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STATE OF NEW YORK

SUPREME COURT

COUNTY OF ESSEX

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LEWIS FAMILY FARM, INC.,)
Petitioner,)

- v -

ADIRONDACK PARK AGENCY,)
Respondent.)

-----*

) Index No.: 315-2008
) RJI No.: 15-1-2008-0109

Order to Show Cause proceedings held in the
above-entitled matter in Essex County Supreme Court,
Elizabethtown, New York, before the Honorable Richard
B. Meyer on April 11, 2008.

Appearances:

McNAMEE, LOCHNER, TITUS & WILLIAMS, P.C.
Appearing for the Petitioner
677 Broadway
Albany, NY 12207-2503
By: JOHN PRIVITERA, ESQUIRE

ANDREW M. CUOMO, Attorney General
of the State of New York
Appearing for the Respondent
By: LORETTA SIMON, Assistant Attorney General

Court Clerk: Lise Johnson

ELLEN D. CHASE
Court Reporter
Franklin County Courthouse
Malone, New York 12953

1 (Court was called to order on
2 Friday, April 11, 2008, by the
3 Hon. Richard B. Meyer at 1:30 p.m.)

4 THE COURT: This is the matter of Lewis
5 Family Farm against the Adirondack Park
6 Agency, it's a Supreme Court matter bearing
7 Index No. 315-08. We'll get the appearances,
8 Mr. Privitera?

9 MR. PRIVITERA: Yes, your Honor, John
10 Privitera. Good afternoon.

11 THE COURT: Good afternoon. And also
12 present is Mr. Lewis of the Lewis Family
13 Farm.

14 MR. PRIVITERA: Yes, your Honor.

15 THE COURT: Ma'am?

16 MS. SIMON: Loretta Simon from the
17 attorney general's office.

18 THE COURT: And you, ma'am?

19 MS. REYNOLDS: Sarah Reynolds from the
20 Adirondack Park Agency.

21 THE COURT: All right, thank you. Please
22 be seated. I have read the papers so I'm
23 somewhat familiar with the arguments being
24 made here. Mr. Privitera, is there something
25 that you want to make an argument here

1 without going into detail over the papers
2 because I have read them and gone through
3 them?

4 MR. PRIVITERA: Yes, your Honor. Thank
5 you. First, your Honor, thank you for making
6 the time on such short notice to be heard
7 this afternoon. The issue before the Court
8 this afternoon is very narrow at this early
9 procedural hour. As an acting supreme court
10 justice, a Court of general jurisdiction, you
11 will be administering justice in this case
12 from the Order to Show Cause that you signed
13 earlier this week through the conclusion of
14 this matter and the final judgment entered by
15 the Court. Today's issue is narrow because
16 we ask you to determine only how you will
17 carve out the elbow room and the scope of
18 this matter so that when you do finally
19 render a determination, you are able to serve
20 due process and the full administration of
21 justice.

22 The stay that we seek today, your Honor,
23 is only under 7805. You have sole discretion
24 to make that decision. When you make that
25 decision the Third Department will respect it

1 and defer to you and affirm if there's any
2 way that they can. In fact you could enter a
3 stay under 7805 under your own initiative
4 under the terms of the statute without even
5 heard by the parties if you thought it was
6 important to the administration of due
7 process. And courts have said that it's a
8 mistake to pass on the merits at this time,
9 so the affidavits that have been filed by the
10 respondent here are largely immaterial.

11 Your Honor, when we ask you to pass on the
12 merits, you will be the first jurist in the
13 history of this state to interpret and imply
14 Article 14, Section 4 of the New York State
15 Constitution, part of the Conservation Bill
16 of Rights that's nestled against the Forever
17 Wild clause, and you will be the first jurist
18 to be asked to what extent that clause of our
19 Constitution protects the right to farm.

20 You will be the first jurist in the history
21 of this state to decide the scope of Section
22 305.3 of the Agricultural and Markets Law and
23 determine whether the respondent has a duty
24 to modify its regulations as the statute
25 demands in order to protect the right to

1 farm.

2 You will be the first jurist to decide the
3 scope of the Court of Appeals case in the
4 *Town of Lysander* as to the right to farm
5 worker housing in the Adirondack Park, and
6 you will be the first jurist in the history
7 of the state to interpret and decide whether
8 the Adirondack Park Agency has jurisdiction
9 over farming to any extent and certainly
10 under the Act with respect to farm worker
11 housing. You will be the first to decide the
12 impact of the commissioner of the Department
13 of Ag and Markets decision in this case that
14 was ignored by the determination that you
15 have before you in which the commissioner
16 found that the Lewis Family Farm had the
17 right to farm under 308.4 of the Ag and
18 Markets Law which is a final determination
19 that can be only challenged by an Article 78
20 and has not been challenged here in which the
21 commissioner found that the specific houses
22 in this case on February 1, were agricultural
23 buildings.

24 THE COURT: Why is that binding on the
25 Agency which has its own definitions and own

1 regulations? Why is that determination
2 binding particularly I don't think the Agency
3 was a party to that determination, were they?

