

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

---

LEWIS FAMILY FARM, INC.,

Petitioner-appellant,

v.

NEW YORK STATE ADIRONDACK  
PARK AGENCY,

Respondent-Respondent.

---

AFFIRMATION OF AAG  
LORETTA SIMON  
IN OPPOSITION TO  
LEWIS FARM'S MOTION TO  
ENJOIN ENFORCEMENT OF  
AGENCY DETERMINATION

AD Docket No. 504626

Pursuant to CPLR § 2106, Loretta Simon, an attorney duly admitted to practice in the courts of the State of New York, hereby affirms the following under penalty for perjury:

1. I serve as an Assistant Attorney General in the Environmental Protection Bureau of the Office of the New York State Attorney General and am litigation counsel to the Adirondack Park Agency ("the APA" or "the Agency") in this proceeding as well as APA v. Lewis Family Farm, Inc., Salim B. Lewis, and Barbara Lewis, (Essex Co. Sup. Ct., Index No. 332-08). I also represented the APA in a previous action, involving the same violations, brought by Lewis Family Farm, Inc., against the APA, Lewis Family Farm, Inc. v. APA, (Essex Co. Sup. Ct., Index No. 498-07), for which a Notice of Appeal is pending to this Court. Accordingly, I am familiar with the underlying facts and the litigation among the parties.

2. I submit this affirmation in opposition to Appellant's Motion to enjoin enforcement of a determination of the APA dated March 25, 2008 ("APA determination"). The APA determination found that Petitioner-Appellant Lewis Family Farm Inc. ("Lewis Farm") violated the APA Act and the Rivers Act by constructing three single-family dwellings without any APA permits. See Affirmation of John J. Privitera dated April 28, 2008 ("Privitera Aff.") Exhibit C (3/25/08 APA determination).

3. The Court below adjudicated Lewis Farm's application for a stay of the APA determination, heard oral argument and issued a Decision and Order on April 11, 2008. See Exhibit Privitera Aff., Exhibit L (4/11/08 transcript); see also Privitera Aff., Exhibit A (4/11/08 Decision and Order of Justice Richard B. Meyer).

4. The April 11, 2008, Decision and Order of the Court ("4/11/08 Order") below stayed certain portions of the March 25, 2008 APA determination, but denied Lewis Farm's motion for a stay of paragraphs 5 and 6 of the APA determination, which require payment of a \$50,000 civil penalty and prohibit occupancy of the single-family dwellings until a permit is issued and the penalty is paid. See Privitera Aff., Exhibit A (4/11/08 Order p. 3 ¶¶ 5-6, p. 5).

5. On or about April 14, 2008, Lewis Farm Moved for Leave to Reargue and Renew the April 11, 2008 stay. In a letter Decision and Order dated April 25, 2008, Justice Meyer, granted

reargument and renewal but adhered to his April 11, 2008 Order. See Privitera Aff., Exhibit B (4-25-08 Order).

The APA Act and the Rivers Act

6. The Adirondack Park Agency Act ("APA Act") prohibits subdivisions and construction or placement of single-family dwellings in Resource Management areas within the Adirondack Park without an APA permit. See Executive Law § 809(2)(a).<sup>1</sup> See also Exhibit 2 (Affirmation of Sarah Reynolds ["Reynolds Aff."] dated April 22, 2008, ¶¶ 12-22). The APA regulations also require a permit before one installs foundations, footings, and septic systems. See 9 NYCRR 570.3(ai)(1).

7. The Rivers Act (the Wild, Scenic, and Recreational River System Act; Environmental Conservation Law ("ECL") § 15-2701 et. seq.) authorizes the APA 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 in the Adirondack Park. See ECL § 15-2701. The applicable APA regulations prohibit anyone from undertaking a construction project in a designated river corridor area without obtaining a permit from the APA. See 9 NYCRR § 577.4(a) (stating "no person shall undertake a rivers project

---

<sup>1</sup>The APA Act defines "subdivision" to include "any division of land into two or more lots, parcels, or sites...for the purpose of ...any form of separate ownership or occupancy". See Executive Law § 802(63), see also 9 NYCRR § 570.3 (ah)(3)

without first obtaining an agency permit"), see also Exhibit 2 (Reynolds Aff., ¶¶ 24-31, Exhibit A [Van Cott Aff. 4/10/08, ¶¶ 6-7]).

### Summary of Facts

8. This matter involves the construction of three single-family dwellings in the Adirondack Park without permits from the Agency. See Exhibit 2 (summary of facts found in the Reynolds Affirmation ¶¶ 4-11, Exhibits A-G, and the Affirmation of Paul Van Cott dated April 10, 2008 ["Van Cott Aff. 4/10/08"]). The originals of these affirmations were submitted to the Court below. Lewis Farm was aware of the jurisdiction of the APA, having submitted an application for the construction of three single-family dwellings in March of 2007.<sup>2</sup> See Affirmation of Paul Van Cott dated May 2, 2008 ("Van Cott Aff. 5/2/08"), Exhibit C.

