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 / COUNTERCLAIM

Index No.: 332-08

Hon. Richard B. Meyer

MEMORANDUM OF LAW IN SUPPORT OF THE LEWIS FAMILY FARM'S MOTION FOR SUMMARY JUDGMENT ON THE AGENCY'S ENFORCEMENT ACTION / COUNTERCLAIM

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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 pursuant to CPLR 3212 granting summary judgment dismissing the Agency's duplicative enforcement action (Index. No. 332-08).

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO DISPUTE

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. 326, 427).[1] The Lewis Family Farm produces USDA certified organic beef animals by breeding and raising 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. As a recognized leader in farming, the Lewis Family Farm allows students and apprentices from national and international programs to work and study on the farm for academic credit. (Lewis Aff., ¶ 4) (R. 327).

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.

[1] The Agency filed the administrative record with the Court on June 13, 2008 in the Article 78 proceeding (Index No. 315-08). However, because the Agency neglected to Bates Stamp this record for the convenience of the parties and the Court, the Lewis Family Farm has taken the liberty of Bates Stamping the record. (See Affirmation of John J. Privitera, dated August 1, 2008, Ex. D). Therefore, "(R. ___)" references a citation to a specific page contained in the Bates Stamped version of the administrative record.

Privitera, sworn to February 26, 2008, Ex. A) (R. 326, 541-43). Over the years, the Lewis Family Farm has acquired and cleaned up its land and demolished at least fifteen (15) residences that were beyond repair. (Lewis Aff., ¶¶ 5-6; Martens Aff., ¶ 6) (R. 327, 427, 578). The Lewis Family Farm also constructed at least fifteen (15) new farm buildings and other agricultural use structures, including two bridges to protect wetlands and a 60-foot grain bin, in support of the farm, all without Agency permits. (Lewis Aff., ¶ 7 and Ex. H) (R. 327, 417, 420-21).

As a successful large-scale USDA certified organic farm, the Lewis Family Farm has had a full-time manager, three full-time employees, and requires interns and other farm workers working on the farm. (Lewis Aff., ¶¶ 8-10) (R. 327-28). 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; Lewis Aff., ¶ 14) (R. 327, 428). Suitable and affordable 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 quality and motivated employees that will bring their families to the farm and become vested in the farm and the community. This housing is necessary for a sustainable farm. (Lewis Aff., ¶¶ 11-12) (R. 328-29).

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 and Ex. E (engineer's drawing of housing cluster); Ex. H (photographs of Walker Complex and existing housing cluster and other farm photographs)) (R. 329, 333, 393, 408-24). 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. B, C, D, E and F) (R. 330, 338-402)[2]. 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. (See id., Ex. B and F) (R. 338, 398-402).

The three-building farm employee housing cluster is located several hundred feet from the Boquet River, with several residences, a railroad track, some high ground, and roads situated between the employee houses and the river. (See Lewis Aff., ¶ 13 and Ex. H) (R. 329, 408-24); (Privitera Aff., ¶ 15 and Ex. I) (R. 434, 469). In fact, the farm worker houses are well-located, no more than a few feet east of the Hamlet of Whallonsburg in the Town of Essex, New York. (Privitera Aff., ¶ 13 and Ex. H) (R. 433-34,467).[3]

The farm employee housing cluster is ideally located to provide easy and energy efficient access to and surveillance of the adjacent barns. (Martens Aff., ¶ 12) (R. 428). 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

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[2] It is not clear on this record why the Agency did not take action regarding Dr. Turco's house, one of the four employee homes. (See Lewis Aff., Ex. H) (R. 416).

[3] This is important, because a developer could build a 99 unit apartment complex with 15,000 square feet of first floor retail space supported by 175 parking spaces, on the river (west) side of Christian Road across from the Lewis Family Farm housing cluster and this large apartment/retail development project would not need a permit from the Agency. See N.Y. Exec. Law § 810 1(a)(3) (threshold for Class A projects in hamlets is 100 residential units). Although this Court's July 2, 2008 Decision and Order states at pg. 3 that the portion of the Lewis Family Farm land at issue in this matter is classified as resource management, there is a question as to where the actual land classification boundary is located. (See Privitera Aff. Ex. H) (R. 467) (Miller Aff., Ex. B) (R. 177) (includes at least a corner of Walker Farm) (Privitera Reply Aff. ¶ 6 Ex. C) (R. 538, 548-49). Despite this question of fact, summary judgment is still appropriate since the Agency does not have jurisdiction over farmworker housing in either hamlet or resource management lands. Further, the fact that the farm employee houses are in and/or adjacent to the hamlet serves the overall values of the Plan by maximizing open space and minimizing visual impacts. Concentrating development at the hamlet, where unlimited growth is allowed, is a farming plan that ought to be recognized, commended and exemplified – not penalized. Indeed, the Agency's punitive approach in this case disregards its Hamlet boundary policy. The Agency's "Citizen's Guide" says that "Hamlet boundaries usually go well beyond established settlements to provide room for future expansion." The Walker Farm, at an intersection that is part of the settlement – Walker Road runs through Whallonsburg to the Walker Farm – should be part of the Hamlet. See N.Y. Exec. Law § 805.

leach field located around a common courtyard. (Lewis Aff., ¶ 14 and Ex. E) (R. 329-30, 393-96). 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. 329-30). These farm worker buildings are customary, appropriate and necessary to the success of the Lewis Family Farm's operation. (Martens Aff., ¶¶ 14-16) (R. 428); (Privitera Aff., Ex. B) (R. 439-41).

