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 FURTHER OPPOSITION TO THE AMENDED PETITION AND ITS ANSWER TO THE THIRD, FIFTH, SIXTH, SEVENTH, EIGHTH, NINTH, TENTH AND ELEVENTH CLAIMS OF THE AMENDED PETITION

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Dated: July 30, 2008

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PRELIMINARY STATEMENT

Plaintiff, the New York State Adirondack Park Agency ("APA" or "Agency") submits this memorandum of law in further opposition to the Amended Petition and in further support of its answer to the Amended Petition's third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh causes of action. The underlying dispute centers on Lewis Farm's construction of three single-family dwellings without an APA permit, on land within the Adirondack Park in the Town of Essex, Essex County without APA permits 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).

Of the sixteen (16) claims in the Amended Petition, the APA moved to dismiss nine -- seven based on the doctrine of collateral estoppel and res judicata (claims 3, 5, 6, 7, 8, 9 and 10), and two for failure to state a cause of action (claims 4 and 11). This Court denied dismissal of the fifth, sixth, seventh, eighth, ninth, tenth and eleventh claims, granted partial dismissal of the third claim and full dismissal of the fourth claim. Accordingly, this memorandum of law is submitted in opposition to the Amended Petition's remaining claims (claim 3 [in part] and claims 5, 6, 7, 8, 9, 10 and 11).

APPLICABLE STATUTES AND REGULATIONS

The APA 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 Rivers Act, 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 Bouquet River is a New York State designated recreational river. See 9 NYCRR, Appendix Q-6, 5a (Recreational Rivers). The Official Adirondack Park Land Use and Development Plan Map classifies private lands in the Adirondack Park under various categories, one of which is "Resource Management." See Executive Law § 805. A more detailed statutory overview is provided in the APA's memorandum of law dated June 13, 2008. See Affidavit of Paul Van Cott dated July 30, 2008 ("Van Cott Aff. dated July, 2008") and Affidavit of Paul Van Cott dated June 13, 2008 ("Van Cott Aff. dated June, 2008").

STATEMENT OF FACTS

A summary of facts in this matter is provided in the APA's memorandum of law dated June 13, 2008 and in the Van Cott Aff. dated June, 2008, ¶¶ 35-64, and is not repeated herein.

ARGUMENT

POINT I

THE APA DETERMINATION IS NOT AFFECTED BY ERROR OF LAW PURSUANT TO THE COURT OF APPEALS DECISION IN "LYSANDER", WHICH INTERPRETS AGRICULTURE AND MARKETS LAW AND DOES NOT SUPERCEDE THE APA ACT OR THE RIVERS ACT

Lewis Farm alleges in its third cause of action that the APA's determination is affected by error of law because it unreasonably restricted farm operations, contrary to Town of Lysander v. Hafner, 96 N.Y.2d 558 (2001) ("Lysander"). See Amended Petition ¶ 73. In Lysander, the Court of Appeals considered whether a local zoning ordinance regarding installation of mobile homes to house migrant farm workers was superceded by Agriculture and Markets Law § 305-a(1)(a).[1] Id. at 96. However, this Court dismissed petitioner's Agriculture and Markets Law § 305-a claim as *res judicata* in its July 2, 2008 Decision and Order. See Lewis Family Farm v. Adirondack Park Agency, 2008 NY Slip Op. 51348U (Sup. Ct., Essex Co., July 2, 2008). Therefore, the remaining question is whether any other

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[1] This provision reads "1. Policy of local governments. a. Local governments, when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules, or regulations, shall exercise these powers in such a manner as may realize the policy and goals set forth in this article, and shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of this article unless it can be shown that the public health or safety is threatened." Agriculture and Markets Law § 305-a (1)(a).

holdings in Lysander apply to the APA's determination in the Lewis Farm matter. They do not.

