

PRESENT: Hon. Leslie E. Stein
Justice Appellate Division

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ORDER TO SHOW CAUSE

ADIRONDACK PARK AGENCY,

Index No. 315-08

Respondent.

**ORDER TO SHOW CAUSE FOR AN ORDER
GRANTING A FULL STAY OF RESPONDENT'S
MARCH 25, 2008 ENFORCEMENT DETERMINATION**

Upon reading the annexed affirmation of John J. Privitera, dated April 28, 2008, the papers thereto attached and the papers therein referred to, and upon all the pleadings and proceedings had herein, it is

ORDERED, that Respondent show cause before this Court at a motion term thereof, to be held at the Appellate Division Courthouse Justice Building, Empire State Plaza, Albany, New York, at _____ a.m. on _____, 2008, or as soon thereafter as counsel can be heard, why an order should not be granted that: (1) grants Petitioner-Appellant permission to appeal the April 11, 2008 Decision and Order of the Essex County Supreme Court (Hon. Richard B. Meyer) so that this Court may review in order to modify and affirm it pursuant to CPLR § 5701(c); (2) modifies and affirms Judge Meyer's Decision and Order to implement a full stay of Respondent's Enforcement Committee Decision of March 25, 2008 until a final judgment is

rendered in the Article 78 proceeding and any appeals thereto; and (4) grants such other and further relief as this Court deems just and proper, and it is further

ORDERED, that pending determination by this Court on the motion brought on by this Order to Show Cause, the Respondent's administrative determination dated March 25, 2008 is hereby stayed in its entirety; and it is further

ORDERED, that service of a copy of this order and a copy of the papers upon which it was granted upon Respondent's counsel by personal or facsimile service at:

Loretta Simon, Assistant Attorney General
NYS Office of the Attorney General
Environmental Protection Bureau
146 State Street, 2nd floor
Albany, New York 12224
Fax: (518) 473-2534

on or before April 28, 2008, be deemed good and sufficient service upon Respondent, and it is further

ORDERED that papers in opposition to this motion, if any, are to be served upon Petitioner's counsel so as to be received by _____, 2008 and filed with this Court on the same date, and it is further

ORDERED that this motion shall be submitted and the personal appearance of the attorneys for the parties is not permitted.

Dated: April 28, 2008
Albany, New York

Hon. Leslie E. Stein
Justice Appellate Division

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ADIRONDACK PARK AGENCY,

Respondent.

**AFFIRMATION IN SUPPORT
OF A FULL STAY OF
RESPONDENT'S
DETERMINATION**

Essex County Index No. 315-08

JOHN J. PRIVITERA, an attorney at law duly admitted to practice in the courts of the State of New York, swears and affirms under penalty of perjury as follows:

1. I am duly licensed and admitted to practice law in the State of New York, and I am a principal with the law firm of McNamee, Lochner, Titus & Williams, P.C., attorneys for Petitioner Lewis Family Farm, Inc. (hereafter "Lewis Family Farm"). As such, I am fully familiar with the pleadings and proceedings had in this action, and with the matters set forth herein.

2. I make this affirmation rather than submitting an affidavit of a party because the allegations contained herein are based solely on procedural and legal matters within my knowledge.

3. I make this affirmation in support of the Lewis Family Farm's motion for leave to review for the purpose of modifying and affirming the April 11, 2008 Decision and Order of the Essex County Supreme Court (Hon. Richard B. Meyer) (hereafter "April 11 Decision and Order") pursuant to CPLR § 5701(c) in order to implement a full stay of Petitioner's obligation to abide by Respondent Adirondack Park Agency's Enforcement Committee Decision of March 25, 2008 (hereafter "March 25 Determination") until a final judgment is rendered in the Article 78

proceeding and any appeals thereto. A copy of the April 11, 2008 Decision and Order is attached hereto as **Exhibit "A"**.

4. On April 25, 2008, the Essex County Supreme Court issued a Decision and Order granting Petitioner's motion to renew and reargue its motion for a stay, but adhered to the April 11 Decision and Order. A copy of the April 25, 2008 Decision and Order is attached hereto as **Exhibit "B"**.

