

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : THIRD DEPARTMENT

LEWIS FAMILY FARM, INC.,
Plaintiff-Appellant,

AFFIRMATION IN OPPOSITION
TO APPELLANT'S MOTION TO
EXTEND TIME TO PERFECT
APPEAL AND IN SUPPORT OF
RESPONDENTS' CROSS-MOTION
FOR CONDITIONAL
DISMISSAL OF APPEAL

NEW YORK STATE ADIRONDACK
PARK AGENCY,
Defendant-Respondent.

AD Docket No. 504696
Supreme Court
Index No. 498-07

Pursuant to CPLR § 2106, Loretta Simon, an attorney duly admitted to practice in the courts of the State of New York, hereby affirms the following under penalty for perjury:

1. I serve as an Assistant Attorney General in the Environmental Protection Bureau of the Office of the New York State Attorney General and am litigation counsel to the Adirondack Park Agency ("the APA" or "the Agency") in this appeal of Lewis Family Farm, Inc. v. NYS Adirondack Park Agency, (Sup. Ct., Essex Co. Index No. 498-07) ("Lewis Farm I") and in the subsequent CPLR article 78 proceeding, in Matter of Lewis Family Farm, Inc. v. APA, (Sup. Ct., Essex Co. Index No. 315-08) ("Lewis Farm II"). I also represent the APA in its enforcement action,

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APA v. Lewis Family Farm, Inc., Salim B. Lewis, and Barbara Lewis, (Sup. Ct., Essex Co. Index No. 332-08) ("Lewis Farm III").

Accordingly, I am familiar with the underlying facts and the litigation among the parties.

2. I submit this affirmation in opposition to Appellant Lewis Family Farm Inc.'s ("Lewis Farm") motion for an extension of time to perfect its appeal and in support of the APA cross-motion for a conditional order of dismissal. Lewis Farm seeks an extension of time on the grounds that this Court should allow a court of coordinate jurisdiction below to rule on the same issues presented in this appeal in a second proceeding brought by Lewis Farm in 2008, before this Court addresses this appeal. See Affidavit of John J. Privitera dated May 8, 2008 ("Privitera Aff.") ¶ 25. Since the court below already determined that the APA has jurisdiction over this matter, awaiting a second determination on the question of jurisdiction would amount to giving Lewis Farm a "second bite at the apple." Therefore, Lewis Farm's request should be denied.

3. Each of the above-mentioned cases arises from Lewis Farm's construction of three single-family dwellings in the Adirondack Park, along the Boquet River, without permits from the APA.

4. In the action giving rise to this appeal, the Supreme

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Court (Ryan, Acting J.S.C.) issued a Decision and Order dated August 16, 2007, which denied a restraining order Lewis Farm sought against the Agency, determined that the APA had jurisdiction over the dwellings, and granted the Agency's motion to dismiss the matter pending further administrative proceedings. See Exhibit C (August 8, 2007 transcript); see also Exhibit D (Decision and Order of Justice Kevin K. Ryan, Lewis Family Farm, Inc. v. APA, Index No. 498-07 Sup. Ct. Essex Co., dated August 16, 2007).

5. Specifically, Justice Ryan held that the APA had jurisdiction over the dwellings and the subdivisions at issue, rejected Lewis Farm's argument that the structures are "agricultural use structures," and concluded that Section 305-a of the Agriculture and Markets Law did not supersede Agency authority. See Exhibit D (August 16, 2007 Order, p. 6). These are precisely the issues that Lewis Farm seeks to re-litigate in its article 78 proceeding (Lewis Farm II) now pending in Supreme Court, Essex County before A.S.C. Justice Richard B. Meyer.

STATUTORY OVERVIEW

The APA Act and the Rivers Act

6. The Adirondack Park Agency Act ("APA Act") prohibits subdivisions and construction or placement of single-family

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dwellings in Resource Management areas within the Adirondack Park without an APA permit.¹ See Executive Law § 809(2)(a). The APA regulations also require a permit before installation of foundations, footings, and septic systems. See 9 NYCRR 570.3(ai)(1).

7. The Wild, Scenic, and Recreational River System Act ("Rivers Act"); Environmental Conservation Law ("ECL") § 15-2701 et. seq., authorizes the APA to make and enforce regulations necessary for the management, protection, and enhancement and control of land use and development in the wild, scenic and recreational river areas in the Adirondack Park. See ECL § 15-2701. The applicable APA regulations prohibit anyone from undertaking a construction project in a designated river corridor area before obtaining a permit from the APA. See 9 NYCRR § 577.4(a) ("no person shall undertake a rivers project without first obtaining an agency permit").

BRIEF SUMMARY OF FACTS

8. Lewis Farm constructed three single-family dwellings in the Adirondack Park, within a protected river corridor, without

¹The APA Act defines "subdivision" to include "any division of land into two or more lots, parcels, or sites . . . for the purpose of . . . any form of separate ownership or occupancy". See Executive Law § 802(63), see also 9 NYCRR § 570.3 (ah)(3).

permits from the APA. See Exhibit D (August 16, 2007 Order, p. 3).