In Lysander, the Court of Appeals found that "farm operations" under Agriculture and Markets Law § 301(11) included farm worker housing. See Agriculture and Markets Law § 301(11); Lysander, 96 N.Y. 2d at 562-563. While the literal language of the statute does not include residential farm worker housing, the Court determined that the statute makes plain that all buildings "on-farm" may be considered part of the farm operation under the Agriculture and Markets Law, noting that the Commissioner of Agriculture and Markets supported that view. Id. at 564. However, Lysander's broad reading of "farm operations" in the context of Section 301(11) of Agriculture and Markets Law does not provide grounds to challenge the APA's March 25, 2008 determination that single family dwellings are not "agricultural use structures" under the APA Act. See, Return and Record, Volume I, Item 1 (Determination pg.7, ¶¶ 24; pgs 8-10, ¶¶ 25, 37-40. Simply put, the Agriculture and Markets Law does not supercede Agency jurisdiction under the APA Act. See, e.g., Hunt Brothers v. Glennon, 81 N.Y.2d 906, 909 (1993) (finding that the Mined Land Reclamation Law language superceding all other state and local laws relating to mining did not deprive the APA of jurisdiction to regulate other aspects of mine's operations).

Fundamental principles of statutory construction support APA's exercise of regulatory jurisdiction under the APA Act. The

preface to the "Definitions" section of the Agriculture and Markets Law limits its application of the definitions to "when used in this statute." See Agriculture and Markets Law § 301. By use of this language, the Legislature expressly limited the definitions in Agriculture and Markets Law § 301 to that statute. There is no language in Agriculture and Markets Law which applies its definitions to other state statutes, nor is there language that indicates that the Agriculture and Markets Law supercedes any other state statutes. In fact, in Lysander the Court of Appeals found the Agriculture and Markets Law, § 305-a supercedes only actions of local governments. Lysander, 96 N.Y.2d at 561, 563 (noting that Agriculture and Markets Law § 305-a(1)(a) directs that local governments shall not unreasonably restrict or regulate farm operations); see also Matter of Inter-Lakes Health Inc. v. Town of Ticonderoga, 13 A.D.3d 846 (3d Dep't 2004) (finding that a local zoning ordinance was superceded by Agriculture and Markets Law § 305-a(1)(a)). In the same way, the Legislature limited the definition section of the APA Act to that Act (Executive Law § 802 "as used in this article..."). Logic dictates that the definition section of a particular state statute should be read to apply only to that statute, unless the statute expressly states otherwise. Plainly, Agriculture and Markets Law does not supercede other state statutes.

POINT II

THE APA'S EXERCISE OF JURISDICTION OVER THESE SINGLE FAMILY DWELLINGS IN A RESOURCE MANAGEMENT AREA UNDER BOTH THE APA ACT AND THE RIVERS ACT IS RATIONAL AND REASONABLE

Petitioner asserts in claims 5, 6, 7, 8, 9 and 10 that the APA lacks jurisdiction over Lewis Farm's three single family dwellings and its subdivision of land into sites, and has acted without regulatory authority. See Amended Petition ¶¶ 77-87. However, the APA's statutes and regulations are clear: single family dwellings and subdivisions on Resource Management lands and in designated recreational river areas are subject to Agency jurisdiction and require a permit. See Executive Law § 809(2)(a) (permit required for Class A and Class B projects); Executive Law § 810(1)(e)(1) (Class A projects include subdivisions of land in Resource Management areas); § 810(2)(d)(1) (Class B projects include single family dwellings in Resource Management areas); see also 9 NYCRR Sections 577.4(a) and 577.5(c)(1) (requiring a rivers project permit on Resource Management lands for all subdivisions of land and all land use and development classified as compatible in APA Act Section 805). The APA's March 25, 2008 determination applied these statutes and regulations the Agency is mandated to enforce and administer, determining that single family dwellings are not "agricultural use structures", and that Lewis Farm's single family dwellings and subdivision into sites required an Agency permit. See Return and Record, Volume I, Item 1 (APA determination ¶¶ 37, 38). That determination was neither

irrational nor unreasonable and, therefore, must be upheld.

Lewis Farm does not dispute that the three dwellings at issue are located within a Resource Management area, or that they are located within a designated recreational river area under the Rivers Act. Nonetheless, petitioner argues that its single family dwellings are exempt from APA regulation because they are used for farm workers. See Amended Petition ¶¶ 77-87. Petitioner's argument is without merit. There is no exemption in the APA Act or Rivers Act for single family dwellings that are used for farm worker housing. Moreover, there is no basis to argue - using the APA Act or Rivers Act - that "agricultural use structure" includes on-farm single family dwellings. Rather, new single family dwellings in Resource Management and designated recreational river areas are subject to APA permitting jurisdiction. See Executive Law § 802(58).