5. The stay granted by the lower court does not fully preserve the status quo. The status quo has only been partially preserved by Judge Meyer's grant of a stay pursuant to CPLR § 7805 in the April 11 Decision and Order. The lower court made an error of law in not fully staying the March 25 Determination.

6. Petitioner will be irreparably harmed if it is forced to comply with the March 25 Determination. The affidavits attached describe the irreparable harm to Petitioner.

7. The procedural history of this case is set forth succinctly by Judge Meyer in the Decision and Order. In November 2006, the Lewis Family Farm began construction on three farm worker housing structures on its land within the Adirondack Park and within Essex County Agricultural District No. 4. The Agency commenced an enforcement proceeding which resulted in the March 25 Determination, whereby the Agency's Enforcement Committee determined that the Lewis Family Farm had violated the Adirondack Park Agency Act by failing to obtain a permit for the construction of the dwellings and subdivision of land. (See April 11 Decision and Order, pg. 2).

8. By way of the March 25 Determination, Respondent Adirondack Park Agency (hereafter "Agency") has, among other things, wrongfully asserted jurisdiction over the Lewis Family Farm's agricultural use structures.

9. The Agency's March 25 Determination against Petitioner Lewis Family Farm, Inc. directs the following:

- (1) Lewis Farm will apply for a permit for the three new dwellings and the 4-lot subdivision into sites (including retained "lot") by April 14, 2008, by submitting the appropriate major project application.
- (2) By April 28, 2008, Lewis Farm will also submit the following to the Agency:
 - (a) a detailed description of the use of each dwelling and connection to the Lewis Farm agricultural operations;
 - (b) an as-built plan for the septic system and an evaluation by a NYS licensed professional engineer as to whether the installed septic system for the three dwellings complies with the NYS Department of Health and Agency standards and guidelines;
- (3) Lewis Farm will reply to any addition information request within 30 days of receipt.
- (4) Lewis Farm will retain all rights of appeal in the project review process, but forgoes the right to challenge Agency jurisdiction and the review clocks otherwise applicable.
- (5) Lewis Farm or its employees shall not occupy the three new dwellings located on the corner of Whallons Bay Road and Christian Road unless and until an Agency permit is issued and the civil penalty paid.
- (6) By April 28, 2008, Lewis Farm will pay a civil penalty of \$50,000 to the Agency.
- (7) Agency staff is directed to review the application for the three dwellings and the subdivisions promptly, towards the goal of issuing the after-the-fact permit in time for farm worker occupancy of the dwellings for the 2008 growing season. However, that can only happen if the Respondent responds immediately and favorably to this determination and submits the required information and penalty. The Agency will not proceed with review of the application unless and until the civil penalty is paid, the information requested above is submitted, and the dwellings remain vacant until approval is issued.

A copy of the March 25 Determination is attached hereto as **Exhibit "C"**.

10. On April 8, 2008, Petitioner Lewis Family Farm commenced an Article 78 proceeding against Respondent Adirondack Park Agency seeking to vacate and annul the March 25 Determination. (See April 11 Decision and Order, pg. 2).

11. Among other things, “[t]his proceeding involves novel issues of law relating to the interplay of various statutory definitions contained in the [Adirondack Park Agency] Act, the Respondent’s jurisdiction over ‘agricultural use structures’ (Executive Law § 809[8]), whether a single family dwelling is or can under certain circumstances be such a structure under the Act, whether the Petitioner’s project constitutes a ‘subdivision’ (Executive Law § 802[63]), and the potential impact (if any) of Article 14, § 4 of the New York State Constitution.” (See April 11 Decision and Order, pp. 4-5).

12. On April 14, 2008, Petitioner served an Amended Verified Petition, a copy of which is attached hereto (without exhibits) as **Exhibit "D"**.

13. Pursuant to CPLR § 7805, Petitioner also moved by an Order to Show Cause for a stay of Petitioner's obligation to comply with the March 25 Determination during the pendency of the Article 78 proceeding. A copy of the Amended Order to Show Cause dated April 9, 2008 is attached hereto as **Exhibit "E"**.

