



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

ANDREW M. CUOMO  
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE  
ENVIRONMENTAL PROTECTION BUREAU

August 19, 2008

Via Federal Express

Joseph A. Provoncha  
Essex County Clerk  
7559 Court Street  
P.O. Box 247  
Elizabethtown, New York 12932

Re: Lewis Family Farm, Inc. v. NYSAPA, Index No. 315-08  
APA v. Lewis Family Farm, Inc. et al., Index No. 332-08

Dear Mr. Provoncha:

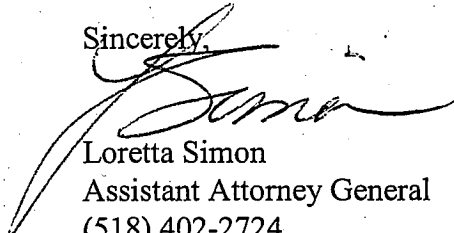
Enclosed for filing pursuant to CPLR §2214(b) please find:

1. Reply Affirmation of Loretta Simon in APA's Cross-Motion for Summary Judgment and to Strike Second Record dated August 19, 2008;
2. Memorandum of Law in Support of APA's Cross-Motion dated August 19, 2008.

Please file the original, time-stamp the enclosed copies and return same to us in the stamped, self addressed envelope provided for your convenience. No fee is tendered pursuant to CPLR § 8017.

Also enclosed is a courtesy copy of each document for the Honorable Richard B. Meyer. Thank you for your attention to this matter.

Sincerely,

  
Loretta Simon  
Assistant Attorney General  
(518) 402-2724

cc: ✓ John Privitera, Esq.  
Paul Van Cott, Esq.

STATE OF NEW YORK SUPREME COURT  
ESSEX COUNTY

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LEWIS FAMILY FARM, INC.,

Petitioner,

v.

NEW YORK STATE ADIRONDACK  
PARK AGENCY,

Respondent.

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ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

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REPLY AFFIRMATION  
OF LORETTA SIMON IN APA'S  
CROSS-MOTION FOR SUMMARY  
JUDGMENT AND TO STRIKE  
SECOND RECORD

Hon. Richard B. Meyer

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

INDEX No. 332-08  
RJI No. 15-1-2008-0117

LORETTA SIMON, an attorney admitted to practice before the courts of the State of New York, duly affirms under penalty of perjury that:

1. I am an Assistant Attorney General, of counsel to Andrew M. Cuomo, Attorney General of the State of New York, attorney for the Adirondack Park Agency ("APA") in above-captioned consolidated matters.

Reply Affirmation of  
Loretta Simon dated  
August 19, 2008

2. I make this reply affirmation pursuant to C.P.L.R. § 2214(b) in further support of the APA's cross-motion for summary judgment and to strike the second record submitted by Lewis Farm. This reply affirmation is submitted after the Return date of August 18, 2008, because the Office of the Attorney General received Lewis Farm's answering papers on the Return date.

3. Regarding the merits of its motion for summary judgment, Lewis Farm asserts that the Agency's 2007 Annual Report "all but admits" that the three single family dwellings at issue in this litigation are "agricultural use structures". See Affidavit Of Jacob Lamme ("Lamme Aff.") dated August 15, 2008 ¶ 10. The Agency has never characterized Lewis Farm's single family dwellings as "agricultural use structures." On the contrary, the Agency specifically found that the APA Act's definition of "agricultural use structure" does not include single family dwellings, which are separately defined in the Act, and found that "farm worker dwellings are "single family dwellings" . . . and not "agricultural use structures." See Record Item I (APA Determination) ¶ 37; see also Executive Law 802 (6) and (58). Further, under the APA Act and Rivers Act, permits are expressly required for all single family dwellings in Resource Management and a designated recreational river area. See Executive Law §§ 810(2)(d)(1) and 805(3)(g)(4)(Secondary uses)(1); see also 9 NYCRR Sections 577.4(a) and 577.5(c)(1).

