

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,
Petitioner,

v.

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Respondent.

AFFIRMATION OF AAG
LORETTA SIMON
IN OPPOSITION TO
PETITIONER'S MOTION TO
REARGUE AND RENEW

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

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 represent the APA in a previous action brought by Lewis Family Farm, Inc. ("Lewis Farm"), against the APA, Lewis Family Farm, Inc. v. APA, Essex Co. Sup. Ct., Index No. 498-07, RJI No. 15-1-2007-0153. Accordingly, I am familiar with the underlying facts and the litigation among the parties.

2. I submit this affirmation in opposition to the

Affirmation In Opposition to
Lewis Farm's Motion for
Leave to Reargue and Renew

petitioner's Motion to Reargue and Renew its previous application to this Court for a stay of the APA's March 25, 2008 determination. In that decision, th APA determined that Lewis Farm and its officers violated the APA Act and the Rivers Act by constructing foundations, buildings houses, and installing septic systems without any APA permits. This Court adjudicated the petitioner's previous application on April 11, 2008 when it stayed certain portions of the March 25, 2008 APA determination, but declined to stay other portions of that determination.

The APA Act and the Rivers Act

3. 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).¹ See also Reynolds Aff., ¶¶ 12-22.

4. The APA regulations also require a permit before one installs foundations, footings, and septic systems. See 9 NYCRR 570.3(ai)(1).

5. The Rivers Act authorizes the APA to make and enforce regulations necessary for the management, protection, and

¹The 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)

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 without first obtaining an agency permit"), see also Reynolds Aff., ¶¶ 24-31, Exhibit A (Van Cott Aff. ¶¶ 6-7).

6. A summary of the relevant facts to this matter is found in the Affirmation of Paul Van Cott dated April 10, 2008 ("Van Cott Aff."), and the Affirmation of Ms. Reynolds ("Reynolds Aff.") dated April 22, 2008, ¶¶ 4-11, Exhibit A-G.

Summary of APA Administrative Proceedings

7. As set forth in Mr. Van Cott's affirmation, on or about March 14, 2007 Lewis Farm applied to the APA for a permit to construct three single-family dwellings. On or about March 15, 2007, APA informed Lewis Farm that the Application was incomplete. See Van Cott Aff., ¶¶ 8, 9.

8. Over the past 13 months the APA staff and Lewis Farm have been engaged in administrative proceedings concerning the propriety of certain development on the Lewis Farm. These proceedings culminated in the March 25, 2008 APA decision. See Van Cott Aff., ¶ 27, Exhibit A.

9. Lewis Farm and its corporate officers subdivided

Affirmation In Opposition to
Lewis Farm's Motion for
Leave to Reargue and Renew

property as defined by the APA Act, constructed three dwellings, and installed septic systems in a protected area designated "Resource Management" pursuant to the APA Act and within a protected river corridor area along the Boquet River, a designated river pursuant to the Rivers Act. See Reynolds Aff., 12-22, 24-30 Van Cott Aff., ¶ 4-6, 10. Lewis Farm and its corporate officers did not obtain APA permits for the development and construction activities. At the time that they constructed the dwellings and septic systems, Lewis Farm and its corporate officers had been informed by APA staff that such development activities required APA permits. See Reynolds Aff. Exhibit A; (Van Cott Aff. at ¶¶, 4, 7, 10).

10. On or about September 5, 2007, the Agency provided notice to the Lewis Farm of the alleged violations, and an opportunity for petitioner to be heard on the violations during the course of the administrative proceedings, including, but not limited to, a Cease and Desist Order, Notice of Apparent Violation, Notice of Request for Enforcement Committee Determination, and an APA Enforcement Committee proceeding where Lewis Farm was represented by counsel (Mr. Privitera). See Reynolds Aff., ¶¶ 5-9 Exhibits B-E.

11. The Agency's Enforcement Committee heard the case on March 13, 2008. On behalf of Lewis Farm, John J. Privitera of McNamee, Lochner, Titus & Williams, P.C., presented an oral

argument to the Enforcement Committee. Petitioner's counsel also made a power point presentation to the APA Enforcement Committee. Counsel's oral argument and power point presentation were included in the administrative record and a transcript was made of the proceeding. See Reynolds Aff ¶ 9, Exhibit F (transcript).