14. Petitioner’s Order to Show Cause was supported by the Affidavit of Barbara A. Lewis, sworn to April 7, 2008 (attached hereto as **Exhibit "F"**), the Affidavit of John J. Privitera, Esq., sworn to April 7, 2008 (attached hereto as **Exhibit "G"**), and a Memorandum of Law in Support of a Stay, dated April 7, 2008 (attached hereto as **Exhibit "H"**).

15. Respondent opposed the Order to Show Cause by submitting the Affirmation of Loretta Simon, dated April 10, 2008 (attached hereto as **Exhibit "I"**), the Affirmation of Paul

Van Cott, dated April 10, 2008 (attached hereto as **Exhibit "J"**), and a Memorandum of Law in Opposition, dated April 10, 2008 (attached hereto as **Exhibit "K"**).

16. The lower court heard oral argument on April 11, 2008. A copy of the transcript is attached hereto as **Exhibit "L"**.

17. The April 11 Decision and Order applied the traditional tripartite test for temporary or preliminary injunctive relief: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor. (See April 11 Decision and Order, pg. 4) (citing Doe v. Axelrod, 73 N.Y.2d 748, 750, 536 N.Y.S.2d 44, 45, 532 N.E.2d 1272).

18. The lower court correctly determined that the Lewis Family Farm "has established a likelihood of success on the merits on at least some issues raised in the petition, and a balancing of the equities in its favor." (See April 11 Decision and Order, pg. 5).

19. The lower court also correctly determined that the Lewis Family Farm will suffer an actual and immediate irreparable injury unless its obligation to comply with the March 25 Determination is stayed during the pendency of this Article 78 proceeding. (See April 11 Decision and Order, pg. 5).

20. Specifically, the lower court found that if the Lewis Family Farm is compelled to obey the Agency's Determination and apply for a permit by April 14, 2008, this entire proceeding becomes moot since the Petitioner will have already submitted to the Agency's jurisdiction, which it vehemently opposes. (See id.).

21. Accordingly, the lower court justly granted a stay as to Paragraphs (1) through (4), and (7) of the March 25 Determination. (See April 11 Decision and Order, pg. 5; see also ¶ 6, *supra*).

22. However, the lower court denied a stay as to Paragraphs (5) and (6) of the March 25 Determination, which prohibit the Lewis Family Farm to occupy the three farm worker dwellings until and Agency permit is issued and require the Lewis Family Farm to pay a civil penalty of \$50,000 to the Agency by April 28, 2008, because it found that the Lewis Family Farm made an insufficient showing of irreparable harm as to those Paragraphs. (See April 11 Decision and Order, pp. 3, 5; see also ¶ 6, *supra*).

23. The lower court erred in denying a full stay of Petitioner's obligation to comply with the March 25 Determination because maintaining the status quo, which the lower court undoubtedly sought to do, would nullify enforcement of the entire administrative determination during the pendency of judicial review.

Denial of Stay As to Farm Worker Housing Occupancy

24. The lower court appears to have denied the stay as to Paragraph (5) of the March 25 Determination, which prohibits the occupancy of the farm worker dwellings, simply because “Petitioner conceded at oral argument that the dwelling units are not occupied.” (See April 11 Decision and Order, pg. 5). It is respectfully submitted that the Lewis Family Farm’s obedience of the March 25 Determination until it received a stay should not be used as a sword against it.

25. The lower court failed to consider the portions of the uncontested Affidavit of Barbara A. Lewis that stated that farm worker housing is necessary for the farm to sustain itself, and that the farm worker housing must be utilized during the imminent 2008 growing season, otherwise the farm will sustain unquantifiable damage to farm operations. (See Ex. F, Lewis Aff., ¶¶ 4, 7). Essentially, without farm employees, the farm cannot survive.

26. Petitioner brought this to the lower court's attention on its motion to reargue and renew, but the lower court again failed to consider the relevant portions of the uncontested Lewis affidavit.