Reply Affirmation of  
Loretta Simon dated  
August 19, 2008

4. In fact, the APA's 2007 Annual Report, summarizing Justice Kevin K. Ryan's Supreme Court Decision and Order dated August 16, 2007, simply summarizes Lewis Farm I. As this Court is aware the Decision and Order of Justice Ryan confirmed the APA's jurisdiction over the three single family dwellings. See Record Item 5, Exhibit B to Van Cott Aff. (Decision and Order of Justice Ryan pp. 5-6), see also Lamme Aff. dated August 15, 2008, Exhibit B, p. 20.

5. Seeking to capitalize on Lewis Farm's intended use of the three single family dwellings, Lewis Farm asks this Court to take judicial notice that the Agency admits that the structures are "agricultural worker housing". See Lamme Aff. dated August 15, 2008 ¶10. The question of end-use is, for purposes of the APA Act and APA jurisdiction, not legally relevant. Moreover, the Agency's Determination specifically found that "farm worker dwellings" are "single family dwellings" . . . and not "agricultural use structures." See Record Item I (APA Determination), ¶ 37. Accordingly the Court should decline Lewis Farm's request.

6. The issue before the Court is whether these dwellings are subject to the APA Act and the Rivers Act, specifically whether "agricultural use structures" under the APA Act include "single family dwellings." As the APA has maintained throughout this controversy, and as the APA rationally determined, as did

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Justice Ryan, the three "single family dwellings" to be used for farm workers are not "agriculture use structures" as defined by the APA Act. See Record Item I (APA Determination), ¶ 37.

The types of structures specifically listed in the definition of "agriculture use structures" are accessory in nature and related to the storage of agricultural equipment, animals and products . . . or the on-site accessory use sale of farm products ("fruit and vegetable stand") . . . [T]he definition of "agricultural use structure" does not include and was not intended to include, the farm owners' dwelling and farm workers' dwellings.

See Record Item I (APA Determination), ¶ 37. (emphasis added).

7. In its motion for summary judgment Lewis Farm appended a Bates stamped version of the APA's Administrative Record. See Affidavit of John J. Privitera dated August 1, 2008 Exhibit D.<sup>1</sup> The APA moved to strike this second record reproduced by Lewis Farm's counsel because the Agency submitted a certified record dated June 13, 2008, and has not certified Lewis Farm's reproduction, which certification is required by C.P.L.R 7804 (e), nor was a copy of the reproduced record provided to the Agency for review prior to submission to the Court. See Affirmation of Paul Van Cott dated, dated August 8, 2008, p. 2, footnote 1.

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<sup>1</sup> Lewis Farm's assertion that the Agency neglected to Bates stamp the record raises no issues of law, but rather is simply their preference as to how the record should be reproduced. See Affidavit of John J. Privitera dated August 1, 2008, ¶ 7.

Reply Affirmation of  
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8. The APA's motion to strike Lewis Farm's second record should be granted. The Agency has authority and responsibility to certify its own administrative record, which Return and Record was already certified and submitted to this Court pursuant to C.P.L.R. 7804. See Certification of Barbara Rottier dated June 13, 2008 (submitted with the Agency's Answer in Part, Record and Objections in Point of Law dated June 13, 2008). Lewis Farm is without legal authority to produce a second Agency administrative record.

9. Lewis Farm argues that the second record should be allowed because Mr. Lamme had several phone conversations with me requesting that the record be Bates stamped. Notably, Mr. Lamme does not deny the fact that he failed to notify me that a second Bates stamped copy of the record would be submitted, nor does he deny that he failed to provide a copy to me for review prior to submission. His assertion that he sent me an e-mail demanding that I withdraw my motion to strike the second record is correct, but irrelevant. See Lamme Aff. ¶ 8. His e-mail of August 11, 2008 said "your objection to this "second" record is improper", and notified me that if I would like to reconsider my position and withdraw my motion I should do so by "end of business today." I was unaware of his August 11<sup>th</sup> e-mail as I was out of town, upon my return to the office, I did not answer the e-mail as there was no issue to which I needed to respond.

