STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ADIRONDACK PARK AGENCY,

Respondent.

ACTION NO. 1

Index No. 315-08

Hon. Richard B. Meyer

STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

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

Defendants.

ACTION NO. 2

Index No.: 332-08

Hon. Richard B. Meyer

MEMORANDUM OF LAW IN SUPPORT OF JUDGMENT ON THE LEWIS FAMILY FARM'S ARTICLE 78 PETITION AND IN SUPPORT OF THE MOTION TO DISMISS THE AGENCY'S DUPLICATIVE ENFORCEMENT ACTION

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PRELIMINARY STATEMENT

This is an action in which the Adirondack Park Agency (hereafter "Agency") is improperly seeking to secure jurisdiction over farm worker housing constructed on farmland by the Lewis Family Farm, Inc. (hereafter "Lewis Family Farm").

For the reasons set forth herein, the Lewis Family Farm respectfully requests an order annulling and vacating the Agency's March 25, 2008 enforcement determination in this Article 78 proceeding (Index No. 315-08). Further, defendants Lewis Family Farm, Salim B. "Sandy" Lewis and Barbara A. Lewis request an order dismissing the Agency's duplicative enforcement action (Index. No. 332-08).

STATEMENT OF FACTS

The Lewis Family Farm, which is comprised of approximately 1,200 acres, is one of New York State's largest USDA Certified organic farms and a national leader in organic farming. (Affidavit of Barbara Lewis, sworn to January 17, 2008, ¶¶ 2-3; Affidavit of Klaas Martens, sworn to January 17, 2008, ¶ 4) (R. ___).[1] The Lewis Family Farm produces certified organic beef animals and raises cows, bulls, heifers and steers. Additionally, the farm produces a range of organic crops, which have included hard white winter wheat, soy beans, alfalfa, mixed cool-season grasses, corn, spelt and oats. (R. ___).

The Lewis Family Farm is located within the Essex County Agricultural District No. 4, a county-adopted, state-certified agricultural district. (Lewis Aff., ¶ 3; Reply Affidavit of John J. Privitera, sworn to February 26, 2008, Ex. A) (R. ___). Over the years, the Lewis Family Farm has cleaned up its land and demolished at least fifteen (15) residences that were beyond repair. (Lewis Aff., ¶¶ 5-6; Martens Aff., ¶ 6) (R. ___). The Lewis Family Farm also constructed at least

[1] "(R. ___)" references a citation to a document contained in the administrative record, which was not yet submitted by the Agency pursuant to CPLR § 7804(e) at the time this Memorandum of Law was served.

fifteen (15) new farm buildings and other agricultural use structures, including bridges and a 60-foot grain bin, in support of the farm, all without Agency permits. (Lewis Aff., ¶ 7 and Ex. H) (R. ___).

As a successful large-scale organic farm, the Lewis Family Farm has a full-time manager, three full-time employees, and requires several interns and other farm workers working on the farm. (Lewis Aff., ¶¶ 8-10) (R. ___). The Lewis Family Farm's employees require on-farm housing in order to monitor the barns, the barn yard and operate the farm. (Martens Aff., ¶ 12) (R. ___). Suitable off-farm housing is not available for farm employees within the area of the Lewis Family Farm. Thus, the Lewis Family Farm decided to provide quality housing for farm workers in an effort to recruit employees that will bring their families to the farm and become vested in the farm and the community. (R. ___).

In November 2006, the Lewis Family Farm commenced an employee housing project involving four new houses on the farm, three of which are built in a cluster next to the barns on the footprint of buildings previously erected at the old Walker Farm. (See Lewis Aff., ¶¶ 12, 30) (R. ___). The Lewis Family Farm obtained the necessary permits from the Town of Essex for the four farm employee houses, including the three-house cluster near the barns that is the subject of this proceeding. (See Lewis Aff., ¶ 15, Ex. C) (R. ___). The Town granted local permits, determining that the buildings met all state building code requirements, had complied with all Town regulations, and that the water and septic systems were protective of human health and the environment and complied with state and local law.

The Lewis Family Farm's employee housing cluster is ideally located on the farm to provide easy and energy efficient access to and surveillance of the adjacent barns. The three farm buildings in the Lewis Family Farm employee housing cluster, which were specifically

designed as a farmer community, are built together to share a common well, driveway, septic system and leach field located around a common courtyard. (Lewis Aff., ¶ 14) (R. ___). The Lewis Family Farm did not subdivide its land to build these farm buildings. No new lots were created and the entire farm is owned and occupied by the Lewis Family Farm. (Lewis Aff., ¶ 14) (R. ___). These farm worker buildings are customary, appropriate and necessary to the success of the Lewis Family Farm's operation. (Martens Aff., ¶¶ 14-16) (R. ___).

Construction proceeded until mid-March 2007, when Barbara Lewis, an officer of the Lewis Family Farm, contacted the Agency staff after hearing rumors of complaints. The Lewis Family Farm voluntarily halted construction of the employee houses in March 2007 after speaking with staff in order to clear up any misunderstandings about the agricultural nature of the project. (Lewis Aff., ¶ 20) (R. ___). In May 2007, staff proposed a "settlement agreement" demanding that the Lewis Family Farm treat the farm worker houses as a three-home subdivision rather than as farm buildings, waive the right to challenge Agency jurisdiction to regulate farming, allow Agency review of all future farm buildings, and pay a substantial $10,000 fine by June 15, 2007. (Lewis Aff., ¶ 22) (R. ___).

PROCEDURAL HISTORY

On June 26, 2007, the Lewis Family Farm commenced an action in Essex County Supreme Court (Index No. 0498-07) seeking a declaratory judgment that the Agency could not prohibit the completion of the farm employee housing project because it is beyond the Agency's authority to regulate farms. (See Lewis Aff., ¶ 27) (R. ___). The very next day, the Executive Director of the Agency issued a purported cease and desist letter prohibiting the completion of the farm employee houses. (See Lewis Aff., 28) (R. ___). The Agency never attempted to enforce the cease and desist letter.

In July 2007, the Lewis Family Farm sought a preliminary injunction, which the Agency opposed. The Agency subsequently moved to dismiss the action. On August 16, 2007, Honorable Kevin K. Ryan, Acting J.S.C., issued a decision and order that denied the Lewis Family Farm's motion for injunctive relief, converted the action into an Article 78 proceeding and summarily dismissed it as premature, with leave to commence a new Article 78 proceeding, since the Agency had not yet issued a final enforcement determination. (See Ex. B to Affirmation of Paul Van Cott, dated December 13, 2007) (R. ___).

On September 5, 2007, several weeks following Justice Ryan's dismissal of the premature action (and nearly one year since the construction project began), the Agency finally commenced its internal administrative enforcement proceeding by serving a Notice of Apparent Violation, which alleged that the Lewis Family Farm's employee housing cluster was illegal unless it received a permit from the Agency as a three-home subdivision. (R. ___).

The Agency's enforcement proceeding culminated in a final enforcement determination of the Agency on March 25, 2008 ("Determination"), whereby the Agency's Enforcement Committee determined that the Lewis Family Farm had violated the Adirondack Park Agency Act (the "Act") and the Wild, Scenic and Recreational River System Act (the "Rivers Act") by failing to obtain a three-home subdivision permit for the farm worker housing cluster.

On April 8, 2008, the Lewis Family Farm commenced the instant Article 78 proceeding against the Agency seeking to vacate and annul the Determination (Index No. 315-08). On April 11, 2008, the Agency commenced a duplicative action seeking to enforce the Determination (Index No. 332-08). After motion practice concerning procedural issues, the Article 78 proceeding and duplicative enforcement action were consolidated by order of this Court on April 25, 2008.

ARGUMENT

POINT I

THE AGENCY'S DETERMINATION IS ULTRA VIRES AND EXCEEDS THE AGENCY'S JURISDICTION

It is well-established that "administrative agencies, as creatures of statute, are without power to exercise any jurisdiction beyond that conferred by statute." Flynn v. State Ethics Comm'n, 208 A.D.2d 91, 93 (3d Dep't 1995); see also Foy v. Schechter, 1 N.Y.2d 604 (1956) (stating that an agency must have jurisdiction in order for its determinations to be valid, and absent such jurisdiction, agency acts are void). To this end, "the APA cannot operate outside its lawfully designated sphere, with the propriety of its actions often depending upon the nature of the subject matter and the breadth of the legislatively conferred authority." Gerdts v. State, 210 A.D.2d 645, 648-49 (3d Dep't 1994).

A. The Agency Has No Authority To Regulate Agriculture Under The Act

The Legislature has specifically excluded farm buildings from regulation by the Agency. Thus, the Agency is without power to regulate farming or exercise jurisdiction over farm development, including the farm worker buildings on the Lewis Family Farm. Accordingly, the Agency's Determination is based on a lack of jurisdiction and must be annulled in this Article 78 Proceeding.

1. Legislative History

In 1971, the Legislature determined that the three million acres of private land inside the Adirondack Park needed a regional land use law. To ensure optimum overall conservation, preservation, development and use of the Park's resources, State lawmakers determined to establish the Agency and the Act under Article 27 of the Executive Law. In so doing, the Legislature specifically determined to "exempt bona fide forest and agricultural management

practices" from regulation by the Agency. (McKinney's 1971 Session Laws of New York, Legislative Memoranda, Adirondack Park Agency-Creation, ch. 706 pg. 2471). At the time of passage, the State Executive Department recognized that the land use plan at the heart of the Act "would be implemented primarily by the park's local government...the Agency would have concurrent jurisdiction only over large scale projects and those proposed to be located in especially critical environmental areas of the park." Id. at 2202.

2. The Intensity Controls of the Act Exempt Farm Buildings

Ultimately, State lawmakers developed a comprehensive approach under the Act through the Adirondack Park Land Use and Development Plan (the "Land Use Plan"). The Park's Land Use Plan is carefully designed to nourish and facilitate existing economic activities in the Adirondack Park while providing a two-fold approach to controlling land use and development by setting forth compatible uses and overall intensity guidelines. N.Y. Exec. Law § 805. Specifically, the Land Use Plan provides "Primary Uses" for each area of the Park, which are those uses generally considered compatible with the character, purposes, policies and objectives of such land use area. These Primary Uses are fully permitted "so long as they are in keeping with the overall intensity guidelines for such area." N.Y. Exec. Law § 805(3)(a). Further, all private lands in the Park are classified into six categories, identified by color on the Land Use Plan map: hamlet (brown), moderate intensity use (red), low intensity use (orange), rural use (yellow), resource management (green) and industrial use (purple).