Permits are required under the APA Act Section 809 for all new land uses and development listed in Section 810 as Class A or Class B regional projects. See Van Cott Aff. dated July, 2008, ¶¶ 4-15. Section 810 requires permits for subdivisions and single family dwellings in Resource Management. See Executive Law §§ 810(1)(e); 810(2)(d)(1). Thus, the Act requires permits for all new single family dwellings on Resource Management lands, except lawful replacements of dwellings in existence prior to 1973. See Executive Law §§ 809(2)(a) and 810(2)(d)(1). This permit requirement applies to Lewis Farm's three single family

dwellings. The Act further specifies that all subdivisions in Resource Management require an Agency permit. See Executive Law §§ 809(2)(a) and 810 (1)(e). This provision applies to the subdivision into sites undertaken by Lewis Farm. See 9 NYCRR ¶ 570.3(ah)(3)(definition of "subdivision into sites").

The APA also has jurisdiction over Lewis Farm's dwellings and subdivision under the Rivers Act. See ECL § 15-2701 et. seq. and 9 NYCRR Part 577, et. seq.; see also Van Cott Aff. dated July 2008 ¶¶ 16-24. Lewis Farm's three single family dwellings require Agency permits as "rivers projects." See 9 NYCRR §§ 577.4(a), 577.5(c)(1); and Executive Law § 805(3)(g)(4)(see "Secondary Uses in Resource Management Areas"[1]); VanCott Aff, ¶¶ 16-24. In contrast, an actual "agricultural use structure" is exempted from Agency jurisdiction on Resource Management lands in recreational river areas. See 9 NYCRR § 577.4(b)(3)(ii)(exemption unless located within 150 feet of a shoreline or in wetlands pursuant to 9 NYCRR Parts 577 and 578). Moreover, pursuant to 9 NYCRR ¶ 577.4(a), Lewis Farm's subdivision into sites requires an Agency permit. See 9 NYCRR §§ 577.5(c)(1) and 570.3(ah)(3); Executive Law, § 802(63).

A. Deference is Due to the APA for the Determination and its Interpretation of the Statutes it is Empowered to Administer and Enforce

Lewis Farm argues that the Agency's exercise of jurisdiction and resulting determination is ultra vires because its single family dwellings are exempt "agricultural use structures"

pursuant to Executive Law § 802(8). See Petitioner's Memorandum of Law dated June 3, 2008, p. 11. This argument is unavailing, because the Agency has specific regulatory authority from the Legislature and has interpreted it rationally.

Where the interpretation of a statute is at issue, courts regularly accord great weight and judicial deference to the governmental agency charged with the responsibility for administration of the statute, especially where the judgment of the Agency involves Agency expertise and is supported by the record. See Flacke v. Onondaga Landfill Systems, Inc., 69 N.Y.2d 355, 363 (1987) (upholding a Department of Environmental Conservation determination to close solid waste landfill and establish fund to cap landfill). When an agency is acting within its authority and area of expertise, the agency is entitled to deference and the court's role is limited to ascertaining whether there is a rational basis for the decision. Id at 363; see also Pell v. Board of Education, 34 N.Y.2d 222, 231 (1974); Riverkeeper v. Johnson as Deputy Commissioner of the Department of Environmental Conservation, 2008 NY Slip Op 5608 (3d Dep't 2008)(upholding determination of DEC involving SPDES permit for plant on Hudson river).

