

STATE OF NEW YORK SUPREME COURT  
ESSEX COUNTY

---

LEWIS FAMILY FARM, INC.,  
Petitioner,

v.

NEW YORK STATE ADIRONDACK  
PARK AGENCY,

Respondent.

---

AFFIDAVIT OF  
PAUL VAN COTT

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

ADIRONDACK PARK AGENCY,  
Plaintiff,

v.

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

Defendants.

---

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

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

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

1. I am an Associate Attorney for the Adirondack Park Agency (the "Agency" or "APA") and have served as the Agency's Enforcement Attorney since 2001. I supervise the Agency's enforcement program, and am responsible for administrative enforcement of the Agency's laws and regulations, including in the Town of Essex, Essex County.

2. I am familiar with the file and the record in this matter and make this affidavit in support of the APA's Cross-motion for Summary Judgment and to strike Lewis Family Farm, Inc.'s ("Lewis Farm") Second Record in its enforcement action (Essex County Index No. 332-08), and in opposition to Lewis Farm's Motion for Summary Judgment.

**Material Facts Supporting APA's Motion for Summary Judgment**

3. In March, 2007, Lewis Farm submitted an application to the Agency for a permit to construct three single family dwellings on its property in the Town of Essex, Essex County. See Record Item<sup>1</sup> 5 (July 23, 2007 Affidavit of John Quinn ["Quinn Aff."], ¶ 4, Exhibit A); see also Record Item 1 (APA Enforcement Committee Determination, dated March 25, 2008 ["Determination"], ¶ 3).

4. On or about March 19, 2007, Lewis Farm notified the Agency that it had already constructed the foundations and septic systems for the dwellings. See Record Item 5 (Quinn Aff., ¶¶ 6-7); see also Record Item 1 (Determination, ¶ 5).

---

1 "Record Item" refers to the Agency-certified return and record previously submitted to this Court. Counsel for Lewis Farm reproduced the Agency's record with Bates stamped pages, and submitted it with its motion for summary judgment. However, the Agency has not certified Lewis Farm's copy of the record, nor was it provided a copy for review before submission. Therefore, references herein are made to the Agency's Record Items and documents.

5. The three single family dwellings were being constructed on Resource Management lands and within  $\frac{1}{4}$  of a mile of the Bouquet River, a designated recreational river area.<sup>2</sup> See Record Item 5 (July 20, 2007 Affidavit of Douglas Miller, ¶¶ 7-10 and Exhibit E); see also Record Item 12 (March 4, 2008 Affidavit of Douglas Miller, Exhibit A); see also Record Item 1 (Determination, ¶7).

6. Based on this information, APA commenced enforcement action against Lewis Farm pursuant to 9 NYCRR Part 581. See Record Item 1 (Determination, ¶ 5).

7. Settlement negotiations failed when Lewis Farm agreed to obtain after-the-fact permits for the dwellings but refused to pay a penalty or to undertake an environmental benefit project as a result of the violation. See Record Item 5 (July 20, 2007 Affidavit of Sarah Reynolds ("Reynolds Aff.") ¶¶ 23-28); see also Record Item 1 (Determination, ¶¶ 9, 10).

8. On June 27, 2007, Lewis Farm installed the three single family dwellings on Resource Management lands and within the Bouquet River recreational river area (extending  $\frac{1}{4}$  mile from each bank of the Bouquet River) without an APA permit. See

---

<sup>2</sup> Lewis Farm has never disputed that the three single family dwellings at issue are located in Resource Management and in a designated river area.

Record Item 5 (July 20, 2007 Affidavit of Douglas Miller, ¶¶ 15-21, Exhibit F); see also Record Item 1 (Determination, ¶ 11).

9. During the installation of the dwellings, APA staff served a Cease and Desist Order on Lewis Farm pursuant to 9 NYCRR § 581-2.4<sup>3</sup>. See Record Item 5 (July 20, 2007 Affidavit of Douglas Miller, ¶ 18-19, Exhibit G); see also Record Item 1 (Determination, ¶ 11). The Cease and Desist Order gave Lewis Farm notice of the alleged violations, and ordered Lewis Farm to stop construction until the violations were resolved.

