

ORIGINAL

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Plaintiff,

- v -

NEW YORK STATE ADIRONDACK PARK AGENCY,

Defendant.

Index No.: 000498-07

**AMENDED MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF LEWIS FAMILY
FARM'S MOTION FOR TEMPORARY RESTRAINING ORDER
AND FURTHER INJUNCTIVE RELIEF**

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Lewis Family Farm, Inc.

Dated: July 3, 2007

PRELIMINARY STATEMENT

The Adirondack Park Agency ("APA") must be enjoined from improperly interfering with Lewis Family Farm, Inc.'s ("Lewis Farm") ability to sustain its organic farming operations. For more than three months, the APA's wrongful interference has halted construction of housing meant for Lewis Farm employees and interns and which is critical to Lewis Farm's continued agricultural, environmental, and educational operations.

Injunctive relief is warranted because the APA Act (the "APAA" or "Act") exempts the Lewis farm employee housing project from the APA's jurisdiction. Additionally, the Agriculture and Markets Law prevents the APA from unreasonably interfering with farming operations on land located within an agricultural district. Enjoining the APA from asserting its jurisdiction pending final resolution of this matter is particularly appropriate here, where the APA is merely seeking to collect an arbitrary \$10,000 "penalty" from Lewis Farm before "allowing" it to proceed with its project. The problem with the APA's reasoning is that it completely ignores not only the limitations within the APAA with regard to its jurisdiction, but also the Agriculture and Markets Law and legislative intent to proscribe this type of unreasonable interference with farming operations.

Such interference has already caused Lewis Farm significant irreparable harm in that it runs a real risk of losing warranties on its modular homes, as well as the risk of decreased quality and/or warranty should the construction's weatherproofing process suffer further delay. Moreover, in addition to the significant financial damages Lewis Farm has suffered because of the APA's interference, the farm housing project has been significantly delayed and Lewis Farm interns are at risk of losing their current temporary housing, with no back-

up housing readily available to them. Finally, Lewis Farm will suffer irreparable harm in the form of the loss of its cattle should it lose employees as a result of insufficient housing.

STATEMENT OF FACTS

Lewis Farm's History and Mission

In or about 1978, the Lewis family farmstead and home was purchased, following a long family association with the Adirondacks which dates back to 1951. Lewis Farm incorporated in 1985 and is not only a working farm, but one of the largest organic farms in New York State. Lewis Farm's mission is to improve land use methods and the lives of those who live in the vicinity of its operations. Additionally, Lewis Farm seeks to enhance and protect the environment, similar to the stated mission of the APA. Lewis Farm's record of environmental stewardship is unparalleled within the Adirondack Park.

Lewis Farm has become a showcase for the Cornell cooperative extension and has, through example, contributed to four neighboring farms having become organic as well. Lewis Farm has a strong reputation which has allowed for students and apprentices, both from the United States and international, to work for academic credit in their agricultural programs.

Lewis Farm provides employment and education to members of its community and beyond and is highly regarded in both local, national and international agricultural and environmental communities. Lewis Farm was approached by the government of Nepal to host four farmers from Nepal so that they may learn the methods of sustainable, organic farming. The Nepali farmers are scheduled to arrive in the fall of 2007.

The Housing Project

Lewis Farm has made significant capital investments to its operations in its efforts to remain economically viable. One of the last capital improvement projects Lewis Farm has left is to build staff homes, which was to have been completed by early summer, 2007 (the "Housing Project"). The purpose of the Housing Project is to provide farm housing for key and critical farm employees and student interns while they work on the Lewis Farm.

In furtherance of the Housing Project, Mark McKenna, Lewis Farm's project manager, obtained building permits from the Town of Essex in or about October, 2006. In or about November, 2006, the Town's Code Enforcement Officer, David Lansing, told Mr. McKenna that no further permits were necessary since the Housing Project was strictly a farm operation. Lewis Farm relied on this information and, accordingly, did not contact the APA.

Only after Lewis Farm had expended significant resources on architectural, engineering, and foundation work, did Mr. Lansing, the Code Enforcement Officer, travel to the Housing Project and, despite his earlier advisement, suggest that Mr. McKenna contact the APA. McKenna immediately chose to voluntarily cease operations on the Housing Project and contacted the APA to obtain whatever permit was allegedly necessary. Only after Lewis Farm contacted the APA to determine what it needed to do in order to obtain an APA permit, in or about January, 2007, did the APA inform Lewis Farm that the issue was being addressed by the APA's Enforcement Division.

