

At a term of the ~~Supreme Court~~ ⁰⁰⁰⁰¹⁹³⁰
of the State of New York, ~~held~~ ^{BOOK 119 PAGE 276}
in and for the County of Essex,
at the Essex County Courthouse
in the Town of Elizabethtown,
on the 8th day of August, 2007.

P R E S E N T: HONORABLE KEVIN K. RYAN
Acting Justice, Supreme Court

STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

 Plaintiff,

-against-

NEW YORK STATE ADIRONDACK PARK
AGENCY,

 Defendant.

DECISION AND ORDER
Index No. 0498-07
RJI #15-1-2007-0153

APPEARANCES: DAVID L. COOK, Esq., Attorney for the
 Plaintiff
 LORETTA SIMON, Esq., Assistant Attorney
 General, for the Defendant

RYAN, A.J.:

Pending before the Court is the plaintiff's amended order to show cause, dated July 13, 2007, and the defendant's cross-motion to convert the underlying declaratory judgment action into a petition under CPLR Article 78 and then dismiss the complaint. The Court has reviewed and considered the following: the amended order to show cause, dated July 13, 2007, the attached undated amended complaint, the amended affidavit of Barbara Lewis, sworn to July 3, 2007, the amended affidavit of Mark McKenna, sworn to July 3, 2007, and the

The plaintiff has no objection to this action being converted to a petition under CPLR Article 78 and thus the relief is **GRANTED** pursuant to CPLR 5103(c).

The plaintiff's motion for a restraining order is denied and the defendant's motion to dismiss the petition is granted for the reasons stated herein.

The relevant facts of this case may be stated as follows: the plaintiff is a corporation which operates an organic farm located in the Town of Essex, which is in the Adirondack Park. In the fall of 2006, the plaintiff obtained a building permit from the Town of Essex to construct housing on the farm for workers. These houses consisted of a total of four modular units which the plaintiff obtained from a Canadian firm. The contract to install these four houses expired on June 30, 2007. Because the Town of Essex Code Enforcement Officer apparently told the project manager no permits were needed from the Adirondack Park Agency (hereinafter "the APA") the project manager did not seek any. After construction had already started, Mrs. Lewis had contact with a representative of the APA and was informed that the Farm did, in fact, need to apply for a permit. However, since construction had already started, the matter was referred to the APA's enforcement division.

Members of the staff at the enforcement division at the

attorney's affirmation in support, by Joseph R. Brennan, Esq., of counsel to plaintiff's attorney, dated July 3, 2007, no exhibits were attached thereto, and the amended memorandum of law in support of the plaintiff's motion for a temporary restraining order and further injunctive relief. The Court has also considered the notice of motion by the defendant, dated August 1, 2007, the affirmation of John Banta, Esq., dated July 23, 2007, the affirmation of Sarah Reynolds, Esq., dated July 20, 2007, plus attached exhibits A through D, the affidavit of John L. Quinn, Environmental Program Specialist 3 with the defendant, sworn to July 23, 2007, plus attached exhibits A through C, and the affidavit of Douglas Miller, Enforcement Officer for the defendant, sworn to July 20, 2007, plus attached exhibits A through I, and the defendant's memorandum of law in support of the motion to dismiss the complaint. The Court has also considered the reply memorandum of law by the plaintiff, the undated affirmation of plaintiff's counsel in opposition to the defendant's motion to dismiss, the affidavit of Salim B. Lewis, sworn to August 7, 2007, the affidavit of Barbara A. Lewis, sworn to August 7, 2007, and the affidavit of Klaas Martens, sworn to August 6, 2007. In addition, the Court heard oral argument from counsel on the order to show cause and the motion to dismiss on August 8, 2007.

APA sent a proposed settlement to the Farm which included the payment of a \$10,000 civil penalty prior to the APA considering an after-the-fact permit application. Over the course of the next several months, the Farm and the APA had numerous contacts in which the Farm repeatedly requested that the APA drop the civil penalty as part of the proposed settlement. The APA staff did not accede to that request.

While construction had halted in March 2007, after the APA informed the Farm a permit was needed for the construction, in the latter part of June 2007, construction re-commenced. The APA served the Farm with a cease and desist order but the Farm continued to build the farm workers' housing. The Farm commenced this law suit seeking a declaratory judgment that the APA had no jurisdiction over the farm workers' housing, or, if they did, that the Agriculture & Markets Law superceded the APA Act, and thus, no permit was needed to construct the houses.