10. Two dwellings were installed prior to the Cease and Desist Order and the third was installed after the Order was served. See Record Item 5 (July 20, 2007 Affidavit of Douglas Miller ¶¶ 17-20).

11. Subsequently, Lewis Farm served APA with a declaratory judgment action commenced by order to show cause in Supreme Court, Essex County, seeking a determination on APA jurisdiction over the dwellings and a restraining order against the Agency's enforcement action. See Record Item 5 (December 13, 2007 Affirmation of Paul Van Cott ["Van Cott Aff."], ¶ 3).

---

3 "In the case of an apparent violation involving ongoing construction, land disturbance or subdivision of land, the landowner and all lessees, contractors, builders, and other agents may be ordered in writing to cease and desist such activities until the apparent violation is resolved according to the provisions of this Part or by a Court."

12. APA moved to dismiss the action, and the Court determined that the APA had jurisdiction and granted the Agency's motion in a Decision and Order issued August 16, 2007. See Record Item 5 (Van Cott Aff., ¶ 4; Exhibit B); see also Record Item 1 (Determination, ¶ 14).

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

14. On August 31, 2007, APA found that Lewis Farm had resumed construction work on the three single family dwellings. See Record Item 6 (December 12, 2007 Affidavit of Douglas Miller, ¶ 3 and Exhibit A); see also Record Item 1 (Determination, ¶ 15).

15. By telefaxed letter of that same date, I advised Lewis Farm's lawyers of the ongoing construction and that the June 27, 2007 Cease and Desist Order remained in effect. See Record Item 5 (Van Cott Aff., ¶ 5; Exhibit C); see also Record Item 1 (Determination, ¶ 15). Counsel for Lewis Farm did not respond.

16. On September 5, 2007, a follow-up inspection by Agency staff revealed that Lewis Farm was continuing construction work on the dwellings. See Record Item 6 (December 12, 2007 Affidavit of Douglas Miller, ¶ 4; Exhibit B); see also Record Item 1 (Determination, ¶ 15).

17. Agency staff served Lewis Farm by a Notice of Apparent Violation ("NAV") on or about September 5, 2007 pursuant to 9 NYCRR § 581-2.6(a). See Record Item 3.

18. In September and October, APA staff attempted further settlement negotiations with Lewis Farm, to no avail. Lewis Farm answered APA staff's NAV on October 4, 2007. See Record Item 4.

19. By letter of October 31, 2007, I wrote to Lewis Farm's attorney, expressing the Agency's continuing interest in trying to resolve the matter by settlement. Lewis Farm's attorney never responded to my letter.

20. On December 7, 2007, Agency staff inspected Lewis Farm's property from off-premises and found that, since September 5, 2007, Lewis Farm had undertaken additional construction work on the three single family dwellings. See Record Item 6 (December 12, 2007 Affidavit of Douglas Miller, ¶ 5; Exhibit C); see also Record Item 1 (Determination, ¶ 15).

21. On December 17, 2007, Agency staff served a Notice of Request for an Enforcement Committee Determination on Lewis Farm's attorney, arguing that a hearing was unnecessary because there were no material facts in dispute. See Record Item 5 (December 17, 2007 Notice of Request for Enforcement Committee Determination). Lewis Farm was given 30 days to respond to the Request for an Enforcement Committee Determination, and responded on January 17, 2008. See Record Item 9 (The Right to Farm in the Champlain Valley)..

22. The administrative enforcement matter was scheduled to be considered by the APA Enforcement Committee at its next regular, monthly meeting on February 7, 2008, but was adjourned to the Committee's March 13, 2008 meeting at the request of Lewis Farm's attorney.

23. On March 13, 2008, Agency staff and Lewis Farm's counsel appeared before the APA Enforcement Committee. See Record Item 2 (March 13, 2008 Transcript of APA Proceeding In the Matter of Lewis Family Farms, Inc.).