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 Agency staff in order to clear up any misunderstandings about the agricultural nature of the project. (Lewis Aff., ¶ 20) (R. 331). A permit application, signed by Barbara Lewis, both as "project sponsor" and representative of the Lewis Family Farm, was filed with the Agency on March 14, 2007, informing the Agency of the Farm's plans to construct the "three single family dwellings in a farm compound to be used by farm employees exclusively." (See Affidavit of John Quinn, Ex. A) (R. 148). The Lewis Farm expected that this verified information had established its right to build the farm buildings as exempt structures, without the need for an Agency permit. (Lewis Aff., ¶ 17) (R. 330-31). In May 2007, Agency 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 $10,000 fine by June 15, 2007. (Lewis Aff., ¶ 22) (R. 331).

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 the regulation of farm development and farm buildings is beyond the Agency's authority. (See Lewis Aff., ¶ 27) (R. 333) (See also Verified Answer, Ex. A). 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. 333). 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. 213-20).

On September 5, 2007, several weeks following Justice Ryan's dismissal of the premature action (and nearly one year since the housing project began), the Agency finally commenced its internal administrative enforcement proceeding by serving a Notice of Apparent Violation, which alleged that two of the farm houses in the Lewis Family Farm's employee housing cluster were illegal unless the Lewis Farm received a permit from the Agency for the project as a three-home subdivision. (R. 79-86).

Soon thereafter, the Agency was presented with several expressions of concern regarding this case from a number of institutions that endeavored to enlighten the Agency as to the Right to Farm issues at stake, yet the Agency plowed ahead with its tenuous legal theory. For example, the Agency was provided with a detailed discussion of the Constitutional and statutory provisions of New York State Law concerning the Right to Farm in New York, and the policy implications of controlling farm development. (R. 294-324). The Agency's final enforcement determination in this matter does not even acknowledge this body of law and policy. In addition, the Commissioner of the New York State Department of Agriculture & Markets wrote the Chairman of the Agency on November 26, 2007, pleading with the Agency to engage in an inter-agency discussion of the major legal and policy implications of its enforcement action. (See Van Cott Aff., Ex. A) (R. 510-12). The Agency refused.

On February 1, 2008, the Commissioner of the New York State Department of Agriculture & Markets issued a formal determination pursuant to his delegated statutory powers under Agriculture & Markets Law § 308(4) that the Lewis Family Farm is a productive, USDA certified organic farm located in a protected, state certified agriculture district; that the four farmworker houses built by the Lewis Family Farm in 2007 were necessary because suitable off-farm housing is not available; that on-farm farmworker housing is a common farm practice; that on-farm worker housing is an integral part of a "farm operation" as defined in New York State's Right to Farm Law, Section 301(11) of the Agriculture & Markets Law; and, that the three clustered farm worker houses that are part of the farm operation at the Lewis Family Farm could not readily be separated or easily subdivided. Therefore, the Commissioner of Agriculture & Markets concluded that the Lewis Family Farm housing, as part of the farm operation, is agricultural. (Privitera Reply Aff. Ex. A) (R. 541-43). The Agency ignored this.

The Farm Bureau of New York supported the Commissioner of Agriculture and Markets formal opinion in a letter dated February 21, 2008 that was submitted to the Agency. (R. 575-76). This was also ignored.

In addition, on March 5, 2008, the Adirondack Park Local Government Review Board passed a resolution finding that the enforcement proceeding against the Lewis Family Farm conflicted with the terms of the Adirondack Park Act Plan which provides that farm buildings are non-jurisdictional and submitted this resolution to the Agency before the final enforcement determination was made. (R. 580-81).

Notwithstanding these formal determinations, supplications and recitations of law and policy, the Agency declined to consider the impact of its enforcement proceeding upon the Right to Farm Law and statewide agricultural policy in New York.

The Agency's enforcement proceeding culminated in a final enforcement determination of the Agency on March 25, 2008 ("Determination"). The Agency's Determination finds that the houses at issue are farm worker housing and that they are "important to the enhancement of farm operations." (See Agency's Determination, ¶¶ 38-40) (R. 18-19). Notwithstanding these findings, the Agency's Enforcement Committee sought a $50,000 fine and 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.[4]

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 this duplicative action seeking to enforce the Determination

[4] Ignoring the Affidavit of Agency staff person Douglas Miller, who swore that two of three farm buildings (without indicating which two) were illegal under the Agency's legal theory, the Determination found all three farmworker houses in the cluster were illegal. (See Miller Aff., ¶ 12) (Record Doc. # 5)

(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.

On July 2, 2008, this Court issued a decision and order (1) granting the motion to dismiss the duplicative enforcement action as against defendants Sandy Lewis and Barbara Lewis, (2) holding that the doctrine of collateral estoppel does not prohibit the Lewis Family Farm from asserting any defense in these consolidated actions, (3) partially dismissing the Lewis Family Farm's third cause of action in the Article 78 proceeding, and (4) dismissing the Lewis Family Farm's fourth cause of action in the Article 78 proceeding.

This Court further directed the Agency to submit its answer to the Article 78 petition and the Lewis Family Farm to submit its answer to the Agency's complaint by July 30, 2008, and directed that the instant motion be filed ten days thereafter.

Having complied with the Court's direction, the Lewis Family Farm now seeks summary judgment dismissing the Agency's enforcement action in its entirety.

ARGUMENT

Standard of Review

The standard for summary judgment under CPLR 3212 is well-settled. The movant must establish its entitlement to judgment by tendering sufficient evidence to eliminate any material issues of fact from the case. Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 853 (1985). Once the movant satisfies its burden, it is incumbent upon an opposing party to come forward with admissible proof of a genuine issue of fact relative to the cause of action. Iseline & Co. v. Landau, 71 N.Y.2d 420, 425 (1988); Ferber v. Sterndent Corp., 51 N.Y.2d 782, 783 (1980). Such issues of fact must be bona fide issues raised by evidence in admissible form.

