ryan's conclusions.

Contrary to petitioner's argument, Justice Ryan's Decision and Order was not made "solely in regard to the motion for a preliminary injunction." See Petitioner's Memorandum of Law in Support of Judgment dated June 3, 2008 ("Memo of Law"), p. 36. While injunctive relief barring further administrative enforcement was the ultimate goal, the Lewis Farm I complaint clearly and unequivocally sought declaratory judgment on the same jurisdictional claims raised (and expanded upon) here.[9] See Simon Aff., Exhibit A and B (Complaint and Amended Complaint, Lewis Farm I). Petitioner relies on Nassau Roofing and Sheet Metal Inc., v. Facilities Dev. Corp. et al., 115 A.D. 48 (3d Dep't 1986) to support its novel claim that a determination on an injunction categorically bars the defense of collateral estoppel. In Nassau Roofing, the contractor sought declaratory judgment regarding its rights under a cancelled contract. Prior to the

[9] Specifically, the pleadings in Lewis Farm I demanded "judgment in the form of a declaration that the APA does not have jurisdiction over the housing project" and "judgment in the form of a declaration that, even if the APA has jurisdiction over the Housing Project, the APA's interference is improper in this instance because it is in direct conflict with Agriculture and Markets Law" See Simon Aff., Exhibit B, p. 8(b) and (c) (Amended Complaint, July, 2007, Lewis Farm I).

declaratory judgment action, the contractor had sought a preliminary injunction enjoining the agency from disqualifying it as a bidder. When the contractor filed its declaratory judgment action challenging the agency's termination of the contract, several defendants asserted the affirmative defense of collateral estoppel. The lower court agreed and dismissed the action. On appeal, the Third Department found that collateral estoppel did not bar the declaratory judgment action because there was no prior action with a decision invoking the issues currently before the court, and that neither the determination on the earlier preliminary injunction, nor the agency's administrative determination constituted a prior decision warranting collateral estoppel. Id. At 50-51. In contrast to Nassau Roofing, Lewis Farm I is clearly a qualifying "prior decision" eligible for preclusive effect.

Lewis Farm chose to place these jurisdictional issues before Justice Ryan in Lewis Farm I. The court properly reached those issues and sustained APA's regulatory jurisdiction over the three single-family residences at issue. This Court should reject Lewis Farm's attempt to get a second "bite" of the apple on the same jurisdictional issues before this Court. Lewis Farm is bound by Justice Ryan's jurisdictional rulings until such time as Lewis Farm perfects and prevails upon its appeal of Lewis Farm I.

POINT II

CLAIM 4 OF THE AMENDED PETITION SHOULD BE DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION

Petitioner's fourth (4th) cause of action alleges that the APA's March 25, 2008 determination is affected by error of law because the APA was required to defer to the February 1, 2008 opinion of the Commissioner of the New York State Department of Agriculture and Markets. The Commissioner's Opinion, issued pursuant to Agriculture and Markets Law § 308, found that Lewis Farm's use of land for the three farm-worker residences was "agricultural in nature" for purposes of Agriculture and Markets Law 308(4). See Simon Aff., Exhibit G (Amended Petition ¶ 75); See Affirmation of John F. Rusnica ("Rusnica Aff.") dated June 13, 2008, ¶ 7. Because the APA is neither bound by the Commissioner's Opinion, nor required to defer to it, petitioner fails to state a cause of action and claim 4 must be dismissed pursuant to CPLR § 3211(a)(7).

Agriculture and Markets Law § 308 authorizes the Commissioner of the New York State Department of Agriculture and Markets ("the Department") to issue opinions upon request from any person as to whether particular agriculture practices are sound, and whether a particular use is "agricultural in nature." See Agriculture and Markets Law § 308(1)(a). At the request of counsel for Barbara and Salim Lewis, the Commissioner issued the

February 1, 2008 Opinion, which was part of the Record before the Agency in its consideration of the Lewis Farm residences. See Rusnica Aff. ¶ 7, Exhibit A; see also Record Item 11, (Affidavit of John Privitera, February 26, 2008, Exhibit A).