The interruption of the Housing Project has caused Lewis Farm significant damage including, without limitation, reputational damage, continuation of payments to the project manager and Lewis Farm interns having to be housed off site in housing that is insufficient

as a long-term solution, as well as attorneys' fees incurred in negotiating with the APA. Such monetary damages have exceeded \$30,000.

In addition, the modular housing units were constructed in Canada and shipped to New York to be placed on the newly built foundations. The manufacturer's laborers are only available, however, through June 30, 2007 for the installation. To the extent Lewis Farm is forced to hire another contractor to install the units, it risks losing the warranty to which it would otherwise be entitled. In addition, the substitute laborers are expected to face language barriers with the manufacturer, who only converses in French. This will cause the operation to proceed with diminished efficiencies and Lewis Farm may suffer from decreased product quality as well.

In addition, it is necessary to weatherize the units once they are placed on the foundations. To the extent the APA's interference causes this process to be interrupted or delayed, such will cause Lewis Farm irreparable harm in that construction quality and/or warranty will be sacrificed.

On or about May 14, 2007, Lewis Farm received correspondence from the APA enclosing a proposed settlement agreement. (Amended Cmplt, Exh A). Notably, neither the APA's letter nor proposed settlement agreement in any way acknowledge that the Housing Project is taking place on a farm in furtherance of farm-related activities. Nor does the May 14, 2007 letter in any way acknowledge that Lewis Farm had previously removed fifteen housing units and that it now only seeks to replace four through the Housing Project (with two others having been replaced earlier). Rather, the APA letter and proposed agreement give the wrongful appearance that what is at issue is some sort of commercial subdivision plan. Nowhere in the APA's May 14, 2007 correspondence does the APA assert

that the Housing Project poses any threat to public health or safety, nor does it ever assert - because it cannot - that the Housing Project is in any way causing damage to the environment. Indeed, the APA has indicated that it will issue an after-the fact permit for the Housing Project. The proposed agreement, however, requests that Lewis Farm first pay a penalty of \$10,000.

ARGUMENT

I. LEWIS FARM IS ENTITLED TO A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

A preliminary injunction should be granted when the plaintiff demonstrates: (1) a likelihood of success on the merits; (2) that it would suffer irreparable injury without the injunction; and (3) that the balance of equities tip in its favor. *See American Para Professional Systems, Inc. v Examination Management Services, Inc.*, 214 AD2d 413, 414 (1st Dept 1995) (citation omitted). Each of these elements are met in this case, thus entitling Lewis Farm to a preliminary injunction, as well as a temporary restraining order.

The Housing Project is necessary to the Lewis Farm agricultural operations. Lewis Farm does not have sufficient housing for its staff and interns, who are integral to the sustainability of its operations. The APA's continued wrongful interference with the Housing Project will cause Lewis Farm significant irreparable harm in that it may lose the warranties on the units, should Lewis Farm be forced to hire outside contractors to perform the work. These outside contractors are expected to face language barriers with the manufacturer which will necessarily lead to diminished efficiencies and, quite possibly, decreased quality. In addition, the interruption or delay of the weatherproofing process will cause Lewis Farm irreparable harm in the form of additional lost construction quality

and/or warranty. Lewis Farm has no adequate remedy at law because it is impossible to predict the extent of damages it has suffered and will continue to suffer should the APA be permitted to continue down its course of unjustified interference with the Housing Project.

A. Lewis Farm is Likely to Succeed on the Merits of its Claims

To demonstrate a likelihood of success on the merits, a movant need only make a *prima facie* showing of a right to relief. *McLaughlin, Piven, Vogel, Inc. v W.J. Nolan & Co.*, 114 AD2d 165, 172, (2d Dept 1986). In other words, the moving party need only show that it is *more likely than not* that it will prevail on its claim. This requirement is clearly met with respect to Lewis Farm's request for a preliminary injunction based on a clear reading of the APAA and New York's Agriculture and Markets Law.

1. The APAA Does Not Give the APA Jurisdiction Over the Housing Project

Through the APAA, the Legislature has set specific limitations with regard to the APA's jurisdiction. Most relevant here is the recitation included in the Act regarding the policy objective involved in any APA oversight of resource management areas, the land use area in which the Lewis Farm falls. (*See, e.g.*, Compl't, Ex. A). The APAA states, in relevant part,

[r]esource management areas,...are those lands where the need to protect, manage and enhance forest, agricultural, recreational and open space resources is of paramount importance because of overriding natural resource and public considerations.