The construction given a statute by the agency responsible for its administration should be upheld unless it is irrational or unreasonable. See Samiento et. al. v. World Yacht Inc., 10 N.Y.3d 70, 79 (2008)(ruling that the Labor Department's

interpretation of Labor Law is entitled to deference in dispute over application of law relating to gratuities). Thus, APA's determination and interpretation of its statute must be upheld absent demonstrated irrationality or unreasonableness. See e.g., Kennedy v. Novello as Commissioner of NYSDOH, 299 A.D.2d 605(3d Dep't 2002), leave denied, 99 N.Y.2d 507 (2003) (upholding reasonable agency interpretation of statute; ambiguity required deference to agency expertise); see also Matter of County of Westchester v. Board of Trustees of State University of New York, 32 A.D.3d 653 (3d Dep't 2006), modified in part, 9 N.Y.3d 833 (2007)(finding that respondent's regulations are not inconsistent with Education Law, and have rational basis that is not unreasonable, arbitrary, capricious or contrary to statute).

Even the Court of Appeals in Lysander accorded deference to the Commissioner of Agriculture and Markets to interpret its statute, there reading farm worker housing into the definition of "farm operations" under the Agriculture and Markets Law.

> The Commissioner's view in this regard is entitled to deference. Where, as here, the "interpretation of a statute or *its application* involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for the administration of the statute (emphasis added).

Id. at 564, 565. This Court should give the same deference to the APA in its determination that the definition of "agricultural

use structure" in the APA Act and Rivers Act does not include single family dwellings.

The APA is charged with the responsibility of enforcing the APA Act and the Rivers Act in the Adirondack Park and must use its knowledge and expertise to protect its resources. Accordingly, contrary to Lewis Farm's arguments, Lysander actually supports the APA here. Under the logic of Lysander, the APA is entitled to deference to interpret the definition of "agricultural use structure" in the APA Act based on its knowledge, experience and expertise in protecting the extensive natural resources within the Adirondack Park. The APA is charged first and foremost with preservation of the Adirondack Park's natural resources. It must weigh the potential impacts of the septic systems, the single family dwellings, and the subdivision into sites herein on the Bouquet River and on the open space Resource Management land use area. See Return and Record Volume I, Item 1, (Determination, p. 12, ¶ (2)(b)); see also Executive Law § 809(10)(e)(concerning the standards the Agency must apply to all single family dwellings and subdivisions requiring a permit in the Adirondack Park, including, but not limited to a finding of no "undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the park...."); Executive Law § 805(4) (development considerations considered by the Agency). These considerations are important to the protection of the park's

resources, fall within the Agency's delegation of authority from the Legislature and its specific knowledge and expertise.

In its determination, the APA specifically found that "single family dwelling" and "agricultural use structure" are mutually exclusive "structures" for purposes of the Agency's permitting jurisdiction. Referring to the definition of "agricultural use structure" in APA Act § 802(8), APA found that:

> "The types of structures specifically listed in the definition of "agricultural use structures" are accessory in nature and related to the storage of agricultural equipment, animals and products ("barn, stable, shed, silo, garage"), or the on-site accessory use sale of farm products ("fruit and vegetable stand"). The language "...or other building or structure directly and customarily associated with agriculture use" is intended to include other structures of an accessory nature only. This is also evident from the exceptions to jurisdiction in the Adirondack Park Agency Act which often include accessory structures. The definition of "agricultural use structures" does not include, and was not intended to include, the farm owners' or farm workers' dwellings. Rather, the owners' dwelling and farm workers' dwellings (for a single family) more precisely fit under the definition of "single family dwelling" or "mobile home."

See Record and Return, Volume I, Item 1(Determination, ¶ 37, pgs. 8-9).

The APA determination next explains how, over and over again, the APA Act consistently treats "single family dwelling" and "agricultural use structure" as separate and distinct uses under the Act:

> "This is evident upon inspection of §805(3) of the Act, which always lists "agricultural use structure" and "single family dwelling" as separate uses for compatibility and jurisdictional purposes under the Act. Similarly, §802(50)(g) lists these two types of uses separately for eligibility for special consideration under the Act regarding the application of the overall intensity guidelines.[1] "Single family dwelling" is a narrowly and specifically defined term and is a keystone of Agency jurisdiction. The term "agricultural use structure" is a broader term for certain agricultural structures, which for the purposes of jurisdiction does not include "single family dwelling." If the drafters of the Adirondack Park Agency Act had intended farm worker dwellings to be included within the definition of "agricultural use structure," it would not have needed to include the phrases "single family dwelling" or "mobile home" separately in either §805(3) or §802(50)(g) in addition to the phrase "agricultural use structure." While the Agency agrees that farm worker housing is important to the enhancement of farm operations, it is not an "agricultural use structure" under the Act, but either a "single family dwelling," "multiple family dwelling," or "mobile home," depending on the type of dwelling."

