

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

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LEWIS FAMILY FARM, INC.,

Petitioner,

v.

NEW YORK STATE ADIRONDACK  
PARK AGENCY,

Respondent.

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NOTICE OF MOTION  
FOR LEAVE TO APPEAL

Essex County  
Index No. 315-08

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

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Essex County  
Index No. 332-08

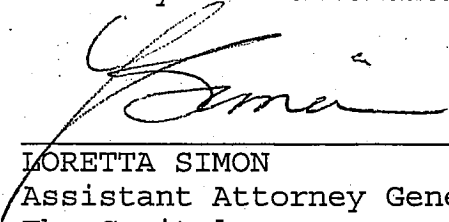
PLEASE TAKE NOTICE that upon the annexed affirmation with exhibits of Loretta Simon, Assistant Attorney General, dated August 1, 2008, the undersigned will move this Court, at a Term thereof to be held at the Justice Building, Empire State Plaza, Albany, New York, on Monday, August 18, 2008, at 10:00 a.m., for an order pursuant to C.P.L.R. § 5701(c) granting respondents leave to appeal from the interlocutory order of Supreme Court, Essex County, dated and entered in the Essex County Clerk's office on July 2, 2008. Pursuant to 22 NYCRR § 800.2 papers in opposition to this motion must be filed by 11 a.m. Friday, August 15, 2008. This motion will be submitted on the papers, and

personal appearances in opposition to the motion are neither required nor permitted.

Dated: Albany, New York  
August 1, 2008

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

By:

  
\_\_\_\_\_  
LORETTA SIMON  
Assistant Attorney General  
The Capitol  
Albany, New York 12224  
Telephone: (518)402-2724

To: John J. Privitera, Esq.  
Jacob Lamme  
McNamee, Lochner, Titus & Williams, P.C.  
677 Broadway  
Albany, New York 12207

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

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LEWIS FAMILY FARM, INC.,

Petitioner,

AFFIRMATION IN SUPPORT OF  
MOTION FOR LEAVE TO APPEAL

NEW YORK STATE ADIRONDACK  
PARK AGENCY,

Essex County  
Index No. 315-08

Respondent.

---

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Essex County  
Index No. 332-08

Defendants.

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LORETTA SIMON, an attorney admitted to practice before the courts of the State of New York, duly affirms under penalty of perjury that:

1. I am an Assistant Attorney General, of counsel to Andrew M. Cuomo, Attorney General of the State of New York, attorney for the Adirondack Park Agency ("APA") in this matter.

2. I make this affirmation in support of the APA's motion for leave to appeal to this Court from the interlocutory order of Supreme Court, Essex County (Meyer, Acting J.S.C.), dated July 2, 2008 (the "July 2, 2008 Supreme Court Order") and entered in this

consolidated C.P.L.R. Article 78 proceeding and State enforcement action on July 2, 2008. See Exhibit A (Decision and Order dated July 2, 2008). The averments in this affirmation are made on information and belief, the source of which is the Attorney General's file in this matter.

3. The underlying dispute in these consolidated matters centers on Lewis Family Farm, Inc., and Salim and Barbara Lewis' ("Lewis Farm") construction of three single family dwellings, without an APA permit, on land within the Adirondack Park in the Town of Essex, Essex County in violation of the Adirondack Park Agency Act ("APA Act"), Executive Law § 801, et seq., and the Wild, Scenic, and Recreational Rivers System Act (the "Rivers Act"), Environmental Conservation Law ("ECL") § 15-2701, et seq. (and its implementing regulations set forth at 9 NYCRR Part 577).

4. The July 2, 2008 Supreme Court Order denied the APA's motion to dismiss on collateral estoppel grounds, Lewis Farms's claims in its Article 78 proceeding that the APA lacks jurisdiction over the dwelling units -- an issue that was decided against Lewis Farm in its 2007 declaratory judgment action. See Exhibit B (Decision and Order dated August 16, 2007 ["August 16, 2007 Order"], Ryan, Acting J.S.C.). The July 2, 2008 Supreme Court Order also granted Lewis Farm's motion to dismiss the APA's consolidated enforcement action as against Salim and Barbara Lewis, Lewis Farm's principals who were directly involved in the

activities at issue, and awarded them costs of \$100 each.

5. On August 1, 2008, the APA filed a notice of appeal from that part of the July 2, 2008 order relating to the enforcement action, and now moves for permission to appeal that part of the order related to the Article 78 proceeding. See C.P.L.R. § 5513 (a) and (b) (no appeal as of right from an interlocutory order in C.P.L.R. Article 78 proceeding).

#### Background

6. Lewis Farm constructed three modular single family dwellings on its 1100-acre organic farm in an area subject to the APA Act and Rivers Act. After being advised that it needed a permit from the APA, Lewis Farm submitted a permit application to the APA in March 2007. Because Lewis Farm had already commenced construction, however, the matter was referred to the APA's enforcement division. When the parties could not agree to settle the matter, Lewis Farm resumed construction of the dwellings, and the APA served Lewis Farm with a cease and desist order.

#### Lewis Farm's 2007 Declaratory Judgment Action ("Lewis Farm I")

7. Lewis Farm immediately commenced a declaratory judgment action in Supreme Court, Essex County, seeking to restrain the APA's enforcement proceedings; seeking a declaration that the Agency lacked jurisdiction over construction of the three dwellings; and arguing that APA jurisdiction is preempted by Agriculture and Markets Law § 305-a. On August 16, 2007, Justice

Ryan held that neither the APA Act, nor the regulations implementing the Rivers Act, exempt the dwellings from the APA's jurisdiction. The court also held that Agriculture and Markets Law Section 305-a did not preempt APA's jurisdiction. The court converted the action to an Article 78 proceeding (with Lewis Farm's consent) and dismissed the proceeding as premature. Lewis Farm filed a notice of appeal in September 2007, but has yet to perfect its appeal. This Court, on July 24, 2008 granted Lewis Farm's second motion to extend the time to perfect its appeal extending the deadline to September 22, 2008 (A.D. Case # 504696).

