

STATE OF NEW YORK SUPREME COURT  
ESSEX COUNTY

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LEWIS FAMILY FARM, INC.,  
  
Petitioner,

v.

NEW YORK STATE ADIRONDACK  
PARK AGENCY,

Respondent.

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ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

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AFFIRMATION OF  
LORETTA SIMON IN  
SUPPORT OF MOTION  
TO DISMISS IN PART  
AND ANSWER IN PART  
Hon. Richard B. Meyer

INDEX No. 315-08  
RJI No. 15-1-2008-0109

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

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

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 matter. I am familiar with this matter and the underlying facts,

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dated June 13, 2008

having represented the APA in a previous declaratory judgment action brought by Lewis Family Farm, Inc. ("Lewis Farm") against the APA in 2007 (Lewis Family Farm, Inc., v. APA, Essex Co. Sup. Ct., Index No. 498-07, RJI No. 15-1-2007-0153, assigned to Hon. Kevin K. Ryan [hereafter "Lewis Farm I"]).

2. In addition, I am counsel to the APA in Lewis Family Farm, Inc. v. APA, Sup. Ct., Essex Co., Index No. 315-08 (hereafter "Lewis Farm II") and the civil enforcement action against Lewis Farm and Barbara and Salim B. Lewis (APA v. Lewis Family Farm, Inc., Salim B. Lewis and Barbara Lewis, Index No. 332-08, [hereafter "Lewis Farm III"]).

3. I submit this affirmation in support of the APA's Motion to Dismiss in part and Answer in part Lewis Farm's CPLR Article 78 proceeding.

4. These three civil actions all arise from the same facts: Lewis Farm's construction of three single-family dwellings and subdivision of land pursuant to the APA Act, on land located in the Town of Essex, Essex County in violation of the Adirondack Park Agency Act ("APA Act") and the Wild, Scenic, and Recreational River System Act ("Rivers Act"). See Executive Law § 809 and Executive Law § 810; Environmental Conservation Law ("ECL") § 15-2701.

5. Lewis Farm installed foundations, septic systems, and three single-family dwellings, and subdivided the land for the

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purpose of occupancy, as defined by the APA Act, all without APA permits.

#### STATEMENT OF FACTS

6. In March 2007 Barbara and Salim B. Lewis applied to the APA for a permit to construct three single-family dwellings along the Bouquet River, in Essex County on property of Lewis Farm. See Record Item 5 (Quinn Aff. dated July 23, 2007, Exhibit A). The APA informed Lewis Farm that the application was incomplete. See Record Item 5 (Quinn Aff., dated July 23, 2007, Exhibit B). On or about March 19, the Agency learned that Lewis Farm had already begun installation of the foundations for the dwellings and commenced enforcement actions. See Record Item 5 (Quinn Aff. dated July 23, 2007, ¶ 6).

7. From June of 2007 through August, 2007 the parties were engaged in litigation (Lewis Farm I) which resulted in the Decision and Order of Hon. Kevin K. Ryan, who held that the APA had jurisdiction over the housing and subdivision pursuant to the APA Act and the Rivers Act, that section 305-a of the Agriculture and Markets Law applies only to local governments, and dismissed the complaint. See Exhibit D.

8. Thereafter the APA scheduled and heard the matter on March 13, 2008 and issued an Agency determination dated March 25, 2008 finding Lewis Farm in violation of the APA Act, and the

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Rivers Act. See Record Item 1.

#### LITIGATION SUMMARY

A. Lewis Farm I:  
Lewis Family Farm Inc., v. APA (Index No. 498-07) 2007

9. In June 2007, during the pendency of the underlying APA administrative enforcement actions, Lewis Farm commenced an 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 jurisdiction over such development. See Exhibit A (Complaint dated June 26, 2007, Index No. 498-07). Attorneys Joseph R. Brennan of Brennan & White, and David L. Cook and Jena R. Rotheim of Nixon Peabody LLP, represented Lewis Farm in this action.

10. The complaint was amended on or about July 3, 2007. See Exhibit B. At that time the Lewis Farm also sought an ex parte stay against the APA. The application for the ex parte stay was presented to Acting Supreme Court Justice Kevin K. Ryan, who declined to sign it. See Exhibit B (OSC dated July 13, 2007).

11. On or about August 1, 2007, the State filed a Motion to Dismiss the Amended Complaint for lack of subject matter

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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.

12. On August 8, 2007, oral argument was held on the motion to dismiss before Justice Ryan. See Exhibit C (transcript dated August 8, 2007).