The Opinion's assessment of agricultural practices on the Lewis Farm does not give rise to any cause of action against the APA, nor does it affect the jurisdiction of the APA over construction of single-family dwellings on lands subject to APA jurisdiction, as provided by the APA Act. See Rusnica Aff., ¶ 7, Exhibit A. An objective reading of the Opinion simply articulates the Commissioner's view, under the Agriculture and Markets Law, that the housing at issue on Lewis Farm is "agricultural in nature." See Rusnica Aff., ¶ 7, Exhibit A. Moreover, nothing in Agriculture and Markets Law § 308 suggests that Commissioner opinions are binding on another State agency. See Rusnica Aff., ¶ 7. While the Agriculture and Markets Law gives considerable authority to the Commissioner over local government regulation, it does not provide for a preemption of other State agencies' statutes or regulatory programs. See Agricultural and Markets Law § 305-a; see also Rusnica Aff., ¶ 5. In fact, Agriculture and Markets acknowledges that here, its opinion was advisory and was provided for the APA's consideration. See Rusnica Aff., ¶ 5-7. Accordingly, petitioner has failed to state a cause of action against the APA under Agriculture and Markets Law § 308.

POINT III

CLAIM 11 OF THE AMENDED PETITION SHOULD BE DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION

Petitioner's eleventh (11th) cause of action alleges that the APA's March 25, 2008 determination is affected by error of law because the APA failed to consider the March 4, 2008, Resolution of the Adirondack Park Local Government Review Board. Petitioner's 11th cause of action is without merit and should be dismissed.

The Adirondack Local Government Review Board ("Review Board") was established pursuant to the Executive Law § 803-a to advise and assist the APA in carrying out its functions, powers and duties in the Adirondack Park. It is comprised of twelve members, each of whom is a resident of a county within the Park. The APA Act directs that the Review Board "shall monitor the administration and enforcement of the Adirondack park land use and development plan and periodically report thereon, and make recommendations in regard thereto, to the governor and the legislature, and to the county legislative body of each of the counties wholly or partly within the park." See Executive Law § 803-a(7).

On or about March 4, 2007 the Review Board passed a resolution regarding the APA enforcement proceeding against Lewis Farm, providing its recommendation to the Agency that it "is in

conflict with the terms of the [Adirondack Park Land Use and Development] Plan, which provide that agricultural use structures are non-jurisdictional". However, this resolution is included in the record of the APA's March 25, 2008 determination. See Record Item 15. Accordingly, petitioner's claim that the resolution was not considered by the Agency in its March 25, 2008 determination is simply wrong. The Enforcement Committee's March 25, 2008 determination specifically addressed the definition of "agricultural use structures" in the APA Act and rejected the contention that a single-family fit within that category. See Record Item 1 (Agency determination p. 4, ¶ 8, p. 8, ¶ 37-38). The Agency found that under the APA Act, farm worker dwellings are "single family dwellings" and not "agricultural use structures." Id.

The Review Board's resolution, according to statute, was advisory and not binding on the Agency. While the Agency considered the resolution in making its March 25, 2008 determination, the Agency did not agree with the Review Board's interpretation. This does not give rise to a cause of action against the APA, and petitioner's 11th cause of action should be dismissed.

POINT IV

THE PROPER STANDARD OF REVIEW FOR THIS AGENCY DETERMINATION IS WHETHER IT WAS "ARBITRARY AND CAPRICIOUS" PURSUANT TO CPLR § 7803(3), NOT THE SUBSTANTIAL EVIDENCE STANDARD

Petitioner claims - mistakenly - that the Agency determination "was entered in violation of lawful procedure by failing to be supported by substantial evidence."[10] See Simon Aff., Exhibit G, Amended Petition ¶ 91-92 (claim 12). Petitioner is wrongly asserts this standard, which applies only to adjudicatory hearings. The proper standard of review is whether the determination was "arbitrary and capricious" or an "abuse of discretion" under CPLR § 7803(3). As demonstrated by the record, the APA's March 25, 2008 determination is a sound, rational and proper exercise of its discretion and statutory authority.

The Agency made its March 25, 2008 determination pursuant to and in compliance with its enforcement regulations, 9 NYCRR 581-2.6. CPLR 7803(3) sets forth the appropriate standard of review:

> 3. whether a determination was made in violation of lawful procedure, was affected by error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed;

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[10] CPLR § 7803(4) provides the standard for review of adjudicatory proceedings: "whether a determination was made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence."