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10. The issue before the Court is whether the record submitted by Lewis Farm can replace the Agency's certified Return and Record without the Agency's consent, review or certification. Pursuant to CPLR Article 7804(e) it cannot. Lewis Farm's arguments about conversations in May 2008, are a distraction and not legally relevant.<sup>2</sup>

11. A preliminary review of the second record reveals the following errors: the cover page to the July 20, 2007 Miller Affidavit is missing and the numbering skips from page 188 to page 190. In addition, the following pages are inserted in reverse order: pages 396 and 395, pages 398 and 397, pages 402 and 401, pages 462 and 461, and pages 464 and 463. The APA cannot certify this inaccurate record.

12. Accordingly, Lewis Farm's unilateral reproduction of an uncertified "copy" of the record, failure to provide its copy to

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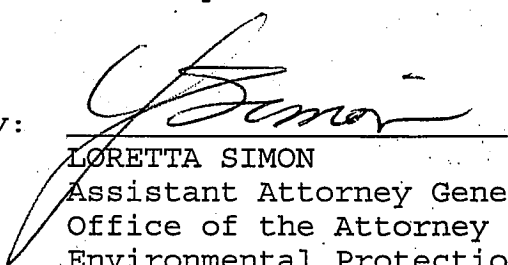
<sup>2</sup> See Affidavit of Jacob Lamme dated August 15, 2008, ¶ 4 where Mr. Lamme alleges that on May 13, 21, and 29, 2008, he specifically requested that the Agency Bates stamp the record. My record of our May 13, 2008 phone conversation indicates we discussed the APA's agreement to extend Lewis Farm's time to answer the complaint, the APA's agreement to extend the return date to accommodate Lewis Farm's counsel, and confirming that counsel's firm would accept service on behalf of the Lewis' individually. This conversation was confirmed to the Court by letters from Mr. Lamme dated May 13, and May 14, 2008. Similarly my notes of conversations with Mr. Lamme later in May do not indicate a request by him for a Bates stamped record. While I do not recall if Mr. Lamme repeatedly asked for a numbered record, I do recall he repeatedly asked that I produce the record earlier than required by C.P.L.R. § 7804.

the APA for review prior to submission to the Court, and inaccurate reproduction should be rejected by the Court and the "second," inaccurate record stricken.

Dated: Albany, New York  
August 19, 2008

ANDREW M. CUOMO  
Attorney General of the  
State of New York  
Attorney for Adirondack Park Agency

By:

  
LORETTA SIMON  
Assistant Attorney General  
Office of the Attorney General  
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Albany, New York 12224-0341  
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Reply Affirmation of  
Loretta Simon dated  
August 19, 2008



STATE OF NEW YORK SUPREME COURT  
ESSEX COUNTY

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LEWIS FAMILY FARM, INC.,

Petitioner,

v.

Hon. Richard B. Meyer

NEW YORK STATE ADIRONDACK  
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INDEX No. 315-08  
RJI No. 15-1-2008-0109

ADIRONDACK PARK AGENCY,

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Defendants.

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INDEX No. 332-08  
RJI No. 15-1-2008-0117

ADIRONDACK PARK AGENCY'S REPLY MEMORANDUM OF LAW  
IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT,  
TO STRIKE "SECOND RECORD"

ANDREW M. CUOMO  
Attorney General of the  
State of New York  
Attorney for Adirondack Park  
Agency  
The Capitol  
Albany, New York 12224  
Tel No. (518)402-2724  
Date: August 19, 2008

LISA M. BURIANEK  
LORETTA SIMON  
Assistant Attorneys General

of Counsel

### PRELIMINARY STATEMENT

The Adirondack Park Agency ("APA"), submits this reply memorandum of law in further support of its cross-motion for summary judgment in its action (Index No. 332-08) to enforce: (1) the Adirondack Park Agency Act ("the Act") (Executive Law §§ 801-820); (2) the Wild, Scenic, and Recreational Rivers System Act (the "Rivers Act"), (Environmental Conservation Law, ["ECL"] § 15-2701, et seq. and its implementing regulations set forth at 9 NYCRR Part 577); and (3) the APA's March 25, 2008 Determination, and to strike the "record" submitted by Lewis Family Farm, Inc.

