

Case No. 504696

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

LEWIS FAMILY FARM, INC.,

Plaintiff-Appellant,

NOTICE OF MOTION

-against-

Case No. 504696

NEW YORK STATE ADIRONDACK PARK AGENCY,

Defendant-Respondent.

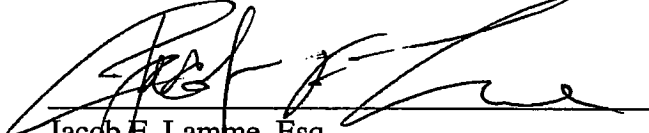
PLEASE TAKE NOTICE that upon the Affidavit of Jacob F. Lamme, Esq., sworn to July 3, 2008, and upon all of the papers and proceedings had herein, appellant Lewis Family Farm, Inc., will move at a motion term of this Court to be held at the Justice Building, South Mall, Albany, New York, on the 14th day of July 2008 for an order pursuant to 22 NYCRR § 800.12 granting an extension of the time in which the Appellant has to perfect its appeal, and granting such other and further relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that pursuant to 22 NYCRR § 800.2, papers in opposition to this motion, if any, must be filed by 11:00 a.m. on Friday, July 11, 2008. This motion will be submitted on the papers and personal appearances by the parties or their counsel in opposition to the motion is neither required nor permitted.

Dated: July 3, 2008

Albany, New York

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



Jacob F. Lamme, Esq.
Attorneys for Plaintiff-Appellant
677 Broadway
Albany, New York 12207
(518) 447-3200

TO: Loretta Simon, Esq.
Assistant Attorney General
State of New York
Office of the Attorney General
The Capitol
Albany, New York 12224-0341

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Case No. 504696

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

LEWIS FAMILY FARM, INC.,

Plaintiff-Appellant,

AFFIDAVIT

-against-

Case No. 504696

NEW YORK STATE ADIRONDACK PARK AGENCY,

Defendant-Respondent.

**AFFIDAVIT IN SUPPORT OF MOTION TO
EXTEND TIME TO PERFECT APPEAL**

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

JACOB F. LAMME, being duly sworn, deposes and states as follows:

1. I am duly licensed and admitted to practice law in the State of New York, and I am an associate with the law firm of McNamee, Lochner, Titus & Williams, P.C., attorneys for the Lewis Family Farm, Inc. (hereafter "Lewis Family Farm" or "Appellant"), plaintiff-appellant in this action (Essex County Index No. 0498-07) (hereafter "*Action No. 1*"). I am also counsel to the Lewis Family Farm in an Article 78 proceeding (Essex County Index No. 315-08) (hereafter "*Action No. 2*") and an action (Essex County Index No. 332-08) (hereafter "*Action No. 3*"), both of which involve the same parties herein. *Action No. 2* and *Action No. 3* were consolidated and are currently pending before Hon. Richard B. Meyer, Acting J.S.C., Essex County Supreme Court. As such, I am fully familiar with the pleadings and proceedings had in this action, and with the matters set forth herein.

2. This affidavit is submitted in support of a motion to extend the time in which the Appellant has to perfect its appeal in *Action No. 1* in the interest of judicial economy.

3. On May 29, 2008, this Court issued a Decision and Order extending the Appellant's time to perfect the appeal to July 28, 2008. A copy of this Decision and Order is attached hereto as **Exhibit "A"**.

4. The relevant facts pertaining to these actions are set forth in the Affidavit of John J. Privitera, sworn to May 8, 2008, a copy of which is attached hereto as **Exhibit "B"**, and the Affidavit of John J. Privitera, sworn to May 16, 2008, a copy of which is attached hereto as **Exhibit "C"**, both of which were submitted to this Court in support of the previous motion to extend the time to perfect this appeal.

5. To briefly summarize, these actions involve the Adirondack Park Agency's (hereafter "Agency" or "Respondent") attempt to regulate farming by claiming jurisdiction over the Lewis Family Farm's farm worker housing structures. In June 2007, the Lewis Family Farm commenced *Action No. 1* in Essex County Supreme Court seeking a declaratory judgment that the Agency lacked authority to regulate farms. In August 2007, the Honorable Kevin K. Ryan, Acting J.S.C. converted *Action No. 1* to an Article 78 proceeding and summarily dismissed it as premature. However, in doing so, the lower court improperly reached some of the merits of the dispute and advised that the Agency had jurisdiction over the Lewis Family Farm's farm worker housing project.

6. After *Action No. 1* was dismissed, the Agency commenced its internal enforcement proceeding, which culminated in a final enforcement determination of the Agency on March 25, 2008 ("March 25 Determination"). On April 8, 2008, the Lewis Family Farm commenced an Article 78 proceeding against the Agency seeking to vacate and annul the March

25 Determination (*Action No. 2*, Essex County Index No. 315-08). On April 11, 2008, the Agency commenced a duplicative action seeking to enforce the March 25 Determination (*Action No. 3*, Essex County Index No. 332-08). Those actions were consolidated by order of the lower court on April 25, 2008 and are currently pending before Hon. Richard B. Meyer, Acting J.S.C.

7. On July 2, 2008, the Essex County Supreme Court (Hon. Richard B. Meyer) issued a Decision and Order in *Action No. 2* and *Action No. 3*, which disposed of several preliminary issues in those actions. A copy of the July 2, 2008 Decision and Order is attached hereto as **Exhibit "D"**.

8. Specifically, the July 2, 2008 Decision and Order ruled that the doctrine of collateral estoppel does not prohibit the Lewis Family Farm from challenging the Agency's jurisdiction in *Action No. 2* and *Action No. 3*. Specifically, the July 2, 2008 Decision and Order states as follows:

To the extent that the motion court [in *Action No. 1*] addressed whether the project involved "agricultural use structures", a "single family dwelling" and "subdivision (*Executive Law §802[8], [63]*), such was only to indicate that Lewis Farm had not established a "clear legal wrong" (*City of Newburgh v. Public Employment Relations Bd., supra; see also Town of Huntington v. New York State Div. of Human Rights*, 82 NY2d 783, 604 NYS2d 541, 624 NE2d 678) or that the Agency was acting in excess of its jurisdiction (*see Cortland Glass Co., Inc. v. Angello*, 300 AD2d 891, 752 NYS2d 741). None of the court's determinations on those issues were essential to its ultimate decision to dismiss the proceeding as "not ripe for judicial intervention".

(See July 2, 2008 Decision and Order, Ex. D, pp. 8-9).

9. This is precisely the outcome on the issue of collateral estoppel that the Lewis Family Farm seeks from this Court in its appeal of *Action No. 1*.

10. The July 2, 2008 Decision and Order also decided that the doctrine of *res judicata* prohibits the Lewis Family Farm from asserting that the Agency violated Section 305-a of the Agriculture and Markets Law because the Lewis Family Farm raised that issue in *Action No. 1*.

(See July 2, 2008 Decision and Order, Ex. D, pg. 9). However, the lower court only decided that half of the Lewis Family Farm's Third Cause of Action in its Amended Petition in *Action No. 2* is barred by the doctrine of *res judicata*. (See July 2, 2008 Decision and Order, Ex. D, pg. 9, n.17).

11. Thus, this appeal in *Action No. 1* is necessary for the Lewis Family Farm to preserve its argument that the Agency has violated Section 305-a of the Agriculture and Markets Law. This argument has merit because local governments are prohibited from regulating farm operations. N.Y. Agric. & Mkts. Law § 305-a(1)(a) (McKinney 2004). The Court of Appeals has spoken as to the Agency's powers, and regards the Agency as the functional equivalent of a "*local* planning board and a *local* zoning entity." Hunt Brothers v. Glennon, 81 N.Y.2d 906, 909 (1993) (emphasis supplied). Moreover, the term "local government" is not defined by the Legislature. See N.Y. Agric. & Mkts. Law § 301. Therefore, the Agency is prohibited from regulating farm operations.