#### APA's Administrative Enforcement Proceedings

8. Thereafter, the APA continued with its administrative enforcement proceedings. On March 25, 2008, the APA's Enforcement Committee issued a determination that Lewis Farm violated the APA Act and the Rivers Act, directed Lewis Farm to submit a permit application to the APA accompanied by detailed information on the dwellings and the septic system, directed that the dwellings not be occupied until the permit is issued, and imposed a civil penalty of \$50,000.

#### Lewis Farm's 2008 Article 78 Proceeding ("Lewis Farm II")

9. On April 8, 2008, Lewis Farm commenced this C.P.L.R. Article 78 proceeding challenging the APA Enforcement Committee's determination on various grounds and sought a stay of

enforcement. Lewis Farm's petition, like its 2007 declaratory judgment complaint, alleges that the APA lacks jurisdiction over the three dwelling units under the APA Act and the Rivers Act, and claims that the Agriculture and Markets Law preempts the APA's jurisdiction.

10. On April 11, 2008, the Supreme Court (Meyer, Acting J.S.C.) partially granted and partially denied Lewis Farm's application for a stay of APA's enforcement order. On April 28, 2008, Lewis Farm moved in the Appellate Division by order to show cause for permission to appeal Justice Meyer's April 11, 2008 order and to enjoin enforcement of the APA's order in its entirety.

11. On April 28, 2008, the Court granted Lewis Farm permission to appeal and (a) ordered a stay of the APA's assessment of a \$50,000 civil penalty, provided that Lewis Farm pay that amount to the Essex County Treasurer's office or post an undertaking; and (b) enjoined enforcement of APA's prohibition regarding occupancy of one of the single family dwellings, on the condition that Lewis Farm submit as-built septic plans and an evaluation by a NYS licensed engineer as to whether the septic system complies with state standards. Lewis Farm's appeal of the Supreme Court's order partially denying a stay of the APA's order in Lewis Farm II remains pending (A.D. Case # 504626).

The State's Enforcement Action ("Lewis Farm III")

12. Also on April 11, 2008, the Office of the Attorney General commenced an action against Lewis Farm, Inc., Salim Lewis, and Barbara Lewis on behalf of the APA, to enforce the APA statutes and regulations. Justice Meyer consolidated the State's enforcement action with Lewis Farm's Article 78 proceeding.

13. In its July 2, 2008 Decision and Order, Supreme Court dismissed the APA's enforcement action against Salim and Barbara Lewis individually, and awarded them costs of \$100 each. See Exhibit A (Decision and Order dated July 2, 2008, p. 10).

14. The APA filed a notice of appeal on August 1, 2008.

Pending Appeals

15. In sum, there are now pending before this Court three separate appeals related to this matter: (a) Lewis Farm's appeal of Justice Meyer's April 11, 2008 order regarding a stay in Lewis Farm II; (b) the APA's appeal of Justice Meyer's July 2, 2008 order in Lewis Farm III; and (c) Lewis Farm's appeal of Justice Ryan's August 16, 2007 order in Lewis Farm I.

16. The APA requests permission to appeal the Article 78 portion of the July 2, 2008 order, which may be consolidated for purposes of briefing and argument with the APA's appeal as of right from that same July 2, 2008 order.



The APA's Appeal is Meritorious

17. The APA's appeal is meritorious. Lewis Farm raised jurisdictional claims in its 2007 declaratory judgment action, which Justice Ryan flatly rejected in his August 16, 2007 Order. Now, in Lewis Farm II, Lewis Farm seeks to relitigate before Justice Meyer the same jurisdictional issues that Justice Ryan decided against it in Lewis Farm I. It is unfair to permit a party to relitigate an issue which has previously been decided against it in a proceeding in which it had a full and fair opportunity to be heard. See Buechel v. Bain, 97 N.Y.2d 295, 303-304 (2001), cert. denied, 535 U.S. 1096 (2002); Gilberg v. Barbieri, 53 N.Y.2d 285, 291 (1981). While Lewis Farm raises several additional issues in Lewis Farm II, Lewis Farm's jurisdictional and statutory preemption arguments are identical to those raised and decided in Lewis Farm I.

18. Justice Ryan unambiguously decided the merits of Lewis Farm's jurisdictional arguments and fixed the legal rights of the parties before concluding that the court had no authority to intervene in the administrative proceedings. Lewis Farm chose to put these jurisdictional issues before Justice Ryan in its 2007 declaratory judgment action. These jurisdictional determinations were essential to the court's conclusion that the APA should be allowed to proceed with its administrative enforcement against Lewis Farm. See Watergate II Apartments v. Buffalo Sewer Auth.,

46 N.Y.2d 52, 57 (1978); see also 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).

19. In fact, in the same July 2, 2008 decision and order Justice Meyer recognized this principle when he granted the APA's motion to dismiss Lewis Farm's Agriculture and Markets Law § 305-a claim based on res judicata. See Exhibit A (July 2, 2008 Supreme Court Order, p. 9). This aspect of Justice Meyer's ruling is completely inconsistent with his refusal to dismiss Lewis Farm's jurisdictional claims on collateral estoppel grounds. This internal inconsistency underscores the merits of the APA's permissive appeal.

Wherefore, the Adirondack Park Agency respectfully requests that this Court grant leave to appeal the interlocutory order of the Supreme Court dated July 2, 2008.

Dated: Albany, New York  
August 1, 2008

  
LORETTA SIMON

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