(APAA, § 805(3)(g)(1)). Moreover, according to the Act,

[t]he basic purposes and objectives of resource management areas are to protect the delicate physical and biological resources, encourage proper and economic management of forest, agricultural and recreational resources and preserve the

open spaces that are essential and basic to the unique character of the park.

(APAA § 805(3)(g)(2). With this language, the Legislature exhibits its intent that "proper and economic" agricultural uses be encouraged as they are of "paramount importance" for public considerations including, necessarily, the economic viability of farming operations within the Adirondack Park.

Indeed, the very definition of "agricultural use structure" found within the APAA, read in tandem with other portions of the Act, demonstrates the Legislature's intent to prevent the APA's interference with such operations. The Act defines "agricultural use structure" as "any...building or structure directly and customarily associated with agricultural use." (APAA § 802(8)). In turn, "agricultural use" is defined as "any management of any land for agriculture...." (APAA § 802(7)). "Structure" is defined within the Act to include "any object constructed, installed or placed on land to facilitate land use and development or subdivision of land, such as buildings, sheds, single family dwellings, mobile homes, signs, tanks, fences and poles, and any fixtures, additions and alterations thereto."

The Housing Project falls squarely within the APAA definition of "agricultural use structure" because farm employee housing constitutes structures directly and customarily associated with the management of farm operations. Section 810 of the Act demonstrates with clarity the fact that the Legislature never intended to give the APA jurisdiction of projects such as the Housing Project. Subsection e, which pertains to resource management area, expressly exempts agricultural use structures from APA review. (APAA § 810(e)(8). Moreover, a quick review of the APA's own "Jurisdictional Table" demonstrates that the

APA does not have jurisdiction over either agricultural uses or agricultural use structures. (See APA Jurisdictional Table, Exhibit A of Affirmation of Joseph R. Brennan dated July 3, 2007).

Finally, APA jurisdiction is also precluded by § 811 of the Act which expressly states that "a single family home may always be enlarged or rebuilt to any extent provided it continues to be used as such." Given that the Lewis Farm has removed fifteen housing structures on its land, the replacement of only four through the current project (and two previously) is not only entirely permissible under the Act, but outside of APA review.

The APAA does not give the APA jurisdiction over the Lewis Farm Housing Project and Lewis Farm respectfully seeks a declaration of this Court to this effect, as well as an injunction enjoining the APA from further unwarranted interference.

2. Even if the APA Had Jurisdiction, the Agriculture and Markets Act Precludes the APA's Interference with Farm Operations

Lewis Farm conducts farm operations within an agricultural district. The Housing Project constitutes farm operations within the meaning of § 305-a because residential buildings on farm lands constitute "farm operations" pursuant to New York's Agriculture and Markets Law § 305-a ("§ 305-a"). See *Town of Lysander v. Hafner*, 96 NY2d 558, 564 (2001). In *Town of Lysander*, the Court of Appeals found that a town ordinance against single-wide mobile homes constituted an unreasonable restriction on farm operations in violation of § 305-a. In that case, the mobile homes were placed on the farm in order to house migrant workers. In reaching its decision, the Court of Appeals noted that the legislative history behind New York's Agriculture and Markets Law shows that the statute was amended in 1997 in an effort to, among other things, "strengthen — not limit — the

protections against unreasonably restrictive local laws and ordinances." *Id.* (citations omitted) (emphasis in original); see also *Inter-Lakes Health, Inc. v. Town of Ticonderoga*, 13 AD3d 846, 848 (3d Dept 2004) (Section 305-a restricts a municipality from not just enacting, but from administering ordinances in a manner which unreasonably restricts or regulates farming operations).

Moreover, the *Town of Lysander* Court found relevant the fact that the Town had not made an evidentiary showing that the ban on single-wide mobile homes was necessary to remedy a threat to the public health or safety. See *Town of Lysander*, 96 NY2d at 565 (citation omitted). Similarly, the APA has not stated any reason why the Housing Project would pose any threat to public health or safety. Indeed, the APA has indicated that, once Lewis Farm pays a seemingly arbitrary \$10,000 penalty, the APA will issue a permit.

The APA's interference with the Housing Project including, without limitation, the imposition of a \$10,000 penalty, is an unreasonable restriction or regulation of farm operations in violation of § 305-a. The APA in this instance is no different from a town in that it is not a state-wide agency and is seeking to control land use in a manner proscribed by the Agriculture and Markets Law. The imposition of a \$10,000 penalty on Lewis Farm will pose a significant hardship, legal expense and reputational damage on Lewis Farm as it endeavors to become a profitable organic farm. Moreover, the Housing Project is necessary to provide housing to Lewis Farm employees and interns in furtherance of its farming operations. The APA's May 14, 2007 correspondence and proposed settlement agreement does not even acknowledge the fact that Lewis Farm is engaged in farming operations. Given the clear mandate of New York's Agriculture and Markets law, there is no

justification for the APA to assert jurisdiction over the Housing Project and it must be enjoined from using its regulations to unreasonably hinder Lewis Farm's Housing Project.