12. The lower court heard oral argument in *Action No. 2* and *Action No. 3* on June 19, 2008. Less than two weeks later, the lower court issued the July 2, 2008 Decision and Order. Moreover, the lower court directed the Agency to file its answer to the Amended Petition in *Action No. 2* and directed the Lewis Family Farm to file its answer to the Amended Complaint in *Action No. 3* within twenty (20) days. The lower court also welcomed a motion for summary judgment from the Lewis Family Farm, on submission, ten (10) days thereafter.

13. Accordingly, it is entirely conceivable that the lower court will issue a final decision and order on the merits in *Action No. 2* and *Action No. 3* by early September 2008.

14. In the interests of judicial economy, this Court should not require that these matters be heard in piecemeal fashion. The issues of the instant appeal in *Action No. 1* are inextricably intertwined with the issues in *Action No. 2* and *Action No. 3*. Thus, they should be

heard together. It is respectfully submitted that it would be a waste of judicial resources and the expenses of the parties to require that this appeal be prosecuted during the pendency of the consolidated actions before Justice Meyer.

15. The time in which to perfect this appeal in *Action No. 1* has not yet expired, but will expire on July 28, 2008.

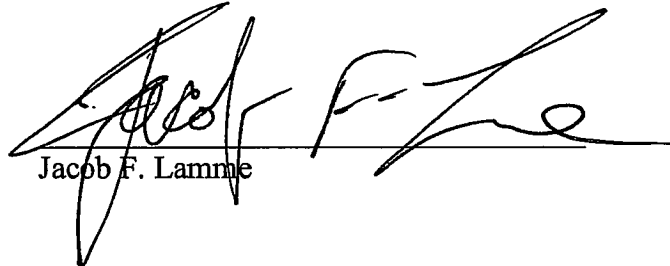
16. Rule 800.12 of the Rules of this Court permits this Court to extend the time to perfect an appeal upon a showing of a reasonable excuse for the delay and merit to the appeal. The Lewis Family Farm has demonstrated a justifiable and reasonable excuse for their anticipated delay in perfecting the appeal within the nine-month time frame imposed by 22 NYCRR § 800.12, namely that the pendency of the consolidated actions in the lower court will likely dispose of and render moot any issues to be raised on this appeal. In any event, the issues pending in *Action No. 2* and *Action No. 3* overlap, in part, with the erroneous opinion by Justice Ryan in *Action No. 1*. Accordingly, this Court should review the matters together.

17. No party will be prejudiced if this Court extends the Appellant's time in which to perfect the appeal.

18. Moreover, this Court should grant the extension because the Lewis Family Farm has demonstrated that this appeal has merit, and the extensions would further the interests of justice and judicial economy.

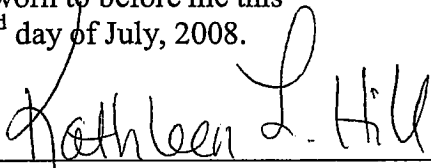
19. The Lewis Family Farm respectfully requests that it receive a 60-day extension, until September 26, 2008, to file and serve the record and brief in this appeal. This timeframe will allow the lower court to decide *Action No. 2* and *Action No. 3* on the merits. A decision there will settle this entire dispute. If not, and one party appeals, the matter should be consolidated with this case.

20. Based on the foregoing, the Lewis Family Farm respectfully requests an order from this Court granting: (i) an extension of the time in which to perfect its appeal of Justice Ryan's August 16, 2007 Decision and Order (which has not yet expired); and (ii) such other relief as to this Court seems just and proper.



Jacob F. Lamme

Sworn to before me this
3rd day of July, 2008.



Notary Public

KATHLEEN L. HILL
Notary Public, State of New York
No. 01HI6029213
Qualified in Alb. Co.
Commission Expires Aug. 9, 20 10

*State of New York
Supreme Court, Appellate Division
Third Judicial Department*

Decided and Entered: May 29, 2008

Case # 504696

LEWIS FAMILY FARM, INC.,
Appellant,

**DECISION AND ORDER
ON MOTION**

v

**NEW YORK STATE ADIRONDACK
PARK AGENCY,** Respondent.

Motion for extension of time to perfect appeal.

Cross motion to dismiss appeal for failure of prosecution.

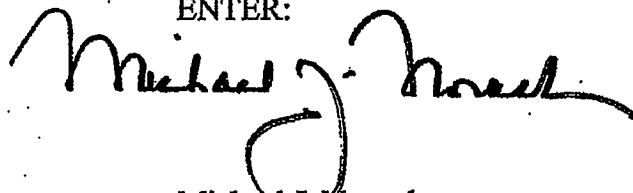
Upon the papers filed in support of the motion and the cross motion and the papers filed in opposition thereto, it is

ORDERED that the motion for an extension of time to perfect the appeal is granted, without costs, and the time to perfect the appeal is extended to July 28, 2008, and it is further

ORDERED that the appeal is dismissed, without costs, unless appellant shall file and serve its record on appeal and brief on or before July 28, 2008, in which event the cross motion to dismiss the appeal is denied.

CARDONA, P.J., MERCURE, MUGGLIN, ROSE and LAHTINEN, JJ., concur.

ENTER:



Michael J. Novack
Clerk of the Court

Exhibit B

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

LEWIS FAMILY FARM, INC.,

Plaintiff,

-against-

NEW YORK STATE ADIRONDACK PARK AGENCY,

Defendant.

AFFIDAVIT

Index No.: 0498-07
RJI No.: 15-1-2007-0153

**AFFIDAVIT IN SUPPORT OF MOTION TO
EXTEND TIME TO PERFECT APPEAL**

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

JOHN J. PRIVITERA, being duly sworn, deposes and states as follows:

1. I am duly licensed and admitted to practice law in the State of New York, and I am a principal with the law firm of McNamee, Lochner, Titus & Williams, P.C., attorneys for the Lewis Family Farm, Inc. (hereafter "Lewis Family Farm" or "Appellant"), plaintiff in this action (Essex County Index No. 0498-07) (hereafter "*Action No. 1*"). I am also counsel to the Lewis Family Farm in an Article 78 proceeding (Essex County Index No. 315-08) (hereafter "*Action No. 2*") and an action (Essex County Index No. 332-08) (hereafter "*Action No. 3*"), both of which involve the same parties herein. *Action No. 2* and *Action No. 3* were consolidated and are currently pending before Hon. Richard B. Meyer, Acting J.S.C., Essex County Supreme Court. As such, I am fully familiar with the pleadings and proceedings had in this action, and with the matters set forth herein.

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2. This affidavit is submitted in support of a motion to extend the time in which the Appellant has to perfect its appeal in *Action No. 1* in the interest of judicial economy.

3. This action involves the Adirondack Park Agency's (hereafter "Agency" or "Appellee") attempt to regulate farming by claiming jurisdiction over the Lewis Family Farm's farm worker housing structures.

4. In November 2006, upon receiving approval from the Town of Essex, the Lewis Family Farm began construction of four farm worker housing structures on its land within the Adirondack Park and within Essex County Agricultural District No. 4. Three of these agricultural structures, which are situated in a horseshoe-shaped cluster adjacent to the Hamlet of Whallonsburg, are at the center of this dispute.

5. 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.

6. The Lewis Family Farm voluntarily halted construction of the employee houses in March 2007 after speaking with staff in order to clear up any misunderstandings about the agricultural nature of the project.

7. In May 2007, staff proposed a "settlement agreement" demanding that the Lewis Family Farm subdivide the farm, waive the right to challenge Agency jurisdiction to regulate farming, allow Agency review of all future farm buildings, and pay a substantial \$10,000 fine by June 15, 2007.

8. On June 26, 2007, the Lewis Family Farm commenced *Action No. 1* in Essex County Supreme Court seeking a declaratory judgment that the Agency could not prohibit the completion of the farm employee housing project because it is beyond the Agency's authority to regulate farms.

9. The next day, on June 27, 2007 the Executive Director of the Agency issued a purported cease and desist letter prohibiting the completion of the farm employee houses. The Agency never attempted to enforce the cease and desist letter.