9. The APA attempted, without success, to negotiate a settlement of the apparent violations with Lewis Farm. See Exhibit D (August 16, 2007 Order, p. 3-4).

10. Lewis Farm was aware that an APA permit was required, and even halted construction in March 2007, but it recommenced installation and construction in June 2007. See Exhibit D (August 16, 2007 Order, p. 4). In June, 2007, the APA served a cease and desist order on Lewis Farm. See Exhibit D (August 16, 2007 Order p. 4). Lewis Farm nevertheless continued to build the housing. See Exhibit D (August 16, 2007 Order, p. 4).

SUMMARY OF LITIGATION

Lewis Farm I

11. On or about June 28, 2007, Lewis Farm commenced the underlying action by serving a complaint against the Agency in New York State Supreme Court, Essex County, seeking a declaratory judgment that the Agency had no jurisdiction over construction of the three single-family dwellings, or if it did, that the Agriculture and Markets Law § 305-a, superceded the APA Act and divested the APA of jurisdiction over such development. See Exhibit A (June 26, 2007 Complaint, Index No. 498-07). Acting

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Supreme Court Justice Kevin K. Ryan was randomly assigned as the IAS Judge for the litigation.

12. Lewis Farm amended its complaint on or about July 13, 2007, and sought an ex parte stay against APA enforcement action. The application for ex parte stay was presented to Justice Ryan, who denied it. See Exhibit B (July 13, 2007 OSC and Amended Complaint dated July, 2007).

13. On or about August 1, 2007, the APA filed a motion to dismiss the amended complaint for 1) lack of subject matter jurisdiction (CPLR § 3211[2]); 2) prematurity; and 3) failure to state a cause of action pursuant to CPLR § 3211(7) because Agriculture and Markets Law § 305-a does not preclude the APA from requiring a permit for the subdivision of land and construction of single-family dwellings. The APA also opposed plaintiff's request for injunctive relief.

14. After oral argument on August 8, 2007, Justice Ryan issued a Decision and Order dated August 16, 2007, which denied the restraining order sought against the Agency and granted the Agency's motion to dismiss the proceeding. See Exhibit C (August 8, 2007 transcript); see also Exhibit D (August 16, 2007 Decision and Order of Justice Kevin K. Ryan, Lewis Family Farm, Inc. v. APA, Index No. 498-07, Sup. Ct., Essex Co., August 16, 2007 ["August 16, 2007 Order"]). Justice Ryan found that the APA had

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jurisdiction over the dwellings and the subdivisions, rejected Lewis Farm's argument that the structures are "agricultural use structures," and further determined that Section 305-a of the Agriculture and Markets Law did not supersede Agency authority. See Exhibit D (August 16, 2007 Order, p. 6).

15. The August 16, 2007 Order was entered in the Essex County Clerk's office on August 29, 2007 and served by mail on Lewis Farm on August 31, 2007. See Exhibits D and E (August 2007 Order, and Affidavit of Service dated August 31, 2007).

16. Upon information and belief, Lewis Farm filed a notice of appeal, dated September 26, 2007, in the Essex County Clerk's office on October 1, 2007. See Exhibit F (September 26, 2007 Notice of Appeal). Upon information and belief, the nine month deadline within which the appeal will be deemed abandoned is June 26, 2008. See 22 NYCRR § 800.12.

Lewis Farm II

17. On or about April 8, 2008, Lewis Farm commenced an article 78 proceeding against the APA in Supreme Court, Essex County challenging APA's final enforcement determination dated March 25, 2008. See Exhibit G (Matter of Lewis Family Farm, Inc. v. APA, Index No. 315-08, Sup. Ct., Essex Co. OSC, Notice of Petition and Petition). Lewis Farm's 2008 petition challenges

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the APA's determination and involves the same underlying facts and violations and, among other things, raises the same issues decided in Lewis Farm I, i.e., the construction of three single-family dwellings and the subdivision of land in the Adirondack Park without an APA permit, and the relationship between the APA Act and Agriculture and Markets Law.² See Exhibit M (March 25, 2008 APA determination).

18. The Article 78 petition for Lewis Farm II was served on the Office of the Attorney General by Order to Show Cause ("OSC") with an ex parte stay against the State on or about April 8, 2008. See Exhibit G (OSC and ex parte stay dated April 8, 2008, Notice of Petition and Petition dated April 7, 2008). The stay was vacated after objection of the Office of the Attorney General, and replaced with an Amended Order to Show Cause dated April 9, 2008. See Exhibit G (Amended Order to Show Cause dated April 9, 2008).