The classification of particular areas depended upon such factors as existing land use and population growth patterns, soils, geological features, biological considerations, the need to preserve the open space character of the Park and the protection of certain fragile ecosystems.[2]

[2] See generally Citizens Guide to the Adirondack Park Agency Land Use Regulations, Adirondack Park Agency, pp. 2-6 (2006).

The two-fold purpose of the land classification system established by the law is to (i) channel growth into areas where it can best be supported, and (ii) limit incompatible uses in some land use areas. Thus, "primary compatible uses" are listed for each of the six land use areas under the Plan and overall intensity guidelines are in place for each of the land uses. See generally N.Y. Exec. Law § 805.

The intensity guidelines facilitate compatible uses in appropriate land use categories while significantly limiting the number of "Principal Buildings" in other areas. Compatible uses, such as homes in the hamlets, are not limited in the intensity guidelines, nor are compatible industrial uses in the industrial zones. The overall intensity guidelines are fairly summarized as follows:

Overall Intensity Guidelines

Land Use Area	Color on Map	Bldgs. (per sq. mile)	Size (acres)
Hamlet	brown	no limit	none
Moderate Intensity Use	red	500	1.3
Low Intensity Use	orange	200	3.2
Rural Use	yellow	75	8.5
Resource Management	green	15	42.7
Industrial Use	purple	no limit	none

In accordance with the legislative purpose of exempting farming practices from regulation by the Agency, "agricultural uses" and "agricultural use structures" are allowed without a permit throughout the Park, except in the hamlets. See N.Y. Exec. Law § 805(3).[3]

In fulfilling its commitment to exempt farming practices from Agency regulation, the Legislature took several steps in the Act to prevent the exercise of State executive power over farming. The Legislature acknowledged that "open space uses, including forest management,

[3] N.Y. Exec. Law §§ 805(3)(d)(4)(4) and (5) [farming compatible in moderate intensity use areas]; Executive Law §§ 805(3)(e)(4)(4) and (5) [farming compatible in low intensity use areas]; Executive Law §§ 805(3)(f)(4) and (5) [farming compatible in rural use areas]; Executive Law §§ 805(3)(g)(4)(1) and (2) [farming compatible in resource management areas]; Executive Law §§ 805(3)(h)(3)(9) and (10) [farming compatible in industrial use areas].

agriculture and recreational activities, are found throughout" the land use designation of "resource management areas" where "Agricultural Uses" and "Agricultural Use Structures" are classified as the highest and best use of the land. The Legislature recognized that farms achieve two of the primary goals of the overall act: (1) "protection of open space resources"; and (2) protection of farming as an economic activity in the Park. See N.Y. Exec. Law § 805(3)(g)(1). Specifically, the Legislature acknowledged in the text of the statute that farming had to be embraced in resource management areas, like the Lewis Family Farm:

> Important and viable agricultural areas are included in resource management areas, with many farms exhibiting a high level of capital investment for agricultural buildings and equipment. These agricultural areas are of considerable economic importance to segments of the park and provide for a type of open space which is compatible with the park's character. Id.

Further, the Legislature deemed farming to be compatible throughout the Park, except in hamlet areas,[4] and made all farm buildings exempt from the Park-wide 40-foot height restriction.[5]

Most importantly, although the intensity guidelines within resource management areas limit growth to fifteen "Principal Buildings" per square mile in this land use area, the Legislature carefully crafted the statute to embrace and protect unlimited economic growth of farms in the resource management areas without any impact whatsoever upon the density guidelines. This was done through a specific paragraph within the definition of "Principal Building", which provides as follows:

> 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

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[4] See Footnote No. 3, *supra.*

[5] N.Y. Exec. Law § 810(1)(a)(4) [agricultural use structures of any height exempt from regulation in hamlet areas]; Id., § 810(1)(b)(5) [agricultural use structures of any height exempt from regulation in moderate intensity areas]; Id., § 810(1)(c)(1)(d)(5) [agricultural use structures of any height exempt from regulation in low intensity use areas]; Id., § 810(1)(d)(1)(d)(5) [agricultural use structures of any height exempt from regulation in rural use areas]; and Id., § 810(1)(e)(8) [agricultural use structures of any height exempt from regulation in resource management areas].

use and members of their respective immediate families, will together constitute and count as a single principal building.

N.Y. Exec. Law §802(50).

Thus, as the Agency regulates development in accordance with the intensity guidelines, the Agency is prohibited from interfering with the growth of farms as a matter of law. The expansive definition of "Principal Buildings" on farms could not be clearer in expressing a legislative requirement that farms be allowed to grow without regulation by the Agency. A farm may have many farm structures upon it, including employee housing, yet all of the structures are counted as just one "Principal Building," thereby assuring the growth and prosperity of farms in protecting open space and providing an economic foundation for residents of the Park. Simply put, the Agency does not have jurisdiction over farm development.

Since a farm is the highest order of land use in a resource management area as a matter of law, and all of the farm buildings including farm employee housing on any one farm count as only one Principal Building, a farm will always be "in keeping with the overall intensity guidelines" as required by the Land Use Plan, no matter how big it gets and no matter how many agricultural use structures are built on the farm.

Thus, the Agency's assertion of jurisdiction over the Lewis Family Farm's farm worker houses and the Agency's imposition of penalties serve no land use purpose under the Land Use Plan. Indeed, the Agency's senseless attack upon the Lewis Family Farm is directly contrary to the best interests of the Park and the legislative purpose of the Land Use Plan because it seeks to harm, rather than protect, farm development—a fragile, valuable Park asset "of paramount

importance because of overriding natural resource and public considerations." N.Y. Exec. Law § 805(3)(g)(1).[6]

B. The Agency Has No Authority To Regulate "Agricultural Use Structures" Under The Act

It is indisputable that the Agency lacks jurisdiction over "agricultural use structures" in the Park. See N.Y. Exec. Law § 805(3); Footnotes 3 and 5, *supra*; (see also Affidavit of John Privitera, sworn to January 18, 2008, ¶ 12 and Ex. G) (R. ___). Thus, since the Lewis Family Farm's farm worker houses fit into the definition of "agricultural use structures", the Agency's *ultra vires* Determination exceeded the Agency's jurisdiction and was made in violation of CPLR § 7803(2).

The Act defines "***agricultural use structure***" to include "any barn, stable, shed, silo, garage, fruit and vegetable stand ***or other building or structure directly and customarily associated with agricultural use.***" N.Y. Exec. Law § 802(8) (emphasis supplied).

Since the term "***structure***" is defined separately in the Act, its definition must necessarily be incorporated into the definition of "agricultural use structure" by reference. See Friedman v. Connecticut Gen. Life Ins. Co., 9 N.Y.3d 105, 115 (2007) ("A court must consider a statute as a whole, reading and construing all parts of an act together to determine legislative intent,

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[6] Not only is the Agency's Determination contrary to State law and destructive of the Park's open space plan [(see N.Y. Exec. Law § 805(3)(g)(1)], it is also dreadful economic policy. If the Lewis Family Farm is forced to treat its farm worker housing cluster as a three-home subdivision rather than as farm buildings, then three new homes for working families inside the Park will be lost. The 2006 annual report of the Adirondack Park Agency considers reasonably priced housing as one of the three most "important issues to the region's long term economic viability." (APA 2006 Annual Report, p. 27). In recent years, this has become a crisis leading to a "class divide" between wealthy landowners inside the Park and working families. See Virtanen, Michael, "*A New Chasm Widens in the Park: Soaring Adirondack Land Values Have Created A Class Division, Brokers Say,*" ALBANY TIMES UNION, February 17, 2008. Indeed, destruction of economic development even where, as here, it is of "economic importance to segments of the Park," see N.Y. Exec. Law § 805(3)(g)(1), has garnered nationwide attention. A recent PBS film, *Adirondacks*, closes with references to the impaired communities in the Park. See http://www.workdogpro.com/our_shows/adirondack.htm. Reviewing the film, the Wall Street Journal recently recognized that anti-development trends inside the Park threaten to turn it into a "pre-human time capsule." See DeWolf Smith, Nancy, "*Danger In Paradise,*" WALL STREET JOURNAL, May 9, 2008, available at http:///www.wsj.com.

and...[give] effect and meaning...to the entire statute and every part and word thereof") (internal citations omitted).

The Act defines "***structure***" to include "...buildings, sheds, ***single family dwellings***, mobile homes, signs, tanks, fences and poles and any fixtures, additions and alterations thereto." N.Y. Exec. Law § 802(62) (emphasis supplied).

Therefore, it is axiomatic that a "single family dwelling" directly or customarily associated with agricultural use must necessarily be an "agricultural use structure" under the Act. See N.Y. Exec. Law § 802(8).

Here, the Lewis Family Farm conclusively established by uncontested affidavits that (i) the buildings at issue in this proceeding are farm employee houses; and (ii) on-farm employee housing is a sound agricultural practice directly and customarily associated with agricultural use that provides the foundation for any self-sustaining farm. (See Lewis Aff., ¶¶ 11-12; Martens Aff., ¶ 16; Privitera Aff. ¶¶ 5-6, Ex. C and D) (R. ___). The Commissioner of the Department of Agriculture & Markets also issued a formal land use determination under New York State's Right to Farm Law that the Lewis Family Farm's use of its land to construct the farm employee houses at issue in this proceeding is agricultural in nature as a matter of law. (See POINT II, *infra*). Moreover, the Agency's Determination admits that "farm worker housing" is a "farm structure" and that it is "important to the enhancement of farm operations." (Agency's Determination, ¶¶ 38-40).

Thus, the Agency cannot deny that the Lewis Family Farm employee houses are "directly and customarily associated with agricultural use,"[7] which places them inside the definition of "agricultural use structures" and far outside of the Agency's jurisdiction.