CPLR S 7803(3). Under that standard, the APA's decision must be upheld unless it is found to be "without sound basis in reason and . . . without regard to the facts." County of Monroe v. Kaladjian, 83 N.Y.2d 185, 189 (1994); Pell v. Board of Education, 34 N.Y.2d 222, 231 (1974). Judicial review is limited to the record before the Agency when it made its determination. Aldrich v. Pattison, 107 A.D.2d 258, 267-269 (2d Dep't 1985); Ryan v. Adirondack Park Agency, 186 A.D.2d 922, 924 (3d Dep't 1992). A court may not "substitute its judgment for that of the agency whose determination is being reviewed." Town of Moreau, et al. v. New York State Dept. of Environmental Conservation, et al., 178 Misc.2d 56 (Sup. Ct. Albany Co. 1998), p. 9. Deference should be accorded agencies for interpretation of their own statutes, especially where the agency has particular subject matter expertise, such as in the area of environmental law. See Flacke v. Onondaga Landfill Systems, Inc., 69 N.Y.2d 355, 363 (1987). Where an agency's determination involves expertise and judgment, that determination will be upheld unless it is patently arbitrary and capricious.[11] County of Monroe v. Kaladjian, 83 N.Y.2d 185,

[11]In its amicus brief, the Farm Bureau, discussing structures associated with agricultural use, asserts that the APA "obviously has no special competence or expertise, and thus its views are entitled to no deference from this Court". See Farm Bureau Memo of Law p. 19. Under the same logic, one could argue that Agriculture and Markets had no special competence or expertise in matters involving regulation and protection of the Adirondack Park, as the APA does under the Executive Law, related statutes and its duly enacted regulations. Neither doctrinaire view advances the interests of the State or its citizens.

189 (1994); Flacke v. Onondaga Landfill Systems, Inc., 69 N.Y.2d 355, 363 (1987); Pell v. Board of Education, 34 N.Y.2d 222, 231 (1974). To the extent Lewis Farm argues that "preferential" deference should be given the Department of Agriculture and Markets because the APA's balanced regulation of single family dwellings in the Adirondack Park incidentally involves farm worker housing, such an argument is without basis in law and contrary to the body of law that directs courts to defer to agency interpretations of their own statutes. Here the Agency's determination pursuant to the Adirondack Park Agency Act and Rivers Act is a reasonable and rational exercise of its discretion within its regulatory expertise and is entitled to deference.

POINT V

LEWIS FARM WAS AFFORDED AMPLE DUE PROCESS, INCLUDING NOTICE AND AN OPPORTUNITY TO BE HEARD, THUS THERE IS NO VIOLATION OF ITS DUE PROCESS RIGHTS

The Amended Petition includes several claims which relate to due process: (1) failure to hold a hearing before an administrative law judge; (2) alleged delay in the commencement of enforcement proceedings; and (3) requiring payment of a fine before a final judicial determination was made. See Simon Aff., Exhibit G (Amended Petition ¶¶ 94, 98, 100 (claims 13, 15 and 16). Lewis Farm's procedural due process argument is unavailing because procedural due process is met where there is notice and an

opportunity to be heard, both of which petitioner had in this Agency proceeding.

Petitioner cites no legal authority in support of its due process claims, nor does it cite the constitutional basis for its argument. See Memo of Law p. 40-41. Assuming petitioner's claim sounds in procedural due process, there is plainly no violation of its rights here. Lewis Farm was afforded notice, an opportunity to be heard, and was represented by counsel. See Mathews v. Eldridge 424 U.S. 319, 348 (1976)(finding that an evidentiary hearing is not required, or even the most effective method of decision making in all circumstances, and that the essence of a due process claim is notice and opportunity to be heard); see also Record Items 3 and 5 (NAV, Notice of Request for Enforcement Committee determination dated December 17, 2007); Record Item 1 (proceeding minutes); and Item 2 (transcript of oral argument before the Committee).

As an initial matter, Lewis Farm alleges that it did not have notice that an APA permit was required for its residential construction. This argument, is both unavailing and belied by the record. In the first instance, the plain fact is that the Lewises submitted a permit application to the APA. See Record Item 5, Van Cott Aff., dated December 13, 2007, Exhibit A (Quinn Aff. July 23, 2007, Ex. A). The record also shows that prior to the submission of that application, the Agency's Executive Director visited Lewis Farm and he specifically advised Salim Lewis that a permit would

be required. See Record Item 5, (Affirmation of John Banta dated July 23, 2007, ¶¶ 4-6). The Lewises were well aware of the likely jurisdiction of the Agency because they had a previous violation of the Act, as noted in the March 25, 2008 determination. See Record Item 1 (Agency determination p. 5, ¶ 16); see also Simon Aff. Exhibit N (Order dated December 26, 2000, Hon. James P. Dawson, Essex County Supreme Court, Index No. 626-00).