12. On March 25, 2008, the Enforcement Committee made a 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, and imposed a civil penalty of \$50,000. See Reynolds Aff ¶ 10, Exhibit A (attachment to Van Cott Aff, March 25, 2008 Determination).

13. On or about April 18, 2008, the APA modified its March 25, 2008 Decision and Order, by deleting a provision that purported to preclude Lewis Farm from challenging the Agency's jurisdiction. See Reynolds Aff., Exhibit G.

Summary of Litigation

1. **The First Judicial Action:**

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

14. In the summer of 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 jurisdiction over such development. See Exhibit A (Complaint 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 proceeding.

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

A. Lewis Farm Seeks an Ex Parte Stay Against the APA

16. The complaint was amended on or about July 13, 2007. At that time the Lewis Farm also 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 A (OSC dated 7/13/07 and Amended Complaint).

B. The Court's August 16, 2007 Decision and Order

17. 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.

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

19. 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, Index No. 498-07 (Sup. Ct. Essex Co., August 16, 2007) ("the August 2007 Decision"). 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 the August 2007 Decision, pp. 4, 7.

20. The Court's August 2007 Decision 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 August 2007 Decision, p. 5.

21. The Court further stated that Section 305-a of the Agriculture and Markets Law did not supersede Agency authority under the Adirondack Park Agency Act or its regulations, and dismissed the action as not ripe for judicial intervention and

referred it back to the Agency to proceed with its enforcement procedures. See August 2007 Decision, p. 6.

22. On September 26, 2007, Lewis Farm filed a Notice of Appeal of the August 2007 Decision. See Exhibit D. Upon information and belief, as of Friday, April 19, 2007, Lewis Farm has not perfected its appeal to the Appellate Division, Third Department.

23. Consistent with the August 2007 Decision, the APA administrative process continued. As note above, on March 13, 2008 the APA Enforcement Committee heard oral argument from counsel for the APA Staff and attorney John Privitera for Lewis Farm during the APA proceeding. On March 25, 2008 the APA Enforcement Committee issued a determination that Lewis Farm was in violation of the APA Act and the Rivers Act. See Van Cott Aff., Exhibit A.

2. The Second Judicial Action:

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

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

Affirmation In Opposition to
Lewis Farm's Motion for
Leave to Reargue and Renew

relationship between APA Act and Agriculture and Markets Act.²

A. Petitioner Obtains an Ex Parte Stay Against the APA

25. The Article 78 petition was served on the Office of the Attorney General with an Order to Show Cause ("OSC") and stay against the State on or about April 8, 2008. As in the 2007 litigation, Lewis Farm sought an ex parte stay against the APA. The ex parte stay, which upon information and belief was drafted and presented by Mr. Privitera, was signed by Acting Supreme Court Justice Richard B. Meyer. The next day, 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 E (ex parte stay order), Exhibit F (letter dated 4/8/08 and G (Amended Order to Show Cause dated 4/9/08).

26. Oral argument on the OSC and stay application was held on April 11, 2008 before Honorable Richard B. Meyer. 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 H (April 11, 2008 Decision).

²A 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). 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. See Exhibit I.

3. **The Third Judicial Action:
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 the summons and complaint herein on behalf of the APA in Essex County, 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 ("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 577.

28. On April 14, 2008, the Lewis defendants filed a motion to consolidate civil actions nos. 332-08 and 315-08.³ 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.

**Lewis Farm's Factual Arguments Do Not Satisfy
the Requirements for a Motion for Leave to Renew**

29. The Court should deny the motion because it fails to meet the standard for reargument or renewal pursuant to CPLR §

³When the Lewis Farm defendants filed the motion to consolidate in civil action No. 332-08, they once again failed to alert the Court about the previously-filed related case, civil action No. 498-07. See Exhibit J (April 14, 2008 RJ1).

2221(d) and (e). There can be no dispute that the petitioner had a full and fair opportunity to be heard on its previous application to this Court. Petitioner carefully prepared its petition and its April 11, 2008 oral presentation to this Court. Petitioner's new motion fails to show how this court overlooked or misapprehended the facts or law to support a reargument, and petitioner's motion raises no new issue of fact nor justifiable excuse for renewal.