[7] Not only is on-farm employee housing for workers as old as farms themselves and a longstanding business practice directly and customarily associated with agricultural use, but New York State has also gone out of its way on several

1. The Agency's Determination Misinterprets the Act

The Agency's Determination attempts to skirt around the exemption for "agricultural use structures" by claiming the following:

> The Agency finds that under the Adirondack Park Agency Act, farm worker dwellings are "single family dwellings" (or possibly "multiple family dwellings" or "mobile homes," depending on the type of dwelling structure), and not "agricultural use structures." The types of structures specifically listed in the definition of "agricultural use structures" are accessory in nature and related to the storage of agricultural equipment, animals and products ("barn, stable , shed, silo, garage"), or the on-site accessory use sale of farm products ("fruit and vegetable stand"). ***The language "...or other building or structure directly and customarily associated with agriculture use" is intended to include other structures of an accessory nature only.*** This is also evident from the exceptions to jurisdiction in the Adirondack Park Agency Act which often include accessory structures. The definition of "agricultural use structures" does not include, and was not intended to include, the farm owners' or farm workers' dwellings. Rather, the owners' dwelling and farm workers' dwellings (for a single family) more precisely fit under the definition of "single family dwelling" or "mobile home."

(Agency's Determination, ¶ 37) (emphasis supplied).

This transparently weak and unconvincing argument must fail, and the Agency's statutory interpretation is not entitled to any deference by this Court. See Matter of Putnam Northern Westchester Bd. of Coop. Educ. Svcs. v. Mills, 46 A.D.3d 1062, 1063 (3d Dep't 2007) (citing Matter of Madison-Oneida Bd. of Coop. Educ. Svcs. v. Mills, 4 N.Y.3d 51, 29 [2004]).

The Agency's statutory interpretation pretends to decipher the legislative intent behind the definition of "agricultural use structure" by claiming that the phrase "or other building or

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occasions to help farmers with the financing of farm worker housing, as special and important farm structures. Indeed, in 1999, when the Governor signed into law amendments to the farm worker housing project loan funding program to make it easier for farmers to finance on-farm housing for workers, he stated: "New York farm families are leaders in providing jobs in our rural economy and we have worked very hard to help them thrive" the Governor said. "Through this new law we will continue that effort by expanding state funding for farm worker housing, making it easier for farm families to upgrade or build new housing facilities for their workers." Message of Governor George E. Pataki on December 29, 1999, when he signed into law the Farmworker Equity and Wage Reform Act, which also amended the Farmworker Housing Project Loan Program. (See generally N.Y. Private Housing Finance Law §§ 572-576).

structure directly and customarily associated with agriculture use" is limited solely to accessory structures. (Agency's Determination, ¶ 37). This disingenuous interpretation is plain wrong.

The Act defines "accessory structure" separately. See N.Y. Exec. Law § 802(5).[8] Thus, if the Legislature had intended the phrase "***or other building or structure directly and customarily associated with agricultural use***" in the definition of "agricultural use structure" to only mean "accessory structures," it would have said so. Indeed, since "structure" and "accessory structure" are both defined terms in the Act, the Legislature's deliberate inclusion of the term "structure" into the definition of "agricultural use structure" signifies the Legislature's intent to exempt from Agency jurisdiction any ***structure*** (e.g., building, shed, or ***single family dwelling***) that is directly and customarily associated with farming. Simply stated, the Agency's attempt to add the word "accessory" to the statutory definition of "agricultural use structure" is a plain error and fatal to its Determination.

Similarly, the Agency's Determination erroneously misinterprets the definition of "Principal Building". (Agency's Determination, ¶ 38). Despite the Agency's admission at the March 13, 2008 enforcement hearing that it only has jurisdiction over structures that count as "principal buildings,"[9] the Agency's Determination asserted jurisdiction over the Lewis Family

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[8] The Act defines the term "accessory structure" to mean "any structure or a portion of a main structure customarily incidental and subordinate to a principal land use or development and that customarily accompanies or is associated with such principal land use or development, including a guest cottage not for rent or hire that is incidental and subordinate to and associated with a single family dwelling." N.Y. Exec. Law § 802(5) (emphasis supplied). The Agency is plain wrong in labeling farm worker housing subordinate to the land use of farming because the record is replete with unchallenged findings by an organic farm expert (see Martens Aff.) (R. ___), and the Commissioner of Agriculture and Markets (see Commissioner Hooker's February 1, 2008 Determination, pg. 2, Ex. A to Privitera Reply Aff.) (R. ___), that farm worker housing is as integral, primary, necessary and customary to farming as a barn. However, the definition of "structure" must necessarily be read into the definition of "accessory structure" since it is a separately defined term. Accordingly, even if the Agency's interpretation is correct, a "single family dwelling" can be an "accessory structure". Essentially, no matter how hard the Agency tries, it cannot avoid the fact that a "single family dwelling" can be an "agricultural use structure" or an "accessory structure" under the Act. Either way, the Agency does not have jurisdiction over the Lewis Family Farm's farm worker buildings.

[9] At the Agency's March 13, 2008 enforcement proceeding, Paul Van Cott, the Agency's enforcement attorney, admitted that "principal buildings" are only counted where the Agency asserts jurisdiction. (March 13, 2008

Farm's farm worker buildings. The Agency's sole argument in favor of asserting jurisdiction rests almost entirely on the grammatical conjunction "and" in the definition of "Principal Building." See N.Y. Exec. Law § 802(50)(g). As stated above, the Act defines "Principal Building" as follows:

> 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.

N.Y. Exec. Law § 802(50) (emphasis supplied).

The Agency's Determination essentially states that because this sub-definition contains the word "and" instead of the word "including," that single family dwellings were never intended to be covered by the very broad definition of "agricultural use structures." (See Agency's Determination, ¶ 37). The Agency is plain wrong for several reasons.

First, use of the word "including" in place of the word "and" would have been incorrect, which the Legislature clearly knew when it wrote the definition. A farm owner's home, such as the home of Sandy and Barbara Lewis, is not an agricultural use structure. It is a single family dwelling. The Agency is entitled to treat it as such. This is state law, and the Commissioner of Agriculture recognizes that a farm owner's home is not a farm building, as distinguished from the housing for a farmer's workers.[10] So, it would have been incorrect and confusing for the Legislature to have used "including" rather than "and" as a conjunction between farm buildings and all houses on farms.

Transcript, pp. 41-42) (R. ___). But the Agency admits that the Lewis Family Farm's farm worker buildings will not count as "principal buildings." (See Agency's Reply Memorandum of Law, dated March 5, 2008, pp. 5-6) (R. ___). It nonetheless seeks to assert jurisdiction over them. (R. ___).

[10] See http://www.agmkt.state.ny.us/AP/agservices/guidancedocuments/305-aFarmHousing.pdf (last visited June 2, 2008).

Second, the Agency's interpretation and emphasis on the word "and" fails to acknowledge the syntax of the entire sentence and the multiple meanings of the conjunction "and". Statutes are never to be construed by strictly adhering to technical and grammatical rules. N.Y. Statutes § 251 (McKinney 1971). It is well-established that dictionary definitions are considered "useful as guide posts" in determining the legislative intent of a word. N.Y. Statutes § 234 (McKinney 1971). Merriam-Webster defines the word "and" to include "supplemental explanation."[11] Thus, when the Legislature said that all agricultural use structures and single family dwellings occupied by a farmer and his employees will count as one "principal building," it meant to supplement rather than limit the definition of "agricultural use structure." Indeed, if the Legislature had used the word "including" in place of the word "and", then the statute would not make sense because it would then include a farmer's personal residence in the definition of "agricultural use structure."[12]

Additionally, the words in a statute must be construed in connection with other statutes *in pari materia* and in harmony with the circumstances surrounding the enactment of the statute. N.Y. Statutes § 234 (McKinney 1971); Matter of Plato's Cave Corp. v. State Liquor Auth., 68 N.Y.2d 791, 793 (1986); see also Matter of Inter-Lakes Health, Inc. v. Town of Ticonderoga Town Bd., 13 A.D.3d 846, 848 (3d Dep't 2004) (stating that legislative history must not to be ignored even if the words of a statute appear to be clear). Thus, the definitions of "Principal Building" and "agricultural use structure" must be construed in connection with Article 25-AA of

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[11] See http://www.merriam-webster.com/dictionary/and (last visited June 2, 2008).

[12] To be sure, a farm owner's house must be considered a "single family dwelling" under the Act. This is the only rational way to read the Act since the farmer's house is not an "agricultural use structure" because it is not "directly and customarily associated with agricultural use." See N.Y. Exec. Law § 802(8). Treating a farmer's house as a "single family dwelling" is consistent with the Act, which provides that the house and all associated "agricultural use structures" constitute only a "single principal building" for intensity purposes. See N.Y. Exec. Law § 802(50)(g). Moreover, the New York State Board of Real Property Services adheres to this distinction as well. See Form RP-483-Ins (applying a tax exemption to farm worker housing, but denying the exemption to the farmer's personal residence), available at http://www.orps.state.ny.us/ref/forms/pdf/rp483ins.pdf (last visited June 2, 2008).

the Agriculture and Markets Law, which requires all state agencies to modify their procedures and regulations to encourage farming. (See POINT II.B, *infra*). Indeed, the Act and Article 25-AA of the Agriculture and Markets Law were adopted by the same legislative session in 1971 on the heels of the 1969 constitutional amendment of Section 4 of Article 14, which mandates a state policy of encouraging farm development. (See POINT II.A, *infra*). Therefore, when read in harmony with the circumstances surrounding the enactment of the Act, the definition of "agricultural use structure" most certainly includes farm worker buildings. This is the only reading of the Act that would breathe life into the legislative intent surrounding the enactment of the Act and Article 25-AA of the Agriculture and Markets Law. See N.Y. Statutes § 92 (McKinney 1971) (stating that "legislative intent is said to be the fundamental rule, the great principle which is to control - the cardinal rule - and the grand central light in which all statutes must be read") (internal quotations omitted). Simply stated, there is no reason why the Agency should be empowered to treat farm worker housing as non-agricultural buildings when the New York State Department of Agriculture and Markets and the New York State Office of Real Property Services both treat them as unregulated farm buildings.[13] (See Footnotes 10 and 12, *supra*).