24. On March 25, 2008, APA's Enforcement Committee issued its Determination pursuant to 9 NYCRR § 581-2.6(d), finding Lewis Farm in violation of the Adirondack Park Agency Act and the Wild, Scenic and Recreational Rivers Act, requiring Lewis Farm to: obtain after-the-fact permits for its three single family dwellings and subdivision into sites; provide a professional engineer's evaluation as to whether its installed septic system complies with New York State Department of Health and Agency standards and guidelines; and pay a civil penalty in the amount of \$50,000 for the violations. See Record Item 1 (Determination, Pages 12-13)<sup>4</sup>.

---

<sup>4</sup> In its Determination, the Enforcement Committee considered, inter alia, an exchange of correspondence between the NYS Department of Agriculture and Markets and Agency staff (Record Item 10, Exhibit A) involving a consultation between the two agencies concerning Agency staff's interpretation of the APA Act in this matter.

25. The March 25, 2008 Determination also found that all three single family dwellings were constructed in violation of the Adirondack Park Agency Act and the Rivers Act, even though Agency staff had thought only two of the three dwellings to be violations. See Record Item 1 (Determination, p. 11, ¶¶ 46, 48). The Committee found that none of the three dwellings met the regulatory requirements for a lawful replacement of a pre-existing single-family dwelling that would not require a permit.<sup>5</sup> Id. The Enforcement Committee did not include the third single family dwelling in its penalty determination, but did require Lewis Farm to obtain a permit for all three single family dwellings. Id.

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

27. On April 18, 2008, the Chairman of the Agency's Board and the Chairman of the Agency's Enforcement Committee transmitted to counsel for Lewis Farm a revised Enforcement

---

<sup>5</sup> A fourth single family dwelling that was built by Lewis Farm in 2007 on Resource Management lands but outside the designated recreational river area was found by Agency staff to be a lawful replacement of a pre-1973 single family dwelling and, as such, not subject to APA permitting requirements or the March 13, 2008 proceeding before the Enforcement Committee. See Record Item 12 (March 4, 2008 Affidavit of Douglas Miller, ¶ 7).



Committee Determination striking Paragraph 4, Page 12 of the original Determination. See Record Item 1.

28. Attached is a timeline of Agency Enforcement actions. See Exhibit 1.

29. The APA's Amended Complaint (Essex County Index No. 332-08) is attached hereto as Exhibit 2. The action alleges violations of the APA Act and Rivers Act, and seeks enforcement of the APA's March 25, 2008 Determination. Lewis Farm's Answer is attached hereto as Exhibit 3.

**Material Law Supporting APA's Summary Judgment Motion**

**Adirondack Park Agency Act ("APA Act")**

30. The APA Act establishes permitting jurisdiction over certain types of specifically defined land uses and development in the Adirondack Park. Permits are required by APA Act § 809 for all new land uses and development listed in § 810 as either class A regional projects or class B regional projects. Many of the new land uses and development listed in § 810 are specific uses that are expressly defined in § 802.

31. APA Act § 809(1) provides that:

"The agency shall have jurisdiction to review and approve all class A regional projects, including those proposed to be located in a land use area governed by an approved local land use program, and all class B regional projects in any land use area not governed by an approved and validly enacted or adopted local land use program." (Emphasis added).

32. APA Act § 809(2)(a) provides that:

"Any person proposing to undertake a class A regional project in any land use area, or a class B regional project in any land use area not governed by an approved and validly enacted or adopted local land use program, shall make application to the agency for approval of such project and receive an agency permit therefore prior to undertaking the project."

See Record Item 1 (Determination, ¶ 17).

33. The Town of Essex does not have an approved local land use program, so the Agency has permitting jurisdiction over all of the new land uses and development listed in Section 810 proposed to be undertaken there. See Record Item 1 (Determination, ¶ 7).