27. The Lewis Family Farm has created several jobs solely by being able to offer housing to the farm workers and their families. However, the Lewis Family Farm cannot function or recruit the highly-skilled workers it needs to run New York State's largest organic farm without being able to provide the farm workers and their families with housing. (See id.). Thus, it is respectfully submitted that the Lewis Family Farm is suffering irreparable harm by not being able to utilize the farm worker houses for the 2008 growing season during the pendency of this proceeding.

28. Further, the March 25 Determination goes far beyond the Agency's pleadings that were framed by Agency's staff in the underlying administrative Notice of Violation that was the subject of the March 25 Determination. Specifically, the Agency pleaded that only two of the three farm worker houses in the cluster were illegal, not three. The Lewis Family Farm's employee housing cluster is comprised of two (2) three-bedroom cottages for nuclear farm families and a larger four-bedroom residence designed for employees, interns, apprentices, and farm consultants ("Dormitory"). The Agency's own affidavits pleaded that one of the structures did not require a permit, because it was a replacement of one of the old Walker farm houses. See Affidavit of Douglas Miller, Respondent's Enforcement Officer, sworn to July 20, 2007, paragraph 12, a copy of which is attached hereto (without exhibits) as **Exhibit "M"**.

29. Thus, for a full year, Petitioner has relied on the fact that the Dormitory is illegal. The Dormitory is finished on the inside. I am informed and believe that it has a Certificate of

Occupancy from the Town of Essex and it has been used periodically for short periods of time since the Certificate of Occupancy was obtained.

30. Indeed, the Agency's own affidavits recognized that the Dormitory was being occupied long before the Agency issued the March 25 Determination when it pleaded that the Dormitory appeared completely finished "and there are even curtains in the windows," a clear indication of occupancy. (See Affidavit of Douglas Miller, Respondent's Enforcement Officer sworn to December 12, 2007, paragraph 5, attached hereto as **Exhibit "N"**).

31. Now, it is urgent that this structure be usable by the Lewis Family Farm to house four (4) farm workers.

32. Under a program supported in part by the Government of Nepal, the Lewis Family Farm is due to host four farmers from Nepal this spring so that they may learn the methods of sustainable, organic farming so that they may teach these methods to other Nepalese farmers upon their return. These farmers must be housed in the Dormitory. We respectfully pray that this important employment and teaching opportunity not be aborted *pendente lite*. Upon information and belief the Nepalese farmers are due to arrive on or about May 1, 2008.

33. Moreover, "administrative agencies, as creatures of statute, are without power to exercise any jurisdiction beyond that conferred by statute." Flynn v. State Ethics Comm'n, 208 A.D.2d 91, 93 (3d Dep't 1995); see also Foy v. Schechter, 1 N.Y.2d 604 (1956) (stating that an agency must have jurisdiction in order for its determinations to be valid, and absent such jurisdiction, agency acts are void). To this end, "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." Gerdtz v. State, 210 A.D.2d 645, 648-49 (3d Dep't 1994). Accordingly, the Agency is completely without any enforcement power

to order the vacancy of a structure.¹ See N.Y. Exec. Law § 813. The Agency's sole recourse at the administrative stage of the proceeding was to proscribe a monetary penalty. See id. Thus, the Agency could not unilaterally enjoin the Lewis Family Farm from occupying the dwellings – even without a showing of irreparable harm.

Denial of Stay as to Payment of Civil Penalty

34. The lower court appears to have denied the stay as to Paragraph (6) of the March 25 Determination, which orders the Lewis Family Farm to pay an administrative penalty of \$50,000 by April 28, 2008, simply because “[n]o allegation has been made that Petitioner lacks sufficient financial resources to pay the penalty.” (See April 11 Decision and Order, pg. 5). However, the lower court fails to account for the fact that the Lewis Family Farm will suffer irreparable harm if it pays the penalty in compliance with the March 25 Determination because the Lewis Family Farm will be deprived of its right to due process.

35. The Lewis Family Farm should not be forced to pay the fine as the price to access judicial review of the March 25 Determination. Moreover, no state agency should be allowed to collect a fine in dispute until such time as a court has reviewed the matter.