Accordingly, because the Lewis Family Farm's farm worker buildings are exempt "agricultural use structures" under the Act, the Agency's *ultra vires* Determination, which

[13] Additionally, the federal government treats farm worker housing as a farm asset. Pursuant to the Internal Revenue Code (the "Code"), expenses attributable to farm activities are deductible as either business expenses pursuant to Code § 162 or production of income expenses pursuant to Code § 212. It is well-settled that farm buildings used for farm laborer housing can be depreciated pursuant to Code § 167 and the Treasury Regulations thereunder (26 C.F.R. 1.167(a)-6(b)). Similarly, the cost of boarding farm laborers is a deductible labor cost. See *IRS Publication 225 - Farmer's Tax Guide*. In the event that the farm worker housing at the Lewis Family Farm is re-classified as residential property as opposed to agricultural property used in the business of farm activities, pursuant to local law, the taxpayer's ability to treat the property and associated expenses with farm housing is jeopardized. Such forced re-classification of the taxpayer's farm buildings violates the fundamental privileges and tax benefits afforded to farm activities pursuant to the Code.

exceeded the Agency's jurisdiction and was made in violation of CPLR § 7803(2), must be annulled by the Court in this Article 78 proceeding.

C. The Agency Lacks Authority to Regulate Agriculture and Farm Buildings Under the Rivers Act

The Wild, Scenic and Recreational River System Act (the "Rivers Act") was enacted pursuant to a legislative finding that rivers possess outstanding natural, scenic, historic, ecological and recreational values that ought to be protected consistent with law. N.Y. Envtl. Conserv. Law § 15-2701(1). The primary purpose of the Rivers Act is to preserve the free flowing condition of the rivers for recreational uses. N.Y. Envtl. Conserv. Law § 15-2701(3).

Except for a few select areas where wild rivers are found, the Legislature made clear that the right to farm, as bolstered by the Constitution and New York's Agriculture and Markets Law (see POINT II, *infra*), ought to be fortified with respect to the regulation of development near scenic and recreational rivers. Thus, the Rivers Act specifically provides as follows:

> In recreational river areas, ***the lands may be developed for the full range of agricultural uses***, forest management pursuant to forest management standards duly promulgated by regulations, stream improvement structures for fishery management purposes, ***and may include small communities as well as disbursed or cluster residential areas***.

N.Y. Envtl. Conserv. Law § 15-2709(2)(c) (emphasis supplied).

Clearly, the Legislature knew what it meant when it passed the Rivers Act several years after passing the Act. The explicit statutory language that provides the freedom to farm "for the full range of agricultural uses" is a deliberate reference to the farm development exemptions then in existence in the Act itself.

The Agency followed through with this legislative directive, and promulgated the following regulation designed to implement the Rivers Act:

> The following ***may be undertaken without a permit*** if in compliance with the restrictions and standards set forth in Section 577.6 of this Part:
> In recreational river areas:
>
> > Agricultural uses, agricultural use structures, open space recreation uses, game preserves and private parks . . .

9 NYCRR § 577.4(b)(3)(ii) (emphasis supplied).

Moreover, the Agency's regulations provide that agricultural use structures may be constructed in a river area without a permit as long as the structures are located at least 150 feet from the mean high water mark of the river. See 9 NYCRR § 577.6(b)(3). Accordingly, a farm building may be constructed without a permit so long as it is more than 150 feet from the mean high water mark of a protected river.

Here, the Lewis Family Farm's farm employee buildings are located several hundred feet from the Boquet River. (See Lewis Aff., ¶ 13) (R. ___). In fact, the Lewis Family Farm's farm employee buildings are so far away from the Boquet River that the entire Hamlet of Whallonsburg and an active railroad line are situated between them and the river. (See Reply Memorandum of Law, dated February 26, 2008, pg. 11) (R. ___). Thus, since the Lewis Family Farm's farm employee buildings are "agricultural use structures" that are more than 150 feet from the mean high water mark of the Boquet River, they are exempt from Agency jurisdiction.

The statutes and regulations that control development within the Adirondack Park have uniformly and consistently placed all farm structures beyond the regulatory reach or control of the Agency. This deliberate legislative decision was made to eliminate any discretion whatsoever within the Agency to control the size, growth, character or success of any farm in the Park. The Legislature wisely determined, consistent with the pro-farm development clause of the Constitution, that farming in the Adirondacks needed complete freedom in order to foster two very important goals inside the park: (i) the preservation of open space; and (ii) the cultivation of

economic growth. The Agency's Determination, which erroneously found that the Lewis Family Farm violated the Rivers Act by constructing the farm buildings without a permit, fails to consider the statutory protections given to farmers in the interest of the future of the Park.

Accordingly, the Agency's Determination, which found that the Lewis Family Farm violated the Rivers Act by constructing the farm employee buildings, exceeded the Agency's jurisdiction in violation of CPLR § 7803(2) and must be annulled by the Court in this Article 78 proceeding.

D. The Agency Lacks the Authority to Order the Vacancy of a Structure

The Agency is without power to operate outside of its statutorily conferred jurisdiction. See Flynn, 208 A.D.2d at 93; Gerdts v. State, 210 A.D.2d at 648-49. Here, the Agency is completely without any enforcement power to order the vacancy of a structure. The power to order the vacancy of a dwelling rests with the local government, and even then the power is limited to those instances when the dwelling is not in compliance with safety or health standards.

Accordingly, the Agency's Determination exceeds the Agency's authority to the extent that it orders the Lewis Family Farm's farm employee buildings to remain vacate. (Agency's Determination, Resolution of the Matter, ¶ 5). As such, the Determination is *ultra vires* and must be annulled by the Court in this Article 78 proceeding.

POINT II

THE AGENCY'S DETERMINATION IS AFFECTED BY SEVERAL ERRORS OF LAW

A. The Agency Has Failed to Fulfill Its Constitutional Duty to Encourage Farm Development

In 1969, Article 14 of the New York State Constitution was adopted by the People of New York State to protect the State's natural resources and agricultural lands. Specifically, Section 4 of Article 14 states as follows:

> The policy of the state shall be to conserve and protect its natural resources and scenic beauty and ***encourage the development and improvement of its agricultural lands*** for the production of food and other agricultural products.

N.Y. CONSTITUTION, Article 14, § 4 (McKinney 2006) (emphasis supplied).

This section of the New York State Constitution, which was adopted as part of the "Conservation Bill of Rights", imposes a mandatory duty upon the Agency to encourage improvement of farms, not penalize farm development. It also specifies that the development of agricultural lands is a matter "of particular importance for action by the legislature." Proceedings of the Constitutional Convention of the State of New York, Vol. XI, Document No. 53, pg. 5 (1967). In fact, Section 4 of Article 14 further directs the legislature "to provide for the exercise of various governmental powers to encourage the maintenance of lands in their agricultural state." Id.

The Constitutional directive to "encourage the development and improvement" of farm lands is contained in the very same Article of the New York State Constitution as the highly regarded and well-known "forever wild" clause. See N.Y. CONSTITUTION, Article 14, § 1

(McKinney 2006).[14] Accordingly, the "pro-farm development clause" is no less important than the "forever wild" clause, and it must be equally honored and obeyed.

Here, the Agency is in violation of its constitutional duty to encourage the development and improvement of farms, because its heavy-handed penalty effort and gross distortion of the Act is unguided by a written Agency farm policy. The Agency issued the Determination, which penalizes the Lewis Family Farm for constructing farm structures, without having established a policy. This alone violates the pro-farm development clause. The Agency's constitutional shortcomings are exacerbated by this enforcement case, which seeks to penalize the Lewis Family Farm for constructing locally-permitted and statutorily-exempt farm buildings.

The Agency—formed only two years after the adoption of Article 14 of the New York State Constitution—is obliged to develop and endorse a pro-farm development policy. Indeed, the absence of a pro-farm development policy violates the Constitution as much as if the Agency itself deliberately uprooted every tree in the forest preserve.

The Legislature was cognizant of New York State's constitutionally mandated policy of encouraging farm development when it enacted the Act two years after adoption of the pro-farm development clause of the Constitution. Under the Act, the Agency only has jurisdiction to review "Class A" and "Class B" regional projects within the Park. See N.Y. Exec. Law § 810. In defining this limited class of projects over which the Agency has jurisdiction, the Legislature was careful to protect farming by exempting farm buildings from Agency jurisdiction. (See POINT I, *supra*).

[14] Section 1 of Article 14 of the New York State Constitution provides, in pertinent part, as follows: "The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands."

Here, the Agency's Determination has completely ignored the explicit farm building exemption and asserted jurisdiction over the Lewis Family Farm's farm worker houses by unilaterally labeling them as "single family dwellings" rather than properly considering them as "agricultural use structures." (See Agency's Determination, ¶ 38). Such a contorted reading of the Act abuses and ignores the legislative intent and careful structure of the Act, which was undoubtedly crafted to be consistent with the then-recently amended Constitution in exempting farms. See N.Y. Statutes § 234 (McKinney 1971); Matter of Plato's Cave Corp., 68 N.Y.2d at 793 (1986); Matter of Inter-Lakes Health, Inc., 13 A.D.3d at 848 (stating that legislative history must not to be ignored even if the words of a statute appear to be clear).

New York State's Constitution is unquestionably the supreme law of the State. See Dalton v. Pataki, 5 N.Y.3d 243, 296 (2005). Thus, the Agency must obey the New York State Constitution by developing a policy of encouraging the development and improvement of agricultural lands. Despite being fully briefed on this issue during the administrative enforcement proceeding below, the Agency ignored the issue and failed to even mention its constitutional duty in the Determination.

Accordingly, the Agency's Determination, which asserts jurisdiction over the Lewis Family Farm without a written pro-farm development policy, is unconstitutional and must be annulled by this Court in the instant Article 78 proceeding.