Spearmon v. Times Square Stores Corp., 96 A.D.2d 552 (2d Dep't 1983). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment. Zuckerman v. New York, 49 N.Y.2d 557, 562 (1980).

POINT I

THE LEWIS FAMILY FARM IS ENTITLED TO SUMMARY JUDGMENT DISMISSING THE COMPLAINT/COUNTERCLAIM IN THESE CONSOLIDATED ACTIONS BECAUSE IT IS MOOT, UNRIPE OR BARRED BY RES JUDICATA

The Lewis Family Farm is entitled to summary judgment dismissing the Agency's Amended Complaint/counterclaim in these consolidated actions if this Court renders the Agency's Determination null and void, as prayed for by the Lewis Family Farm, in the Article 78 proceeding (Index No. 315-08). No relief is sought in this counterclaim other than what was ordered by the Determination.

Accordingly, a determination by this Court in the Article 78 portion of these consolidated actions rendering the Agency's Determination null and void pursuant to CPLR 7803 would necessarily leave the Agency's enforcement action moot and dictate that summary judgment dismissing this action is warranted.

The Agency commenced this duplicative enforcement action merely seventeen (17) days after the Agency issued its Determination. Instead of a simple pleading with a single cause of action seeking to enforce the Agency's Determination, the Amended Complaint contains five causes of action, four of which re-plead the alleged violations that the Agency sought to establish at the administrative level. (See Amended Complaint, ¶¶ 49-60). Nevertheless, the Agency admits that it commenced the enforcement action solely to enforce the Determination and not to re-litigate the Determination. (See Agency's Memorandum in Opposition to Lewis Farm's Motion to Dismiss APA Complaint, dated June 10, 2008, pg. 5). Since the Agency is not

seeking any further relief, nor is it seeking to prove or establish any facts, this enforcement action is not ripe. The Determination is still subject to review by this Court. It cannot yet be enforced, because it is stayed.

In any event, the Agency chose the administrative forum and made a final determination. It cannot relitigate the same case. "[T]he 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).

However, even if this Court approaches this enforcement action *de novo*, the Agency still cannot establish violations of either the Adirondack Park Agency Act (the "Act"), or the Wild, Scenic and Recreational Rivers Act (the "Rivers Act"), thereby requiring summary judgment dismissal of the Agency's Amended Complaint against the Lewis Family Farm. (See POINTS II through IV, *infra*).

POINT II

THE LEWIS FAMILY FARM IS ENTITLED TO SUMMARY JUDGMENT DISMISSING THE FIRST, THIRD AND FIFTH CAUSES OF ACTION BECAUSE THE AGENCY LACKS AUTHORITY TO REGULATE AGRICULTURE AND FARM BUILDINGS UNDER THE ACT

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).

Therefore, the Agency cannot force the Lewis Family Farm to obtain a permit to construct farm worker housing because it has no authority to regulate agriculture or "agricultural use structures" under the Act.

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, which exercises jurisdiction over the Lewis Family Farm's farm worker buildings, cannot be enforced in this action as a matter of law.

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 Land Use 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 "Park Plan"). The Park 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 Park 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 Park 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.[5] 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 Park Plan and overall intensity guidelines are in place for each of the land uses. See generally N.Y. Exec. Law § 805.

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

3. The Act Makes Clear That Farm Buildings Are Not Regulated

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)	Statutory Reference
Hamlet	brown	no limit	none	Executive Law § 805(3)(c)(4)
Moderate Intensity Use	red	500	1.3	Executive Law § 805(3)(d)(3)
Low Intensity Use	orange	200	3.2	Executive Law § 805(3)(e)(3)
Rural Use	yellow	75	8.5	Executive Law § 805(3)(f)(3)
Resource Management	green	15	42.7	Executive Law § 805(3)((g)(3)
Industrial Use	purple	no limit	none	Executive Law § 805(3)(h)(4)

Thus, if the Lewis Family Farm fails because it is unable to be viable due to the lack of on-farm worker housing, this two square mile farm in a Resource Management Area can be developed with thirty (30), 42.7-acre home sites. Of course, this will defeat the open space character in resource management areas that was envisioned by the Legislature by protecting farms from Agency regulations in the Park Plan. The statutory scheme was designed to protect farming so that open space would be conserved, as is clear from the following statutory reference:

> 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.

N.Y. Exec. Law § 805(3)(g)(1).

Indeed, the Legislature sought to encourage the creation of open space by supporting farm development and making it clear to the Agency that all farm buildings, including farm worker housing, are not to be counted in the intensity guidelines set forth above. Executive Law § 802(50)(g) provides that only the Lewis Family Farm home counted in the intensity guidelines is the one occupied by Sandy and Barbara Lewis: "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" together constitute and count as only single principal building. Id.

Perhaps there is no clearer indication of legislative intent than this special, exclusionary definition of Principal Building that relates only to farms. The hallmark of the Park Plan is to impose intensity guidelines, yet they do not apply to farms. The Agency is in the absurd position in this enforcement case of arguing that the Lewis Family Farm housing cluster is jurisdictional, in the face of the admission they must make based on the statute, as just quoted, that the buildings are invisible to the Park Plan itself. Surely there is no indication of legislative intent to regulate buildings that do not count and, thus, are immaterial.

4. The Act Makes Clear That Farm Buildings Are Compatible Throughout The Park

In accordance with the legislative purpose of exempting farming practices from regulation by the Agency, "agricultural use structures" of any size, color, location, height, are allowed without a permit throughout the Park. See N.Y. Exec. Law § 805(3).[6] The Agency has recently conceded that it lacks jurisdiction over "agricultural use structures", even though the construction of such structures—not matter how tall—falls under the definition of "land use or

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

development" (N.Y. Exec. Law § 802(28)). (See Affidavit of Paul Van Cott, sworn to July 30, 2008, ¶ 27).