4 MR. PRIVITERA: No, they weren't, your
5 Honor, but we're not here to decide the
6 merits. You will be deciding whether or not
7 it's possible for the commissioner in Ag and
8 Markets to find that a building is
9 agricultural and for another agency perhaps
10 to find that it is not as was done here. And
11 you will be the first to decide whether the
12 Agency may ignore the advice, the statutory
13 advice of the Adirondack Park local
14 government review board which was given here
15 and not even mentioned in the determination
16 and they represent all of the towns inside
17 the Blue Line.

18 When you ultimately reach the merits here,
19 and I know your Honor will take that up in
20 due time when it's fully briefed and you
21 have an answer and a return before you, you
22 will then be asked to administer justice in
23 this matter. If I may approach, your Honor,
24 please, I have a proposed Order if your Honor
25 would like it, but I have a proposed Order

1 because I would like to go through, if I may,
2 the specific terms of the decretal paragraph
3 of the Agency.

4 THE COURT: Are you talking about the
5 determination here?

6 MR. PRIVITERA: Yes, your Honor.

7 THE COURT: I have that. In the paper?

8 PRIVITERA: I meant the last page, your
9 Honor, and if I may approach your Honor?

10 THE COURT: Certainly.

11 MR. PRIVITERA: This quotes from the
12 determination, your Honor, the determination
13 that we ask to be stayed here in the narrow
14 business of the Court this afternoon. This
15 determination says and orders that Barbara
16 Lewis shall apply for a permit for the three
17 new buildings and the four lots, four lot
18 subdivision, that's to say subdividing these
19 farm worker housing from the farm even though
20 they are not subdivided now, by April 14, on
21 Monday, and submitting the appropriate major
22 project application to the Agency.

23 The Order also says that the penalty that
24 was levied -- I'm sorry, in paragraph 2 it
25 also says by April 28 to submit to the Agency

1 a detailed description of the dwellings and
2 as built planing plans for the septic system.
3 Your Honor, I have no idea where that came
4 from because when you get to the record in
5 this matter, and I'm sorry, the deal of no
6 merits, there is detailed drawings and
7 approvals by the Town of Essex approving the
8 septic system in accordance with all building
9 codes, having looked at the stamped drawings
10 of a professional engineer, so it's already
11 been determined that the septic system and
12 the wells and everything about the houses,
13 the three houses are in compliance with all
14 building codes and all state standards.

15 THE COURT: That's been submitted to the
16 Agency?

17 MR. PRIVITERA: Yes, and it's in the
18 record. That will be part of the return
19 before you, your Honor. By the way, the *Town*
20 *of Lysander* case, the Court of Appeals said
21 that was all a family ever has to do is to
22 get the local town and code enforcement
23 officer to bless the construction, so I don't
24 know where paragraph 2 comes from. That was
25 already in the record.

1 Paragraph 3 says that the Lewis Family
2 Farm must reply to any information requests
3 after filing the application within thirty
4 days and then, this is very important, your
5 Honor, paragraph 4 says Lewis Farm will
6 retain all rights of appeal in the project
7 review process but foregoes the right to
8 challenge agency jurisdiction and the review
9 clocks otherwise applicable. So what the
10 Order seeks, your Honor, is to avoid your
11 review of the merits. It seeks and by its
12 terms directs that the Lewis Family Farm
13 submit an application where we have before
14 you a constitutional and statutory challenge
15 saying that the Agency does not have
16 jurisdiction over farm worker housing, it
17 says almost immediately. This decision was
18 only a couple of weeks ago. Walk in, submit
19 jurisdiction, and the minute you do that you
20 forgo the right to challenge the agency's
21 jurisdiction.

22 They are seeking, your Honor, to avoid
23 judicial review by you of the merits and that
24 is what will happen if we comply. If we
25 comply the case is moot. If we comply we

1 have lost all of our arguments, some of which
2 are sound in the Constitution, to have your
3 Honor deliver justice and consider all of the
4 matters before you.

5 Number 5 says that we shall not occupy the
6 three dwellings during this entire proceeding
7 even though that's where the farm workers are
8 supposed to live, even though the Agency has
9 said the buildings can stay where they are.
10 Then it says that we must pay the penalty of
11 \$50,000 by the end of the month. And then
12 finally it says, which is sort of
13 interesting, it directs agency staff to
14 review the application, the application in
15 which we can no longer argue our
16 constitutional rights, review the application
17 with the interest of getting workers in the
18 houses this growing season, "However that can
19 happen only if respondent responds
20 immediately and favorably to this
21 determination and submits the required
22 information and penalty."

23 Your Honor, I would like to suggest that
24 due process in the country generally allows a
25 trial before sentencing, generally allows a

1 day in court before a penalty, and I don't
2 even want to mention regress that we hold so
3 abhorrent that to not allow that we do that,
4 but certainly have we never in this country
5 seen an Order that says submit, forgo the
6 right to challenge and do it immediately?

7 We ask your Honor to stay that and what's
8 the impact of a stay? The impact of a stay
9 is that ultimately, your Honor, if we lose
10 and you determine all of our many points in
11 Article 78 are wrong, we will have to decide,
12 but certainly will be subject to the Order to
13 apply for a permit and pay a fine. If your
14 Honor decides that any one point in our
15 proceeding here is correct, we will at least
16 have had the opportunity to have your Honor
17 apply your obligation as a jurist to review
18 the merits and decide what if anything might
19 be done with respect to these issues.