1. Any Reading of the Park's Land Use Plan That Allows Regulation of Farm Buildings is Unconstitutional

Although the pro-farm development clause was brought to the Agency's attention in order to provide a perspective from which to understand the scope and meaning of the Act and the Right to Farm Law in the context of farm worker housing, the Agency chose to pay the Constitution no respect and instead ignored it. This deliberate blindness is peculiar because the

pro-farm development clause plays just as important a role in land use protection in the Adirondacks, and the open space it conserves, as the "forever wild" clause that is so important to the forest preserve. The pro-farm development clause is the foundation upon which all farm lands are conserved in New York. It became part of our Constitution in New York in 1969, just a couple of years before the Act was passed. It was fresh in the minds of the lawmakers. That is why the legislature directed the Agency not to regulate farms the moment the Agency was created. See N.Y. Exec. Law § 815(4).

The Agency's interpretation of the Act runs afoul of the Constitution because it would empower the Agency to control farm development. However, the constitutional issue need not be reached if the Court finds that the Agency lacks the statutory power it asserted in the Determination.[15] Indeed, every effort should be made to reconcile the Act with the Constitution. See In re Fay, 291 N.Y. 198 (1943) (stating that every statute has a presumption of constitutionality). That reconciliation is cogent and attainable upon this Court's finding that the Agency cannot regulate farm worker housing.

B. The Agency Has Failed to Fulfill Its Statutory Duty to Modify Its Procedures and Policies to Encourage Farming

In 1971—the same year that the Agency was formed—the Legislature enacted Article 25-AA of the Agriculture and Markets Law. A recent Court of Appeals decision succinctly states the purpose of this statute as follows:

> The Legislature enacted [A]rticle 25-AA of the Agriculture and Markets Law in 1971 for the stated purposes of protecting, conserving and encouraging 'the development and improvement of [this State's] agricultural lands' (L 1971, ch 479, § 1). At that time and again in 1987 (L 1987, ch 774, § 1), the Legislature

[15] By adopting the interpretation of the Act set forth herein, the Court would also avoid the precariously difficult situation regarding any effort by the New York State Attorney General to defend the Agency's Determination as comporting with the New York State Constitution, given his sworn obligation to uphold and defend it. The dilemma is avoided if the Court finds that the Agency lacks jurisdiction to regulate the Lewis Family Farm's farm worker buildings.

> specifically found that 'many of the agricultural lands in New York state are in jeopardy of being lost for any agricultural purposes' due to local land use regulations inhibiting farming, as well as various other deleterious side effects resulting from the extension of nonagricultural development into farm areas.

Town of Lysander v. Hafner, 96 N.Y.2d 558, 563 (2001) (citing N.Y. Agric. & Mkts. Law § 300).

To facilitate this purpose, the Legislature enacted Section 305 of the Agriculture and Markets Law to require all New York State agencies—including the Adirondack Park Agency—to create and/or modify their regulations and procedures to support the development of farming within the State:

> 3. Policy of state agencies. ***It shall be the policy of all state agencies to encourage the maintenance of viable farming in agricultural districts and their administrative regulations and procedures shall be modified to this end...***

N.Y. Agric. & Mkts. Law § 305(3) (McKinney 2004) (emphasis supplied).

This statutory mandate, which is more focused and direct than the Constitution, requires the Agency to "modify its regulations and procedures" in order to encourage the maintenance of viable farming in agricultural districts. (Id.). The Lewis Family Farm is located in Essex County Agricultural District No. 4, so it is entitled to the benefit of this statutory protection. (Lewis Aff. ¶ 3) (R. ___). However, these mandated regulatory and procedural changes have yet to occur in the Agency. Again, despite being fully briefed on this issue during the administrative enforcement proceeding below, the Agency ignored the issue and the Determination fails even to mention the Agency's statutory duty. In essence, the Agency has buried its head in the sand rather than address its legal obligations.

The Agency can hardly say that its current regulations and procedures are "encouraging the maintenance of viable farming" in this case when it issued the enforcement Determination

that violates the Constitution, State agricultural law, and the Act by seeking to penalize the Lewis Family Farm for constructing locally-permitted farm buildings.

Since the Adirondack Park Agency Act and Section 305 of the Agriculture and Markets Law were both enacted in 1971, the Legislature was undoubtedly mindful of New York State's constitutional mandate to promulgate and maintain a policy of encouraging farm development, which was adopted only two years prior to the enactment of these statutes. Therefore, the Legislature's deliberate exclusion of "agricultural use structures," a defined term in the Act, from Agency jurisdiction, is informed by its historical context. That is, the Act was written to exempt farm buildings from the Agency's regulatory power promptly after the Constitution was amended to mandate a pro-farm development policy and at the same time the Legislature established the statutory right to farm in agricultural districts. See Friedman v. Connecticut Gen. Life Ins. Co., 9 N.Y.3d 105, 115 (2007) ("A court must consider a statute as a whole, reading and construing all parts of an act together to determine legislative intent, and...[give] effect and meaning...to the entire statute and every part and word thereof") (internal citations omitted); see also Briar Hill Lanes, Inc. v. Ossining Zoning Bd. of Appeals, 142 A.D.2d 578, 581 (2d Dep't 1988) ("The task in interpreting a statute or ordinance is to give effect to the intent of the body which adopted it"); American Motors Sales Corp. v. Brown, 152 A.D.2d 343, 349 (2d Dep't 1989) ("courts are required to harmonize statutes with each other as well as with the overall legislative intent in an effort to provide a logical and unstrained interpretation to each").

Accordingly, the Agency's Determination, which asserts jurisdiction over the Lewis Family Farm without the Agency having modified its regulations and procedures in order to encourage the maintenance of viable farming in violation of its affirmative duty pursuant to

Section 305(3) of the Agriculture and Markets Law, must be annulled by this Court in the instant Article 78 proceeding.

C. The Agency's Determination Violates Section 305-a of the Agriculture and Markets Law in Violation of Law

New York's Agriculture and Markets Law prohibits local planning and zoning laws from unreasonably hindering farming operations in agricultural districts.

> "3. Policy of local governments. a. Local governments, when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules or regulations shall exercise these powers in such a manner as may realize the policy and goals set forth in this article, and ***shall not unreasonably restrict or regulate farm operations with agricultural districts***."

N.Y. Agric. & Mkts. Law § 305-a(1)(a) (McKinney 2004) (emphasis supplied).

The statute defines "farm operation" to include "the land and on-farm buildings, equipment and practices which contribute to production, preparation and marketing of crops, livestock and livestock products as a commercial enterprise." N.Y. Agric. & Mkts. Law § 301(11). The Court of Appeals, in a seminal right to farm case, declared that this definition includes farm worker housing. Town of Lysander v. Hafner, 96 N.Y.2d 558, 563-64 (2001). The Legislature does not define "local government" in the statute. See N.Y. Agric. & Mkts. Law § 301. Therefore, this Court should adopt a functional and practical approach to the definition.

The Court of Appeals has spoken as to the Agency's powers, and regards the Agency as the functional equivalent of a "***local*** planning board and a ***local*** zoning entity." Hunt Brothers v. Glennon, 81 N.Y.2d 906, 909 (1993) (emphasis supplied). In Hunt Brothers, the Court of Appeals held that the New York State Department of Environmental Conservation had exclusive jurisdiction to regulate mining, but that the Adirondack Park Agency may have limited jurisdiction over incidental matters unrelated to mining itself. Id. In so doing, the Court of Appeals found that the Agency's powers and goals are akin to those of a local land use board.

Here, the Agency's Determination baldly states that Section 305-a of the Agriculture and Markets Law does not apply because the Agency is not a "local government" in the traditional sense. (Agency's Determination, ¶ 39). However, that position lacks merit because the Agency's main purpose is to administer the Land Use and Development Plan in order to control intensity of development within designated land use categories, just like a local government. See N.Y. Exec. Law § 805. The Court of Appeals has unequivocally established that the Agency is a mere functional equivalent of a local government. See Hunt Brothers, 81 N.Y.2d at 909. Therefore, the Court of Appeals' holding in Town of Lysander, which prohibits local governments from regulating farm worker housing under of Article 25-AA of the Agriculture and Markets Law, also prevents the Agency—essentially a local government as declared by the Court of Appeals—from regulating farm buildings in agricultural districts.

Accordingly, the Agency's Determination unreasonably regulates the Lewis Family Farm's farm operation, which is located in Essex County Agricultural District No. 4. Thus, the Determination is based on an error of law and must be annulled by this Court in the instant Article 78 proceeding.

D. The Agency's Determination Fails to Defer to the Commissioner of the Department of Agriculture and Markets

In the absence of a constitutionally and statutorily mandated pro-farm development policy, the Agency is obliged to defer to the policy of the Department of Agriculture and Markets, which is solely responsible for the interpretation, implementation and administration of the New York State Agriculture and Markets Law, including the right to farm set forth in Article 25-AA (Agricultural Districts). See N.Y. Agric. & Mkts. Law § 16.

The Agency has no mission, charter, or responsibility with respect to agricultural protection, other than honoring its obligation to have a pro-farm development policy under the

New York State Constitution and Agriculture and Markets Law. With respect to all other agricultural matters, the Agency is obliged to defer to the governmental agency charged with the responsibility for the administration of the statute, the interpretation of which, if it is not irrational or unreasonable, must be respected and followed. See generally Kurcsics v. Merchants Mutual Insurance Company, 49 N.Y.2d 451, 459 (1980); see also Town of Lysander, 96 N.Y.2d at 564 (deferring to the view of the Commissioner of the Department of Agriculture and Markets in determining that the regulation of farm worker housing unreasonably restricts farm operations).

Here, on February 1, 2008, the Commissioner of the New York State Department of Agriculture and Markets issued a formal land use determination pursuant to Section 308(4) of the Agriculture and Markets Law, whereby he proclaimed that:

> Farm worker housing [is] an integral part of numerous farm operations. Farmers often provide on-farm housing for their farm laborers to, among other things, accommodate the long work day, meet seasonal housing needs and address the shortage of nearby rental housing in rural areas. The use of such homes for farm worker housing is a common farm practice. On-farm housing provides a practical and cost effective means for farmers to meet their farm labor housing and recruitment needs.

(Commissioner Hooker's February 1, 2008 Determination, pg. 2, Ex. A to Privitera Reply Aff.) (R. ___).