13. In a Decision and Order dated August 16, 2007, Justice Ryan denied Lewis Farm's motion for a restraining order against the Agency for failure to show irreparable damages and granted the Agency's motion to dismiss the proceeding. See Exhibit D (Decision and Order, Lewis Family Farm, Inc. v. APA, Sup. Ct. Essex Co., August 16, 2007 ("August 2007 Decision and Order")). The Court's Decision and Order further stated that the APA had jurisdiction over the dwellings and the subdivisions created by construction of the dwellings. See Exhibit D (August 2007 Decision and Order, pp. 4, 7).

14. The Court's August 2007 Decision and Order also rejected Lewis Farm's argument that the structures are "agricultural use structures" stating that when read in its

entirety, the APA Act and the regulations implementing the Rivers Act do not exempt such dwellings from Agency jurisdiction. See Exhibit D (August 2007 Decision and Order, p. 5).

15. The Court further held that Section 305-a of the Agriculture and Markets Law did not supersede Agency authority under the Adirondack Park Agency Act or its regulations, noting that from a plain reading of the section, it applies only to local laws. See Exhibit D (August 2007 Decision and Order, p. 6).

16. Justice Ryan dismissed the action as not ripe for judicial intervention noting that the APA has authority to review the matter as per Executive Law § 809. See Exhibit D (August 2007 Decision and Order, p. 6).

17. On or about October 1, 2007, Lewis Farm filed a Notice of Appeal of the August 2007 Decision and Order. See Exhibit E.

18. From September 2007 to May 2008 Lewis Farm failed to perfect its appeal to the Third Department. 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.

19. In a Decision and Order on Motion dated May 29, 2008, the Third Department granted Lewis Farm's Motion to extend the time to perfect its appeal, but ordered the appeal dismissed, unless the appellant filed and served its record and brief on or

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before July 28, 2008. See Exhibit E.

B. Lewis Farm II:

Lewis Family Farm, Inc. v. APA (Index No. 315-08) 2008

20. On or about April 8, 2008, Lewis Farm, represented by John J. Privitera of McNamee, Lochner, Titus & Williams, P.C., initiated a second judicial challenge against the APA by filing an Article 78 proceeding in Essex County Supreme Court. The petition, like the earlier declaratory judgment complaint continues to challenge the APA's jurisdiction over the three dwellings. See Exhibit F.

21. The Article 78 petition was served on the Office of the Attorney General with an Order to Show Cause ("OSC") and ex parte stay against the State on or about April 8, 2008. See Exhibit F. The ex parte stay was later vacated after objection of the Office of the Attorney General, and replaced with an Amended Order to Show Cause on April 9, 2008. See Exhibit F (stay order dated April 9, 2008).

22. Oral argument on the OSC and stay application was held on April 11, 2008 before Honorable Richard B. Meyer. See Exhibit I (transcript dated April 11, 2008). In a Decision and Order dated April 11, 2007, Judge Meyer granted in part and denied in part Lewis Farm's request for a stay. See Exhibit J (April 11, 2008 Decision).

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23. On or about April 14, 2008, Lewis Farm moved for leave to renew and reargue the April 11, 2008 stay order, and also filed an amended petition. See Exhibit G.

24. On April 25, 2008, by letter Decision and Order Justice Meyer granted reargument but adhered to his April 11th Order. See Exhibit K.

25. On April 28, 2008, Lewis Farm sought by order to show cause to the Appellate Division, permission to appeal the April 11, 2008 stay order and to enjoin enforcement of the APA determination in its entirety. After oral argument, Honorable Leslie Stein ordered a limited, conditional stay pending a determination on the motion. See Exhibit L.

26. In a Decision and Order dated May 19, 2008, the Appellate Division granted Lewis Farm permission to appeal the April 11, 2008 stay order of Justice Meyer. See Exhibit M.

C. Lewis Farm III:  
APA v. Lewis Family Farm, Inc., Salim B. Lewis,  
and Barbara Lewis (Index No. 332-08)

27. On April 11, 2008, on behalf of the APA, the Office of the Attorney General filed a summons and complaint in Essex County, against Lewis Farm, Barbara Lewis and Salim B. Lewis, for violations of the Adirondack Park Agency Act ("APA Act"), Executive Law § 801, and the Wild, Scenic, and Recreational River System Act (the "Rivers Act") Environmental Conservation Law

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("ECL") § 15-2701. The APA commenced civil action no. 332-08 for various 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 57. The APA filed an amended complaint dated May 14, 2008.

28. Lewis Farm filed a motion to consolidate civil actions nos. 332-08 and 315-08, which was granted by Justice Meyer in his letter Decision and Order dated April 25, 2008. See Exhibit K.

