

STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

LEWIS FAMILY FARM, INC.,

Petitioner,

v.

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Respondent.

AFFIDAVIT OF
PAUL VAN COTT

INDEX No. 315-08

RJI No. 15-1-2008-0109

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

INDEX No. 332-08

RJI No. 15-1-2008-0117

STATE OF NEW YORK)
) ss:
COUNTY OF ESSEX)

PAUL VAN COTT, having been duly sworn, deposes and says:

1. I am an Associate Attorney for the Adirondack Park Agency (the "Agency" or "APA") and have served as the Agency's Enforcement Attorney since 2001. I supervise the Agency's enforcement program, including a Senior Attorney and six enforcement officers. In this role, I am responsible for

Affidavit of Paul Van Cott
dated June 13, 2008

administrative enforcement of the Agency's laws and regulations, including in the Town of Essex, Essex County.

2. I am familiar with the file in this matter and make this affidavit in support of the Agency's motion to dismiss in part and to answer in part, Lewis Family Farm's ("Lewis Farm") amended petition. The facts stated herein are upon information and belief based upon the affidavits submitted by Agency staff in the administrative enforcement proceeding, including my own affirmation, and based on the Agency file in this matter.

3. The Lewis Farm owns approximately 1,111 acres located in the Adirondack Park, in the Town of Essex, Essex County, New York. Record Item 5 (July 20, 2007 Miller Affidavit, p. 2 ¶¶ 4, 6).

4. In June of 2007, Lewis Farm placed three modular single-family dwellings on the subject property in a Resource Management Area of the Adirondack Park, on lands within the designated Bouquet River Recreational River area, without an Agency permit. Id., (p. 2, ¶¶ 4, 7 and p. 3, ¶¶ 7, 10 and p. 5, ¶ 17). See also Exhibit A (Timeline).

5. The Adirondack Park Agency Act ("APA Act") requires an Agency permit for subdivisions and placement of single-family dwellings in Resource Management areas within the

Adirondack Park. See Executive Law §§ 809(2)(a), 810(1)(e)(3) and 810(2)(d)(1).

6. The Wild, Scenic, and Recreational River System Act (the "Rivers Act"), Environmental Conservation Law ("ECL") § 15-2701, which is implemented within the Adirondack Park pursuant to the Agency's regulations set forth at 9 NYCRR Part 577, requires an Agency permit for subdivisions and placement of single-family dwellings on Resource Management lands in Recreational River Areas.

STATUTORY OVERVIEW

7. The Official Adirondack Park Land Use and Development Plan Map classifies private lands in the Adirondack Park under the following land use categories: "Hamlet," "Moderate Intensity Use," "Low Intensity Use," "Rural Use," "Resource Management," and "Industrial Use." See Executive Law § 805.

The Adirondack Park Agency Act

8. Executive Law § 809(2)(a) requires individuals and corporations to obtain a permit from the Agency prior to the undertaking of any Class A regional project or the undertaking of any Class B regional project in any town not governed by an Agency-approved local land use program in the Adirondack Park.

The Town of Essex does not have an Agency-approved local land use program.

9. Pursuant to 9 NYCRR § 570.3(ai)(1), "undertake" is defined as the:

commencement of a material disturbance of land, including ... clearing of building sites, excavation (including excavation for the installation of foundations, footings and septic systems), ... or any other material disturbance of land preparatory or incidental to a proposed land use or development or subdivision.

Subdivision Jurisdiction

10. Executive Law § 810(1)(e) lists the Class A regional projects in a Resource Management land use area that require an Agency permit pursuant to Executive Law § 809(2)(a). These projects include, inter alia, any subdivision of land (and all land uses and development related thereto) involving two or more lots, parcels or sites. Executive Law § 810(1)(e)(3).

11. Pursuant to Executive Law § 802(63), a "subdivision" is:

any division of land into two or more lots, parcels, or sites ... for the purpose of ... any form of separate ownership or occupancy (including any grading, road construction, installation of utilities or other improvements or any other land use and development preparatory or incidental to any such division) . . .

(Emphasis added).

12. 9 NYCRR § 570.3(a)(3) defines a subdivision into sites as occurring "where one or more new dwelling(s) or other principal building(s) is to be constructed on a parcel already containing at least one existing dwelling or other principal building, and regardless of whether the existing building is proposed to be removed after completion of the new building(s)."