The Commissioner's land use determination further found that farm worker housing is warranted at the Lewis Family Farm, and that the use of land for employee housing is undoubtedly "***agricultural in nature***." (Id. at 3) (emphasis supplied) (R. ___). Indeed, the Commissioner is on record with the Agency as having expressed the sound view that the Agency has a statutory obligation to embrace, rather than penalize, the Lewis Family Farm's farm worker houses. (Privitera Aff., ¶ 5, Ex. B) (R. ___). "The Commissioner's view in this regard is entitled

to deference." Town of Lysander, 96 N.Y.2d at 564; see also Matter of Inter-Lakes Health, Inc., 13 A.D.3d at 848 (holding the same); Village of Lacona v. New York State Dep't of Agric. & Mkts., 2008 N.Y. Slip Op. 4597, *3 (3d Dep't May 22, 2008) (stating that the Commissioner of Agriculture and Markets has "vested authority" to attack laws that "unreasonably restrict or regulate farm operations within agricultural districts").

The Agency's Determination not only fails to consider the Commissioner's formal opinion, but it also fails even to mention it. (See generally Agency's Determination). The Agency has no authority to ignore a formal land use determination properly issued and deemed final under New York State's Right to Farm Law, particularly when it has no greater power than any other land use board. See Hunt Brothers, *supra*. The Agency improperly asserted jurisdiction over the Lewis Family Farm's farm worker houses without deferring to the Commissioner of the Department of Agriculture and Markets.

Accordingly, the Determination is based on an error of law and must be annulled by this Court in the instant Article 78 proceeding.

E. The Agency Failed to Consider the Recommendation of the Adirondack Park Local Government Review Board

When creating the Agency in 1971, the Legislature simultaneously created the Adirondack Park Local Government Review Board (hereafter "Board") as a cornerstone of the Act "for the purpose of advising and assisting the Adirondack Park Agency in carrying out its functions, powers and duties." N.Y. Exec. Law § 803-a(1). The Board consists of twelve members, each of whom must be a member of a County within the Park. Id. The members are formally appointed and delegated by each County Board of Supervisors. See id. The Legislature directed the Board to "monitor the administration and enforcement of the Adirondack Park Land

Use and Development Plan and periodically report thereon, and make recommendations in regard thereto." Id. at § 803-a(7).

Here, the Board considered the facts and law applicable to the Lewis Family Farm's farm worker buildings. On March 4, 2008, the Board issued a Resolution in which it determined:

> WHEREAS, the Board finds that the pending enforcement proceeding by the Agency against the Lewis Family Farm, Agency File E2007-041, is in conflict with the terms of the Plan, which provide that agricultural use structures are non-jurisdictional; and
>
> WHEREAS, the Board finds that the Agency has constitutional and statutory duties to develop and implement a farm policy that encourages farming in the Adirondack Park; and
>
> WHEREAS, the Board finds that the Agency has not discharged its constitutional duty or its statutory duty to develop a farm policy

(Board's March 4, 2008 Resolution) (R. ___).

Thereafter, the Board sent a letter to the Governor requesting that he issue an Executive Order directing the Agency to develop a farm policy. (R. ___).

Despite being presented with the Board's Resolution, which was issued pursuant to Section 803-a of the Executive Law, the Agency failed to consider the statutorily-mandated recommendation of the Board. The Legislature created the Board, empowered it and built it in to the decision making under the Park Act because the legislature meant the many local governments inside the Park to have a voice, and that voice must be heard and faithfully considered in order to breathe life in to the Board and the Act itself.

As a matter of fundamental statutory construction, the Board's creation and functions under Section 803-a of the Act cannot be treated as surplusage. If the Legislature wished the expressed concerns of the Towns and Counties to be merely hortative, there would have been no reason to build the Local Board's recommendations in to the decision-making under the Act.

The Agency has no discretion to completely ignore, as it did here, the Board's formal recommendations under Section 803-a of the Act. The Determination assiduously avoids even mention, much less evaluation of the Local Board's work and resolution. (See generally Agency's Determination). Moreover, the Agency failed to cite Section 803-a of the Executive Law in its "Applicable Sections of Law" in the Determination. (Id., ¶¶ 17-36). The Agency's adamant refusal to even consider the terms of the resolution is in derogation of the structure of the Act and an insult to every Town and County in the Park. The Agency's deliberate deafness to the well-articulated, formal recommendations of the Board is one of the critical mistakes of law that lead it to err here.

Thus, the Agency improperly asserted jurisdiction over the Lewis Family Farm's farm worker houses without properly considering the Board's Resolution in violation of Section 803-a of the Executive Law. Accordingly, the Determination is based on an error of law and must be annulled by this Court in the instant Article 78 proceeding.

F. The Agency's Determination Improperly Found That the Lewis Family Farm Subdivided Its Land Under the Act and Rivers Act

Ordinarily, a farmer constructs housing for her employees on lands of her own, without changing the appearance of the land, the use of the land or the description of the land in real property terms. No land is divided, no new lots are created, no new ownership regimes are imposed and no leases are signed. That is what happened here.

The Act defines "subdivision of land" as a "division of land into two or more lots, parcels or sites" for "separate ownership or occupancy". N.Y. Exec. Law § 802(63) (emphasis supplied). Similarly, the Agency's regulations implementing the Rivers Act define "subdivision" as "any division of land into two or more lots." 9 NYCRR § 570.3(ah)(1) (emphasis supplied).

The Lewis Family Farm has not divided its land. (Lewis Aff., ¶ 14) (R. ___). Indeed, the Lewis Family Farm's farm employee houses, which are situated in a horseshoe-shaped cluster, are designed specifically as an on-farm, undivided farmer community of worker homes. The farm buildings are closely adjacent to one another and designed to share a common well, driveway, septic system and leach field located beneath a common courtyard. (Id.). The homes are situated next to the barn yard to facilitate access to other farm structures and equipment. The houses are clearly not designed for any use other than for farm employees. (Id.). As such, this portion of the Lewis Family Farm is incapable of being divided as a matter of fact and law.

The construction of farm employee housing by a farmer in the ordinary course does not include "the division of land", the creation of lots, separate ownership, separate occupancy, or separate tax status. Rather, the occupancy anticipated in farm employee housing is only that which is integral to and within the employment structure of the farm; it is not "separate" from the Lewis Family Farm – it is part of the Lewis Family Farm. The Lewis Family Farm owns it all. The farm employee buildings are constructed and used solely to sustain the Lewis Family Farm.

Moreover, the Agency's regulations clarify that the construction of farm employee housing does not automatically create a subdivision because "subdivision into sites" only occurs when an additional principal building is constructed. 9 NYCRR § 570.3(ah)(3). As previously stated, farm growth does not impact the intensity guidelines sought to be fostered by the structure of the Act because the Legislature prohibited the Agency from counting agricultural use structures as "principal buildings" within the intensity guidelines. (See POINT I.A, *supra*).

Since the very definition of "principal building" that is relied upon in the definition of "subdivision" in the Agency's own regulations demands that farm employee housing not be counted as a "principal building", the subdivision statute and regulations are not triggered such

that the Agency gains subdivision jurisdiction. Farm employee housing is never an additional "principal building". See N.Y. Exec. Law § 802(50)(g). Since the land is not divided and no principal buildings are built, farm employee housing is never an automatic subdivision over which the Agency may assert jurisdiction.

Moreover, the portion of the Agency's Determination that purports to establish the "subdivision" violation is complete nonsense as a matter of real estate law. (See Agency's Determination, ¶¶ 41-44). The Agency assumes the right to declare the creation of a subdivision where no division of land has occurred, yet the Agency remains silent as to the procedural requirements needed to effectuate a subdivision of land, including the filing of a subdivision map at the County Clerk's office with a drawing of the metes and bounds.[16]

The Agency's topsy-turvy interpretation of the statute is nothing less than an effort to swallow the Act's farm building exemption and defeat a farmer's right to farm with an inapplicable rule. It also violates fundamental statutory construction. If the Legislature intended the Agency to have review authority over farm employee housing by virtue of a magical subdivision that in fact has not occurred, then it would not have provided the exemption for "agricultural use structures" in the first place. The Agency's own literature states that farm buildings are nonjurisdictional. (Privitera Aff. ¶ 12, Ex. G) (R. ___). Staff's newly-minted "subdivision" argument, as belied by this Agency's own publication, makes no sense. The Agency's confounding effort to secure jurisdiction over the Lewis Family Farm's farm employee

[16] The Agency recently announced a new subdivision enforcement program in which it will use a statewide real estate transaction database and a parcel's tax number to determine whether or not a subdivision has occurred. See Agency's January 10, 2008 News Release, *Adirondack Park Agency Announces Proactive Subdivision Enforcement Initiative*, available at http://www.apa.state.ny.us/Press/pressrelease.cfm?PressReleaseID=286 (last visited June 2, 2008). Since the Lewis Family Farm has not subdivided its land, and thus, does not have new parcel tax numbers, the Agency's new subdivision enforcement program would properly not recommend enforcement against the Lewis Family Farm. No subdivision of land has occurred.

buildings is proof that the Agency is in dire need of a promulgated pro-farm development policy as required by the Constitution and the Agriculture and Markets Law.

The Agency improperly asserted jurisdiction over the Lewis Family Farm's farm worker buildings by insisting that a "subdivision" of land had occurred. Accordingly, the Determination is based on an error of law and must be annulled by this Court in the instant Article 78 proceeding.

G. The Agency's Determination Improperly Relies on Justice Ryan's Decision Dismissing a Prior Article 78 Proceeding

In asserting jurisdiction of the Lewis Family Farm's farm worker buildings, the Agency's Determination improperly relies on a Decision and Order of Hon. Kevin K. Ryan, Acting Supreme Court Justice, dated August 16, 2007 that denied injunctive relief and dismissed a proceeding. The Agency's Determination includes a factual finding, based on this decision, that the Agency has jurisdiction over the Lewis Family Farm's farm worker buildings. (Agency's Determination, ¶ 14). The Agency misinterprets that decision and mistakenly believes that Justice Ryan necessarily decided the issue of the Agency's jurisdiction over the Lewis Family Farm in this matter. The Agency is wrong.