20 Certainly if we win, your Honor, we're
21 entitled, frankly to win, not to be subject
22 to an Order that directs us to waive
23 jurisdiction immediately.

24 Your Honor, there are other issues that
25 are raised in our papers. If the subdivision

1 occurs, it destroys the value of the farm.
2 Understand that this Order says that the --
3 that we must treat these three farm worker
4 houses, and by the way it's very interesting
5 that the Agency admits they are farm worker
6 houses in paragraph 7 before you, and admits
7 that we're harmed if we can't immediately use
8 them. Why else would they say let's hurry up
9 and use the dwellings where they are? They
10 admit they are farm worker houses. They know
11 that is what they are and they are directing
12 that the application be filed with the Agency
13 that treats it as a three-home subdivision as
14 a separate investment, your Honor, cuts it
15 off from the farm. It's on the farm now,
16 it's on the lot of the farm, it's next to the
17 barns right where farmers always have their
18 houses so they can monitor the farm and
19 monitor the barns and walk to the barns.
20 They are only farm worker houses.

21 And look at Mrs. Lewis' affidavit, your
22 Honor. I know your Honor has read it but if
23 you could just look at the exhibits to her
24 affidavit, please. Your Honor, Exhibit A,
25 you have been a lawyer for a while just like

1 me before you were a judge, can you tell me
2 how do we subdivide these three houses that
3 are in the drawing? They have a common
4 well, they have a common septic system that
5 is approved by the town code enforcement
6 officer. They have a common driveway. The
7 three front doors face each other to form a
8 front playground and the north country, the
9 north family cottage which is on the right of
10 what you're looking at, your Honor, has a
11 back door that looks out at the barns. The
12 addresses of these homes currently empty are
13 probably going to be 3, 5 and 7 New Farm
14 Road. Fifteen people can live there?

15 Now, are we going to have these houses
16 vacant for the entire year, year and a half
17 or more so that this matter is litigated?
18 What's the harm in people living there.
19 They haven't even cited any authority that
20 says they can't order people to live in the
21 house.

22 THE COURT: What's the irreparable harm?

23 MR. PRIVITERA: I know there isn't any
24 case law on this in the state but if I could,
25 your Honor, I started with *Mitchell against*

1 *Cuomo, Second Circuit Court, 748 F.2d 804,*
2 which says, "When an alleged deprivation of a
3 constitutional right is involved, most courts
4 hold that no further showing of irreparable
5 injury is required."

6 The Second Circuit Court is also, in a
7 number of cases collected at 475 F.Supp. 1282
8 said that the loss of business is irreparable
9 harm and here, your Honor, we can't run a
10 farm without farm workers. So the harm of
11 not living there is palpable and has been
12 held to be irreparable in a number of cases.

13 THE COURT: Maybe you can tell me how did
14 they operate the farm last year without the
15 houses?

16 MR. PRIVITERA: There are a couple of
17 workers that come from other places, they
18 drive. One comes all the way from
19 Plattsburgh. There is a farm manager in one
20 of the houses which was also built but we're
21 just at the point -- we built the houses to
22 use them. We're just at the point, your
23 Honor, where we need them in order to run the
24 farm. But most importantly the irreparable
25 harm, your Honor, is that case is moot if we

1 comply. If we comply it says we don't have
2 any jurisdiction and we have submitted.

3 THE COURT: What's the irreparable harm of
4 not using the houses?

5 MR. PRIVITERA: They are a farm asset with
6 no farm workers in them and we have -- we
7 need them in order to run the farm. Just
8 because we didn't have them last year doesn't
9 mean we don't need them now. This farm has
10 been growing for thirty years. This is
11 finally at a point where we need to attract
12 three farm families or two plus workers in
13 this farm to move this farm to the next level
14 and we can't do that without people living
15 there and that's harming.

16 THE COURT: You're saying other
17 arrangements can't be made for the workers?
18 There's no other housing in the area?

19 MR. PRIVITERA: No, your Honor. Look at
20 what's been all over the newspapers. There's
21 a housing shortage inside the Blue Line.
22 There's no -- the Adirondack Park, you will
23 see when you see the merits, the Adirondack
24 Park acknowledges, they came out with an
25 economic report that says there's a housing

1 crisis inside the Blue Line. We have no
2 place to live. That is why we built them.
3 But what if they come from another county,
4 your Honor? Where are they going to live?
5 Besides that the reason they are all calling
6 to install them, the farmer has to be on the
7 farm to do everything a farmer does. It's
8 not to say that you can't sometimes have a
9 farm worker come from another place, but to
10 get to the point of a fully functioning farm
11 you need somebody looking at the barns and
12 that -- I can't tell you how much harm we
13 might have depending on what happens to the
14 barns if nobody is living there.

15 One way or the other it's a standing
16 investment that's not being used and what's
17 the harm to the other side? Your Honor,
18 they have made no showing that when you
19 balanced the equities, their orders, their
20 jurisdiction is harmed in any way if we wait.
21 They have said that the houses can stay where
22 they are, they said they will permit them as
23 long as we submit, and they have said also
24 that -- I mean that's right in paragraph 7 of
25 the Order that's before you, your Honor, that

1 the houses can stay where they are.