10. On August 16, 2007, the Honorable Kevin K. Ryan, Acting J.S.C. converted *Action No. 1* to an Article 78 proceeding and summarily dismissed it as premature. Justice Ryan's Decision and Order states as follows:

[T]his situation is not ripe for judicial intervention. While the plaintiff may not wish to proceed to a hearing before the APA commissioners...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.

(August 16, 2007 Decision and Order, pp. 6-7). A copy of the August 16, 2007 Decision and Order is attached hereto as **Exhibit "A"**.

11. Inexplicably, Justice Ryan's August 16, 2007 Decision and Order also contained several pages of dicta that contradict the principles of law that the Court cited above. Essentially, the lower court improperly reached some of the merits of the dispute and advised that the Agency had jurisdiction over the Lewis Family Farm's farm worker housing project. (See August 16, 2007 Decision and Order, pp. 4-6).

12. Therefore, on September 26, 2007, the Lewis Family Farm timely filed a notice of appeal of the August 16, 2007 Decision and Order in order to preserve all of its rights in the

event that the yet-to-occur Agency enforcement determination ultimately found that the Lewis Family Farm's farm buildings were under Agency jurisdiction. A copy of the September 26, 2007 Notice of Appeal is attached hereto as **Exhibit "B"**.

13. Justice Ryan's dismissal of this action was proper since the Agency had yet to render a final determination. However, he made an error of law in reaching the merits of the case. See *Jeffreys v. Griffin*, 301 A.D.2d 232, 247 (1st Dep't 2002) (holding that a determination is not binding under the doctrines of res judicata and collateral estoppel unless it was made in the context of an adjudication, otherwise it is an unwarranted advisory opinion); *Nuro Transp. v. Judges of Civil Court*, 95 A.D.2d 779, 780 (2d Dep't 1983) (holding that "the prohibition against advisory opinions is to prevent the judicial determination of unripe claims in which a current controversy does not exist"); see also *New York Public Interest Research Group, Inc. v. Carey*, 42 N.Y.2d 527, 531 (1977) (stating that a court's determination of any issue beyond what is necessary to dispose of a case is "merely advisory" when the request for a declaratory judgment is premature).

14. On September 5, 2007, several weeks following Justice Ryan's dismissal of the premature action (and nearly one year since the construction project began), the Agency finally commenced its internal enforcement proceeding by serving a Notice of Apparent Violation, which alleged that the Lewis Family Farm's employee housing structures are illegal unless it received a permit from the Agency. Thereafter, my firm was retained by the Lewis Family Farm.

15. The Agency's enforcement proceeding culminated in a final determination of the Agency on March 25, 2008 ("March 25 Determination"), whereby the Agency's Enforcement Committee determined that the Lewis Family Farm had violated the Adirondack Park Agency

Act by failing to obtain a permit for the construction of the agricultural use structures and "subdivision" of land.

16. On April 8, 2008, the Lewis Family Farm commenced an Article 78 proceeding against the Agency seeking to vacate and annul the March 25 Determination (*Action No. 2*, Essex County Index No. 315-08). On April 11, 2008, the Agency commenced a duplicative action seeking to enforce the March 25 Determination (*Action No. 3*, Essex County Index No. 332-08). Those actions were consolidated by order of the lower court on April 25, 2008 and are currently pending before Hon. Richard B. Meyer, Acting J.S.C.

17. The time in which to perfect this appeal of Justice Ryan's August 16, 2007 Decision in *Action No. 1* has not yet expired, but will expire on June 26, 2008.

18. The Lewis Family Farm is justified in not perfecting the appeal at this time because the matters at issue in this appeal concerning the Agency's jurisdiction over the farm structures will be decided in the consolidated actions currently pending before Justice Meyer.

19. Rule 800.12 of the Rules of this Court permits this Court to extend the time to perfect an appeal upon a showing of a reasonable excuse for the delay and merit to the appeal. The Lewis Family Farm has demonstrated a justifiable and reasonable excuse for their anticipated delay in perfecting the appeal within the nine-month time frame imposed by 22 NYCRR § 800.12, namely that the pendency of the consolidated actions in the lower court will likely dispose of and render moot any issues to be raised on this appeal. In any event, the issues pending in *Action No. 2* and *Action No. 3* overlap, in part, with the erroneous expression of an advisory opinion by Justice Ryan. Accordingly, this Court should review the matters together.

20. No party will be prejudiced if this Court extends the Appellant's time in which to perfect the appeal.

21. Moreover, this Court should grant the extension because the Lewis Family Farm can demonstrate that this appeal has merit, and the extensions would further the interests of justice and judicial economy.

22. This appeal has merit because the portion of Justice Ryan's decision that reached the merits was merely an improper "advisory opinion." See New York Public Interest Research Group, Inc. v. Carey, 42 N.Y.2d 527, 531 (1977); Jeffreys v. Griffin, 301 A.D.2d 232, 247 (1st Dep't 2002); Nuro Transp. v. Judges of Civil Court, 95 A.D.2d 779, 780 (2d Dep't 1983).

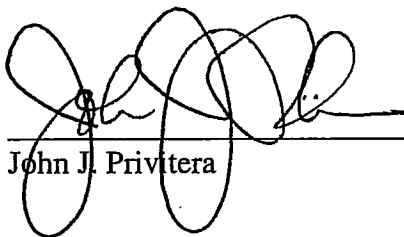
23. Moreover, even if the merits of the case are addressed on this appeal, the Agency clearly lacks jurisdiction over the Lewis Family Farm's farm structures. It is undisputed that "agricultural use structures" are outside of the Agency's jurisdiction. However, the Agency is attempting to gain jurisdiction over the Petitioner's agricultural use structures by ignoring the pro-farm development clause of the New York State Constitution and the Right-to-Farm Law. The Adirondack Park Agency Act (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.*" N.Y. Exec. Law § 802(8) (emphasis supplied). The Act further defines "structure" to include "...buildings, sheds, *single family dwellings*, mobile homes, signs, tanks, fences and poles and any fixtures, additions and alterations thereto." N.Y. Exec. Law § 802(62) (emphasis supplied). Therefore, a "single family dwelling" that is directly or customarily associated with agricultural use must necessarily be an "agricultural use structure" under the Act. See N.Y. Exec. Law § 802(8). Accordingly, the Agency lacks jurisdiction over the Lewis Family Farm's farm worker houses. Justice Meyer has already expressed an opinion that the Appellant "has established a likelihood of success on the

merits on at least some of the issues raised in the petition" in *Action No. 2*. (See Justice Meyer's April 11, 2008 Decision and Order, attached hereto as **Exhibit "C"**).

24. The time to perfect the appeal of Justice Ryan's August 16, 2007 Decision and Order in *Action No. 1* has not yet expired, but will expire on June 26, 2008. It is respectfully submitted that it would be a waste of judicial resources and the expenses of the parties to require that this appeal be prosecuted during the pendency of the consolidated actions before Justice Meyer. Therefore, it is in the interest of judicial economy to extend the Lewis Family Farm's time in which to perfect this appeal.

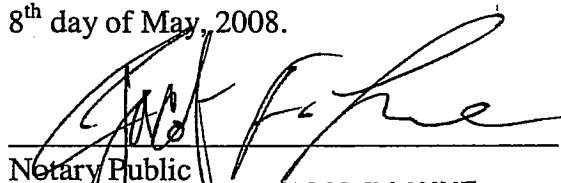
25. The Lewis Family Farm respectfully requests that it receive a 90-day extension, until September 26, 2008, to file and serve the record and brief. This timeframe will allow the lower court to decide *Action No. 2* and *Action No. 3*, which is currently returnable before Justice Meyer on June 6, 2008 (Essex County Index No. 315-08). A decision there could very well settle this entire dispute. If not, and one party appeals, the matter should be consolidated with this case.

26. Based on the foregoing, the Lewis Family Farm respectfully requests an order from this Court granting: (i) an extension of the time in which to perfect its appeal of Justice Ryan's August 16, 2007 Decision and Order (which has not yet expired); and (ii) such other relief as to this Court seems just and proper.