9. The record herein reflects that over the past 13 months the APA issued, among other things, a Cease and Desist Order, a Notice of Apparent Violation, and a Notice of Request for Enforcement Committee Determination. See Exhibit 2 (Reynolds Aff., ¶¶ 5-9, Exhibits B-E).

10. The Agency's Enforcement Committee heard the case on

---

<sup>2</sup> Lewis Farm was also aware of the APA's jurisdiction as early as 2000, when it entered into a Consent Order with the Agency to resolve its illegal filling and draining of wetlands. See Exhibit 1.

March 13, 2008 and Lewis Farm was represented by counsel. See Exhibit 2 (Reynolds Aff ¶ 9, Exhibit F, [Agency transcript 3/13/08]).

11. The APA proceedings culminated in the March 25, 2008 APA decision that, inter alia, determined that Lewis Farm violated the APA Act and the Rivers Act, directed the 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 a permit was issued and the penalty paid, and imposed a civil penalty of \$50,000. See Exhibit 2 (Reynolds Aff ¶ 10, Exhibit A; Van Cott Aff, March 25, 2008 APA determination attached).<sup>3</sup>

#### Summary of Litigation

##### The First Judicial Action:

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

12. In 2007, during the pendency of the underlying APA administrative proceedings, Lewis Farm commenced a judicial action by serving a complaint against the Agency in New York State Supreme Court, Essex County, seeking a declaratory judgment that the Agency had no jurisdiction over construction of farm worker housing, or if it did, that the Agriculture and Markets Law, § 305-a, superceded the APA Act and divested the APA of

---

<sup>3</sup> The APA subsequently amended its determination to remove a provision regarding Lewis Farm's right to challenge the APA determination. See Exhibit 2 (Reynolds Aff., Exhibit G).

jurisdiction over such development. See Exhibit 3 (Complaint dated 6/26/07, Index No. 498-07).

13. Acting Supreme Court Justice Kevin K. Ryan was randomly assigned as the IAS Judge for the litigation.

Lewis Farm Sought an Ex Parte Stay Against the APA

14. The complaint was amended on or about July 13, 2007. At that time the Lewis Farm sought an ex parte stay against the APA. The application for ex parte stay was presented to Justice Ryan, who declined to sign it. See Exhibit 4 (OSC dated 7/13/07 and Amended Complaint dated July 2007).

The Justice Ryan's August 16, 2007 Decision and Order

15. On or about August 1, 2007, the APA filed a Motion to Dismiss the Amended Complaint for: lack of subject matter jurisdiction (CPLR § 3211[2]); prematurity; and failure to state a cause of action pursuant to CPLR § 3211(7) because Agriculture and Markets Law § 305-a does not preclude the APA from requiring a permit for the subdivision of land and construction of single-family dwellings. The APA also requested an order rejecting plaintiff's request for injunctive relief for failure to establish the elements required for injunctive relief.

16. After oral argument on August 8, 2007, Justice Ryan issued a Decision and Order dated August 16, 2007, which denied the restraining order against the Agency and granted the Agency's motion to dismiss the proceeding. See Exhibit 5 (8/8/07

transcript); see also Exhibit 6 (Decision and Order of Justice Kevin K. Ryan, Lewis Family Farm, Inc. v. APA, Index No. 498-07 Sup. Ct. Essex Co., August 16, 2007 ("the August 2007 Decision")). Justice Ryan further stated that the APA had jurisdiction over the dwellings and the subdivisions, rejected Lewis Farm's argument that the structures are "agricultural use structures" and further stated that Section 305-a of the Agriculture and Markets Law did not supersede Agency authority. See Exhibit 6 (August 2007 Decision, p. 6). The August 16, 2007 Order was entered in the Essex County Clerk's office on August 29, 2007 and served by mail on the appellant on August 31, 2007. See Exhibit 6 (August 2007 Decision, and Affidavit of Service dated August 31, 2007).

17. Upon information and belief, a Notice of Appeal of the August 2007 Decision was filed by Lewis Farm in the Essex County Clerk's office on October 1, 2007. See Exhibit 7 (Notice of Appeal). Upon information and belief, the date by which the appeal will be deemed abandoned has not passed.

**The Second Judicial Action:**  
Lewis Family Farm, Inc. v. APA (Index No. 315-08)

18. On or about April 8, 2008, Lewis Farm, initiated a second judicial challenge against the APA by filing an Article 78 proceeding in Essex County Supreme Court. Lewis Farm's 2008 petition challenges an APA determination on the same underlying facts and violations that were at issue in the Supreme Court's

August 2007 Decision, e.g., the subdivision of land, the construction of three single-family dwellings in the Adirondack Park without an APA permit, and the relationship between APA Act and Agriculture and Markets Act.<sup>4</sup>

Petitioner Obtains an Ex Parte Stay Against the APA

19. The Article 78 petition herein was served on the Office of the Attorney General by Order to Show Cause ("OSC") with an ex parte stay against the State on or about April 8, 2008. The stay was vacated after objection of the Office of the Attorney General, and replaced with an Amended Order to Show Cause dated April 9, 2008. See Exhibit 8 (ex parte stay order dated 4/8/08), Exhibit 8 (Notice of Petition and Petition dated 4/7/08); see also Privitera Aff., Exhibit E (Amended Order to Show Cause dated 4/9/08).