2 And, your Honor, I know that there's
3 references in one of the affidavits that was
4 filed this morning to protection of the
5 scenic views from the river, your Honor. The
6 houses that you're looking at have a hamlet
7 between themselves and the river. Dozens of
8 houses, railroad tracks. They can't even be
9 seen from the river and that is why the
10 Agency has said that they are permitted where
11 they are. There is no environmental interest
12 to be protected by them not being occupied.
13 There's no environmental interest that's
14 protected by the forced submission to
15 jurisdiction, rather it's merely a violation
16 of due process.

17 Every case they have cited on the other
18 side, your Honor, is not a 7805 case. They
19 have cited 6301 cases. They even still --
20 their papers in opposition to an injunction,
21 we haven't asked for injunction. 7805 says a
22 stay, and you have the broadest jurisdiction
23 that a jurist may have to grant a stay
24 subject only to reversal for abuse of
25 discretion and the primary case there is,

1 your Honor, is interestingly enough, an
2 environmental case. The primary case there
3 is the *Jorling* case, Second Department
4 *Jorling* case that I believe we have cited for
5 your Honor which where in the Second
6 Department stayed an Order of the Department
7 of Environmental Conservation to close a land
8 fill, stayed it, and what the Second
9 Department said was that all petitioner had
10 to show was that there had been -- that there
11 was irreparable harm and they found
12 irreparable harm in the *Jorling* lean case
13 merely because of an -- of the harm that the
14 town would suffer if the land fill was
15 closed, similar to the harm we'll face if
16 we're unable to use the building. That is
17 the matter of *The Town of East Hamilton*
18 *against Jorling, Second Department, 181 AD2d*
19 *781*. It's cited in all of the literature,
20 it's the standard and it says only this,
21 "Given the possibility of irreparable injury
22 to the towns if the DEC were permitted to
23 proceed with enforcement, the Court did not
24 improvidently exercise its discretion in
25 granting the stay in question." See CPLR

1 7805.

2 Your Honor, I don't think that we're
3 subject to the preliminary injunction
4 standard here under 6301, but I'd also like
5 to suggest that the balance of -- balance of
6 equities is strongly in our favor and there
7 is no harm at all to the Agency in allowing
8 this Order to proceed like any other
9 administrative Order, your Honor. Can you
10 can see in these papers what the significance
11 of Monday is or the significance of April 28?
12 They are completely arbitrary dates. These
13 buildings were begun a year ago and the
14 Agency knew it a year ago.

15 THE COURT: Didn't they take enforcement
16 action? Didn't they seek a cease and desist?

17 MR. PRIVITERA: The staff issued a cease
18 and desist and the board never took it up and
19 enforced it, never took it up and enforced
20 it. They didn't do anything until the board
21 took action two weeks ago.

22 THE COURT: Which board?

23 MR. PRIVITERA: The determination before
24 you.

25 THE COURT: You're talking about the

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Committee?

MR. PRIVITERA: Yes, so given the passage of a year before the Board took action, there's no harm in waiting while your Honor administers justice and considers the merits here and there's certainly no harm in the passage of time. No harm is identified in the respondent's papers. The dates of April 14 and 28 are arbitrary and we ask only, your Honor, that you serve justice by allowing yourself to review these matters, allowing yourself to consider the merits before the farm is punished, and before the farm is submitted to the very jurisdiction that the farm claims is beyond the Agency. Thank you.

THE COURT: Ms. Simon.

MS. SIMON: Thank you, your Honor.

Notwithstanding the fact that counsel for petitioner was not there to discuss the merits, he spent quite a bit of his time discussing the merits and I wanted to, for the record, indicate a couple of things and then get to the three-prong test that you know he argues here today for a stay.

First of all I think it's disingenuous to

1 not have told this Court that this very same
2 matter, this very same violation that came
3 before the Court a year ago, and I was here
4 last summer with a different law firm, all
5 the issues are in Judge Ryan's Order. I'm
6 further dismayed to learn after getting a
7 copy of the RJ1 in the mail on this, this
8 prior case by Judge Ryan was not listed.
9 This case dealt with the very same violation,
10 the construction of these three-family
11 dwellings, and the petitioner brought the
12 case against the State of New York and did
13 file same and without notifying the state and
14 attorney general, so that being said all of
15 the points, many of the points that are
16 raised here already have been dealt with by
17 Judge Ryan.

18 THE COURT: I read his decision and the
19 only thing I saw him deal with was the issue
20 of whether 305-a of the Agriculture and
21 Markets Law superseded APA authority and he
22 said it didn't, 305-a of the local land use.

23 MS. SIMON: That is right.

24 THE COURT: Did it also deal with the
25 issues of the jurisdiction the Agency based

1 upon the definition and statute and
2 regulation?

3 MS. SIMON: It did deal with jurisdiction.
4 It said the Agency had jurisdiction, that
5 these two definitions are indifferent
6 statutes of agricultural use and the Agency
7 was -- is within its power to ask for a
8 permit. It doesn't preempt, they don't
9 preempt each other, they operate in tandem.

10 THE COURT: Were the same claims made
11 regarding whether there is a subdivision or
12 not, whether this is -- whether the
13 agricultural use definition structure, I
14 should say, definition in the APA includes a
15 single-family dwelling structure and
16 therefore it's exempt from the permitting
17 based upon the APA's own definition?