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

Further, the Legislature deemed farming to be compatible throughout the Park, except in hamlet areas,[7] and exempted all farm buildings from the Park-wide 40-foot height restriction.[8]

Most importantly, although the intensity guidelines within resource management areas limit growth to fifteen (15) "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:

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[7] See Footnote No. 6, *supra*.

[8] 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].

> 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).

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 (see N.Y. Exec. Law § 805(3)(g)(1) and (2)), and all of the farm buildings including farm employee housing on any one farm count as only one Principal Building (see N.Y. Exec. Law § 802(50)(g)), a farm will always be "in keeping with the overall intensity guidelines", as required by the Park 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 Park 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).[9]

B. The Agency Lacks Authority To Regulate "Agricultural Use Structures"

It is beyond dispute that the Agency lacks jurisdiction over "agricultural use structures" in the Park. See Exec. Law § 805(3) (see also Privitera Aff., ¶ 12 and Ex. G) (R. 433,460-65). Thus, since the Lewis Family Farm's farm worker houses fit into the definition of "agricultural use structures", the Agency cannot maintain causes of action in the enforcement action/counterclaim to enforce the Determination or establish that the Lewis Family Farm violated the Act by failing to get a permit to construct an "agricultural use structure".

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***." 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,

[9] 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).

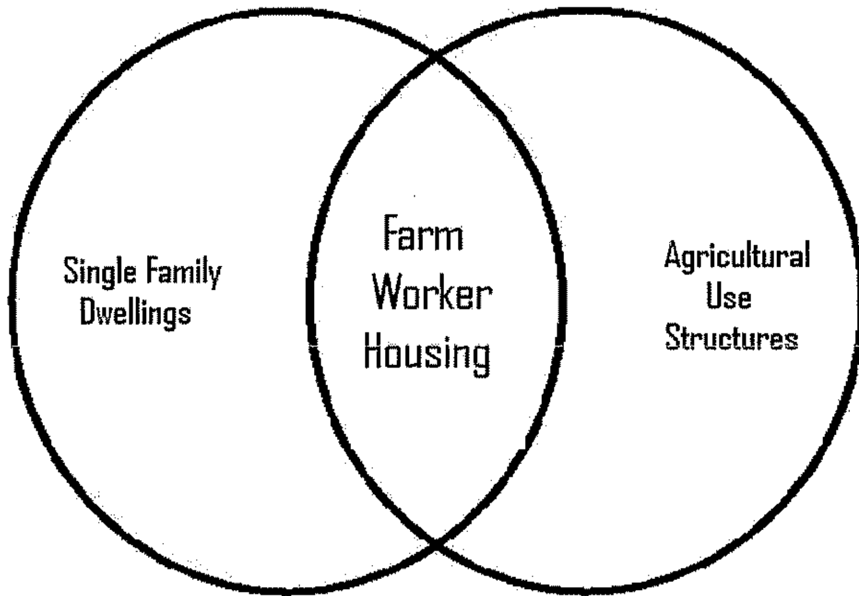
The Act defines "***structure***" to include "...buildings, sheds, ***single family dwellings***, mobile homes, signs, tanks, fences and poles and any fixtures, additions and alterations thereto." Exec. Law § 802(62) (emphasis supplied).

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 Exec. Law § 802(8). The Agency unconvincing attempts to shy away from this fundamental truth by mischaracterizing the statutory interpretation set forth above. (See Agency's Memorandum of Law in Opposition to the Article 78 Petition, dated July 30, 2008, pg. 15). To e sure, the Lewis Family Farm argues (correctly) that the definition of "structure" appears in the definition of "agricultural use structure", not merely the term "agricultural use structure" as the Agency wants this Court to believe. (See id.).

On this record, there is no dispute as to the central fact that on-farm employee houses are "directly and customarily associated with agriculture use" and are thus as much farm buildings as any barn or silo. (See Lewis Aff., ¶¶ 11-12; Martens Aff., ¶ 16; Privitera Reply Aff., Ex. A) (R. 328-29, 428, 541-43) (See also Town of Lysander v. Hafner, 96 N.Y.2d 558, 563 (2001); and see generally NYS Farm Bureau, Inc.'s Brief of *Amicus Curiae*, dated May 29, 2008).

The Agency either refuses to acknowledge or fails to understand that not all "agricultural use structures" are "single family dwellings", just as not all "single family dwellings" are "agricultural use structures". This Court aptly pointed this out with a fundamental set theory observation during the June 19, 2008 oral argument. Recognizing the importance of farmworker

housing, it is abundantly obvious that the Legislature necessarily provided for some overlap in these definitions, fairly illustrated in the following Venn diagram:



The Agency has no response to this basic truth, which is revealed in fairly interpreting the operative definitions in the Act.

Here, the Lewis Family Farm has 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 Reply Aff., Ex. A) (R. 328-29, 428, 541-43). Thus, the Lewis Family Farm's farm worker houses, as a matter of fact and law, are within the overlapping segments of the Venn diagram above.

The Commissioner of the Department of Agriculture & Markets also issued a formal land use determination under New York State's Right to Farm Law, stating that the Lewis Family Farm's use of its land to construct the farm employee houses at issue in this proceeding is part of

a farm operation and thus agricultural as a matter of law. (See POINT V.D, *infra*). Moreover, the Agency's Determination admits that farm worker housing is "important to the enhancement of farm operations." (Agency's Determination, ¶¶ 38-40) (R. 18-19).