To the extent that Lewis Farm relies on due process cases referenced in prior submissions to this Court, the Agency submits that authority actually supports the APA's position or is readily distinguished. For example, in Commissioner of Labor v. Hinman, 103 A.D.2d 886 (3d Dep't 1984), appeal dismissed, 64 N.Y.2d 756 (1984), cited by petitioner previously, the Court found that the Commissioner of Labor did not run afoul of Hinman's due process rights when, following an investigation and conference, the Commissioner issued an order and assessed a civil penalty. Id. at 886, 887. The Appellate Division determined that Special Term erroneously vacated the judgment, noting the due process requirements of notice and an opportunity to be heard had been met. Id. at 886. Thus, Hinman actually supports the APA's argument. 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 Record Item 2 (transcript).

People v. Cortlandt Med. Bldg. Assocs., 153 Misc. 2d 692 (Cortlandt Town Ct., 1992), is similarly unavailing. In Cortlandt, a town court dismissed charges against the defendant for failure to hold a hearing prior to the initial determination, because "officials made their own ex parte determination." Id. at 641. However, in this case APA officials did not make an ex parte determination. On the contrary, Lewis Farm was provided multiple notices, had 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 Record Item 3 (Notice of Apparent Violation); Item 5 (Notice of Request for Enforcement Committee Determination), and Item 2 (transcript). Lewis Farm cannot credibly claim a lack of due process.

Petitioner's other due process arguments also lack merit. First, it argues that it was entitled to an adjudicatory hearing before an administrative law judge, pursuant to the State Administrative Procedure Act ("SAPA"). See Simon Aff., Exhibit G, (Amended Petition ¶ 94). Petitioner was not entitled to an adjudicatory hearing because the APA Act did not require one. See SAPA § 102(3); see e.g. Matter of Interstate Indust. Corp. v. Murphy, 1 A.D.3d 751 (3d Dep't 2003) (petitioner's request for hearing denied, the court found no violations of procedural due process, noting that SAPA Art. 3 applicable "solely to adjudicatory proceedings required by law.."); Matter of Mary M. v.

Clark 100 A.D.2d 41 (3d Dep't, 1984)(finding SAPA § 102(3) not applicable to petitioner's dismissal from college because no statute requires adjudication in college disciplinary proceedings). APA regulations require the Agency to conduct an adjudicatory hearing with an administrative law judge in two instances: (1) to enforce the Freshwater Wetlands Act; and (2) where the Agency has initiated proceedings to modify, suspend or revoke an Agency permit. See 9 NYCRR § 581-4.1. This matter does not involve the Freshwater Wetlands Act, nor does it involve modification, suspension or revocation of a permit - petitioner refused to complete its application process and chose to construct the houses at issue without an APA permit. Petitioner inexplicably cites § 306(3) of SAPA, which refers to the right to cross-examine in an adjudicatory proceeding and is inapplicable. See Memo of Law p. 41. Under the APA rules, and thus under SAPA, petitioner was not entitled to an adjudicatory hearing.

In its memorandum of law, petitioner also argues that it requested the appointment of a hearing officer. See Memo of Law p. 40. However, APA regulations provide that the Executive Director of the Agency will appoint a hearing officer and a hearing will be held "[i]f the *permit holder* requests a hearing." See 9 NYCRR 581-3.4(a)(emphasis added). Again, Lewis Farm cannot invoke this section of the regulations because it does not hold an APA permit. What is more, the issues in dispute before the Agency were legal, not factual; petitioners conceded that the three

single-family dwellings were already constructed without an APA permit. See Record Item 8 (Memorandum of Law of Paul Van Cott dated December 14, 2007, p. 19); Item 12 (Memorandum of Law of Paul Van Cott dated March 5, 2008, p.11). Accordingly, there was no factual basis for adjudication. The hearing held before the Enforcement Committee pursuant to 9 NYCRR § 581-2.6, after notice and with a full and fair opportunity to be heard, provided more than sufficient due process.