Single-Family Dwelling Jurisdiction

13. Executive Law § 810(2)(d) lists the Class B regional projects in a Resource Management land use area that are subject to Agency review in the Town of Essex pursuant to Executive Law § 809(2)(a). These projects include, inter alia, the construction of any new single-family dwelling. Executive Law § 810(2)(d)(1).

14. Executive Law § 802(58) defines a "single-family dwelling" as "any detached building containing one dwelling unit, not including a mobile home."

Distinguishing Single-Family Dwelling Jurisdiction From Agricultural Use Structure Jurisdiction

15. Executive Law § 802(8) defines an "agricultural use structure" as "any barn, stable, shed, silo, garage, fruit and vegetable stand or other building or structure directly and customarily associated with agricultural use."

16. Executive Law § 802(50)(g) indicates that agricultural use structures and single-family dwellings, including dwellings used for farmworker housing, are separate structures for jurisdictional purposes by providing under the definition of "principal building" that:

all agricultural use structures and single family dwellings or mobile homes occupied by a farmer of land in agricultural use, his employees engaged in such use and members of their respective immediate families, will together constitute and count as a single principal building.

(Emphasis added).

17. Executive Law § 802(50)(g) also indicates that, although they require a permit, single-family dwellings constructed for farmworker housing are more easily approvable by the Agency than dwellings used for non-agricultural purposes, as the approval requirements of Executive Law §§ 805(3) and 809(10) are lessened when dwellings are to be used for farmworker housing.

18. Unlike single-family dwellings, including dwellings used for farmworker housing, the Executive Law exempts agricultural use structures from Agency jurisdiction by omitting such structures from the list of jurisdictional projects. Executive Law § 810.

19. In addition, Executive Law § 810(1) specifically exempts land use and development within various critical environmental areas from Agency jurisdiction when the land use and development involves agricultural uses.

20. Executive Law § 810(1) also exempts agricultural use structures in excess of forty feet in height from Agency jurisdiction, where all other structures except residential radio and television antennas require permits from the Agency.

21. Executive Law § 805(3)(g)(1) describes the character of Resource Management areas as follows:

"Resource Management areas, delineated in green on the plan map, are those lands where the need to protect, manage and enhance forest, agricultural, recreational and open space resources is of paramount importance because of overriding natural resource and public considerations. Open space uses, including forest management, agriculture and recreational activities, are found throughout these areas."

22. Executive Law § 805(3)(g)(2) sets forth the purposes, policies and objectives for land use on Resource Management lands in the Adirondack Park:

"The basic purposes and objectives of resource management area are to protect the delicate physical and biological resources, encourage proper and economic management of forest, agricultural and recreational resources and preserve the open spaces that are essential and basic to the unique character of the park...." [Emphasis supplied.]

23. In furtherance of the character, purposes and objectives established for Resource Management lands, Executive Law § 805(3)(g)(4)(1) classifies agricultural uses as a primary compatible use on Resource Management lands.

The Civil Penalty Provision

24. Executive Law § 813 states in part:

1. Any person who violates any provision of this article or any rule or regulation promulgated by the agency, or the terms or conditions of any order or permit issued by the agency pursuant to this article shall be liable to a civil penalty of not more than five hundred dollars for each day or part thereof during which such violation continues. The civil penalties provided by this subdivision shall be recoverable in an action instituted in the name of the agency by the attorney general on his own initiative or at the request of the agency.

2. Alternatively or in addition to an action to recover the civil penalties provided by subdivision one of this section, the attorney general may institute in the name of the agency any appropriate action or proceeding to prevent, restrain, enjoin, correct or abate any violation of, or to enforce any provision of this article or any rule or regulation promulgated by the agency, or the terms of conditions of any order or permit issued by the agency pursuant to this article.

(Emphasis added.)

The Adirondack Park Local Government Review Board

25. Pursuant to Executive Law § 803-a, the Adirondack Park Local Government Review Board was created for the "purpose of advising and assisting the Adirondack park agency in carrying out its functions, powers and duties..."

The Rivers Act and 9 NYCRR § 577

26. The Rivers Act was enacted pursuant to a legislative finding that "many rivers of the state, with their immediate environs, possess outstanding natural, scenic, historic, ecological and recreational values." ECL § 15-2701(1).