18 MS. SIMON: Your Honor, as you know from
19 having given you a copy of the Order and now
20 you have seen it, we got the proceeding
21 dismissed on grounds, and now here we are.
22 There's a reason why we're in litigation with
23 these guys. We went through that, got our --
24 got it dismissed, we have the Order
25 dismissing it. The Judge made certain

1 findings including we discussed *Lysander*.
2 It's in our papers. It doesn't apply.
3 *Lysander* limits local government. It does
4 not limit the state, the Agricultural Market
5 Law, it does not limit the Adirondack Park
6 Agency.

7 THE COURT: My question, I guess, to be
8 more pointed, were the issues before Judge
9 Ryan the same as we have here or are there
10 different issues that weren't presented to
11 Judge Ryan?

12 MS. SIMON: The answer is yes, some were
13 and some are new. What's new is we have a
14 determination from the Agency that can be
15 challenged. Clearly we go forth, forward on
16 Article 78 and we'll reply and answer and
17 make our case to you, so some of this is new.
18 But I wanted to point out to the Court that a
19 lot of this has been dealt with even though
20 the other side hasn't told you that.

21 THE COURT: Are you asking me to take
22 judicial notice of the pleadings in that
23 case?

24 MS. SIMON: Certainly, your Honor, and
25 determination.

1 THE COURT: I better get that file.

2 MS. SIMON: I also wanted to answer that.

3 The *Jorling* case that he's referring to
4 involving DEC, yes, of course you can get a
5 stay against the state. There are plenty of
6 cases. The *Jorling* case the harm was
7 radically different. That is three towns on
8 Long Island all being ordered to close land
9 fills with significant repercussions. The
10 DEC was stayed from those proceedings because
11 of the impact on the towns. We have nothing
12 like that here.

13 Here petitioner argues he doesn't have to
14 show the three-prong test. I think there is
15 no doubt that he has to show. The Court of
16 Appeals case in *Grant* clearly lays that out.
17 That came subsequent to his *Stewart* case,
18 which is a Third Department case which is
19 many years older, and there's plenty of cases
20 that you have to show the three-prong test,
21 whether it has a likelihood of success,
22 irreparable harm and how the equities weigh.

23 So on those particular issues, because
24 that is all we are here to argue, we're not
25 here to argue the merits, I think some of the

1 things that have been said I would disagree
2 with in terms of the facts and that's why
3 we're going to go forward with the Article
4 78. The question is should the Adirondack
5 Park Agency be denied it's statutory
6 authority and right to go forward and do
7 whatever it deems proper under the statute to
8 enforce its determination? I would argue
9 that given the three-prong test I think they
10 can't show any one of the three prongs of
11 that test and they should be denied.

12 THE COURT: Let me ask you while you're on
13 the point with regard to Item 4 in the
14 determination where the petitioner is
15 required to forgo the right to challenge
16 Agency jurisdiction, what authority does the
17 Agency have to do that?

18 MS. SIMON: Are you saying paragraph 4?

19 THE COURT: In the determination, in the
20 determination of the Agency.

21 MS. SIMON: I'm looking.

22 THE COURT: At the end it lists seven
23 determinations and says that 4, Lewis Farm
24 will retain all rights of appeal in the
25 project review process, but it goes on to

1 say, it foregoes the right to challenge
2 Agency jurisdiction and review clocks
3 otherwise applicable. What authority does
4 the Agency have to do that and why?

5 MS. SIMON: That is for an after-the-fact
6 permit. If they want to do an after-the-fact
7 permit, which apparently they don't want to
8 do any permit, but if they wanted an
9 availment of an after-the-fact permit, they
10 have already put the houses in, that is
11 standard language they use. Obviously we're
12 here and you might rule later on that is an
13 improper provision, that's my sense today
14 before I have had a chance to answer
15 officially on the law.

16 THE COURT: So I am -- it's a --

17 MS. SIMON: There are probably a dozen
18 things on the merits that I am not prepared
19 to argue.

20 THE COURT: I understand.

21 MS. SIMON: I think that the first thing,
22 the reason this stay should not be imposed
23 against the state is because the likelihood
24 that they're going to succeed on the merits
25 of many of the claims in light of Judge

1 Ryan's determination, he denied the
2 restraining Order for failure to show
3 irreparable harm, he rejected the farms
4 argument about agriculture structures and the
5 APA and Agricultural and Market Law
6 component. All of that was discussed. I
7 think it puts a great weight on them and not
8 in their favor. There's a Court Order
9 already from this Court, Supreme Court Essex
10 County saying many of these claims the Judge
11 does not agree with you on.

12 THE COURT: Which is not appealed.

13 MS. SIMON: Sorry?

14 THE COURT: Not appealed?

15 MS. SIMON: They have filed a Notice of
16 Appeal, they haven't perfected. The second
17 issue on irreparable harm, petitioner's
18 allegations of what the harm would be, the
19 way I read the papers they have raised two
20 kinds of harm; one is loss of tax incentives
21 if they file for an APA permit, and the
22 second is imposition of penalty or the fact
23 they would have to pay a penalty.