See Record and Return, Volume I, Item 1(Determination, ¶ 38, pg. 9). The APA interpretation of the definition of "agricultural use structure" is wholly consistent with the APA Act and the Rivers Act, the Agency's mandate to protect the resources of the Park and should be upheld.

Even if this Court were to determine that interpretation of the statute is purely a question of law, and that the Agency's

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[1] "Note also, that the overall intensity guidelines do not apply unless and until the Agency has jurisdiction over a project." (Quoting footnote 1 of the Determination)

reading was not entitled to deference, a plain reading of the APA Act and Rivers Act supports the APA determination. See Matter of Charter Dev. Co., L.L.C. v. City of Buffalo, 6 NY3d 578, 581 (2006) (holding that statute clearly entitles charter school to only those exemptions afforded public schools; courts must give effect to plain meaning of statute). First and foremost, the term "single family dwelling" is not included in the definition of "agricultural use structure", or vice versa. In fact, each is separately defined in the APA Act. See Executive Law § 802(8) and (58). An "agricultural use structure" as defined in Executive Law § 802(8):

> means 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). A plain reading of the definition suggests that the types of structures designated as agricultural use are those structures holding farm crops or animals or for the sale of farm crops or animals, not housing people. This intent is further supported by the Act's definition of "agricultural use" as:

> any management of any land for agricultural; raising of cows, horses, pigs, poultry, and other livestock; horticulture or orchards; including sale of products grown or raised directly on such land, and including the construction, alteration or maintenance of fences, agricultural roads, agricultural drainage systems and farm ponds."

See Executive Law § 802(7). Again, "agricultural use" references

crops or animals, not residences for people.

Lewis Farm argues that the Act's definition of "structure" includes single family dwellings, and because "structure" appears in the term "agricultural use structure," a single family dwelling should be considered an "agricultural use structure". See Petitioner's Memorandum of Law dated June 3, 2008, Point I (B) p. 6. Petitioner's dissection of the Legislature's specifically-defined term is belied by the reading of the statute as a whole. Single family dwellings and agricultural use structures are treated differently throughout the Act. For example, in a section of the APA Act which addresses density requirements the terms "single family dwelling" and "agricultural use structure" are used in the same paragraph, indicating that the Legislature considered them different types of structures. Referring to these density requirements, the Legislature defined "principal buildings" to include:

> 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

See Executive Law § 802(50)(g)(emphasis added); see also Van Cott Aff. dated July, 2008, ¶¶ 25-34. This express language, which provides a density exemption for farms, leaves no doubt that the Legislature did not consider single family dwellings and agricultural use structures on farms to be one and the same. To

the contrary, it logically separates the two terms, consistent with the definition section of the APA Act. See Executive Law §802 (8) and (58).

The separate treatment of "single family dwelling" and "agricultural use structure" occurs throughout the APA Act. For example, in Section 805(3)(g)(3), which lists the primary and secondary compatible uses on Resource Management lands, agricultural use structure is listed as a "primary compatible use" and single family dwelling is listed separately as a "secondary compatible use." In Section 810, which lists uses that all require a permit, single family dwelling, but not agricultural use structure, is listed. In fact, the only mention of the term agricultural use structure in Section 810 occurs as an exemption to permitting jurisdiction for structures over 40 feet in height. Presumably, had the Legislature intended for on-farm single family dwellings to fall within the definition of agricultural use structure, it would have included a similar exemption from the permitting jurisdiction applied to all new single family dwellings by § 810. Petitioner also selectively ignores the modifying words that follow "structure" in the definition of "agricultural use structure." Those words indicate that it must be "directly and customarily associated with agricultural use." Again, a plain reading of this statute indicates that a structure directly associated with "agricultural use" defined in the APA Act must be a structure that, as

indicated in the definition above, relates to raising of "cows, horses, pigs, poultry..." including "sale of products grown or raised" and "fences, agricultural roads, agricultural drainage systems and farm ponds." See Executive Law § 802 (7). Black letter law on statutory construction supports the APA's reading of its statute, which principles dictate that a series of words describing things of a particular sort is used to explain the meaning of a general word in the same series. See Schulman v. People of the State of New York, 10 N.Y.2d 249, 256 (1961) (finding words of Highway Law authorizing appropriation of property for safety purpose including "drains, ditches, gravel pits..." followed by general language, did not confer a broad power to prohibit advertising).