27. The Rivers Act was enacted to implement a public policy "that certain selected rivers of the state which, with their immediate environs, possess the aforementioned characteristics, shall be preserved in free-flowing condition and that they and their immediate environs shall be protected for the benefit and enjoyment of present and future generations." ECL § 15-2701(3).

28. Section 15-2705 of the Rivers Act states that "the functions, powers and duties encompassed by this section shall be vested in the Adirondack park agency as to any privately owned part of a river area within the Adirondack park as defined by law which may become part of this system." Section 15-2709(1) states that, within the Adirondack Park, the

Adirondack Park Agency "shall 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."

29. Pursuant to 9 NYCRR § 577.4(a), "no person shall undertake a rivers project without first obtaining an agency permit."

30. In recreational river areas, rivers projects include, inter alia, all subdivisions of land in Resource Management land use areas. 9 NYCRR § 577.5(c)(1). The Bouquet River is a New York State designated recreational river. See 9 NYCRR § 577, Appendix Q-6, 5a.

31. Rivers projects in recreational river areas do not include agricultural uses or agricultural use structures and no Agency permit is required for such uses or structures. 9 NYCRR § 577.4(b)(3)(ii).

32. In recreational river areas, rivers projects include, inter alia, all land uses and developments classified compatible uses by the Adirondack Park land use and development plan in Resource Management land use areas. 9 NYCRR § 577.5(c)(1).

33. Pursuant to Section 805(3)(g)(4) of the Adirondack Park Agency Act, single-family dwellings constitute compatible uses in Resource Management land use areas.

34. Section 15-2723 of the Rivers Act states in part:

Any person who violates any provision of this title or any regulation or order issued pursuant to this act by the commissioner or the agency may be compelled to comply with or obey the same by injunction, mandamus or other appropriate remedy. In addition, any such person shall pay a civil penalty of not less than one hundred dollars or more than one thousand dollars for each day of such violation.

(Emphasis added.)

FACTUAL STATEMENT AND BACKGROUND

35. In December 2005, at the invitation of S.B. "Sandy" Lewis (a shareholder of Lewis Family Farm), senior Agency staff visited the subject property and informed Mr. Lewis that an Agency permit was required prior to construction of single-family dwellings on the subject property. Record Item 5 (Banta Aff., p. 2, ¶ 4-6).

36. On or about March 14, 2007, Barbara Lewis and S.B. Lewis submitted an application to the Agency for a permit for the construction of three single-family dwellings on the subject property. Record Item 5 (Quinn Aff., ¶ 4, Exhibit A).

37. On or about March 15, 2007, the Agency issued a Notice of Incomplete Permit Application and Receipt of Application in response to the application. Id., ¶ 5, Exhibit B.

38. On or about March 19, 2007, Lewis Farm notified the Agency that it had already constructed the foundations and septic systems for the dwellings. Record Item 5 (Quinn Aff., ¶¶ 6-7). This was the Agency's first notice of potential violations on Lewis Farm's property. Based on this information, on March 20, 2007, Agency staff ceased review of the Farm's permit application, as required by 9 NYCRR § 581-2.7, and opened an enforcement file to investigate the potential violations by Lewis Farm involving its single-family dwellings. On March 23, 2007, Agency staff sent Lewis Farm a contact letter, advising them of the investigation into the potential violations and seeking cooperation in that investigation.

39. Upon further investigation, including a March 28, 2007 site visit and discussions with Lewis Farm, the Agency concluded that violations had occurred and sought to resolve the matter through the negotiation of a settlement agreement. Record Item 5 (Reynolds Aff. ¶¶ 23-28, Quinn Aff. ¶ 8).

Agency staff made its initial settlement offer on May 14, 2007. Record Item 5 (Reynolds Affidavit).

40. Lewis Farm objected to paying a penalty or undertaking an environmental benefit project and, as a consequence, refused to enter into a settlement agreement. Despite ongoing settlement negotiations, on June 27, 2007, Lewis Farm installed the three single-family dwellings on the subject property in violation of the Executive Law and the Rivers Act. Record Item 5 (Reynolds Aff., ¶¶ 29-38; Banta Aff., ¶ 7; Miller Aff., ¶¶ 17, 20-21).

41. Upon learning the dwellings were being installed, on June 27, 2007, Agency staff served a Cease and Desist Order on Lewis Farm. See Record Item 5 (Miller Aff., ¶ 18-19, Exhibit G). The Cease and Desist Order gave Lewis Farm notice of the alleged violations, and ordered Lewis Farm to stop construction until the violations were resolved.