The Court does not agree with the plaintiff's assertion that the APA has no authority over this building project. The area in which three of the houses, the particular houses which have been built, is located is defined as part of the Wild, Scenic and Recreational River System Act (Environmental Conservation Law §15-2701(1)). Under the Environmental Conservation Law, the APA has the authority to make and

enforce any regulations necessary to enforce the act (Environmental Conservation Law §15-2709(1)). The APA act, Executive law §810(2)(d), defines the building project as a class B project since it involves the construction of a single-family dwelling. Under the APA regulations, this building project constitutes a "subdivision" even though it is not a typical suburban subdivision. The plaintiff put up a dwelling on a parcel of land which already had either a dwelling or building, even though an already existing building might be removed after construction is completed (9 NYCRR 570.3(ah)(3) and 573.6(e)).

The plaintiff argues that the houses are agricultural use buildings, which the APA does not dispute, but the plaintiff also claims these are exempted from the APA's control, citing Executive Law §810(1)(e)(8). However, when read in its entirety, that section does not support the plaintiff's interpretation. That section states that the APA has authority over "all structures in excess of forty feet in height, except agricultural use structures and residential radio and television antennas". Clearly, that exception was not meant to include every possible farm structure. If the Court were to accept the plaintiff's interpretation of that section, the APA could do nothing if a landowner built a cow barn within a few feet of the river.

Since the APA does have authority over this building project, the next issue is whether the Agriculture and Markets Law §305-a supersedes the APA authority. It does not. From a plain reading of that section, it applies only to local laws. Subdivision (1) (a) of that section states:

"Local governments, when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules or regulations, shall exercise these powers in such manner as may realize the policy and goals set forth in this article and shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of this article unless it can be shown that the public health or safety is threatened."

Thus, this section has no application to the Executive Law or the regulations promulgated by the APA pursuant to that law.

Lastly, this situation is not ripe for judicial intervention. While the plaintiff may not wish to proceed to a hearing before the APA commissioners, because that action may seem to submit to the jurisdiction of the APA or because of the timing of the building contract, that is clearly the next step in the process. This Court has only the

jurisdiction that the Legislature gave it over disputes involving the APA. It does not have concurrent jurisdiction over this situation (*Sohn v Calderon*, 78 NY2d 755, 766-767 (1991)). This Court's jurisdiction is limited to a review of the APA's actions under CPLR Article 78 (*Ibid.*). Otherwise, as the Court of Appeals pointed out in *Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 (1987), the Court condones a breach of the separation of powers between the branches of government.

The Commissioners of the APA have the authority to review this situation under Executive Law §809. If, after receiving a determination from the Commissioners, the plaintiff is still dissatisfied, they are free to file an Article 78 proceeding at which time this Court may review the actions of the APA. Until that time, this matter constitutes an internal matter in which the Court will not interfere.

Finally, were the Court to consider the plaintiff's request for a restraining order, the plaintiff has not made out a case for irreparable damages. The only potential harmful consequences listed by the plaintiff involve monetary damage. The plaintiff has not demonstrated that any potential injury is so serious that a monetary award would not be sufficient compensation (*Norbrook Laboratories Ltd v C.G. Hanford Mfg. Co.*, 297 F.Supp.2d 463, 492 (Northern District of

New York, 2003) (citation omitted), affirmed 126 Fed.Appx. 507 (2005)).

The plaintiff's motion is DENIED and the defendant's motion to dismiss the underlying action is GRANTED.

IT IS ALL SO ORDERED.

E N T E R :

Kevin K. Ryan

KEVIN K. RYAN
Acting Justice, Supreme Court

Dated: Plattsburgh, New York
August 16, 2007

ENTERED AND FILED
ESSEX COUNTY CLERK
07 AUG 29 AM 9:07
ELIZABETHTOWN, NY 12932

ENTERED

Joseph A. Provoncha

JOSEPH A. PROVONCHA
ESSEX COUNTY CLERK
DATED: _____

8/29/07

FILINGS

STAMPED 8-29-07 INDEXED Q ORDERS/JUD _____

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Shirley A. Smith