John J. Privitera

Sworn to before me this
8th day of May, 2008.



Notary Public

JACOB F. LAMME
Notary Public, State of New York
Qualified in Albany County
No. 02LAG150759
Commission Expires Aug. 7, 2010

At a term of the Supreme Court of the State of New York, held 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

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 fo 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.

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

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

Joseph A. Provoncha

JOSEPH A. PROVONCHA
ESSEX COUNTY CLERK

DATED: 8/29/07

A true and original decision and order
was filed in this office on
8-29-07

Witness my hand and by the seal of this office,
this 29th day of August
2007.



Joseph A. Provoncha
County Clerk

STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX



PAID
105

LEWIS FAMILY FARM, INC. Plaintiff,
against
NEW YORK STATE ADIRONDACK PARK AGENCY, Defendant.

NOTICE OF APPEAL

Index No: 0498-07
RJI: 15-1-2007-0153
Hon. Kevin K. Ryan, J.S.C.

PLEASE TAKE NOTICE, that the above-named plaintiff, Lewis Family Farm, Inc., hereby appeals to the Appellate Division of the Supreme Court, Third Judicial Department, from the Decision and Order of the Supreme Court of Essex County (Hon. Kevin K. Ryan, J.S.C.), dated August 16, 2007, which denied the motion of the plaintiff, Lewis Family Farm, Inc. for injunctive relief and granted the defendant's cross-motion to dismiss the plaintiff's Complaint, and this appeal is taken from each and every part of that Order as well as from the whole thereof.

Dated: September 26, 2007
Queensbury, New York

Joseph R. Brennan
BRENNAN & WHITE, LLP
Attorneys for Plaintiff
Office and P.O. Address
163 Haviland Road
Queensbury, NY 12804-8702
Tel. No. (518) 793-3424

TO:
Essex County Clerk's Office
7559 Court Street
P.O. Box 247
Elizabethtown, NY 12932

Loretta Simon, Esq.
Assistant Attorney General
State of New York
Office of the Attorney General
The Capitol
Albany, NY 12224-0341

07 OCT - 1 AM 9:31
ELIZABETHTOWN, NY 12932

Exhibit C

Supreme Court of the State of New York
For the County of Essex

Argued April 11, 2008

Decided April 11, 2008

Index No.: 315-08 - RJI No.: 15-1-2008-0109

LEWIS FAMILY FARM, INC.

Petitioner,

v.

ADIRONDACK PARK AGENCY,

Respondent.

*Decision and Order on Motion for Stay
of Enforcement Pursuant to CPLR §7805*

McNamee, Lochner, Titus & Williams, P.C. (John J. Privitera, Esq., of counsel), Albany, New York, attorneys for the Petitioner.

Andrew M. Cuomo, Esq., New York State Attorney General (Loretta Simon, Esq., Assistant Attorney General), Albany, New York, attorney for the Respondent.

Motion by Petitioner pursuant to CPLR §7805 for a stay of enforcement of a determination made by Respondent's enforcement committee (9 NYCRR Part 581) dated March 25, 2008 which, *inter alia*, directed Petitioner to apply to the Respondent for a permit for three new dwellings and a four-lot subdivision on or before April 14, 2008, imposed a \$50,000 civil penalty, directed that the dwellings remain unoccupied until

Page -2-

LEWIS FAMILY FARM v. ADIRONDACK PARK AGENCY

Decision and Order

a permit was issued, and required Petitioner to forego "the right to challenge Agency jurisdiction and the review clocks otherwise applicable".

Petitioner is the owner of a 1,100 acre organic farm designated as a single parcel of land on the official county tax maps and town tax rolls, located in the Town of Essex, Essex County. The property lies wholly within the Adirondack Park and within Essex County Agricultural District No. 4. The subject parcel is classified on the Adirondack Park Land Use and Development Plan Map as Resource Management, Rural Use and Hamlet.

In or about November 2006, Petitioner commenced construction of certain single family dwelling units on that portion of the property classified as Resource Management, to be used by Petitioner's employees who work on the farm. Petitioner thereafter filed an application with the Respondent for a permit authorizing construction of "three single family dwellings in a farm compound to be used by farm employees exclusively." Thereafter, a dispute arose between the parties, which resulted in a proposed settlement agreement sent to Petitioner on May 14, 2007 providing for the Petitioner to apply for an after-the-fact permit and pay \$10,000 civil penalty. Petitioner rejected the settlement agreement, and on June 28, 2007 commenced an action against the Agency challenging jurisdiction, as well as seeking a temporary restraining order. That proceeding was dismissed, and the application for temporary relief denied, by a decision and order (Ryan, J.) dated August 16, 2007. Petitioner filed a notice of appeal, but the appeal has not yet been perfected.

Despite dismissal of its declaratory judgment action, Petitioner continued with construction of the dwelling units. Respondent commenced an enforcement proceeding, resulting in its March 25, 2008 determination that the Petitioner violated the Adirondack Park Agency Act (Executive Law Article 27) (the "Act") by failing to obtain from the Respondent a subdivision permit and a permit authorizing construction of the dwelling units. In determining such violations, the Respondent's enforcement committee directed the Petitioner to comply with the following requirements:

- "(1) Lewis Farm will apply for a permit for the three new dwellings and the four-lot subdivision into sites

Page -3-

LEWIS FAMILY FARM v. ADIRONDACK PARK AGENCY**Decision and Order**

(including retained "lot") by April 14, 2008, by submitting the appropriate major project application.

- (2) By April 28, 2008, Lewis Farm will also submit the following to the Agency:
 - (a) a detailed description of the use of each dwelling and connection to the Lewis Farm agricultural operations,
 - (b) an as-built plan for the septic system and an evaluation by a NYS licensed professional engineer as to whether the installed septic system for the three dwellings complies with NYS Department of Health and Agency standards and guidelines;
- (3) Lewis Farm will reply to any additional information requests within thirty (30) days of receipt.
- (4) Lewis Farm will retain all rights of appeal in the project review process, but foregoes 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.
- (7) Agency staff is directed to review the application for the three dwellings and the subdivisions promptly, towards the goal of issuing the after-the-fact permit in time for farm worker occupancy of the dwellings for the 2008 growing season. However that can only happen if the Respondent responds immediately and favorably to this determination and submits the required information and penalty. The Agency will

Page -4-

LEWIS FAMILY FARM v. ADIRONDACK PARK AGENCY

Decision and Order

not proceed with review of the application unless and until the civil penalty is paid, the information requested above is submitted, and the dwellings remain vacant until approval is issued.”

Petitioner commenced the instant proceeding pursuant to CPLR Article 78 by the filing of a Notice of Petition and Petition on April 8, 2008. Simultaneously with such filing, Petitioner duly moved by Order to Show Cause for a stay pursuant to CPLR 7805. The motion is supported by affidavits of Petitioner’s counsel and Barbara A. Lewis, an officer of Petitioner, both sworn to April 7, 2008. Respondent opposes the motion, submitting affirmations from an associate attorney for the Respondent and from an Assistant Attorney General, both dated April 10, 2008, alleging that the August 2007 decision and order dismissing Petitioners declaratory judgment action has already resolved many of the issues now before this Court in favor of the Respondent, and because Petitioners have failed to establish sufficient grounds to warrant issuance of a stay.

The purpose of a stay is to maintain the *status quo* (see *State v. Town of Haverstraw*, 219 AD2d 64, 641 NYS2d 879). Temporary or preliminary injunctive relief may be granted “when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party’s favor” (*Doe v. Axelrod*, 78 NY2d 748, 750, 536 NYS2d 44, 45, 532 NE2d 1272). There is no substantive difference between a temporary restraining order or preliminary injunction under CPLR §6301 and a stay pursuant to CPLR §7805, and nothing in the later statute, or in case law, relieves a party seeking a stay from establishing all three elements. Petitioner’s reliance on *Matter of Stewart v. Parker*, 41 AD2d 785, 341 NYS2d 149) to support its claim that only irreparable injury need be shown for relief to be granted under CPLR §7805 is misplaced as the Court there dealt only with the issue of irreparable injury. Indeed the Court there stated “[w]hether it was an order incident to the article 78 proceeding or a preliminary injunction under CPLR 6301, makes little difference (*Id.*, at 786, 341 NYS2d at 192).