> Where words of specific or inevitable purport are followed by words of general import the application of the last phrase is generally confined to the subject matter disclosed in the phrases with which it is connected; for it is known by the company it keeps; and though it might be capable of a wider significance if found alone, it is limited in its effect by the words to which it is an adjunct...it cannot exceed the original outline.

Schulman 10 N.Y.2d at 256. Thus, petitioner's argument that a broader, wider meaning should be applied to the phrase "directly and customarily associated with agricultural use" to include single family dwellings is both inconsistent with the Schulman rule and improperly exceeds the specific words that precede it ("barn, stable, shed, silo, garage, fruit and vegetable stand").

Absent express legislative intent to the contrary, this Court should uphold the APA's reasonable and rational interpretation of the APA Act.[2]

POINT III

PETITIONER'S CLAIM THAT THE APA DETERMINATION IS FLAWED FOR FAILURE TO CONSIDER A RESOLUTION OF THE LOCAL GOVERNMENT REVIEW BOARD IS WITHOUT MERIT

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. See Amended Petition ¶ 89. Not only is this allegation factually incorrect, it fails to state any legal claim and is therefore without merit.

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. The APA Act directs that the Review Board "shall monitor the administration and enforcement of

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[2] The Adirondack Park Agency Act passed in 1971 and went into effect August 1, 1973. However, many sections of the Act relevant to this case - including Executive Law § 802(8), §802(63), §805 and §810 - were not passed until 1973. 1973 N.Y. Laws 1222. Executive Law § 802(50)(g), indicating that agricultural use structure and single-family dwellings used for farmworker housing are separate structures for jurisdictional purposes, was passed in 1976. 1976 N.Y. Laws, ch. 899. Unfortunately, there is no discussion of the definition of "agricultural use structure" in the bill jackets from 1971, 1973, or 1976.

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). The Review Board advises and recommends; it does not provide binding regulatory oversight or dictate policy.

The Review Board resolved to send a letter to the Governor of the State of New York opposing the APA enforcement proceeding against Lewis Farm. See Record Item 15. This resolution, along with a March 5, 2008 letter to the Governor, were submitted by Lewis Farm to the APA Enforcement Committee at its March 13, 2008 proceeding and were made part of the record in the APA proceeding on Lewis Farm. See Record Item 15. In addition, Mr. Frederick Monroe, Executive Director of the Review Board and signatory of the letter to the Governor, both attended and participated in the APA administrative proceeding concerning Lewis Farm. See Return and Record Volume I, Item I (Minutes of March 13, 2008 proceeding, pages 1 and 5) and (APA Determination, page 2, ¶ 13) and Item II (transcript of APA Proceeding pages 1, 45-46).

The Review Board's resolution opined that the enforcement action was in conflict with the APA Land Use and Development Plan which, in its view, provides that agricultural use structures are non-jurisdictional. See Record Item 15. The Enforcement Committee's March 25, 2008 determination specifically considered

and addressed this view of "agricultural use structures" and rejected the contention that a single family dwelling fit within that category. See Return and Record Volume 1, Item 1 (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. See Executive Law § 803-a(7). Accordingly, Lewis Farm fails to state a legal claim against the APA based on the opinion of the Review Board. While the Agency considered the resolution in making its March 25, 2008 determination, it was under no obligation to agree with the Review Board's interpretation. Lewis Farm's 11th cause of action is without merit and should be dismissed.

CONCLUSION

For all of the foregoing reasons, claims 5, 6, 7, 8, 9, 10 and 11, and the portion of claim 3 relating to the Court of Appeals Decision in Lysander are without merit and the amended petition should be rejected in its entirety.

Dated: Albany, New York
July 30, 2008

Respectfully submitted,

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