42. Upon information and belief, two dwellings were installed prior to the Cease and Desist Order and the third home was installed after the Order was served. Record Item 5 (Miller Aff. ¶¶ 17-20).

43. Thereafter, Lewis Farm commenced a declaratory judgment action by order to show cause in Supreme Court, Essex County, seeking a restraining order against the Agency's

enforcement action. Record Item 5 (Affirmation of Paul Van Cott, dated December 13, 2007 ["Van Cott Aff."]), ¶ 3.

44. The Agency, represented by the Attorney General's office, moved to dismiss the action. During the pendency of the Lewis Farm's declaratory judgment action, Agency staff voluntarily suspended its administrative enforcement proceeding against Lewis Farm in deference to the Court. See Exhibit A (Timeline).

45. The Court granted the Agency's motion in a Decision and Order issued August 16, 2007. Record Item 5 (Van Cott Aff., ¶ 4; Exhibit B). In that Decision and Order, the Court confirmed the Agency's jurisdiction over Lewis Farm's single-family dwellings. Record Item 5 (Van Cott Aff.).

46. The Decision and Order was served on Lewis Farm on or about August 31, 2007. Record Item 5 (Van Cott Aff., ¶ 4).

47. On August 31, 2007, Agency staff observed Lewis Farm's property from an off-site location and discovered that Lewis Farm had resumed construction work on the new single-family dwellings. Record Item 6 (Affidavit of Douglas Miller ["Miller Aff."], dated December 12, 2007, ¶ 3; Exhibit A).

48. By telefaxed letter of that same date, Agency staff advised Lewis Farm's lawyers of the ongoing construction and that the June 27, 2007 Cease and Desist Order remained in

effect. Record Item 5 (Van Cott Aff., ¶ 5; Exhibit C).

Counsel for Lewis Farm did not respond to staff's notice.

49. On September 5, 2007, a follow-up inspection by Agency staff revealed that Lewis Farm was continuing construction work on the dwellings. Record Item 6 (Douglas Miller Aff., ¶ 4; Exhibit B).

50. Agency staff served Lewis Farm by a Notice of Apparent Violation ("NAV") on or about September 5, 2007. The NAV provided Lewis Farm with notice of the alleged violations and of staff's request for injunctive relief and penalties.

The NAV included the following notice to Lewis Farm:

"PLEASE ALSO TAKE NOTICE THAT prior to consideration of this matter by the Enforcement Committee, a record consisting of relevant documents, testimony, evidence and any legal briefs must be developed for the Enforcement Committee to consider. If there are no facts in dispute, that record may be developed by stipulation or at the request of either party for a determination pursuant to 9 NYCRR § 581-2.6(d). If there are facts in dispute, a hearing will be held to develop the record for consideration by the Enforcement Committee."

51. In September and October, 2007, Agency staff endeavored to restart settlement negotiations to resolve Lewis Farm's violation. By letter of October 1, 2007, I advised one of Lewis Farm's attorneys, Joseph Brennan, Esq. of Brennan &

White, LLP, of the substance of Agency staff's settlement offer. Thereafter, I spoke with Mr. Brennan and he advised me that David Cook, Esq. of Nixon, Peabody had withdrawn as counsel to Lewis Farm and that Lewis Farm was in the process of securing new counsel.

52. Lewis Farm's current attorney, John Privitera, Esq., answered the NAV for Lewis Farm on or about October 4, 2007.

53. By letter of October 31, 2007, I wrote to Mr. Privitera, expressing the Agency's continuing interest in trying to resolve the matter by settlement, and asking whether his client was willing to discuss this matter. Mr. Privitera never responded to my letter.

54. On December 7, 2007, Agency staff inspected Lewis Farm's property from off-premises and found that, since September 5, 2007, Lewis Farm had undertaken additional construction work on the new single-family dwellings. Record Item 6 (Douglas Miller Aff., ¶ 5; Exhibit C). On that date the dwellings appeared to be fully installed, with doors and windows, finished roofs and siding, and curtains in the windows of one of the dwellings. Id.

55. On December 17, 2007, Agency staff served a Notice of Request for Enforcement Committee Determination on Lewis Farm's attorney, arguing that a hearing was unnecessary

because there were no material facts in dispute. Record Item 5 (Notice of Request for Enforcement Committee Determination). Lewis Farm was given 30 days to respond to the Request for an Enforcement Committee Determination, and responded on January 17, 2008. Record Item 9 (The Right to Farm in the Champlain Valley).