Under the circumstances here, Petitioner has minimally met the requisite elements, at least for an award of partial temporary relief. This proceeding involves novel issues of law relating to the interplay of various

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LEWIS FAMILY FARM v. ADIRONDACK PARK AGENCY

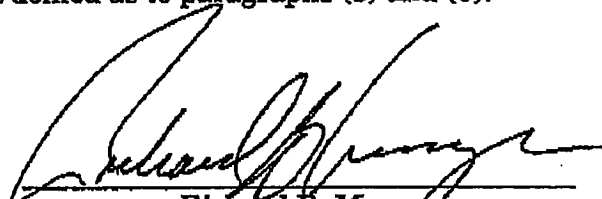
Decision and Order

statutory definitions contained in the Act, the Respondent's jurisdiction over "agricultural use structures" (*Executive Law §809[8]*), whether a single family dwelling is or can under certain circumstances be such a structure under the Act, whether the Petitioner's project constitutes a "subdivision" (*Executive Law §802[63]*), and the potential impact (if any) of Article 14, §4 of the New York Constitution. Moreover, the unexplained failure of the Respondent to timely refer the Petitioner's noncompliance with the Act to the Attorney General (*Executive Law §813[2]*) over a period spanning almost one year, and more than six months following dismissal of the declaratory judgment action, while Respondent was aware that Petitioner continued to construct the dwelling units at considerable cost, cannot be discounted. To the extent now determinable, the Petitioner has established a likelihood of success on the merits on at least some issues raised in the petition, and a balancing of the equities in its favor.

As to irreparable injury, an insufficient showing has been made to establish that irreparable harm will occur to the Petitioner if the stay is not granted as to certain aspects of the challenged determination, specifically the prohibition against the dwellings being occupied or the payment of the civil penalty. Petitioner conceded at oral argument that the dwelling units are not occupied. No allegation has been made that Petitioner lacks sufficient financial resources to pay the penalty, and should Petitioner ultimately prevail in this proceeding the penalty would have to be reimbursed in full to Petitioner. However, because the instant proceeding challenges the Agency's subject matter jurisdiction, and since the challenged determination requires Petitioner to forego its right to challenge the Respondent's jurisdiction here if it proceeds to apply for the after-the-fact permit(s), it is the determination of this Court that a stay should be, and is, granted as to the remaining enforcement determinations in the March 25, 2008 determination, namely paragraphs (1) through (4), and (7). Petitioner's motion is denied as to paragraphs (5) and (6).

IT IS SO ORDERED.

ENTER


Richard B. Meyer
Acting Supreme Court Justice

LEWIS FAMILY FARM, INC.,

Plaintiff,

-against-

NEW YORK STATE ADIRONDACK PARK AGENCY,

Defendant.

AFFIDAVIT

Index No.: 0498-07
RJI No.: 15-1-2007-0153

**PLAINTIFF-APPELLANT'S AFFIDAVIT IN OPPOSITION TO
CROSS-MOTION FOR "CONDITIONAL ORDER OF DISMISSAL"**

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

JOHN J. PRIVITERA, being duly sworn, deposes and states as follows:

1. I am duly licensed and admitted to practice law in the State of New York, and I am a principal with the law firm of McNamee, Lochner, Titus & Williams, P.C., attorneys for the Lewis Family Farm, Inc. (hereafter "Lewis Family Farm" or "Appellant"), plaintiff in this action (Essex County Index No. 0498-07) (hereafter "*Action No. 1*"). I am also counsel to the Lewis Family Farm in an Article 78 proceeding (Essex County Index No. 315-08) (hereafter "*Action No. 2*") and an action (Essex County Index No. 332-08) (hereafter "*Action No. 3*"), both of which involve the same parties herein. *Action No. 2* and *Action No. 3* were consolidated because of common issues of fact and law. They are currently pending before Hon. Richard B. Meyer, Acting J.S.C., Essex County Supreme Court. As such, I am fully familiar with the pleadings and proceedings had in this action, and with the matters set forth herein.

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2. This affidavit is submitted in opposition to the defendant-respondent's "cross-motion for a conditional order of dismissal", served on May 15, 2008, which also served as papers in opposition to plaintiff-appellant's motion to extend the time in which to perfect its appeal in *Action No. 1*.

3. Appellant's motion to extend the time for this appeal is based primarily upon and was prepared in the interest of judicial economy. This action involves the Adirondack Park Agency's (hereafter "Agency" or "Respondent") attempt to regulate farming by claiming jurisdiction over the Lewis Family Farm's farm worker housing structures. The parties are in substantial disagreement. In *Action No. 2*, the trial court has already determined that the Lewis Family Farm is likely to prevail on the merits in maintaining that the Agency lacks jurisdiction to regulate farming. We have no doubt that, one way or another, one of the parties will appeal the decisions in *Action No. 2* and *Action No. 3*. Since *Action No. 1* is a related action that was dismissed because the jurisdictional dispute was not ripe for judicial review, it only makes sense, in the interest of this Court's time and resources, to extend the time to perfect the appeal in *Action No. 1* as requested by the Appellant.

4. Conspicuously, the Respondent does not respond at all to Appellant's simple contention that an extension of time in *Action No. 1* conserves this Court's time. The Respondent does not argue that the three actions are not essentially the same case, nor does it argue that this Court's valuable time would be conserved by denial of Appellant's motion. For this reason alone, Appellant's motion should be granted and the Respondent's cross-motion should be denied.

5. There can be no doubt that the trial court in *Action No. 1* dismissed the proceeding as premature because the Respondent had not yet made a determination on the merits of the jurisdictional claims at issue in all three actions. Moreover, and most importantly, there is no

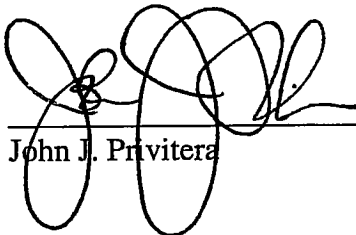
administrative record for this Court to review if Appellant is forced to perfect the appeal in *Action No. 1* now. The record in *Action No. 1* does not even include the administrative decision in this dispute. Thus, the Respondent not only wishes to force this Court to decide *Action No. 1* in the absence of an administrative record and decision, but it also wishes to consume this Court's time and resources in deciding this important jurisdictional dispute in a vacuum while the very administrative decision that the trial court in *Action No. 1* found necessary for judicial review is currently resting below with the trial court in *Action No. 2* and *Action No. 3*, and thus, is presently unreviewable. Not only is this unfair to this Court; it risks the very uninformed result that the trial court in *Action No. 1* sought to avoid in dismissing the matter. This Court should have the benefit of the administrative record, not to mention the very administrative decision itself, in considering the legality of the farm worker houses in these actions.

6. Rather than addressing, much less considering, matters of judicial economy, the Respondent endeavors to argue that the Appellant will be barred from certain arguments in *Action No. 2* and *Action No. 3*, which are not before this Court. Indeed, issue has not even been joined below in *Action No. 2* or *Action No. 3*. Therefore, Respondent's entire argument contained in its Memorandum of Law at pp. 8-16 is non-responsive and immaterial to Appellant's motion. This Court need not decide Respondent's claim of jurisdiction or the scope of any preclusive effect of Judge Ryan's decision in *Action No. 1* to decide the Appellant's motion.

7. Rule 800.12 of the Rules of this Court permits this Court to extend the time to perfect an appeal upon a showing of a reasonable excuse for the delay and merit to the appeal. Appellant has made this showing in the Affidavit of John Privitera, Esq., sworn to May 8, 2008.