36. Forcing the Lewis Family Farm to pay the administrative penalty by April 28, 2008, before it has a chance to litigate the matter, deprives the Lewis Family Farm of its constitutional right to due process. It is axiomatic that no state can deprive any person of life, liberty, or property, without due process of law. U.S. CONST. amend. XIV, § 1. The right to due process affords the right to a hearing before the deprivation of life, liberty or a property interest. See Comm'r of Labor v. Hinman, 103 A.D.2d 886 (3d Dep't 1984). "The touchstone of due process is protection of the individual against arbitrary action of government" County of

¹ The power to order the vacancy of a dwelling rests with the local government, and even then the power is limited to those instances when the dwelling is not in compliance with safety or health standards.

Sacramento v. Lewis, 523 U.S. 833, 845, 118 S. Ct. 1708, 140 L.Ed.2d 1043 (1998). Nothing could be more arbitrary than the imposition of a civil penalty against a party before it has had a chance to litigate the matter. See People v. Cortlandt Med. Bldg. Assocs., 153 Misc.2d 692 (Cortlandt Town Ct., 1992) (finding a due process violation where a town was seeking to collect a civil penalty before the defendant had a chance to contest the underlying issues of the matter).

37. When an alleged deprivation of a constitutional right is involved, courts hold that no further showing of irreparable injury is necessary. See Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984) (affirming injunction to enjoin the closing of a prison which would deprive inmates of their constitutional rights).

38. Thus, forcing the Lewis Family Farm to pay a penalty before it has even had a chance to litigate the matter is shocking to one's sense of fairness. This is especially true since the lower court has already determined that the Lewis Family Farm has "established a likelihood of success on the merits." (See April 11 Decision and Order, pg. 5).

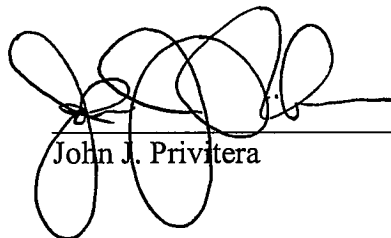
39. Furthermore, the Agency is obligated to follow the Adirondack Park Agency Act ("APAA"), the Agency regulations, and the State Administrative Procedure Act ("SAPA") when issuing a final enforcement determination. See N.Y. Exec. Law § 813; 9 NYCRR § 581-4.16; and N.Y. S.A.P.A. Law § 307. The APAA, Agency regulations, and SAPA provide no administrative power to require that a civil penalty be paid during the pendency of a judicial proceeding to review the administrative determination that assessed the penalty. Thus, the Agency, as creature of statute, is without power to require payment of the penalty by a date certain during the pendency of this judicial proceeding since its enabling statute and regulations are silent on the issue. See Flynn v. State Ethics Comm'n, 208 A.D.2d 91, 93 (3d Dep't 1995);

see also Foy v. Schechter, 1 N.Y.2d 604 (1956) (stating that an agency must have jurisdiction in order for its determinations to be valid, and absent such jurisdiction, agency acts are void).

40. Respondent will not be harmed if a full stay of the March 25 Determination is granted. This case is solely about jurisdiction. The Agency has already declared that the structures at issue in this proceeding can remain in their current position. There is no threat of any harm to the environment. Further, there is no harm to the Agency's land use plan, which counts all agricultural use structures and single family dwellings occupied by farm workers and their families as one principal building for intensity purposes. See N.Y. Exec. Law § 802(50)(g). Further, the Agency cannot claim any prejudice by the passage of time if a stay is granted based on its "unexplained failure of the Respondent to timely refer the Petitioner's [alleged] noncompliance with the Act to the Attorney General (Executive Law § 813[2]) over a period spanning almost one year." (See April 11 Decision and Order, pg. 5).

41. Based on the foregoing, the Lewis Family Farm respectfully asks this Court to enter an order granting permission to seek review of the Decision and Order for the purpose of affirming and modifying it to implement a full stay of the Lewis Family Farm's obligation to comply with the Agency's March 25 Determination pending a final judgment of this Article 78 proceeding, and any appeals thereto.

I hereby swear and affirm the above under penalty of perjury this 28th day of April, 2008.



John J. Privitera