B. Lewis Farm will Suffer Immediate and Irreparable Harm if an Injunction Does Not Issue

A showing of irreparable injury is the "single most important prerequisite for the issuance of a preliminary injunction." See *Inflight Newspapers, Inc. v Magazines In-Flight, LLC*, 990 FSupp 119, 123-4 (EDNY 1997) (citations omitted). Irreparable harm is any injury for which money damages do not provide adequate compensation, or is inadequate. See *Inflight Newspaper*, 990 FSupp at 124-5 (citation omitted); *McLaughlin, Piven, Vogel, Inc. v W.J. Nolan & Co., Inc.*, 114 AD2d 165, 174 (citation omitted). Importantly, in order to establish an entitlement to injunctive relief, a party need only establish the *likelihood* of such harm. See *Inflight Newspaper, supra* at 125.

Absent injunctive relief, Lewis Farm will continue to suffer irreparable harm in that it risks losing the warranty available on the modular units if the manufacturer is not able to complete installation by June 30, 2007. Lewis Farm also will suffer from diminished project efficiencies (higher costs) and is likely to also suffer decreased project quality if forced to hire substitute laborers who likely will not be able to directly converse with the manufacturer, who only speaks French. Moreover, to the extent the APA interference causes delay of the weatherproofing process, Lewis Farm also risks decreased construction quality due to weather-related damages and/or loss of warranty. In short, the longer the APA is allowed to improperly interfere with Lewis Farm's Housing Project, the greater the risk that Lewis Farm will suffer significant irreparable harm in addition to the significant monetary damages it has already incurred. Injunctive relief is warranted because the

measure of the likely imminent irreparable injuries resulting from the APA's unwarranted interference is unascertainable at this time.

In addition, Lewis Farm interns and staff are presently being housed off site at a location that is likely to be sold in the near term. These individuals were supposed to have been housed in the newly-constructed modular homes which were scheduled for completion more than a month ago. Lewis Farm does not know where it will be able to house these employees in the event the Housing Project is not complete at the time the current housing becomes available. The inability of Lewis Farm to secure adequate housing for these individuals will irreparably interfere with its farming program. If Lewis Farm loses staff because of a lack of housing, it will also be forced to liquidate its cattle because there will be insufficient personnel to care for the herd. It is beyond dispute that Lewis Farm will continue to be irreparably harmed in the absence of a temporary restraining order and preliminary injunction.

C. Balancing the Equities Compels Injunctive Relief in Favor of Lewis Farm

That the balance of the equities is in Lewis Farm's favor is established by a showing that the irreparable injury to Lewis Farm is more burdensome to Lewis Farm than the harm that may be caused to the APA by the granting of the injunctive relief. *See McLaughlin*, 114 AD2d at 174. Without the injunctive relief requested herein, Lewis Farm will be immeasurably and irreparably damaged as demonstrated above. This is, of course, in addition to the more than \$30,000 Lewis Farm has already been forced to spend in responding to the APA's unnecessary interference. By contrast, the potential harm to the APA is non-existent. The APA has already indicated that it would issue a permit to Lewis Farm upon Lewis Farm's application. The \$10,000 penalty the APA has "offered" in its

proposed settlement agreement is solely meant to be punitive in nature, extortive, and is not at all necessary for any damage or other cost to the APA. There is no resulting damage to the APA should the requested injunctive relief enter and the equities, therefore, favor this Court entering a temporary then permanent restraining order.

CONCLUSION

For the reasons set forth above and in the accompanying complaint and affidavits, Lewis Farm respectfully requests that the Court grant its application and enter an order enjoining and restraining, preliminarily and permanently, defendant, its agents, affiliates, successors and assigns, and all those in active concert or participation with it, from interfering with the Housing Project including:

- (a) from issuing any stop work order or consent decree purporting to interfere with the Housing Project;
- (b) from attempting to impose any penalty on plaintiff for the Housing Project; and
- (c) from attempting to assert jurisdiction over the Housing Project; and
- (d) for such other and further relief as is just, equitable and proper.

Dated: July 3, 2007

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