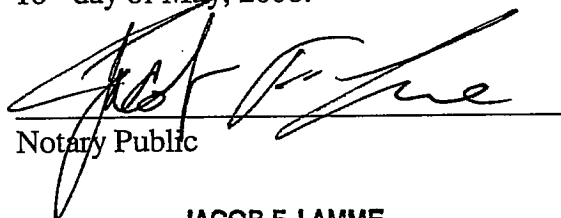
8. Finally, Respondent fails to establish that it will be prejudiced if this Court extends the Appellant's time in which to perfect the appeal in *Action No. 1*. Indeed, the Appellant will be prejudiced if it must perfect this appeal by June 26, 2008 because this Court will then have to "pre-judge" the very issues pending below before they are properly decided by the trial court in *Action No. 2* and *Action No. 3* upon review of the administrative record and decision.

9. Based on the foregoing, the Lewis Family Farm respectfully requests an order from this Court: (i) granting an extension of the time in which to perfect its appeal of Justice Ryan's August 16, 2007 Decision and Order (which has not yet expired); (ii) denying the Respondent's "cross-motion for a conditional order of dismissal"; and (iii) granting such other relief as to this Court seems just and proper.



John J. Privitera

Sworn to before me this
16th day of May, 2008.



Notary Public

JACOB F. LAMME
Notary Public, State of New York
Qualified in Albany County
No. 02LA6150759
Commission Expires Aug. 7, 20~~0~~10



STATE OF NEW YORK
 COUNTY OF ESSEX
 COUNTY, FAMILY & SURROGATE'S COURTS

RICHARD B. MEYER
 JUDGE

AMY N. QUINN
 COURT ATTORNEY
 JILL H. DRUMMOND
 SECRETARY

July 2, 2008

Via Fax & Mail

McNamee, Lochner, Titus & Williams, P.C.

Attn: John J. Privitera, Esq.

677 Broadway

Albany, New York 12207

New York State Attorney General

Attn: Loretta Simon, Esq.

Assistant Attorney General

The Capitol

Albany, New York 12224-0341

Cynthia Feathers, Esq.,

Arroyo Copland & Associates, PLLC

219 Great Oakes Blvd.

Albany, NY 12203

Re: Lewis Family Farm, Inc. v. Adirondack Park Agency

Index No.: 315-08

RJI No.: 15-1-2008-0109

Adirondack Park Agency -v- Lewis Family Farm, Inc.,

Salim B. Lewis and Barbara Lewis

Index No.: 332-08

RJI No.: 15-1-2008-0117

Counselors:

Enclosed please find a copy of the decision and order on the parties' respective motions to dismiss, the original of which has been filed in the Clerk's office this date. As I indicated at the last oral argument, no further such argument will be held and the issues will be decided on submission only following receipt of all answers and motion papers.

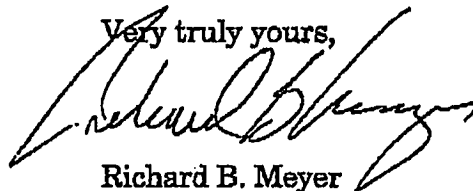
In order to avoid any questions regarding papers served, kindly file the original plus one copy of all papers directly with the County Clerk, with no papers being

Page -2-

furnished to chambers. The Clerk will be responsible for submitting one set of all papers to chambers.

Thank you for your cooperation and assistance in this matter!

Very truly yours,



Richard B. Meyer

RBM:jhd

cc: Essex County Clerk

Supreme Court of the State of New York
FOR THE COUNTY OF ESSEX

Argued June 19, 2008

Decided July 2, 2008

Index No.: 315-08 – RJI No.: 15-1-2008-0109
Index No.: 332-08 – RJI No.: 15-1-2008-0117

LEWIS FAMILY FARM, INC.

Petitioner,

v.

ADIRONDACK PARK AGENCY,

Respondent.

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

***Decision and Order on Motions to Dismiss
Pursuant to CPLR Rule 3211***

McNamee, Lochner, Titus & Williams, P.C. (John J. Privitera, Esq., of counsel), Albany, New York, attorneys for the Petitioner and the Defendants.

Andrew M. Cuomo, Esq., New York State Attorney General

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LEWIS FAMILY FARM, INC. v. ADIRONDACK PARK AGENCY

Decision and Order

(*Loretta Simon, Esq., Assistant Attorney General*), Albany, New York, attorney for the Respondent/Plaintiff Adirondack Park Agency.

Arroyo Copland & Associates, PLLC (*Cynthia Feathers, Esq.*, of counsel) and *Elizabeth Corron Dribusch, Esq.*, General Counsel, Albany, New York, for New York Farm Bureau, Inc., as *amicus curiae*, supporting the Petitioner/Defendant Lewis Family Farm, Inc.

In this consolidated Article 78 proceeding commenced by Lewis Family Farm, Inc. (Lewis Farm) on April 8, 2008, and action by the Adirondack Park Agency (Agency) to enforce the March 25, 2008 determination of the Agency's enforcement committee, the Agency moves¹ to dismiss eight of the sixteen causes of action in the amended petition pursuant to CPLR 3211(a)(5) and (7). Specifically, the Agency claims that the fourth and eleventh causes of action each fail to state a cause of action, and that Lewis Farm is collaterally estopped from asserting the claims alleged in the third, fifth, sixth, seventh, eighth, ninth, and tenth causes of action due to dismissal of a 2007 declaratory judgment action by Lewis Farm against the Agency which was converted to an Article 78 proceeding on consent. Lewis Farm, and the defendants Salim B. Lewis and Barbara Lewis, move² pursuant to CPLR 32311 to dismiss the Agency's

¹ The court has reviewed the following papers in support of the Agency's motion: notice of motion dated June 13, 2008; affirmation of Loretta Simon dated June 13 with exhibits A through N; affidavit of Paul Van Cott dated June 13, 2008 with exhibits A through C; affidavit of John F. Rusnica dated June 13, 2008 with exhibit A; answer in part, record and objections in point of law verified June 13, 2008. In opposition to the motion, the court has considered the affirmation of John J. Privitera, Esq. dated June 17, 2008 regarding the record, with exhibits A through C. The Court has also considered the parties' respective memoranda of law.

² The court has reviewed the following papers in support of the motion by Lewis Farm: notice of motion dated June 3, 2008; affirmation of John J. Privitera, Esq. dated June 3, 2008. In opposition, the Court has considered the reply affirmation of Loretta Simon, Esq. dated June 18, 2008. The Court has also considered the parties' respective memoranda of law.

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LEWIS FAMILY FARM, INC. v. ADIRONDACK PARK AGENCY

Decision and Order

enforcement action as duplicative of the Agency's administrative enforcement proceeding, and also to dismiss all claims against defendants Salim B. Lewis and Barbara Lewis, individually, since neither was a party to the enforcement proceeding which culminated in the March 25, 2008 determination challenged in the Article 78 proceeding.

Lewis Farm owns and operates an eleven hundred acre organic farm designated as a single parcel of land on the official county tax maps and town tax rolls, located in the Town of Essex, Essex County. The property lies wholly within the Adirondack Park and within Essex County Agricultural District No. 4. The subject parcel is classified on the Adirondack Park Land Use and Development Plan Map as resource management, rural use and hamlet. It is undisputed that the portion of the property involved here is classified as resource management.

In or about November 2006, Lewis Farm commenced construction of certain single family dwelling units, to be used by employees working on the farm, on a portion of its property classified as resource management. A permit application³, signed by defendant Barbara Lewis, both as "project sponsor" and representative of the corporation, was filed with the Agency on March 14, 2007 seeking authorization to construct "three single family dwellings in a farm compound to be used by farm employees exclusively." By notice dated the following day⁴, Agency staff advised the applicants that the application was incomplete and requested additional information. A dispute arose between the parties, and following discussions between the parties and their representatives the Agency's staff sent a proposed settlement agreement⁵ to Lewis Farm which called for Lewis Farm to apply for an after-the-fact permit and pay a \$10,000 civil penalty. On June 27, 2007 the Agency's acting executive director issued a cease and desist order⁶ to Lewis Farm, binding upon "its agents, successors and assigns", prohibiting "any and all land use and development related to the construction of the single family dwellings . . . until this matter is resolved

³ Exhibit B to 06-18-08 Simon reply affirmation.