24 First of all a tax incentive is
25 speculative. I think that whether or not

1 simply applying for an APA permit would
2 eliminate whatever tax benefits they may or
3 may not get in the future is speculative and
4 is speculative as to whether what entities of
5 government would interpret the APA statute to
6 their subdivision. I think they haven't
7 shown that to be factually true, so it's
8 speculative harm. And even if it were to be
9 true, that amount of money, its harm in the
10 terms of finance and financial harm is not to
11 be granted in this kind of a stay where you
12 could recoup the money if you win the
13 lawsuit. So I think it's case law that I put
14 in my brief that this is, to me, an example
15 of financial harm.

16 THE COURT: What course of action do they
17 have against the Agency or state if
18 ultimately they prevail? How do they have a
19 claim for damages against the state?

20 MS. SIMON: I'm not suggesting they have a
21 claim for damages.

22 THE COURT: How are they going to recover
23 their financial loss?

24 MS. SIMON: If they win they are not going
25 to have a fine. That's the harm, they are

1 alleging tax incentive loss.

2 THE COURT: If I don't grant the stay they
3 are required to file for permit by Monday and
4 they are required to pay the fine which I'm
5 sure they can get back if they win, but they
6 have to file for the permit. If that is a
7 delay, if that is delayed throughout the
8 process of the Agency needing more
9 information because as a provision it says
10 they may need more information, if they
11 sustain financial damages as a result of that
12 and they ultimately win here or on appeal,
13 how do they collect that monetary damage?
14 Who do they collect it from?

15 MS. SIMON: I don't know and I'm not their
16 attorney so I'm not going to stand here and
17 give them that advice, and I think they are
18 capable of getting their own counsel.

19 THE COURT: I think in a private action I
20 hear you, I'm not sure there's any liability
21 on the part of the state or --

22 MS. SIMON: There is the thinking, this is
23 a law enforcement matter notwithstanding
24 comparing us to some third world country.
25 There is due process rights that, you know,

1 are ridiculously oppressive. The APA is
2 simply enforcing a statutorily authorized
3 permit requirement. All they are saying is
4 submit your permit, we'll give you an
5 after-the-fact permit, get your septic in
6 order showing us the Department of Health
7 approval, you have put them in according to
8 the Department of Health. You shouldn't have
9 built that close to a designated river and
10 these are basic statutorily.

11 This is not unreasonable. They have had
12 more than a year to comply. They have chosen
13 and therefore they have created their own
14 harm. They have chosen not to comply. The
15 Agency originally agreed to accept an
16 application and issue an after-the-fact
17 permit and they said no, sue. When the Court
18 tells them they continued to ignore it. They
19 violated the cease and desist, they install
20 the homes completely, this is -- this would
21 be encouraging law breaking or ignoring the
22 authority of the state legislature laws
23 invested in the APA.

24 THE COURT: Isn't it taking the provision
25 that I read where they have to forgo any

1 rights they have to challenge Agency
2 jurisdiction, why can't they make the
3 application and submit this information
4 without having to forgo those rights?

5 MS. SIMON: Why didn't they do that? What
6 harm comes by submitting a piece of paper?
7 They did it once already, they didn't wait
8 for it to be accepted.

9 THE COURT: It's their point once they go
10 down that road they will be deemed under this
11 determination and perhaps by some future
12 court to have waived their rights to
13 challenge your jurisdiction.

14 MS. SIMON: I think that is not true.
15 There is plenty of Article 78 cases in the
16 state where the people can challenge. An
17 agency makes a determination, you challenge
18 that. That is what we have here. You have
19 to go forward and wait for your determination
20 on the merits. But in the meantime should
21 you stay law enforcement when the APA is
22 doing what it's mandated? It's given them a
23 minimal penalty compared to what it could
24 give, a penalty of \$500 a day. You might
25 say, okay, that is too much. But the

1 legislature made the laws, we're demanding
2 the right to enforce and the state should not
3 be stayed from it's right to enforce the
4 laws, especially in a circumstance where they
5 have repeatedly been given opportunities to
6 comply and they have ignored the Agency's
7 permitting process and desist and doesn't
8 even acknowledge jurisdiction when the
9 Supreme Court says herein the APA has
10 jurisdiction. Given all those things I think
11 the likelihood, and they do not have a
12 likelihood of success, personally I think, on
13 any of these claims but the county, this
14 Court has only looked at a few, but in the
15 harm I think when you create your own harm I
16 think you are not entitled to a stay and I
17 have some citations for that in my papers.

18 Finally there was some discussion of the
19 equities and whether they weigh in favor or
20 not. You know, you could argue that there
21 is, you know, perhaps you might say, economic
22 harm versus environmental preservation or
23 harm or what impact does it have on the
24 Agency. The question is putting in these
25 homes with septic systems within a certain

1 distance to river which is protected, does
2 this create potential environmental harm?
3 And the Agency is being reasonable, we want
4 to know the particulars. We want you to
5 certify that the Department of Health
6 standards have been met. These are
7 reasonable requirements. All of these things
8 could be submitted and not harm these farm
9 owners.