34. APA Act § 810(1)(e) lists the Class A regional projects in a Resource Management land use area that require an Agency permit. These projects include, inter alia, all subdivisions of land (and all land uses and development related thereto) involving two or more lots, parcels or sites. See APA Act § 810(1)(e)(3); see also Record Item 1 (Determination, ¶ 19).

35. A "subdivision" is defined in APA Act § 802(63) as:

"any division of land into two or more lots, parcels, or sites for the purpose of any form of separate ownership or occupancy (including any grading, road construction, installation of utilities or other improvements or any

other land use and development preparatory or incidental to any such division) . . . ." (Emphasis added).

See Record Item 1 (Determination, ¶ 20).

36. The Agency's regulations define "subdivision into sites" as occurring:

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

See 9 NYCRR § 570.3 ah (3); see also Record Item 1 (Determination, ¶ 21).

37. All subdivisions into sites of Resource Management lands require an Agency permit pursuant to APA Act §§ 809(2)(a) and 810(1)(e)(3). The APA's Enforcement Committee found in the Determination that Lewis Farm had undertaken a subdivision into sites and violated these provisions by constructing three new single family dwellings on the Resource Management portion of the Lewis Farm. See Record Item 1 (Determination, ¶¶ 6, 41 and 42).

38. APA Act § 810(2)(d) lists the Class B regional projects in a Resource Management land use area that require an Agency permit in the Town of Essex. See Record Item 1 (Determination, ¶ 23). These projects include, inter alia, all single family dwellings. See APA Act § 810(2)(d)(1); see also Record Item 1 (Determination, ¶ 23).

39. "Single family dwelling" is defined in APA Act § 802(58) as:

"any detached building containing one dwelling unit, not including a mobile home."

See Record Item 1 (Determination, ¶ 24).

40. All new single family dwellings (except for lawful replacements of pre-1973 dwellings) on Resource Management lands require an Agency permit pursuant to §§ 809(2)(a) and 810(2)(d)(1).<sup>6</sup> The APA Enforcement Committee found in its Determination that Lewis Farm had violated these provisions by constructing its three new single family dwellings on the Resource Management portion of the Lewis Farm. See Record Item 1 (Determination, ¶¶ 6, 45 and 46).

***Wild, Scenic and Recreational Rivers Act ("Rivers Act")***

41. The Rivers Act was enacted pursuant to a legislative finding that:

"many rivers of the state, with their immediate environs, possess outstanding natural, scenic, historic, ecological and recreational values."

See ECL § 15-2701(1); see also Record Item 1 (Determination, ¶ 27).

---

<sup>6</sup> For a more detailed explanation of why Lewis Farm's single family dwellings are not "agricultural use structures" as alleged by Lewis Farm, see the July 30, 2008 Affidavit of Paul Van Cott, ¶¶ 25-34; see also Record Item 1 (Determination, ¶¶ 37, 38).

42. The Rivers Act reflects a public policy that:

"certain selected rivers of the state which, with their immediate environs, possess the aforementioned characteristics, shall be preserved in free-flowing condition and that they and their immediate environs shall be protected for the benefit and enjoyment of present and future generations."

See ECL § 15-2701(3).

43. Section 15-2705 of the Rivers Act charges the Adirondack Park Agency with responsibility for administration and enforcement of the Rivers Act on private lands within the Adirondack Park, and the Agency has promulgated regulations in 9 NYCRR Part 577:

"for the management, protection, and enhancement of and control of land use and development in the wild, scenic and recreational river areas."

See ECL § 15-2709(1); see also, Record Item 1 (Determination, ¶ 29).

44. The Bouquet River is designated as a recreational river in 9 NYCRR Appendix Q-6 (See Item 5a. [Recreational Rivers]). The recreational river area associated with the Bouquet River in the Town of Essex, Essex County, extends one-quarter of a mile from each bank of the river. Id.; see also Record Item 1 (Determination, ¶ 6).

45. Pursuant to 9 NYCRR § 577.4(a):

"No person shall undertake a rivers project without first obtaining an agency permit."