Finally, petitioner attempts to argue that "delay" in the commencement of Agency proceedings constitutes a violation of its due process rights. See Simon Aff., Exhibit G, (Amended Petition ¶ 98). Again, petitioner cites no case law to support this notion. More importantly, however, the facts do not support petitioner's allegation. There was no delay of enforcement by the Agency. The Agency first learned of the violation in March 2007, when Barbara Lewis informed the Agency that the foundations and septic systems had been constructed. See Record Item 5 (Affidavit of John L. Quinn dated July 23, 2007, ¶ 6-7). Since Agency regulations provide that a permit application cannot be processed while there is an outstanding violation, the Agency referred the matter to its enforcement staff for resolution in March of 2007. See Van Cott Aff. dated June 13, 2008, ¶ 38; see also 9 NYCRR 581-2.7. Thereafter, the record is replete with the actions taken by the Agency to address the apparent violations, including multiple notices, discussions to resolve the matter, an offer of

settlement, and finally the scheduling of the matter to be heard by its Enforcement Committee. See Van Cott Aff. dated June 13, 2008, Exhibit A (timeline). The Agency's administrative process was interrupted from June 2007 through August 2007 by litigation of Lewis Farm I. After Justice Ryan confirmed APA's regulatory jurisdiction and dismissed the complaint, the Agency resumed its enforcement proceedings, which culminated in the challenged Agency determination.

Accordingly, petitioner's due process arguments should be rejected by the Court.

POINT VI

THE APA DETERMINATION IS CONSISTENT WITH CONSTITUTIONAL AND STATUTORY DIRECTIVES TO PROTECT THE ADIRONDACK PARK AND TO PROMOTE AGRICULTURE IN THE PARK

The New York State Constitution, Article XIV, Section 4, encourages and mandates protection of the State's agricultural heritage as well the Adirondack Park. While petitioner would have the different missions delegated by statute to the Department of Agriculture and Markets and the Adirondack Park Agency in conflict, the interests of the State and its citizens require that the Court construe them to balance and advance both. See e.g. Beneke v. Town of Santa Clara et. al., 36 A.D.3d 1195 (3d Dep't 2007), appeal denied, 10 N.Y.3d 706 (2008) (In declaratory judgment action brought against Town and Department of

Environmental Conservation to determine jurisdiction over a floating boathouse, Court noted that conflicts between Navigation Law and Executive Law could and should be reconciled); Matter of Sun Beach Real Estate Dev. Co. v. Anderson, 98 A.D.2d 367, 369 (2d Dep't 1983), affirmed, 62 N.Y.2d 965 (1984).

(Developer sued to direct city to issue approval for a subdivision and the Court, construing New York State Town Law and State Environmental Quality Review Act noted "conflicting statutory provisions should be harmonized in a manner that preserves the essential purposes of both"). Even where a state statute contained specific language superceding all other state and local laws relating to mining activities, the Court of Appeals held that the it does not deprive the APA of jurisdiction. See Hunt Brothers v. Adirondack Park Agency, 81 N.Y.2d 906 (1993)(In a combined article 78 proceeding and declaratory judgment action, mine operator challenged APA jurisdiction over its mining operations arguing that the Mined Land Reclamation Law superceded the APA Act, the Court found the APA Act was not a law related to mining, and APA was not deprived of jurisdiction).

The State Constitution Article XIV, § 4, at issue here states:

> The policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. The legislature, in implementing

> this policy, shall include adequate provision for the abatement of air and water pollution and excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources.

This provision was added to the Constitution in 1970. Thereafter, in June 1971, the Legislature enacted Agricultural and Markets Law Section 305(3), which directs state Agencies to "encourage the maintenance of viable farming in agricultural districts and their regulations and procedures shall be modified to this end. . . ." 1971 N.Y. Laws 137. At the same time in 1971, the Legislature passed the Adirondack Park Agency Act.

The Legislature implemented the balanced and protective State policy articulated in Article XIV, Section 4 by providing statutory exemptions for certain agricultural uses and structures in the APA Act. See generally Van Cott Aff., June 13, 2008. These provisions, consistent with both the Constitution and § 305(3) of Agricultural and Markets Law, provide exemption from regulation for certain farm structures, as well as exemption from Agency density standards for farms in the Adirondack Park. The APA Act exempts agricultural use structures from Agency jurisdiction by omitting such structures from the list of jurisdictional projects. See Executive Law § 810. In addition, Executive Law § 810(1) specifically exempts land use and development within various critical environmental areas from Agency jurisdiction when the land use and development involves agricultural uses, and

agricultural use structures in excess of forty feet in height from Agency jurisdiction, where all other structures except residential radio and television antennas require permits from the Agency. In addition, Executive Law § 810(1) specifically exempts land use and development within various critical environmental areas from Agency jurisdiction when the land use and development involves agricultural uses.