Time and time again the Agency has admitted that there are no facts at issue pertaining to the farm worker housing. (See e.g., Agency's Memorandum in Opposition to Lewis Farm's Motion to Dismiss APA Complaint, dated June 10, 2008, pg. 5). Regardless of this admission, the Agency is prohibited from attempting to create issues of fact in this enforcement action and on this motion. "[T]he 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).[10] Thus, since the Agency had a "full and fair opportunity" to present its case in the administrative proceeding and declined to challenge the proof provided that established that farm worker housing is "directly and customarily associated with agricultural use", the Agency is now barred from attempting to prove otherwise.

Accordingly, there are no questions of fact that prohibit the Lewis Family Farm's farm worker houses from being classified as "agricultural use structures." The Agency simply cannot deny that the Lewis Family Farm employee houses are "directly and customarily associated with agricultural use,"[11] which places them inside the definition of "agricultural use structures" and far outside of the Agency's jurisdiction.

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[10] 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). See also, Decision and Order in these consolidated actions, July 2, 2008, pp. 6-9.

[11] 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 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"

1. <u>The Agency's Determination Misinterprets the Act</u>

The Agency's Determination, which is the same legal theory advanced in this enforcement action/counterclaim, cannot be enforced because it irrationally avoids 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) (R. 17-18) (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. <u>See</u> <u>Matter of Putnam Northern Westchester Bd. of Coop. Educ. Svcs. v. Mills</u>, 46 A.D.3d 1062, 1063 (3d Dep't 2007) (citing <u>Matter of Madison-Oneida Bd. of Coop. Educ. Svcs. v. Mills</u>, 4 N.Y.3d 51, 29 [2004]). Here, the Legislature has instructed the Agency to <u>not</u> develop any agricultural expertise and to <u>not</u> regulate agricultural activities at all. The Agency has no farmers on staff. The Agency has no agricultural expertise. The Agency is simply inept when it comes to agricultural regulation, and is not assigned any responsibility with respect to agricultural matters. Here, the Agency is

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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. (<u>See</u> <u>generally</u> N.Y. Private Housing Finance Law §§ 572-576).

presuming to define and classify farm buildings when it lacks the expertise, understanding, and authority to do so. Therefore, the Agency's Determination is not entitled to deference by this Court. See Matter of Salvati v. Eimicke, 72 N.Y.2d 784, 791 (1988) (stating that only an agency "acting pursuant to its authority and within its area of expertise" is entitled to judicial deference).

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 structure directly and customarily associated with agriculture use" is limited solely to accessory structures. (Agency's Determination, ¶ 37) (R. 17-18). This disingenuous interpretation is plain wrong. The Act defines "accessory structure" separately. See N.Y. Exec. Law § 802(5).[12] 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

[12] 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. 426-29), and the Commissioner of Agriculture and Markets (see Commissioner Hooker's February 1, 2008 Determination, pg. 2, Ex. A to Privitera Reply Aff.) (R. 542), 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.

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) (R. 18). Despite the Agency's admission at the March 13, 2008 enforcement hearing that it only has jurisdiction over structures that count as "principal buildings,"[13] the Agency's Determination asserted jurisdiction over the Lewis Family 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) (R. 17-18). 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

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[13] 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 Transcript, pp. 41-42) (R. 64-65). 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. 557-58). It nonetheless seeks to assert jurisdiction over them.

dwelling, but it is not an "agricultural use structure". 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.[14] 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.

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."[15] 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."[16]

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[14] See http://www.agmkt.state.ny.us/AP/agservices/guidancedocuments/305-aFarmHousing.pdf (last visited July 28, 2008).

[15] See http://www.merriam-webster.com/dictionary/and (last visited July 28, 2008).

[16] To be sure, a farm owner's house must be considered a "single family dwelling" that is not an "agricultural use structure" 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). It is also how the Department of Agriculture and Markets treats the matter, see fn. 14. 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

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 the Agriculture and Markets Law, which requires all state agencies to modify their procedures and regulations to encourage farming. (See POINT V.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 V.B, *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

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farmer's personal residence), available at http://www.orps.state.ny.us/ref/forms/pdf/rp483ins.pdf (last visited July 28, 2008).

Property Services both treat them as unregulated farm buildings.[17] (See Footnotes 14 and 16, *supra*).

Accordingly, because the Lewis Family Farm's farm worker buildings are unequivocally exempt "agricultural use structures" under the Act, the Agency's enforcement action improperly relies on the Agency's *ultra vires* Determination, which renders summary judgment in favor of the Lewis Family Farm appropriate.

POINT III

THE LEWIS FAMILY FARM IS ENTITLED TO SUMMARY JUDGMENT DISMISSING THE SECOND, FOURTH AND FIFTH CAUSES OF ACTION BECAUSE 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:

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[17] 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.

> 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. The Agency has only recently conceded this truth. (See Agency's Memorandum of Law in Opposition to the Article 78 Petition, dated July 30, 2008, pg. 8).

Here, the Lewis Family Farm's farm employee buildings are located several hundred feet from the Boquet River. (See Lewis Aff., ¶ 13) (R. 329). The Agency has never submitted any

proof otherwise. In fact, the Agency is foolish to argue this point because the Lewis Family Farm's farm employee buildings are so far away from the Boquet River that the entire Hamlet of Whallonsburg, several bridges, and an active railroad line are situated between them and the river. (See Reply Memorandum of Law, dated February 26, 2008, pg. 11) (R. 534). 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 under the Rivers Act.

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 Farm Conservation Clause of the Constitution, that farming in the Adirondacks needs 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, because the Lewis Family Farm's farm worker buildings are unequivocally exempt "agricultural use structures" that are more than 150 feet from the Boquet River, the Rivers Act does not apply here. Because the Agency is prohibited from enforcing the *ultra vires* Determination, summary judgment in favor of the Lewis Family Farm is appropriate.