10 I think for them to say that the state has
11 no interest here is disingenuous. We have an
12 interest of maintaining the integrity, the
13 scenic park, that the septic doesn't leak,
14 that it's going to sustain three homes. I
15 don't even know all the issues involving
16 septic so there's some harm to the state and
17 it's also a harm that someone or an entity
18 can go an entire year or more and violate
19 state law and not be held accountable. I
20 think there's a harm to the enforcement
21 process and sort of respect and deference to
22 the legislative finding that the Adirondack
23 Park is worthy of preserving, and these, the
24 Rivers Act and Adirondack Park Agency Act are
25 designed to protect these areas. And the

1 area where they built the homes is
2 specifically designated resource management.

3 In the end, you know, at the end of the
4 day it isn't about the Agency telling them to
5 take the homes down, some significant harm,
6 they are saying submit a permit on Monday.
7 They did this once. They submitted a permit
8 back in March of 07. They didn't wait, they
9 put the septic in and didn't wait.

10 THE COURT: What's the status of that
11 permit application?

12 MS. SIMON: Nothing. They haven't met
13 requirements.

14 THE COURT: It's not complete?

15 MS. SIMON: Correct.

16 THE COURT: Why do they have to file a new
17 one? Can't they use that one and just
18 provide --

19 MS. SIMON: Now? The Agency made a
20 determination. I can't speak to that, we
21 have to go with the Agency's determination.
22 If the Court finds that it's not rationally
23 based or some other problem at the end of the
24 Article 78, so be it. But as it stands here
25 today they need to submit something on Monday

1 to be in compliance. I don't think that is
2 such a great harm filling out a piece of
3 paper, swallowing your pride, that the Court
4 of the state of New York, at least this Court
5 in this jurisdiction has said that the APA
6 does have jurisdiction. There is no conflict
7 with Agricultural and Market Law. The other
8 issues will be dealt with in due course and I
9 do not think they met any of the three
10 prongs, but they have to meet all three and I
11 ask the Court to reject the stay and we go
12 forward and we each have our opportunity to
13 make our argument.

14 MR. PRIVITERA: Thank you, your Honor.
15 Yes, your Honor, I have three or four points
16 here. First this septic system is a major,
17 major red herring and a gross
18 misrepresentation of the record. I'm sorry
19 to have to get into the merits. These houses
20 are 700 to 800 feet from the river. The
21 septic systems were designed and built by a
22 PE named Mr. Buckley who stamped the drawings
23 and the town of Essex building inspector
24 inspected the septic system, signed off on it
25 and said that they were in compliance with

1 state law and those documents are in the
2 record. Your Honor, would you like to see
3 them?

4 THE COURT: I don't think it's appropriate
5 at this point. I don't think it's necessary.

6 MR. PRIVITERA: But you understand our
7 view, it's a misrepresentation of the facts.
8 They are fully protective of the human health
9 and environmental law, protective of the
10 river and they are in the record and the town
11 of Essex has determined so after looking at
12 Mr. Buckley's drawings.

13 Second, Judge Ryan's decision, your Honor,
14 there is a very important and very
15 substantial vein of federal and state
16 jurisprudence that's based on constitutional
17 principles of separating of power. Your
18 Honor, no jurist is supposed to render an
19 advisory opinion. The primary case on this
20 in the Court of Appeals where we see the
21 intelligent language of Judge Cardozo and
22 Judge Wachtler, *NYPIRG against Carry*, 42 NY2d
23 527, a 1977 decision.

24 Your Honor, in federal law and in state
25 law a court is supposed to exercise judicial

1 restraint and not express an advisory opinion
2 with respect to a matter that's not before
3 him or her. Judge Ryan's decision is only
4 binding to the extent it says this matter is
5 dismissed because no final determination is
6 made. It's not right, he even says so. He
7 says I'm not going to interfere with interim
8 agency matters. This is dismissed and
9 remanded. Everything that -- everything
10 else that Judge Ryan said is not binding on
11 you, the Agency or any other party because it
12 is advisory. It is not necessary to the
13 decision, and when a court determines that a
14 matter must be dismissed because there's no
15 case or constitutional language, the court is
16 not allowed to express an advisory opinion
17 and the court's constantly advised judicial
18 restraint.

19 With all due respect to Judge Ryan, I
20 respectfully suggest that his opinion should
21 have been restrained to the decision at hand
22 and his advisory discussion of the law is
23 something that you're going to want to
24 revisit and you're going to want to look at
25 this when you look at the merits. Moreover,

1 you will find when you look at the merits
2 that the Court of Appeals decision in *Hunt*
3 *Brothers* says that the APA functions as a
4 zoning board and planing board and it's very
5 possible they will determine in this case if
6 it gets there or the Third Department or you
7 will determine that based on the *Hunt*
8 *Brothers* teachings that Judge Ryan is wrong
9 on the 305 issue that he advised upon.

10 Your Honor, let's look at what happens.
11 Again, no harm has been identified here at
12 this stage because if we lose the APA has
13 vindicated it's rights. We will be ordered
14 to submit to jurisdiction and we will be
15 ordered to pay the penalty. Every decision
16 that I have been able to find with respect to
17 individual decision making by an agency in
18 matters such as this does not have these
19 control dates in. A typical decision would
20 have just said we lost.

21 THE COURT: Let me ask you whether or not
22 these dates before, April 14 and 28, are put
23 in the so they would be expeditious in the
24 handling of this application so that the APA
25 could presumptively assume it's proceeding in

1 good faith act upon that application? I
2 would assume very closely around the 28th of
3 April, isn't that the purpose of those dates?