The doctrine of collateral estoppel, which prohibits litigation of an issue that was decided in a previous action, can only be invoked when (i) the issue was "necessarily decided" in the prior action and is decisive in the present action; and (ii) there was "full and fair opportunity to contest the decision now said to be controlling." Buechel v. Bain, 97 N.Y.2d 295, 303-304 (2001). The prior determination of an issue will not be given preclusive effect or be deemed "necessarily decided" unless resolution of the issue was "essential" to the decision in the first action. See Church v. New York State Thruway Auth., 16 A.D.3d 808, 810 (3d Dep't 2005). Moreover, "a case-by-case analysis of the realities of the prior litigation" is the only way to

determine if the party had a full and fair opportunity to contest the issue in the prior action. Id.

Here, the issue of the Agency's jurisdiction over the Lewis Family Farm's farm worker buildings was not "necessarily decided" in Justice Ryan's decision. Additionally, the Lewis Family Farm did not have a full and fair opportunity to contest the merits in the prior action because they were never reached. Therefore, Justice Ryan's decision did not preclude the Lewis Family Farm from contesting the Agency's jurisdiction in this matter.

In June 2007, the Lewis Family Farm commenced an action against the Agency seeking a declaratory judgment that the Agency could not prohibit the completion of the farm employee housing project because it is beyond the Agency's authority to regulate farms (Essex County Index No. 0498-07). (Lewis Aff., ¶ 27) (R. ___). Shortly thereafter, the Lewis Family Farm sought a preliminary injunction, which the Agency opposed. The Agency subsequently moved to dismiss the action.

On August 16, 2007, Justice Ryan denied injunctive relief to the Lewis Family Farm, converted the action into an Article 78 proceeding and summarily dismissed it as premature. Justice Ryan's Decision and Order states as follows:

> [T]his situation is not ripe for judicial intervention. While the plaintiff may not wish to proceed to a hearing before the APA commissioners...that is clearly the next step in the process. This Court has only the jurisdiction that the Legislature gave it over disputes involving the APA. It does not have concurrent jurisdiction over this situation. (*Sohn v Calderon,* 78 NY2d 755, 766-767 (1991)). This Court's jurisdiction is limited to a review of the APA's actions under CPLR Article 78 (*Ibid.*). Otherwise, as the Court of Appeals pointed out in *Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 (1987), the Court condones a breach of the separation of powers between the branches of government.
>
> The Commissioners of the APA have the authority to review this situation under Executive Law §809. If, after receiving a determination from the Commissioners, the plaintiff is still dissatisfied, they are free to file an Article 78 proceeding at which time this Court may review the actions of the APA. Until that time, this matter constitutes an internal matter in which the Court will not interfere.

(August 16, 2007 Decision and Order, pp. 6-7, Ex. B to Van Cott Aff.) (R. ___).

Justice Ryan's decision went on to deny preliminary injunctive relief to the Lewis Family Farm. Although it was not fully articulated in the decision, Justice Ryan applied the well-established traditional standard for injunctive relief. See Doe v. Axelrod, 73 N.Y.2d 748, 750 (1988).[17] Justice Ryan determined, based on the record then before him, that the Lewis Family Farm had not demonstrated a likelihood of success on the merits since it appeared that the Agency had jurisdiction over the Lewis Family Farm's farm worker buildings. (August 16, 2007 Decision and Order, pp. 4-5, Ex. B to Van Cott Aff.) (R. ___). This determination was made solely in regard to the motion for a preliminary injunction.[18] It was not "necessarily decided" that the Agency had jurisdiction. Indeed, because a party seeking injunctive relief need not definitively prove the merits of its case, it cannot be said that the Lewis Family Farm had a "full and fair opportunity" to litigate the issue of the Agency's jurisdiction over the farm worker buildings.

In Nassau Roofing & Sheet Metal, Inc. v. Facilities Dev. Corp., the Third Department held that the determination of an issue on a preliminary injunction motion was not afforded collateral estoppel effect. Nassau Roofing & Sheet Metal, Inc. v. Facilities Dev. Corp., 115 A.D.2d 48 (3d Dep't 1986). The court explained that the prior decision only dealt with the injunction and that any language on the substance of the issue at hand "was gratuitous and

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[17] A preliminary injunction may be granted when the party demonstrates: (1) a likelihood of ultimate success on the merits; (2) irreparable injury; and (3) a balance of equities tipping in the moving party's favor. Doe v. Axelrod, 73 N.Y.2d 748, 750 (1988).

[18] Even if Judge Ryan's determination of the Agency's jurisdiction was made outside of the context of the Lewis Family Farm's motion for a preliminary injunction, it was not "necessarily decided" or "essential" to the decision because Justice Ryan declared that the Court lacked jurisdiction over the matter until such time that the Agency issued a final determination. (August 16, 2007 Decision and Order, pp. 6-7). See Danali Enters., Inc. v. Staub, 154 A.D.2d 864, 867 (3d Dep't 1989) (holding that a conclusion that an action was premature could have been made without reaching the merits, and thus, the issue was not "necessarily decided" and will not be given collateral estoppel effect).

merely incidental" to the injunction analysis, and thus, not given collateral estoppel effect. Id. at 51. This is precisely what occurred here.

Justice Ryan's decision did not "finally resolve" the matter of Agency jurisdiction – it merely denied the motion for temporary relief and dismissed the proceeding with leave to renew pursuant to CPLR § 7806. See Longton v. Village of Corinth, 49 A.D.3d 995 (3d Dep't 2008) (holding that collateral estoppel did not apply in an Article 78 proceeding where the court did not finally resolve a matter and sent it back for an administrative hearing on a proper record). Thus, because Judge Ryan dismissed the claim for lack of ripeness and refused review what was still an internal agency mater, the issue of the Agency's jurisdiction over the Lewis Family Farm's farm worker buildings was not "necessarily decided" for purposes of collateral estoppel.[19]

In addition, a judicial determination is not binding under the doctrines of res judicata and collateral estoppel unless it was made in the context of an adjudication, otherwise it is an unwarranted advisory opinion. See New York Public Interest Research Group, Inc. v. Carey, 42 N.Y.2d 527, 531 (1977) (stating that a court's determination of any issue beyond what is necessary to dispose of a case is "merely advisory" when the request for a declaratory judgment is premature).[20]

Accordingly, the Agency improperly relied on Justice Ryan's decision in making a factual finding that the Agency had jurisdiction over the Lewis Family Farm's farm worker buildings.

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[19] Additionally, Justice Ryan's decision is by no means final. The Lewis Family Farm's appeal of Justice Ryan's decision is currently pending in the Appellate Division, Third Department. Indeed, on May 29, 2008, that Court issued an order that extended the Lewis Family Farm's time in which to perfect the appeal to July 28, 2008.

[20] Advisory opinions are unreliable because they are not informed by the adversarial process. Here, Judge Ryan, unengaged, speculated without citation to law that a farmer could "build a cow barn within a few feet of the river." (Van Cott Aff. Ex. B, p. 5). This is wrong as a matter of law. Cow barns and all other agricultural use structures in resource management areas must be located more than 150 feet from the Boquet River, as here. 9 NYCRR § 577.6(b)(3).

Thus, the Determination is based on an error of law and must be annulled by this Court in the instant Article 78 proceeding.

POINT III

THE AGENCY'S DETERMINATION MADE FINDINGS THAT ARE UNSUPPORTED BY SUBSTANIAL EVIDENCE

In reviewing a substantial evidence issue, a court should not confirm an agency's determination simply because it was made by a New York State agency. See 300 Gramatan Ave. Assocs. v. State Div. of Human Rights, 45 N.Y.2d 176, 181 (1978). Rather, the reviewing court should review the record for proof that is "so substantial that from it an inference of the existence of the fact found may be drawn reasonably." Id. at 179-80. Bare surmise, conjecture, speculation, or rumor are insufficient to establish substantial evidence. Id. at 190. The proof within the record must be of such quality and quantity to persuade an impartial person of the ultimate fact or conclusion. Matter of Stiefvater Real Estate, Inc. v. Comm'r of Labor, 34 A.D.3d 1176, 1177 (3d Dep't 2006) (reversing an administrative determination because the administrative findings were not supported by substantial evidence); see also Matter of City of New York v. New York State Div. of Human Rights, 228 A.D.2d 255 (1st Dep't 1996) (annulling an administrative determination that was not supported by substantial evidence).

Here, several findings contained in the Agency's Determination are not supported by substantial evidence. First, the Agency determined that the Lewis Family Farm violated the Act and Rivers Act by failing to obtain permits for the construction of three new buildings. (Agency's Determination, ¶¶ 42, 44, 46, and 48). This finding goes far beyond the Agency's pleadings that were framed in the Notice of Violation. Indeed, it is directly contrary to the sworn record. Specifically, the Agency pleaded that only two of the three farm worker buildings were illegal, not three. (See Agency's September 5, 2007 Notice of Apparent Violation) (R. ___).

Further, the Agency staff's own affidavits pleaded that one of the structures did not require a permit, because it was a replacement dwelling. (See Affidavit of Douglas Miller, Respondent's Enforcement Officer, sworn to July 20, 2007, ¶ 12) (R. ___). Therefore, the Agency unreasonably based its Determination and penalty on the unsupported finding that three of the Lewis Family Farm's farm worker buildings were allegedly constructed without a permit. There is no evidence—much less substantial evidence—to support this Agency finding.

Second, the administrative record is completely devoid of any information involving the Lewis Family Farm's past dealings with the Agency. However, the Agency "took notice" that the Lewis Family Farm has had been involved in some previous, unstated violation with the Agency. (Agency's Determination, ¶ 16). No evidence supports this finding. Moreover, the Agency found that the Lewis Family Farm had actual notice that a permit would be required for the farm worker buildings. (Id.). This finding is unsupported by substantial evidence because the Lewis Family Farm's affidavits directly contest that issue. (Lewis Aff., ¶ 18) (R. ___).