POINT IV

THE LEWIS FAMILY FARM IS ENTITLED TO SUMMARY JUDGMENT DISMISSING THE THIRD, FOURTH AND FIFTH CAUSES OF ACTION BECAUSE NO SUBDIVISION OF LAND OCCURRED

It is well-established that the Lewis Family Farm is not required to obtain an Agency permit prior to constructing farm buildings. Thus, the Agency cannot try to craft a "backdoor" Act violation by claiming that an illegal subdivision of land occurred by the construction of exempt buildings. Therefore, the Agency cannot maintain causes of action claiming 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) (Record Doc. # 9). 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. See 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 II.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 and cannot be

enforced in this action. (See Agency's Determination, ¶¶ 41-44) (R. 19-20). 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.[18] Indeed, as revealed in an internal Agency memo dated February 2, 2005, the Agency seeks to crack down on illegal subdivisions by educating the surveyors, realtors, and lawyers before a lot is divided, sold, and new deeds are filed in the County Clerk's office. (See Internal Agency Memorandum, dated February 2, 2005, Ex. "A" to Affidavit of John J. Privitera, sworn to August 1, 2008). Here, the Agency can scour the Essex County records until it is blue in the face, but it will not find any evidence to support its Third and Fourth Causes of Action because the Lewis Family Farm simply did not subdivide its land when it constructed farm worker housing.[19]

The Agency's topsy-turvy interpretation of the Act and Rivers Act 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

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[18] 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 July 28, 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.

[19] Under the Agency's interpretation of "subdivision" in this case, the Agency can attack every farm in the Park that constructs a new barn, shed, or silo under its vague and over-inclusive "subdivision" argument. Obviously, this cannot be allowed to occur.

buildings are nonjurisdictional. (Privitera Aff. ¶ 12, Ex. G) (R. 433, 460-65). The Agency's "subdivision" argument, as belied by this Agency's own publications and memorandums, makes no sense. The Agency's confounding effort to secure jurisdiction over the Lewis Family Farm's farm employee buildings is proof that the Agency lacks agriculture knowledge and should have deferred to the Commissioner of Agriculture and Markets.

The Agency improperly asserts jurisdiction over the Lewis Family Farm's farm worker buildings by insisting that a "subdivision" of land had occurred. The Agency has not produced any facts to support this feeble argument. Accordingly, the Determination is based on an error of law and cannot be enforced in this action. Therefore, the Lewis Family Farm is entitled to summary judgment dismissing the Agency's Third, Fourth, and Fifth Causes of Action.

POINT V

THE LEWIS FAMILY FARM IS ENTITLED TO SUMMARY JUDGMENT DISMISSING THE FIFTH CAUSE OF ACTION BECAUSE THE AGENCY'S DETERMINATION IS AFFECTED BY SEVERAL ERRORS OF LAW

The Agency's Fifth Cause of Action in the Amended Complaint seeks to enforce a Determination that is replete with several other errors of law. These reasons, which were brought to this Court's attention in the Lewis Family Farm's Memorandum of Law in Support of the Article 78 Petition, dated June 3, 2008, are set forth herein.

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 Conservation 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).[20] Accordingly, the Farm Conservation 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 Farm Conservation Clause. The Agency's constitutional

[20] 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."

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 carry out its limited charter to implement the Park Plan in a manner that encourages farm development.

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 Farm Conservation 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 II.A, *supra*).

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) (R. 18). Such a contorted reading of the Act abuses and ignores the legislative intent and careful structure of the Act, which was clearly 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 construing its narrowly delegated powers consistent with encouraging the development and improvement of agricultural lands. The uncontested affidavits of Barbara Lewis and Klaas Martens, read together with the Commissioner of Agriculture and Markets final Right to Farm determination, establish unequivocally that successful farm development demands on-farm housing for workers. Federal, state and local tax laws are consistent with the overall theme of our land use laws and the Farm Conservation Clause of the Constitution. Farm development is not to be regulated.

The Agency's assertion of regulatory power over farm buildings in this case is not only contrary to the Constitution and this seamless web of federal and state law, it is contrary to their own charter. The Act exempts all agriculture use structures from regulation by the Agency, no matter how large, dense or unattractive to non-farmers the structures may be, unless they are within 150 feet of a protected river or wetland. Clearly, with these broad exemptions, and given the fabric of state law, the legislature never intended that the Agency control the size of farms by controlling the size of the farm labor force, which is the power asserted here. 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 in derogation of the Farm Conservation Clause, is unconstitutional and cannot be enforced in this action. As such, the Lewis Family Farm is entitled to summary judgment dismissing the Agency's Complaint in its entirety.

1. The Agency's Insistence That It Is Not Seeking To Regulate Farming Is Disingenuous

Throughout this entire dispute, the Agency has insisted that it does not regulate farming, but saying this does not make it true. Jurisdiction over farm worker housing grants the Agency a

blanket pocket veto that conveys control and authority to regulate farm size inside the Park. Simply put, the right to permit is the right to deny. If it succeeds in gaining jurisdiction over farm worker housing, the Agency can deny a housing permit to a farmer for any number of transparent reasons (e.g., location, screening, etc.). The Agency will control the development and growth of successful farms, just as it demanded in the settlement agreement and the Determination terminology. With jurisdiction over farm worker housing, the Agency would have unprecedented and unique power to deny a farmer the right to have on-farm employees. In the Agency's view, a farmer is only someone who picks her own carrots, not someone that runs a successful business.