See Record Item 1 (Determination, ¶ 30).

46. In recreational river areas, rivers projects include, inter alia, all subdivisions of land, including but not limited to subdivisions into sites for purposes of separate occupancy, in Resource Management land use areas. See 9 NYCRR § 577.5(c)(1); see also R 9 (Determination, ¶ 31). In the Determination, the APA Enforcement Committee found that Lewis Farm had undertaken a subdivision into sites on Resource Management lands in a recreational river area in violation of 9 NYCRR Part 577. See Record Item 1 (Determination, ¶¶ 43, 44).

47. In recreational river areas, unless otherwise provided, rivers projects that require an Agency permit also include all land uses and developments classified as "compatible uses" by the Adirondack Park land use and development plan in Resource Management land use areas. See 9 NYCRR § 577.5(c)(1); see also Record Item 1 (Determination, ¶ 32).

48. Section 805(3)(g)(4) of the APA Act lists the compatible uses on Resource Management lands in the Adirondack Park that constitute "rivers projects" under 9 NYCRR Part 577. See Record Item 1 (Determination, ¶ 32).

49. Pursuant to APA Act § 805(3)(g)(4)(1), single family dwellings are listed as "secondary compatible uses" in Resource Management land use areas. Thus, all single family dwellings (except lawful replacements of pre-1973 dwellings) require Agency permits as "rivers projects" pursuant to 9 NYCRR § 577.4(a). See Record Item 1 (Determination, ¶¶ 33, 38). In its Determination, the APA Enforcement Committee found Lewis Farm in violation of 9 NYCRR Part 577 by failing to obtain a permit from the Agency prior to constructing its three new single family dwellings on Resource Management lands in the Bouquet River recreational river area. See Record Item 1 (Determination, ¶¶ 43, 44, 47 and 48).

***Enforcement Authority under the APA Act and Rivers Act***

50. APA Act § 813 states in part:

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

2. Alternatively or in addition to an action to recover the civil penalties provided by subdivision one of this section, the attorney general may institute in the name of the agency any appropriate action or proceeding to prevent, restrain, enjoin, correct or abate any violation of, or to

enforce any provision of this article or any rule or regulation promulgated by the agency, or the terms of conditions of any order or permit issued by the agency pursuant to this article." (Emphasis added).

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

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

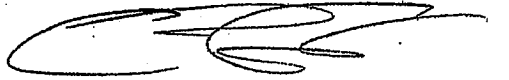
**Facts in Opposition to August 1, 2008 Affirmation of John Privitera**

52. In his August 1, 2008 Affirmation, Lewis Farm's attorney inaccurately portrays the Agency's clear jurisdiction over subdivisions, using a February 2, 2005 memorandum that I wrote concerning Agency staff efforts to prevent illegal subdivisions from occurring to make his argument. See August 1, 2008 Affirmation of John Privitera, ¶ 9, Exhibit E. My memorandum only pertained to subdivisions that occur by deed and create separately-owned parcels. It did not purport to address violations involving a "subdivision into sites" as that term is defined in the Agency's regulations at 9 NYCRR § 570.3(ah), or the Agency's permitting jurisdiction over such subdivisions pursuant to the APA Act and the Rivers Act. See ¶¶ 34-37 and 45-46 above.



53. The APA Act and the Rivers Act provide no exemptions from Agency permitting jurisdiction for a subdivision, including a subdivision into sites for purposes of separate occupancy, on the basis that the subdivision involves lands in agricultural use. In the context of clear Agency jurisdiction and no exemption from that jurisdiction, as well as undisputed material facts, the Agency is entitled to summary judgment.

DATED: Ray Brook, New York  
August 8, 2008



Paul Van Cott, Esq.

Sworn to before me this  
8th day of August, 2008

  
Notary Public

MARY L. REARDON  
Notary Public - State of New York  
Qualified in Essex County  
No. 01RE6114798  
Commission Expires Aug. 23, 20 12