Finally, the Agency made a finding of fact that the farm worker buildings at issue in this proceeding cost $985,000 to construct. (Agency's Determination, ¶ 16). The record is completely void of any information relating to the cost of this agricultural project, except for the ill-informed guess of the Agency. (See Affidavit of Douglas Miller, Respondent's Enforcement Officer, sworn to December 12, 2007, ¶ 6) (R. ___). The Agency's inherent bias toward the Lewis Family Farm is revealed throughout the unsupported findings in the Determination.

Accordingly, because the Agency's findings were not supported by substantial evidence, this Court should annul the Determination in this Article 78 proceeding.

POINT IV

THE AGENCY VIOLATED THE LEWIS FAMILY FARM'S RIGHT TO DUE PROCESS

The Agency commenced this administrative enforcement proceeding against the Lewis Family Farm by service of a Notice of Violation, as required by 9 NYCRR § 581-4.3 and the State Administrative Procedures Act (hereafter "SAPA"). The Lewis Family Farm timely served an Answer under 9 NYCRR § 581-4.4. The Answer asserted all of the Lewis Family Farm's procedural rights under the State Administrative Procedures Act, The United States Constitution, the New York State Constitution and the Agency regulations. The Lewis Family Farm properly asserted and preserved an affirmative defense, pleading the inapplicability of the Permit requirement to the activity alleged as a violation, all in accordance with 9 NYCRR § 581-4.4(d). (R. ___). The Lewis Family Farm also requested the appointment of a Hearing Officer under 9 NYCRR § 581-4.7(a). (R. ___). Upon this request, the Agency had a regulatory obligation to appoint a Hearing Officer under 9 NYCRR § 581-4.7(d). A record of the hearing must also be compiled and a hearing report by the Hearing Officer is also usually compiled under § 581-4.15(a) and (b). Thereafter, the Agency's enforcement committee is obliged to review the record before it makes a recommendation to the Agency for consideration, which it is required to review prior to making its final determination. 9 NYCRR §§ 581-4.16(a)-(b). None of these procedural safeguards occurred in this case.

The Agency ignored all of the fundamental due process protections and carefully staged procedural process set forth in its regulations. Instead, the Agency sought to abort the due process of law and receive a finding of liability by the enforcement committee before the enforcement proceeding has been held, citing only § 581-2.6(d), which provides as follows:

> ***Following the enforcement proceeding***, the Enforcement Committee shall consider the alleged violation in executive session and may make a determination as to whether a violation has occurred. The Enforcement Committee may also decide on an appropriate disposition of the enforcement action, or may decide to adjourn the matter for additional investigation or consideration or for any other reason it deems appropriate.

Id. (emphasis added).

The operative language of this subsection, "Following the enforcement proceeding" is an obvious reference to the careful procedure set forth in 9 NYCRR § 581-4.3. Thus, the Agency failed to meet a condition precedent to the enforcement committee's consideration, which proceeded in violation of the Lewis Family Farm's fundamental due process rights. In the end, the Agency subjected the Lewis Family Farm to a finding of liability and a $50,000 fine without allowing the Lewis Family Farm to cross-examine the witnesses identified by the Agency or use the other protections of SAPA. See N.Y. A.P.A. § 306(3).

Additionally, the Agency violated the Lewis Family Farm's right to due process by unreasonably delaying the commencement of its enforcement proceeding, which did not occur until the Agency served the Notice of Apparent Violation on September 5, 2007. See 9 NYCRR § 581-2.6 (declaring that an Agency enforcement proceeding is deemed commenced upon service of the notice of apparent violation). The Agency is unable to explain why it waited nearly one year after the Lewis Family Farm received a Town of Essex permit and began construction on the farm worker housing before the it decided to commence the enforcement proceeding.

Accordingly, the Agency's Determination violates the Lewis Family Farm's right to procedural due process and must be annulled by the Court in this Article 78 proceeding.

POINT V

THE AGENCY'S DUPLICATIVE ENFORCEMENT ACTION SHOULD BE DISMISSED IN ITS ENTIRETY

On April 11, 2008—a mere seventeen (17) days after the Agency issued the Determination—the Agency commenced a duplicative enforcement action against the Lewis Family Farm, Salim B. "Sandy" Lewis and Barbara A. Lewis (Essex County Index No. 332-08).[21] Essentially, this duplicative enforcement action has taken each of the four violations set forth in the Determination and has alleged them as causes of action in the Complaint. This action seeks nothing more than to enforce the Determination, which as stated above, was improperly issued by the Agency. Thus, for the reasons set forth in this Memorandum of Law, this duplicative action should be dismissed in its entirety.

A. Standard

It is well settled that on a motion to dismiss pursuant to CPLR 3211, the plaintiff's complaint is afforded liberal construction such that the facts alleged are deemed to be true. Arnav Indus., Inc. v. Brown, Raysman, Millstein, Felder & Steiner, LLP, 96 N.Y.2d 300, 303 (2001); Griffin v. Anslow, 17 A.D.3d 889, 891 (3d Dep't 2005). However, vague and conclusory allegations are insufficient to state a cause of action. Fowler v. American Lawyer Media, 306 A.D.2d 113 (1st Dept 2003).

B. The Agency Has Failed To State A Cause Of Action Against The Lewis Family Farm

The Lewis Family Farm submits this memorandum of law, and the arguments set forth in POINTS I through IV above, in support its pre-answer motion to dismiss the Agency's Amended

[21] On May 14, 2008, the Agency served an Amended Complaint, which included a new cause of action seeking to enforce its purported "corrected" Determination, which was issued on April 18, 2008 in response to this Court's April 11, 2008 decision and order that issued a partial stay of the Determination. As noted by this Court, the Determination required the Lewis Family Farm to forego its right to challenge the Agency's jurisdiction.

Complaint in its entirety pursuant to CPLR § 3211(a)(7) because the Agency has failed to state a valid cause of action.

C. The Agency Has Failed To State A Cause Of Action Against Salim B. "Sandy" Lewis And Barbara Lewis Individually

It is fundamental law that a corporation is an independent legal entity that is distinct from its shareholders. Rapid Transit Subway Const. Co. v. New York, 259 N.Y. 472, 487 (1932); Rothermel v. Ermiger, 161 A.D.2d 1016, 1017 (3d Dep't 1990). In fact, "it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners." Matter of Morris v. New York State Dept. of Taxation & Fin., 82 N.Y.2d 135, 140 (1993); see also Rothermel, 161 A.D.2d at 1017 (stating that incorporation is a legitimate means of avoiding personal liability).

It is further well-established that a corporate officer acting solely in his capacity as agent of his corporate principal cannot be held individually liable for alleged corporate wrongdoing. Mendez v. City of New York, 259 A.D.2d 441, 442 (1st Dep't 1999) (dismissing action against two corporate officers where the plaintiff failed to allege individual tortious conduct on the part of the individuals); Michaels v. Lispenard Holding Corp., 11 A.D.2d 12, 14 (1st Dep't 1960) (stating that agents of the corporation can only be liable for misfeasance).

Generally speaking, a court will only disregard the corporate form and "pierce the corporate veil" in order to prevent fraud or achieve equity. Morris, 82 N.Y.2d at 140. This is a limited exception to the principle that a corporation is separate from its owners. Id. Piercing the veil requires a showing that (1) the owners of the corporation exercised complete domination and control of the corporation; and (2) used such domination to commit a fraud or wrong against the plaintiff that resulted in injury. Island Seafood Co. v. Golub Corp., 303 A.D.2d 892, 893 (3d Dep't 2003); Damianos Realty Group, LLC v. Fracchia, 35 A.D.3d 344, 344 (2d Dep't 2006).

Here, the Agency has failed to allege any fact that would indicate that Salim B. "Sandy" Lewis or Barbara A. Lewis personally abused the Lewis Family Farm's corporate structure so as to warrant piercing the corporate veil. The Agency has no legitimate reason for seeking enforcement against Salim B. "Sandy" Lewis or Barbara A. Lewis, and allowing the Agency's claims against them to remain would invariably expose corporate officers to personal liability for any corporate obligation. This unjustness must not be permitted.

D. The Agency's Duplicative Enforcement Action is Barred

Moreover, "the doctrines of *res judicata* and collateral estoppel are applicable to give conclusive effect to the quasi-judicial determinations of administrative agencies." Ryan v. New York Tele. Co., 62 N.Y.2d 494, 499 (1984). Thus, since the Agency had a "full and fair opportunity" to present its case in the administrative proceeding and obtained a result, the enforcement action is barred. In addition, because the Agency chose not to seek a determination as to the individual liability of Salim B. "Sandy" Lewis or Barbara A. Lewis, the Agency is now barred from seeking that result in this action.

Based on the foregoing, defendants Salim B. "Sandy" Lewis and Barbara A. Lewis respectfully request dismissal of this action as against them since the Agency has failed to state a cause of action against them individually.

E. The Agency's Duplicative Enforcement Action Should Be Dismissed Pursuant to CPLR 3211(a)(4)

This Court is afforded the discretion needed to dismiss the Agency's duplicative enforcement action. CPLR § 3211(a)(4) states as follows:

> A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> * * *
>
> (4) there is another action pending between the same parties for the same cause of action in a court of any state or the United States;

> the court need not dismiss upon this ground but may make such order as justice requires;

CPLR § 3211(a)(4).

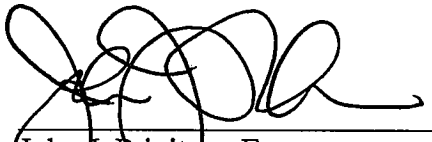
Here, the Agency commenced a duplicative enforcement action that seeks a finding that the Lewis Family Farm (and two of its officers and shareholders) violated the Act and Rivers Act by constructing farm worker buildings without a permit. These are the exact same matters at issue in the instant Article 78 proceeding. This action is completely unnecessary and premature since this Court has yet to rule on the merits of the Article 78 proceeding challenging the Agency's Determination.

CONCLUSION

Based on the foregoing, the Lewis Family Farm respectfully seeks judgment on its Petition vacating and annulling the Agency's Determination, dismissing the Agency's duplicative enforcement action, and granting such other and further relief the Court deems just and proper.

Dated: June 3, 2008
Albany, New York

McNAMEE, LOCHNER, TITUS & WILLIAMS, P.C.



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