4 MR. PRIVITERA: I don't know.

5 MS. SIMON: Yes, I can tell you.

6 MR. PRIVITERA: I thought I was speaking.

7 THE COURT: I'll control my courtroom,
8 thank you. But I believe that's how I read
9 the decision, it was -- those dates were put
10 in for those purposes.

11 MR. PRIVITERA: And did they think about
12 the impact of that on their review ability of
13 the decision because when I discussed, see in
14 my affidavit, I had to say that I asked for a
15 stay before I sought one and I asked the
16 Agency counsel if they had thought about what
17 happens if we sought redress in the matter,
18 and they said all they thought about was
19 pursuing compliance and they expected us to
20 comply with the Order. They hadn't thought
21 through what the impact would be if we
22 decided to seek judicial review of the
23 matter, and that is all before your Honor.

24 Assume that that was a good faith attempt
25 and that we are in -- if we -- let's assume,

1 your Honor, that we do not -- that you do not
2 stay the matter and we decide not to submit
3 the jurisdiction. That means they can
4 enforce it. How do they enforce it? They
5 come before you and say they didn't file the
6 applications, let's penalize them \$500 a day,
7 because they just said they could penalize us
8 \$500 a day, they enforce it, they don't want
9 your Honor to stay enforcement.

10 THE COURT: Can't they go after you for
11 that \$500 a day from the 25th of March until
12 today no matter what I do?

13 MR. PRIVITERA: No, your Honor, because I
14 don't think we disobey the Order until
15 Monday.

16 THE COURT: All right. Let's say Monday,
17 what happens if I don't grant the stay but
18 the case proceeds? Let's go back, what
19 happens if I grant the stay, the case
20 proceeds and you ultimately win, can't they
21 go back in time and get the \$500 a day?

22 MR. PRIVITERA: No, that is what your
23 Honor's stay means that the Order stayed
24 pending a final determination. You stay the
25 penalty while the trial is held.

1 THE COURT: What about -- what if I only
2 stayed the provision that said that you forgo
3 your rights to challenge jurisdiction?

4 MR. PRIVITERA: Your Honor, we're still
5 directed to apply for a permit for a
6 subdivision. When we -- our petition says we
7 have a constitutional right to not have to do
8 that and I have -- that is irreparable harm.
9 According to the *Cuomo* case we shouldn't have
10 to until your Honor makes a determination on
11 the merits and there's no harm in waiting for
12 due process to be reached.

13 THE COURT: Are the houses occupied now?

14 MR. PRIVITERA: No.

15 THE COURT: Anything else, Mr. Privitera?

16 MR. PRIVITERA: No.

17 THE COURT: Ms. Simon, last word.

18 MS. SIMON: There isn't going to be a
19 trial. This is an Article 78. What will be
20 decided is was the Agency determination,
21 rational, arbitrary. There's no trial.
22 We're going to look at the standard for
23 Article 78. I just wanted to clarify that
24 they chose not to comply. Harm is
25 self-created and I fail to see how submitting

1 an application to an agency for a permit is
2 harm enough to stop the statute of the state
3 of New York for enforcement of Adirondack
4 Park Agency Law.

5 And secondly, the other harm they are
6 alleging here if they submit a detailed
7 description of use of each dwelling and an
8 acceptable plan for septic and evaluation by
9 a New York State licensed professional
10 engineer as to whether they installed a
11 septic for three dwellings, how are they
12 harmed? They are telling us they have
13 already done it, submit the stuff, let's work
14 this out.

15 The harm, the final harm in this
16 determination is the \$50,000 penalty. Yes,
17 that's a lot of money. I have not heard them
18 name one case that a penalty constitutes
19 harm, a penalty that is statutorily
20 authorized. I have not heard one case cited
21 to that effect.

22 So on the very first issue, your Honor, to
23 stay the state of New York from any action
24 involving this matter I would argue, your
25 Honor, that it's not appropriate here.

1 There's not harm. The likelihood of success
2 is poor. Some of the areas of their argument
3 is already determined and I think the
4 equities balance in favor of the state, given
5 the tax especially since they have had more
6 than a year, the Agency has bent over
7 backwards to try to accommodate and they
8 violated a cease and desist.

9 Just for the record these are two-story,
10 single family dwellings, two-car garage,
11 within a quarter of a mile of a protected
12 river. We ask you not to order any stay,
13 your Honor.

14 THE COURT: Thank you. I'm going to
15 reserve decision. I'll decide something this
16 afternoon. I don't know if you want to stay
17 around, I have another case and I want to
18 look at a couple of cases, but I will issue
19 something today.

20 MS. SIMON: Since we're both likely to be
21 in Albany, will we get a fax or something?

22 THE COURT: Yes.

23 MR. PRIVITERA: Thank you, your Honor.

24 MS. SIMON: Thank you, your Honor.

25 THE COURT: Thank you very much.

C E R T I F I C A T E

I, Ellen D. Chase, court reporter of the Essex County Supreme Court, do hereby certify that the foregoing pages numbered 2 through 43, inclusive, comprise a full, true and correct transcript to the best of my ability of the proceedings held before me on April 11, 2008, as to which a transcript was duly ordered and transcribed by me.


Ellen D. Chase, Court Reporter