### STATEMENT OF FACTS

A summary of facts regarding the construction of three single family dwellings at the Lewis Farm was previously submitted to the Court in the APA's memorandum of law dated June 13, 2008 and in the Affidavits of Paul Van Cott dated June 13, 2008, ¶¶ 35-64, Exhibit A, and dated August 8, 2008, and is not repeated herein.

ARGUMENT

POINT I

LEWIS FARM FAILS TO RAISE ISSUES OF  
LAW OR FACT SUFFICIENT TO DEFEAT  
THE APA'S MOTION FOR SUMMARY  
JUDGMENT

As noted in the APA's moving papers, the proponent of a summary judgment motion "must make a prima facie showing of an entitlement to judgment as a matter of law sufficient to demonstrate the absence of any material issue of fact." State of New York v. Williamson, 8 A.D.3d 925, 928 (3d Dep't 2004) (quoting Flacke v. NL Indus., 228 A.D.2d 888, 890 (3d Dep't 1996)). Lewis Farm raises no new issues of law or fact, nor does it cite any case law in opposition to the APA's motion for summary judgment. See Lewis Farm Memorandum of Law ("Memo of Law") dated August 15, 2008 at 1-11. Therefore, the APA should be granted summary judgment against Lewis Farm.

In its August 15 reply memorandum, Lewis Farm makes a number of unsupported and incorrect statements. First, Lewis Farm states "No federal, state or local department, agency, authority or land use board anywhere within New York State may regulate farm buildings." See Memo of Law dated August 15, 2008 at 2. This sweeping statement is inaccurate, as demonstrated by Agriculture and Markets Law § 305-a(1)(a), which allows local governments to regulate farm operations where it can be shown

that the public health or safety is threatened. See Agriculture and Markets Law § 305-a(1)(a); see also Justice Dawson's 2000 Order (and attached Consent Order) related to Lewis Farm's freshwater wetlands violations (claimed agricultural exemption to Clean Water Act, 33 U.S.C. §§ 1344 (f)(1)(A) and (C) and ECL § 24-0701(4)). See APA Amended Complaint, Exhibit B.

In the same vein, Lewis Farm also expansively (and inaccurately) asserts that "[f]arm buildings- all farm buildings- are exempt from any regulation by the Adirondack Park Agency." See Memo of Law dated August 15, 2008 at 1. Lewis Farm is wrong. In addition to the permitting requirements for single family dwellings under the APA Act and the Rivers Act at issue here, farm buildings are also subject to Agency shoreline setbacks. See Executive Law § 806; see also 9 NYCRR Part 577 [Rivers Act]) and wetland regulation (9 NYCRR Part 578).

The APA previously addressed the regulatory loophole that could occur in Resource Management and designated River Areas were this Court to adopt Lewis Farm's argument. See APA's August 8, 2008 Memorandum of Law, Footnote 11. The APA Act Section 802(7) broadly defines "agricultural use" as any management of any land for agriculture: raising of cows, horses, pigs, poultry and other livestock; horticulture or orchards. Executive Law § 802(7) (emphasis added). This definition extends to intensive, large-scale farming operations like Lewis Farm, yet also applies

to any landowner, even a hobby-oriented chicken coop and a few chickens. Under Lewis Farm's argument, both Lewis Farm and the landowner with a simple chicken coop would be free to build a single family dwelling in Resource Management or in a designated River Area without Agency approval merely because they could claim that they were making an "agricultural use" of their properties.<sup>1</sup>

Lewis Farm attempts to downplay this legitimate concern, but confuses the law and the Agency's permitting jurisdiction in its hypothetical "thirty foot structure" example. See August 15, 2008 Memorandum of Law. Under APA Act Section 810, the Agency would not assert jurisdiction over structures simply because they are thirty feet in height. Only when the hypothetical thirty-foot high structure<sup>2</sup> is proposed to be raised to a height in excess of forty feet would an Agency permit be required. This

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<sup>1</sup> Lewis Farm concedes that if it were to abandon its agricultural use and sell a portion of its land an Agency subdivision permit would be required. See August 15, 2008 Memorandum of Law at 7. That concession is not relevant to the hypothetical posed by the Agency in Footnote 11 of its August 8, 2008 Memorandum of Law, which did not involve a subdivision of land. The plain fact is that the Legislature expressly asserted Agency permitting jurisdiction over single family dwellings in Resource Management and designated River Areas to ensure prior appropriate environmental review of such development. Lewis Farm's argument would create a hole in this comprehensive statutory scheme that an unscrupulous developer could exploit.