29. A Request for Judicial Intervention ("RJI") form dated April 7, 2008, filed by Lewis Farm's counsel in Lewis Family Farm v. APA (Index No. 315-08), failed to list its prior related action heard by Justice Ryan (Index No. 498-07). In response to the last question on the RJI, a sworn statement, Lewis Farm indicated that there were no other related proceedings, notwithstanding the fact that Lewis Farm filed the prior proceeding which had been assigned to Justice Ryan (Index No. 498-07). See Exhibit H.

30. One week later, Lewis Farm filed an RJI form dated April 14, 2008, in the APA's enforcement action (Index No. 332-08) and again failed to alert the Court to the proceeding heard by Justice Ryan (Index No. 498-07). See Exhibit H.

31. The State, by motion, requested these matters be transferred to Justice Ryan consistent with the provisions of 22 NYCRR §§ 202.3 and 202.6 which requires all related matters to be

handled by the same IAS judge, because Justice Ryan was the original judge assigned to the first judicial action and because the second and third judicial actions are related to the first action.

32. The State's motion to transfer the matter was denied by Justice Meyer. See Exhibit K.

D. Prior Order: State of New York and APA v. Lewis Family Farm, Inc. (Index No. 626-00) (2000)

33. A prior action was brought by the State and APA against Lewis Farm for violations of Article XIV § 1 of the New York State Constitution and the APA Act involving drainage of wetlands onto State-owned Forest Preserve lands. See Exhibit N, p. 3.

34. Lewis Farm alleged that it was not legally responsible for the violations, and that it had the right to conduct the work under the agricultural exemption of the Federal Clear Water Act. See Exhibit N, p. 3.

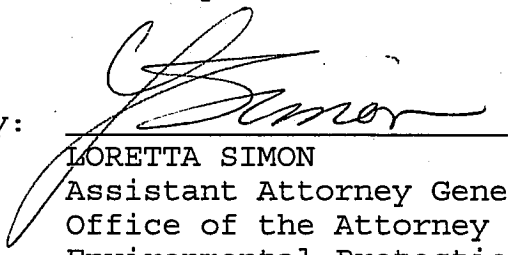
35. Salim Lewis signed a Consent Order on behalf of Lewis Farm, which included payment of \$50,000 for an environmental benefit project, restoration of the wetlands and stipulated penalties in the event of default. See Exhibit N, p. 4.

36. The Consent Order was entered as an Order of Honorable James P. Dawson on January 3, 2001. See Exhibit N (Order dated December 26, 2000).

Dated: Albany, New York  
June 13, 2008

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

By:

  
LORETTA SIMON  
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**SIMON AFFIRMATION  
TABLE OF EXHIBITS**

**LEWIS FARM I (Lewis Family Farm, Inc. v. NYS APA) Index No. 498-07**

- Exhibit A Summons and Complaint dated June 26, 2007 (Index No. 498-07), with Exhibit A
- Exhibit B Order to Show Cause dated July 3, 2007 and Amended Complaint dated July 2007 (Index No. 498-07)
- Exhibit C Transcript of Oral Argument before Honorable Kevin K. Ryan dated August 8, 2007 (Index No. 498-07)
- Exhibit D Decision and Order of Honorable Kevin K. Ryan dated August 16, 2007 (Index No. 498-07) and Affidavit of Service of Order dated August 31, 2007
- Exhibit E Notice of Appeal dated September 26, 2007 and filed October 1, 2007 (Index No. 498-07); Decision and Order on Motion for extension of time to appeal dated May 29, 2008

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

- Exhibit F Ex Parte Order to Show Cause ("OSC") dated April 8, 2008; Amended OSC dated April 9, 2008 and Notice of Petition and Verified Petition dated April 7, 2008 (Index No. 315-08), with Exhibits A, B, C
- Exhibit G Amended Verified Petition dated April 14, 2008 (Index No. 315-08)
- Exhibit H 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 I Transcript of Oral Argument before Honorable Richard B. Meyer dated April 11, 2008 (Index No. 315-08)
- Exhibit J Decision and Order on Motion for Stay of Honorable Richard B. Meyer dated April 11, 2008 (Index No. 315-08)
- Exhibit K Letter Decision on Motion to Reargue and Renew the April 11, 2008 Order and Motion to Consolidate and Cross-Motion to Transfer, of Honorable Richard B. Meyer dated April 25, 2008 (Index No. 315-08 and No. 332-08)
- Exhibit L Order to Show Cause dated April 28, 2008 signed by Honorable Leslie E. Stein, Appellate Division, Third Department for partial preliminary stay (Index No. 315-08, Case No. 504626)
- Exhibit M Decision and Order on Motion dated May 19, 2008 granting permission to appeal Supreme Court order of April 11, 2008, and extending partial stay pending appeal

**PRIOR ORDER**

- Exhibit N Order dated December 26, 2000 of Honorable James P. Dawson, Index No. 626-00, State of New York and APA v. Lewis Family Farm, Inc.