The Agency has already sought to preclude the Lewis Family Farm from challenging Agency jurisdiction when, unconstitutionally, it claimed this power in the proposed settlement agreement and again in the Determination. However, on April 18, 2008, after this Court stayed the majority of the Determination pending the outcome of these consolidated actions, the Agency scrambled to issue a "corrected" Determination, in violation of the State Administrative Procedures Act, stating that it never intended to preclude the Lewis Family Farm from challenging jurisdiction. The purported "correction" reads as follows:

> (3) Lewis Farm will reply to any additional information request within 30 days of receipt.
>
> ~~(4) Lewis Farm will retain all rights of appeal in the project review process, but forgoes the right to challenge Agency jurisdiction and the review clocks otherwise applicable.~~
>
> (5) Lewis Farm or its employees shall not occupy the three new dwellings located on the corner of Whallons Bay Road and Christian Road unless and until an Agency permit is issued and the civil penalty paid.
>
> (6) By April 28, 2008, Lewis Farm will pay a civil penalty of $50,000 to the Agency.

(R. 8).

Although the Agency attempted to downplay and pencil out its assertion of unprecedented power, the Agency's intent to control farms and deny civil liberties to the Lewis Family Farm became abundantly clear.

No farm must, no farm can, and no farm will be subjected to development controls by the Agency, as the NYS Farm Bureau, Inc. has made clear to this Court. (See generally NYS Farm Bureau, Inc.'s Brief of *Amicus Curiae*, dated May 29, 2008). If the Agency's unilateral extension of the Act to reach farm worker housing is allowed by this Court, the Agency has achieved its goal. The Agency will then be in the position of controlling farm development, because a grant of jurisdiction provides the power to deny permit approval. In context of modern farming technology, no self-sustaining farm can succeed without on-farm worker housing, a fact that is established and unchallenged on this record. Thus, no farmer can survive because she cannot plan her business in reliance upon the necessity of farm worker housing, which is as fundamental and necessary to a farm as a barn, shed, or silo. The Agency cannot be empowered with farm development controls that are not wielded by any other board, town, state agency, or authority anywhere else in the State, because such empowerment and development control plainly is unconstitutional.

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

Although the Farm Conservation 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 Farm Conservation 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 Farm Conservation 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 asserts in this case.[21] 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 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.

[21] 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.

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. 326). 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 farm conservation 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").

Here, the Agency has shown absolutely no regulatory flexibility in the face of this unqualified statutory obligation. This is remarkable, because the Agency has many statutory tools within the Act with which to demonstrate flexibility for farmers, consistent with its constitutional and statutory obligations. The Agency could have read the Act consistent with Lysander. The Agency could have deferred to the Commissioner of Agriculture and Markets. As set forth previously, the Agency could have easily redrawn the edge of the Hamlet of

Whallonsburg, consistent with its policy of including entire settlements, which would have placed the Lewis Family Farm worker house in a non-regulated area, where no permits are required under the Act for single family housing. (See Footnote 3, *supra*).

More broadly, the Agency could have adopted a farm policy in accordance with the Right to Farm mandate of Section 305(3) of the Agriculture & Markets Law by declaring that a farmer is entitled to replace an existing single family dwelling, that has to be razed because it is uninhabitable, by allowing another house anywhere on the farm. That is, the Agency takes the strict regulatory view that a replacement single family dwelling must be built in the same place as one that is razed to be non-jurisdictional. However, the Legislature stated in the Act that any structure may be rebuilt in whole or in part and even increased in size and this development activity "shall not be subject to review by the Agency" Executive Law § 811(5). There is no reference in this statutory provision to the precise footprint of the pre-existing structure. Indeed, the only statement in the statute is that a house may not be rebuilt closer to a shore in such a manner that it violates the setback requirements of the shoreline restrictions. Id.

The Agency asserts its regulatory powers beyond this limited statutory reach in manners that need not be briefed here. Suffice it to say that, based upon this safe harbor as provided by the Legislature, the Agency was obliged to take into consideration and apply some flexibility in the case of the Lewis Family Farm where fifteen substandard, uninhabitable homes were razed and only four were rebuilt. A farmer should be able to rebuild a house in a location that makes the most sense for her farm. The lack of flexibility on this issue in the face of the Right to Farm mandate indicates that the Agency feels it may impede modern farm development and force farmers to avoid regulation by leaving shacks in open fields.

Thus, this Court should find that the Agency had reasonable opportunities for flexibility within the confines of their delegated powers in this case, yet chose to snub its Right to Farm law duties.

Accordingly, the Complaint, 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, violates the Right to Farm law and cannot be enforced in this action. As such, the Lewis Family Farm is entitled to summary judgment dismissing the Agency's Complaint in its entirety.

C. The Agency Violated Established Court of Appeals Precedent

The Court of Appeals, in a seminal Right to Farm case, declared that the Legislature deliberately meant to include farm worker housing in the definitions of "farm operation" and "on-farm building" under the New York State Agriculture and Markets Law. Town of Lysander v. Hafner, 96 N.Y.2d 558, 563-64 (2001). Specifically, the Court of Appeals held that, as a matter of New York's Right to Farm Law, farm worker houses are on-farm buildings. Id. Farm worker housing is within the unregulated and protected class of structures that includes barns and silos, and worker housing is no less important. Further, the Court of Appeals found that a farmer has an absolute right to build housing for farm workers and that land use review boards do not have jurisdiction to assert site plan review authority over these farm buildings. Id. Although the Legislature had removed farm worker houses from the list of structures within the definition of "on-farm building", the Court firmly adhered to this farming right. Lysander, 96 N.Y.2d at 564. Reading the Right to Farm as embracing a "protective reach" for all farm buildings, the Court held that all farm buildings are necessarily within the safe harbor provided

by the Legislature because the statute does not contain any specific language excluding the structures from protection. Id.