20. Oral argument on the OSC and stay application was held on April 11, 2008 before Honorable Richard B. Meyer, who issued an Order the same day which granted in part and denied in part Lewis Farm's request for a stay. See Privitera Aff., Exhibit A (April 11, 2008 Decision).

---

<sup>4</sup>A Request for Judicial Intervention ("RJI") form dated April 7, 2008, filed by petitioner in Lewis Family Farm v. APA (Index No. 315-08), failed to disclose the prior related action (Index No. 498-07). See Exhibit 10.



**The Third Judicial Action:  
APA v. Lewis Family Farm, Inc., Salim B. Lewis,  
and Barbara Lewis (Index No. 332-08)**

21. On April 11, 2008, on behalf of the APA, the Office of the Attorney General filed a summons and complaint in Essex County, for violations of the APA Act and the Rivers Act (civil action no. 332-08), for violation of the permitting requirements and for enforcement of Executive Law §§ 809(2)(a), 810(1)(e)(3), and 810(2)(d)(1), ECL § 15-2701, and 9 NYCRR Part 577. See Exhibit 9 (Summons and Complaint APA v. Lewis Family Farm, Inc., et al.).

22. On April 14, 2008, the Lewis Farm filed a motion to consolidate civil actions nos. 332-08 and 315-08.<sup>5</sup> On April 21, 2008 the APA filed a cross-motion to transfer the second and third judicial actions to Justice Ryan, the IAS Judge assigned to the first judicial action. The lower court granted the Motion to Consolidate and denied transfer of the matter to Justice Ryan in a letter decision and order dated April 25, 2008. See Privitera Aff., Exhibit B (4/25/08 Order of Justice Meyer).

**Application for A Stay To The Appellate Division**

23. On April 28, 2008, Lewis Farm filed an Order to Show Cause in the Appellate Division Third Department for permission

---

<sup>5</sup>When Lewis Farm filed the motion to consolidate in civil action No. 332-08, they failed to alert the Court to the previously-filed related case, civil action No. 498-07. See Exhibit 10 (April 14, 2008 RJI).

to appeal the April 11, 2008 Supreme Court Order, and to enjoin the APA determination.

24. In oral argument before Justice Leslie Stein on April 28, 2008, during a discussion of possible occupancy of one of the three houses, Justice Stein asked counsel for the appellant if local approvals for the dwellings had been obtained and he indicated that they had been. We also discussed the status of the septic system, and counsel for petitioner indicated that documentation for the septic system had been submitted to the Agency. I requested that the specific provisions of paragraph 2(b) of Justice Meyer's Order regarding documentation for the septic system be submitted before occupancy of the dwelling. Thereafter Justice Stein agreed to allow occupancy of the one dwelling on the condition that appellant provide the information denoted in paragraph 2(b) of Justice Meyer's Order by May 5, 2008, regarding the septic systems.

25. In the April 28, 2008 Order, this Court temporarily lifted the stay issued by Justice Meyer, pending a determination on this motion, to allow occupancy of one single-family dwelling, on the condition that the appellant provide the specific plans for the septic system as delineated in Justice Meyer's Order, paragraph 2(b), and that appellant pay a sum of \$50,000 to the Essex County Treasurer's Office pursuant to CPLR § 5519(a)(2), or

post an undertaking on or before May 5, 2008. See Exhibit 11  
(4/28/08 Order of Justice Stein).

Dated: Albany, New York  
May 5, 2008



LORETTA SIMON  
Assistant Attorney General  
Office of the Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, New York 12224-0341  
(518) 402-2724

## SIMON TABLE OF EXHIBITS

- EXHIBIT 1** 2000 Consent Order
- EXHIBIT 2** Affirmation of Sarah Reynolds, Esq. dated April 22, 2008 with exhibits
- EXHIBIT 3** Summons and Complaint dated June 26, 2007 (Index No. 498-07)
- EXHIBIT 4** Order to Show Cause dated July 13, 2007 and Amended Complaint dated July 2007 (Index No. 498-07)
- EXHIBIT 5** Transcript of Oral Argument before Honorable Kevin K. Ryan dated August 8, 2007 (Index No. 498-07)
- EXHIBIT 6** Decision and Order of Honorable Kevin K. Ryan dated August 16, 2007 (Index No. 498-07); Affidavit of Service dated August 31, 2007
- EXHIBIT 7** Notice of Appeal dated September 26, 2007 and filed October 1, 2007 (Index No. 498-07)
- EXHIBIT 8** Ex Parte Order to Show Cause dated April 8, 2008; Notice of Petition and Verified Petition dated April 7, 2008 (Index No. 315-08)
- EXHIBIT 9** Summons and Complaint dated April 10, 2008 (Index No. 332- 08)
- EXHIBIT 10** Request for Judicial Intervention dated April 7, 2008 (Index No. 315-08)  
Request for Judicial Intervention dated April 14, 2008 (Index No. 332- 08)
- EXHIBIT 11** Order of the Appellate Division, Third Dept. (J. Stein) dated April 28, 2008