30. Lewis Farm's sole basis for claiming "new" facts exist is that Lewis Farm is expecting Nepalese farmers who will be arriving in a few weeks and need housing. See Pet. Memo, p. 3. However, in January of 2008, long before petitioner filed this proceeding, petitioner knew that it would "host" Nepalese farmers who would be arriving in the spring of 2008. In an affidavit of Barbara Lewis dated January 17, 2008, discussing the farmers expected visit, Ms. Lewis states "These farmers had been scheduled to arrive in the fall of 2007 and now plan to arrive in late spring 2008." See Affirmation of John J. Privitera, dated April 14, 2008 ("Privitera Aff.") Exhibit D (Affidavit of Barbara Lewis dated January 17, 2008, ¶ 9). Indeed, petitioner acknowledges that this information is not new and was before the Court at the hearing on the Order to Show Cause and Motion for Stay on April 11, 2008, in Supreme Court Essex County. See Pet. Memo p. 3. A motion to renew must be based upon newly discovered

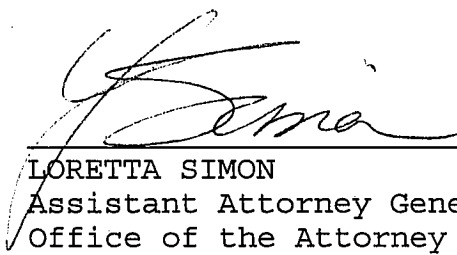
evidence that was not available when the original motion was made, and must also include a justifiable excuse for not placing such new and arguably material facts before the court in the first instance. Accordingly, petitioner fails to meet the requirement of CPLR § 2221(e)(2), that the motion be based on new facts.

31. Petitioner's attorney, arguing for a motion to renew affirms "I failed to fully inform the Court of the facts..." and "I failed to emphasize at the argument...the nature of farm employee housing..." See Privitera Aff., ¶ 20. A motion for leave to renew, however, is not a "second chance freely given to parties who have not exercised due diligence in making their first factual presentation." Carota v. Wu, 284 A.D.2d 614, 617 (3d Dep't 2001) (citations omitted).

32. In support of its motion for leave to renew, petitioner also argues that it will suffer irreparable harm if it pays the APA penalty because it "will be deprived of constitutional due process rights." See Privitera Aff., ¶ 22. Petitioner failed to make this argument in its April 7, 2008 Memorandum of Law in Support of a Stay dated or in Mr. Privitera's April 7, 2008 affidavit in support of a stay. This is a new legal theory and

is therefore not grounds for granting a motion to reargue or
renew.

Dated: Albany, New York
April 22, 2008



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

LORETTA SIMON AFFIRMATION

EXHIBIT LIST

- Exhibit A Summons and Complaint dated June 26, 2007
Order to Show Cause dated July 13, 2007 and Amended Complaint
- Exhibit B Letter from Assistant Attorney General Loretta Simon to David Cook, Esq. dated July 2, 2007
Letter from Assistant Attorney General Loretta Simon to Honorable Kevin K. Ryan dated July 19, 2007
Letter from Honorable Kevin K. Ryan to Assistant Attorney General Loretta Simon dated July 19, 2007
- Exhibit C Transcript of argument on Motion to Injunctive Relief and Declaratory Judgment dated August 8, 2007
- Exhibit D Decision and Order of Honorable Kevin K. Ryan, with Notice of Entry dated August 31, 2007 (Index No. 498-07)
Notice of Appeal dated September 26, 2007
- Exhibit E Ex Parte Stay against New York State Adirondack Park Agency dated April 8, 2008
- Exhibit F Letter from Assistant Attorney General Loretta Simon to Honorable Richard B. Meyer, dated April 8, 2008
- Exhibit G Amended Order to Show Cause dated April 9, 2008
- Exhibit H Decision and Order of Honorable Richard B. Meyer dated April 11, 2008
- Exhibit I Request for Judicial Intervention dated April 7, 2008 (Index No. 315-08)
- Exhibit J Request for Judicial Intervention dated April 14, 2008 (Index No. 332-08)
- Exhibit K Notice of Petition and Verified Petition dated April 18, 2008 (Index No. 315-08)