With respect to the three residences at issue in this case, Executive Law § 802(8), passed in 1973 (1973 N.Y. Laws 1222), defines "agricultural use structures" as "any barn, stable, shed, silo, garage, fruit and vegetable stand or other building or structure directly and customarily associated with agricultural use." This definition does not include single-family dwellings, which are separately defined under the APA Act at Executive Law § 802 (58). Executive Law § 802(50)(g), passed in 1976 (1976 N.Y. Laws, ch. 899), provides that single-family dwellings used for farmworker housing are separate structures for jurisdictional purposes. These key provisions were enacted by the Legislature after § 305(3) of Agriculture and Markets Law was enacted, and reflect the policy goal of § 305(3) to "encourage the maintenance of viable farming." Consistent with these statutory definitions, the Agency determination does not regulate the agricultural use structures on Lewis Farm, but consistent with its statute the APA does regulate single-family dwellings in specific protected areas.

Petitioner claims that the APA's March 25, 2008 determination

is affected by error of law, alleging the APA has not honored and encouraged the maintenance of farming in the Park as required in Article XIV § 4, and pursuant to Agriculture and Markets Law § 305(3).[12] See Simon Aff., Exhibit G, (Amended Petition ¶¶ 69, 71). However, the APA fulfilled its legal obligations to protect the Park and encourage agriculture in its March 25, 2008 determination. The fact that petitioner disagrees with the balance struck by the Agency in its interpretation and application of its statute does not render the Agency's decision irrational, an abuse of discretion or legally flawed. The APA's March 25, 2008 determination asserts authority over three single-family dwellings, located on protected lands pursuant to the APA Act and the Rivers Act. The Agency at no time has sought to regulate Lewis Farm's agricultural use structures or its farming operations. Moreover, the Agency determination was made only after a Supreme Court decision holding that the APA had jurisdiction over these specific dwellings, in this location, pursuant to the APA Act and Rivers Act.

The Agency determination can hardly be deemed to be a violation of the state constitution or § 305(3) of Agricultural and Markets Law. Rather, it is wholly consistent with the constitution and the APA's mandate to protect the natural

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[12] The Farm Bureau's amicus brief cites the same constitutional and statutory provisions and asserts that the APA determination is in derogation of state policy and the constitution. See Amicus Brief at 13-14, 20.

resources of the Adirondack Park, by ensuring among other things, that installation of a septic system does not adversely affect the Bouquet River. 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. Lewis Farm's 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 New York designated recreational river. Lewis Farm's unilateral and conscious decision to bypass the regulatory process undermines the Agency's regulatory mandate.

Likewise, since occupancy of the structures will logically lead to use of the septic systems, the APA had broad authority to restrict occupancy until the informational and permitting provisions of the March 25, 2008 determination were met. See e.g. Gerdts v. State, 210 A.D.2d 645 (3d Dep't 1994), appeal dismissed 85 N.Y.2d 857 (1995). In Gerdts, the Court found that the APA did not exceed its comprehensive statutory authority to protect the Park by participating in conferences:

> As an administrative agency, the APA has those powers expressly conferred by its authorizing statute, as well as those required by necessary implication. The APA is charged with an awesome responsibility and the Legislature has granted it formidable powers to carry out its task. 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. 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..."

Gerdts at 648-649 (citations omitted).

The APA's broad statutory authority includes authority over single-family dwellings in Resource Management areas of the Adirondack Park, and in protected areas pursuant to the Rivers Act. See Van Cott Aff., June 13, 2008, ¶¶ 13, 14. Contrary to petitioner's characterization of the determination, the record demonstrates that the Agency never ordered vacancy of the dwellings; rather, it sought compliance with the APA Act prior to construction or occupancy of the dwellings. See Record Item 1 (Determination dated March 25, 2008, p. 12); see also Van Cott Aff. dated June 13, 2008, Exhibit A (timeline). This Court's April 11, 2008 Order actually prohibited occupancy of the units.

CONCLUSION

For all of the foregoing reasons, claims 3, 5, 6, 7, 8, 9 and 10 in the amended petition should be dismissed for collateral estoppel; claims 4 and 11 of the amended petition should be dismissed for failure to state a cause of action and the remaining causes of action should be dismissed as without merit. In the event the State APA motion to dismiss is denied in whole or in part, the State respectfully requests 30 days after service of notice of entry of the order denying this motion, in which to serve a full answer to the amended petition.

Dated: Albany, New York
June 13, 2008

Respectfully submitted,

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