⁴ Exhibit D to Agency's amended complaint.

⁵ Exhibit E to Agency's amended complaint.

⁶ Exhibit F to Agency's amended complaint.

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LEWIS FAMILY FARM, INC. v. ADIRONDACK PARK AGENCY

Decision and Order

and the enforcement case is concluded.” The next day, Lewis Farm commenced a declaratory judgment action⁷ against the Agency challenging jurisdiction.

An amended complaint was filed on July 3, 2007, and Lewis Farm also applied for a temporary restraining order⁸. Lewis Farm alleged that its farm worker housing project was outside of the Agency’s jurisdiction since the structures were “agricultural use structures” (Executive Law §802[8]) in a “resource management area” (Executive Law §805[3][g]), and thus exempt from Agency jurisdiction, and that any assertion of jurisdiction by the Agency violated Agriculture and Markets Law §305-a. In opposing the application, the Agency moved to convert the action to an Article 78 proceeding and dismiss the same for lack of subject matter jurisdiction, “as premature and not ripe for judicial review because the State defendant has not issued a final determination”, citing CPLR §7801(1), and for failing to state a cause of action “because Agriculture and Markets Law §305-a does not preclude the APA from requiring a permit for subdivision of land and construction of single family dwellings”⁹.

At oral argument, Lewis Farm consented to convert the action to an Article 78 proceeding. Counsel for Lewis Farm argued that although a final determination is a prerequisite to judicial review “under normal circumstances”¹⁰, the “crux” of the amended complaint was the staff’s requirement of an application for an after-the-fact permit and payment of the \$10,000 civil penalty¹¹ as a prerequisite to Agency review, and also Lewis Farm’s concern that it has no ability to obtain a refund of the penalty should it ultimately prevail. The Agency asserted that Lewis Farm

⁷ Exhibit A to 06-13-08 Simon affirmation.

⁸ Exhibit B to 06-13-08 Simon affirmation.

⁹ The Court takes judicial notice of the 2007 proceeding, including the Agency’s notice of motion dated August 1, 2007, the affirmations/affidavits of Sarah Reynolds (with exhibits A-D), Douglas Quinn (with exhibits A-C) dated July 20, 2007, John L. Quinn (with exhibits A-I), and John Banta dated July 23, 2007.

¹⁰ Exhibit C to 06-13-08 Simon affirmation, at page 3, line 19.

¹¹ *id.*, from page 3, line 17 to page 4, line 25.

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LEWIS FAMILY FARM, INC. v. ADIRONDACK PARK AGENCY
Decision and Order

had the ability to present its case to the Agency's enforcement committee, comprised of five Agency commissioners, or to the full Agency, at a hearing and then challenge the committee's determination in court if it is still dissatisfied¹²:

"THE COURT: Suppose they don't want to lose that money, they don't want to pay?"

MS. SIMON: They should ask for a hearing and/or await for the process to take them there and say to the staff, we're not interested in this settlement offer you made to us, we want to go to the full agency, we want a hearing, and then challenge that hearing decision if the don't agree with it.

THE COURT: And then they can go into Supreme Court.

MS. SIMON: Absolutely."

Time and again, the Agency's counsel stated to the court that there was no final determination and that Lewis Farm had to await such a determination before it could properly seek judicial review¹³.

By decision and order (Ryan, J.) dated August 16, 2007 the proceeding was dismissed, and the application for temporary relief denied. In its decision dismissing the proceeding, the court stated that the farm worker dwellings did not constitute "agricultural use structures" under the Agency's statutory scheme and therefore were within the permit jurisdiction of the Agency, and also that Agriculture & Markets Law §305-a did not apply to a state agency. Lewis Farm filed a notice of appeal, but the appeal has not been perfected. The Agency now claims that the dismissal of this prior proceeding as premature precludes Lewis Farm from now challenging the Agency's jurisdiction on the same grounds which it had asserted in that proceeding.

¹² Exhibit C to 06-13-08 Simon affirmation, at pages 5-7.

¹³ *Id.*, at pages 14-15, 26.

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A.

Collateral estoppel "precludes a party from relitigating 'an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point' (*Gilberg v. Barbieri*, 53 NY2d 285, 291, 441 NYS2d 49, 423 NE2d 807; see, *Schwartz v. Public Administrator*, 24 NY2d 65, 69, 298 NYS2d 955, 246 NE2d 725)" (*Kaufman v. Eli Lilly and Co.*, 65 NY2d 449, 455, 492 NYS2d 584, 588, 482 NE2d 63, 67), because "it is not fair to permit a party to relitigate an issue that has already been decided against it" (*Id.*). However, its application is limited to "issues of ultimate fact . . . determined by a valid and final judgment" (*McGrath v. Gold*, 36 NY2d 406, 411, 369 NYS2d 62, 65, 330 NE2d 35, 37). For the doctrine of collateral estoppel to be invoked, the party seeking it must establish that

- (1) the factual issue decided in the prior action was "material to the first action or proceeding and essential to the decision rendered therein (*Silberstein v. Silberstein*, 218 NY 525, 528, 113 NE 495; see, also, *Hinchey v. Sellers*, *supra*; *Ripley v. Storer*, *supra*; *Ward v. Boyce*, 152 NY 191, 46 NE 180)" (*Ryan v. New York Telephone Co.* 62 NY2d 494, 500, 467 NE2d 487, 490-490, 478 NYS2d 823, 826 (N.Y.,1984), and
- (2) the factual issue is identical to "the point actually to be determined in the second action or proceeding such that 'a different judgment in the second would destroy or impair rights or interests established by the first' (*Schuykill Fuel Corp. v. Nieberg Realty Corp.*, *supra*, 250 NY at p. 307, 165 NE 456 [Cardozo, Ch. J.]; see, also, *S.T. Grand, Inc. v. City of New York*, 32 NY2d 300, 304-305, 344 NYS2d 938, 298 NE2d 105)" (*Id.*), and
- (3) "the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination (*Gilberg v. Barbieri*, 53 NY2d 285, 291, 441 NYS2d 49, 423 NE2d 807; see also *Schwartz v. Public Administrator*, *supra*, 24 NY2d at

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p. 71, 298 NYS2d 955, 246 NE2d 725; *Koch v. Consolidated Edison Co.*, 62 NY2d 548, 554-555, 479 NYS2d 163, 468 NE2d 1, *cert. denied* 469 US 1210, 105 SCt 1177, 84 LEd2d 326; *Ryan v. New York Tel. Co.*, 62 NY2d 494, 500-501, 478 NYS2d 823, 467 NE2d 487" (*Kaufman v. Eli Lilly and Co.*, *supra.*).

An Article 78 proceeding "shall not be used to challenge a determination . . . which is not final or can be adequately reviewed by appeal to a court or to some other body or officer . . ." (*CPLR §7801(1)*). "[P]rohibition may be availed of only to proscribe a clear legal wrong . . . [and] even as to a clearly *ultra vires* act, prohibition does not lie against an administrative agency if another avenue of judicial review is available, absent a demonstration of irreparable injury to the applicant if he is relegated to such other course" (*City of Newburgh v. Public Employment Relations Bd.*, 63 NY2d 793, 795, 481 NYS2d 327, 328, 471 NE2d 140, 141). "Prohibition is an extraordinary remedy to be invoked only where a clear right to relief is established and the action taken or threatened is clearly without jurisdiction or in excess of jurisdiction (*Matter of Bloom v. Clynne*, 69 AD2d 956, 415 NYS2d 712)" (*Rainka v. Whalen*, 73 AD2d 731, 732, 423 NYS2d 292, 293, *affirmed* 51 NY2d 973, 435 NYS2d 721, 416 NE2d 1056; *see also Ashe v. Enlarged City School Dist. of Troy*, 233 AD2d 571, 571, 649 NYS2d 97, 98). In cases where there is or appears to be an act in excess of jurisdiction, "prohibition will not lie if there is available an adequate remedy at law which may bar the extraordinary remedy (*Matter of State of NY v. King*, 36 NY2d 59, 62, 364 NYS 879, 881, 324 NE2d 351, 353)" (*Id.*), and even in the absence of such a remedy prohibition "does not issue as a matter of right, but only in the sound discretion of the court in cases of supreme necessity" (*People ex rel. Hummel v. Trial Term, Part 1 (Criminal Branch) of Supreme Court for New York County*, 184 NY 30, 32, 76 NE 732; *see also Holtzman v. Goldman*, 71 NY2d 564, 566, 528 NYS2d 21, 23, 523 NE2d 297, 298; *Matter of Greenwald v. Scheinman*, 94 AD2d 842, 844, 463 NYS2d 303, *leave to appeal denied* 60 NY2d 551, 467 NYS2d 1025, 454 NE2d 126).