<sup>2</sup> Excepting agricultural use structures and residential radio and televisions antennas. APA Act Section 810(1)(e)(2)(8).

express Section 810 permitting jurisdiction over structures exceeding forty feet in height would allow the Agency to review the potential environmental impacts of the proposed vertical expansion of the structure before the expansion is undertaken.

In contrast, Section 810 asserts Agency permitting jurisdiction over all single family dwellings in Resource Management. Again, the Legislature's specific deliberate permitting jurisdiction ensures Agency review of all potential environmental impacts of a proposed single family dwelling before the house is built. Lewis Farm's argument that single family dwellings may be built without APA review, simply because an "agricultural use" is undertaken on the land - no matter how big or small - is being undermines the Act and its intended protections.

Finally, Lewis Farm's arguments regarding the Agency's jurisdiction over subdivision of land are unavailing. See Memo of Law dated August 15, 2008 p. 8, Point III. The APA Act Section 802(63) defines "subdivision" as:

any division of land into two or more lots, parcels or sites....for the purpose of....separate ownership or occupancy....by any person....

The Agency defines "subdivision into sites" (9 NYCRR Section

570.3 (ah) (3))<sup>3</sup> to mean:

any action....(1) where more than one dwelling or other principal building is to be constructed on a vacant parcel of land, or (2) where one or more new dwelling(s) or other principal building(s) is to be constructed on a parcel already containing at least one existing dwelling or other principal building, and regardless of whether the existing building is proposed to be removed after completion of the new building(s)..

Here, there is no dispute that Lewis Farm is a "person" that has undertaken the construction of the three new single family dwellings and removal of the existing single family dwelling. The regulatory definition of "subdivision into sites" clearly applies.<sup>4</sup> Three new single family dwellings have been constructed by Lewis Farm on the Lewis Farm parcel. The construction of the three new "single family dwellings" clearly effected a subdivision into sites subject to Agency jurisdiction in Resource Management and River Areas. Moreover, "single family dwellings" are by definition "principal buildings."<sup>5</sup> Finally, the three new dwellings will be occupied by different, diverse and

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<sup>3</sup> Counsel for Lewis Farm mistakenly believes that the definitions in 9 NYCRR Part 570 only apply to the Rivers Act. See Memo of Law, dated August 15, 2008, Page 9. The definitions also apply to other regulatory jurisdiction of the APA.

<sup>4</sup> Counsel for Lewis Farm misstates the regulatory definition of "subdivision into sites" claiming that it only applies to principal buildings.

<sup>5</sup> See APA Act Section 802(50) (a).

unrelated people - some of them will be employees, others will be interns. All of the elements of "subdivision into sites" are present here. Lewis Farm's distortion of the clear statutory definition of "subdivision" would create yet another unintended loophole in Agency jurisdiction, where a family could build multiple single family dwellings on one parcel of land (with compounded impacts to the environment and natural resources) and not effectuate a subdivision, so long as the land and the dwellings remain under the ownership of one family member or under a family trust. This construction, while creative, is contrary to the letter and spirit of the APA Act and should be rejected by the Court.



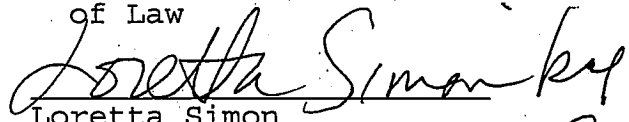
CONCLUSION

The Adirondack Park Agency respectfully requests that the Court grant the APA's motion for summary judgment and deny summary judgment to Lewis Farm.

Dated: August 19, 2008  
Albany, New York

Attorney General of the  
State of New York  
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