56. Thereafter, the administrative enforcement matter was originally scheduled to be considered by the Enforcement Committee at its next regular, monthly meeting on February 7, 2008, but was adjourned to the Committee's March 13, 2008 meeting at the request of Lewis Farm's attorney, John Privitera. See Exhibit C. The Enforcement Committee is comprised of Agency members and is authorized to make enforcement determinations on behalf of the Agency pursuant to 9 NYCRR §§ 581-2.1 and 581-2.6.

57. On March 13, 2008, Agency staff and Lewis Farm's counsel each had an opportunity to present oral argument on the record before the Enforcement Committee, after which the Committee members asked questions of both parties. Lewis Farm's counsel spoke for approximately 30 minutes. Agency staff and Lewis Farm's counsel each made powerpoint presentations on the record. Record Item 17. A stenographic transcript of the proceeding was made. Record Item 2.

AGENCY DETERMINATION

58. On March 25, 2008, the Agency Enforcement Committee issued its Determination in the administrative enforcement proceeding, finding Lewis Farm in violation of the Adirondack Park Agency Act and the Wild, Scenic and Recreational Rivers Act, requiring Lewis Farm to obtain after-the-fact permits for its single-family dwellings and subdivisions, and imposing a civil penalty in the amount of \$50,000 for the violations.

59. In its March 25, 2008 Determination, the Enforcement Committee took notice of the fact that Lewis Farm had a prior violation involving Agency requirements. Record Item 1 (Determination, p. 5, ¶ 16). That prior violation involved wetlands on the Lewis Farm property and was resolved by a so-ordered stipulation and payment of a sum of \$50,000 for an environmental benefit project, and was signed by Essex County Supreme Court Justice Dawson. See Simon Aff., Exhibit N.

60. The March 25, 2008 Determination also found that all three single-family dwellings were constructed in violation of the Adirondack Park Agency Act and the Rivers Act, even though Agency staff had thought only two of the three dwellings to be violations. Record Item 1 (Determination, p. 11, ¶¶ 46, 48). The Committee found that none of the three dwellings met the regulatory requirements for a lawful replacement of a pre-

existing single-family dwelling that would not require a permit. *Id.* The Enforcement Committee did not include the third single-family dwelling in its penalty determination, but did require Lewis Farm to obtain a permit for all three single-family dwellings. *Id.*

61. Agency Associate Counsel Barbara Rottier transmitted the March 25, 2008 Determination to Lewis Farm's attorney by telefax on March 26, 2008. The Determination was also served on Lewis Farm by certified mail, return receipt requested.

62. On that date, Lewis Farm's attorney called Ms. Rottier, requesting that the Agency "stay" its Determination pending disposition of litigation that he stated his client intended to bring.

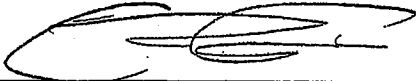
63. Thereafter, in March, 2008, Ms. Rottier advised Lewis Farm's attorney that the Agency would not agree to "stay" its determination.

64. On April 18, 2008, the Chairman of the Agency's Board and the Chairman of the Agency's Enforcement Committee, acting on behalf of the Agency pursuant to the authority of the "Resolution of the Adirondack Park Agency on Delegating Certain Powers and Responsibilities" (see Exhibit B, herein March 9, 2007), transmitted to counsel for Lewis Farm a

Affidavit of Paul Van Cott
dated June 13, 2008

revised Enforcement Committee Determination striking Paragraph
4, Page 12 of the original Determination.

DATED: Ray Brook, New York
June 13, 2008



Paul Van Cott, Esq.

Sworn to before me this
13th day of June, 2008

Mary B. Palmer
Notary Public

MARY B. PALMER
Notary Public, State of New York
01PA6128439
Commission Expires June 13, 2009

Affidavit of Paul Van Cott
dated June 13, 2008

VAN COTT AFFIDAVIT
LIST OF EXHIBITS

- Exhibit A Timeline of Agency Enforcement Actions
- Exhibit B Resolution of the Adirondack Park Agency on
Delegating Certain Powers and Responsibilities
- Exhibit C Letter to John Privitera from Barbara Rottier
dated March 4, 2008