Also, "one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law (*e. g.*, *Young Men's Christian Assn. v. Rochester Pure Waters Dist.*, 37 N.Y.2d 371, 375, 372 N.Y.S.2d 633, 635, 334 N.E.2d

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586, 588)" (*Watergate II Apartments v. Buffalo Sewer Authority*, 46 NY2d 52, 57, 412 NYS2d 821, 824, 385 NE2d 560, 563) in order to "[relieve] the courts of the burden of deciding questions entrusted to an agency (*see 1 NY Jur, Administrative Law, §5, pp. 303-304*), [prevent] premature judicial interference with the administrators' efforts to develop, even by some trial and error, a co-ordinated, consistent and legally enforceable scheme of regulation and [afford] the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its 'expertise and judgment' (*Matter of Fisher [Levine]*, 36 NY2d 146, 150, 365 NYS2d 828, 832, 325 NE2d 151, 153; *see, also, 24 Carmody-Wait 2d, NY Prac, §145:346*)" (*Id.*).

Here, the issues before the motion court in the prior proceeding were issues of law – whether the amended complaint stated a cause of action for prohibition, namely to prohibit the Agency from exercising jurisdiction over the farm worker housing project, and for a violation of and Agriculture and Markets Law §305-a – not of fact. No final determination had yet been made by the Agency. Moreover the proposed requirement that Lewis Farm apply for an after-the-fact permit and pay a \$10,000 penalty, as well as the cease and desist order, were indisputably subject to review by the Agency's enforcement committee and full board of commissioners (*see 9 NYCRR Part 581*), and thereafter by judicial review in an Article 78 proceeding. It is not only clear that Lewis Farm had not exhausted its administrative remedies, but also that the Agency had not had an opportunity to "decide questions entrusted to" and "prepare a record reflective of its 'expertise and judgment' " (*Id.*).

To the extent that the motion court addressed whether the project involved "agricultural use structures", a "single family dwelling" and "subdivision"¹⁴ (*Executive Law §802[8], [58], [63]*), such was only to indicate that Lewis Farm had not established a "clear legal wrong" (*City of Newburgh v. Public Employment Relations Bd., supra; see also Town of Huntington v. New York State Div. of Human Rights*, 82 NY2d 783, 604 NYS2d 541, 624 NE2d 678) or that the Agency was acting in excess of its jurisdiction (*see Cortland Glass Co., Inc. v. Angello*, 300 AD2d 891, 752 NYS2d 741). None of the court's determinations on those issues were

¹⁴ Exhibit D to 06-13-08 Simon affirmation, at pages 4-5.

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essential to its ultimate decision to dismiss the proceeding as “not ripe for judicial intervention”¹⁵. Significantly, the court indicated that its decision did not preclude Lewis Farm from subsequent judicial review after the Agency performed its administrative functions:

“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.”¹⁵

Furthermore, Lewis Farm did not have a full and fair opportunity to litigate those, or any other factual, issues since on “a motion by the defendant to dismiss the complaint on the ground of its insufficiency made before service of an answer, allegations of fact contained in the complaint are not in issue, and the court can determine only the question of law whether the pleading is sufficient to withstand challenge by demurrer or by its statutory modern substitute motion to dismiss” (*Rockland Power & Light Co. v. City of New York*, 289 NY 45, 51, 43 NE2d 803, 806).

The Agency has failed to establish the any of the required elements for collateral estoppel to be applied here, and its motion to dismiss the third, fifth, sixth, seventh, eighth, ninth, and tenth causes of action on collateral estoppel grounds is denied. However, the doctrine of *res judicata* bars Lewis Farm from asserting a violation of Agriculture and Markets Law §305-a in the third cause of action, but not for dismissal of the entire cause of action¹⁷. “Under the doctrine of *res judicata*, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter” (*In re Hunter*, 4 NY3d 260, 269, 794 NYS2d 286, 291, 827 NE2d 269, 274). The

¹⁵ Exhibit D to 06-13-08 Simon affirmation, page 6.

¹⁶ Exhibit D to 06-13-08 Simon affirmation, page 7.

¹⁷ The third cause of action in Lewis Farm's amended petition alleges both a violation of Agriculture and Markets Law §305-a and the legal precedents stated in *Town of Lysander v. Hafner*, 96 NY2d 558, 733 NYS2d 358, 759 NE2d 356.

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Agency's motion to dismiss the third cause of action is partially granted to the extent that Lewis Farm's claims under §305-a are dismissed.

The Agency's motion to dismiss the fourth cause of action is, however, granted as a matter of law since there is no legal requirement that the Agency defer to an opinion of the Commissioner of Agriculture and Markets when interpreting the Agency's own statutory scheme. The motion to dismiss the eleventh cause of action, alleging that the Agency failed to consider the recommendations of, and consult with, the Adirondack Park Local Government Review Board as provided in Executive Law §803-a and §805, is denied as an issue of fact is presented that cannot be determined from the four corners of the amended petition and without resort to the record.

B.

As to the motion to dismiss by Lewis Farm, Salim B. Lewis and Barbara Lewis, the motion is granted as to the individual defendants, but otherwise denied. The Agency is statutorily empowered, through the Attorney General, to "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, . . . the terms or conditions of any order or permit issued by the agency pursuant to this Article" (*Executive Law §813(2)*). The notice of apparent violation which initiated the administrative enforcement proceeding before the Agency's enforcement committee (9 NYCRR §581-2.6) named only Lewis Farm as a respondent, and its March 25, 2008 determination refers only to Lewis Farm. To the extent that the determination is an "order" (*see 9 NYCRR §581-1.2*), enforcement proceedings through the Attorney General are limited by Executive Law §813(2) solely to Lewis Farm.

The motion by defendants Salim B. Lewis and Barbara Lewis to dismiss the Agency's amended complaint seeking enforcement of the March 25, 2008 determination of the Agency's enforcement committee is granted, with costs including \$100 motion costs for each defendant, and the Clerk of the Court is hereby directed to enter judgment accordingly.

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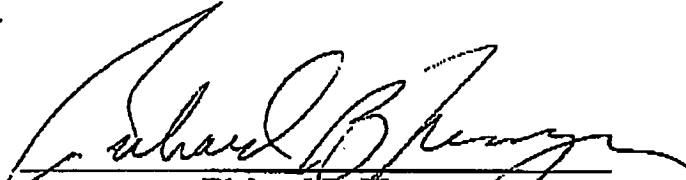
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C.


Within twenty (20) days of the date of this decision and order with notice of entry hereof, the Agency shall serve and file its answer to the amended petition and any additional record, as well as any affidavits or other evidentiary proof establishing the need for a trial of any issue of fact (CPLR §7804[e], [f]), and Lewis Farm shall serve and file its answer to the amended complaint (CPLR §3012[a]). Any motion for summary judgment by Lewis Farm must be served and filed within ten (10) days thereafter.

IT IS SO ORDERED.

ENTER


Richard B. Meyer
Acting Supreme Court Justice

ENTERED



JOSEPH A. PROVONCHA
ESSEX COUNTY CLERK
DATED: 7/2/08

ENTERED AND FILED
ESSEX COUNTY CLERK
08 JUL -2 PM 12:31
ELIZABETHTOWN, NY 12932