The Agency ignored the Court of Appeals' teachings of Lysander, and the Agency's recent attempt to spin Lysander is unavailing. (See Agency's Memorandum of Law in Opposition to the Article 78 Petition, dated July 30, 2008, pg. 10-11). The Act and the Park Plan draw out a broad protective reach for all farm buildings no matter where located and no matter what size, height, color or visibility. The Legislature plainly instructed the Agency to not regulate farming, and did so by passing the Act hot on the heels of a popular constitutional amendment that set the foundation stone for a new era of farm conservation and established new rights to develop farms free of governmental regulation.

The Agency cannot maintain that the Legislature was irrational and selective in defining the protective reach of New York law for farmers among the real property tax law, the Right to Farm Law and the Park Plan. Rather, unless the Legislature specifically stated otherwise, Lysander teaches that the "protective reach" must be read to be seamless, rational and consistent throughout New York law. There is no basis upon which to conclude that the Legislature intended a different meaning for "on-farm building" under the Right to Farm Law than it intended for "agricultural use structure" under the Act. There is surely no reason to conclude that the Legislature meant for the Agency to have regulatory power over farms in the face of the "protective reach" in the Act and in light of the fact that no other governmental board, agency or authority in New York State has this power.

This conclusion is inescapable upon reading the plain definition of "agricultural use structure" in the Act, which includes a catch-all reference to every building that is "directly and customarily" used by a farmer. On this record it is undeniable that the Lewis Family Farm's

worker housing cluster by its barns is "directly and customary" related to farming. (See Lewis Aff., ¶¶ 11-12; Martens Aff., ¶ 16; Privitera Reply Aff., Ex. A) (R. 328-29, 428, 541-43) (See also Town of Lysander v. Hafner, 96 N.Y.2d 558, 563 (2001); and see generally NYS Farm Bureau, Inc.'s Brief of *Amicus Curiae*, dated May 29, 2008).

Applying the teachings of Lysander, there can be no doubt that the catch-all phrase in the definition of "agricultural use structure" includes farm worker housing. As the Court of Appeals has stated, the definition would specifically have to exclude farm worker housing to conclude that the Legislature intended to place these farm buildings beyond the protective reach of the Act. Lysander, 96 N.Y.2d at 564. The Act does not do this, and even goes a step further in providing that farm worker houses, like all farm buildings, are immaterial and invisible to the Act's intensity guidelines. Thus, we are compelled to conclude that the Agency cannot regulate the Lewis Family Farm worker housing.

The Venn diagram above (pg. 19, *supra*) is exactly the way the Court of Appeals, the Commissioner of Agriculture and Markets, the Commissioner of New York State Department of Taxation and Finance, and the Executive Director of the New York State Office of Real Property Services view the relationship between farm houses and farm buildings. See Town of Lysander v. Hafner, 96 N.Y.2d 558, 563 (2001); Footnotes 14 and 16, *supra*.

Accordingly, the Agency unreasonably seeks to regulate 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 cannot be enforced in this action. As such, the Lewis Family Farm is entitled to summary judgment dismissing the Agency's Complaint in its entirety.

D. The Agency Failed to Defer to the Commissioner of the Department of Agriculture and Markets

In the absence of any delegated power to regulate farming, the Agency is obliged 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 under the New York State Constitution and Agriculture and Markets Law. Thus, when attempting to regulate farm worker housing, the Agency is acting outside of its delegated authority since it has no authority pertaining to agriculture. With respect to all agricultural matters, the Agency should 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. 541-43).

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.) (emphasis supplied) (R. 543). 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. 432, 439-41). "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 determination of an agency (e.g., Department of Agriculture and Markets) "acting pursuant to its authority and within its area of expertise" is entitled to judicial deference. See Matter of Salvati v. Eimicke, 72 N.Y.2d 784, 791 (1988); Matter of Tockwotpen Assoc. v. New York State Div. of Hous. & Comm. Renewal, 7 A.D.3d 453, 454 (3d Dep't 2004).

The Agency's Determination not only fails to consider the Commissioner's formal opinion, but incredibly, it fails even to mention it. (See generally Agency's Determination) (R. 7-22). The Agency should not ignore a formal land use determination properly issued and deemed final under New York State's Right to Farm Law, particularly when the Agency has no greater power than any other land use board. See Hunt Brothers v. Glennon, 81 N.Y.2d 906, 909

(1993) (likening the Agency as the functional equivalent of a "***local*** planning board and a ***local*** zoning entity") (emphasis supplied). 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 cannot be enforced in this action. As such, the Lewis Family Farm is entitled to summary judgment dismissing the Agency's Complaint in its entirety.

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. 581).

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. 580).

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 mere surplus. 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. Moreover, the Agency failed to cite Section 803-a of the Executive Law in its "Applicable Sections of Law" in the Determination. (Agency's Determination, ¶¶ 17-36) (R. 15-17). 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.

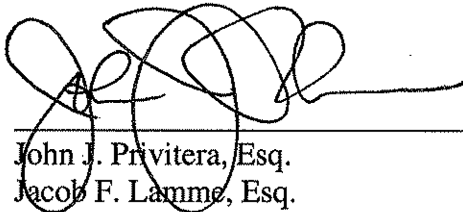
Thus, the Agency improperly asserted jurisdiction over the Lewis Family Farm's farm worker houses without properly considering the Board's Resolution in violation of Section 803-a of the Executive Law. Accordingly, the Determination is based on an error of law and cannot be enforced in this action. As such, the Lewis Family Farm is entitled to summary judgment dismissing the Agency's Complaint in its entirety.

CONCLUSION

Based on the foregoing, the Lewis Family Farm respectfully seeks summary judgment dismissing the Agency's Amended Verified Complaint in its entirety, and granting such other and further relief the Court deems just and proper.

Dated: August 1, 2008
Albany, New York

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



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