19. Justice Richard B. Meyer heard oral argument on the stay application on April 11, 2008. He issued an Order the same day granting in part and denying in part Lewis Farm's request for a stay. See Exhibit I (transcript dated April 11, 2008); and

² Lewis Farm filed a Request for Judicial Intervention ("RJI") form dated April 7, 2008 (Index No. 315-08), but did not disclose its previously-filed, related case Lewis Family Farm v. APA (Index No. 498-07). See Exhibit O.

Exhibit J (April 11, 2008 Decision). Justice Meyer did not stay provisions of the APA determination requiring Lewis Farm obtain a permit and pay a \$50,000 penalty before the three dwellings could be occupied. See Exhibit J (April 11, 2008 Order p. 3).

20. On or about April 14, 2008, Lewis Farm moved for leave to reargue and renew its argument to stay the occupancy prohibition and requirement that Lewis Farm pay a civil penalty of \$50,000. On April 25, 2008, the court issued a letter Decision and Order granting reargument and renewal, but adhered to its April 11, 2008 Order, which prohibited occupancy and maintained the requirement for a payment of a \$50,000 penalty. See Exhibit K (April 25, 2008 Order of Justice Meyer).

21. On or about April 14, 2008, Lewis Farm also filed an amended petition, which was served on the Office of the Attorney General on or about April 17, 2008. See Exhibit H (April 14, 2008 Amended Petition). The amended petition contains additional claims, but again asserts that the APA lacks jurisdiction over the housing project and alleges that the APA enforcement is precluded by Agricultural and Markets Law § 305-a. Id. at ¶¶ 73, 77, 79, 81, 83, 85, 87).

22. On April 28, 2008, Lewis Farm filed an order to show cause in the Appellate Division, Third Department, seeking permission to appeal the April 11, 2008 Supreme Court Order, and

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to enjoin the APA determination in its entirety.

23. On April 28, 2008, Justice Stein signed an order to show cause temporarily allowing occupancy of one single-family dwelling, on the condition that the appellant provide the specific plans for the septic system as delineated in Justice Meyer's Order, paragraph 2(b), and that appellant pay a sum of \$50,000 to the Essex County Treasurer's Office pursuant to CPLR § 5519(a)(2), or post an undertaking on or before May 5, 2008. See Exhibit L (April 28, 2008 Order of Justice Stein). Lewis Farm's application for permission to appeal and further injunctive relief remain pending in this Court.

Lewis Farm III

24. On April 11, 2008, on behalf of the APA, the Office of the Attorney General filed a summons and complaint in Essex County, against Lewis Farm, and Salim and Barbara Lewis its principals, for violations of the APA Act and the Rivers Act, for violation of the permitting requirements and for enforcement of Executive Law §§ 809(2)(a), 810(1)(e)(3), and 810(2)(d)(1), ECL § 15-2701, and 9 NYCRR Part 577. See Exhibit N (Summons and Complaint, APA v. Lewis Family Farm, Inc., et al., Sup. Ct., Essex Co., Index No. 332-08, without exhibits).

25. On April 14, 2008, the Lewis Farm filed a motion to consolidate civil action (Index No. 332-08) and the Article 78

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proceeding (Index No. 315-08). On April 21, 2008 the APA filed a cross-motion to transfer the second and third judicial actions to Justice Ryan, the original IAS Judge assigned to the first judicial action. The lower court granted the motion to consolidate and denied the APA's cross-motion to transfer the matter to the original IAS Justice. See Exhibit K (April 25, 2008 Order of Justice Meyer).

**THE INSTANT MOTION FOR AN EXTENSION OF TIME AND
CROSS-MOTION FOR CONDITIONAL DISMISSAL OF THIS APPEAL**

26. The notice of appeal in this action was dated September 26, 2007. Pursuant to 22 NYCRR § 800.12, the nine month deadline by which the appeal will be deemed abandoned is June 26, 2008. See Exhibit F (September 26, 2007 Notice of Appeal).

27. Lewis Farm seeks an extension of time to allow a second justice of the supreme court, to rule on the same jurisdictional issues raised and decided by Justice Ryan in the action giving rise to this appeal. See Privitera Aff. ¶ 25.

28. Pursuant to 22 NYCRR § 800.12, an extension of time requires an order of this court which "shall be granted only pursuant to a motion on notice supported by an affidavit setting forth a reasonable excuse for the delay and facts showing merit to the appeal or proceeding."

29. Lewis Farm fails to provide a reasonable excuse for the

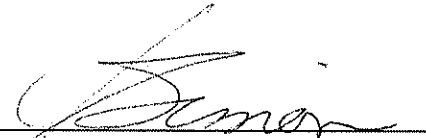
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delay, as required by 22 NYCRR § 800.12. Rather, Lewis Farm seeks a delay to allow it time to pursue a second proceeding against the APA on the same facts and violations and raising the same issues already decided by Justice Ryan herein. As explained in the APA's Memorandum of Law, Lewis Farm's strategy is barred by collateral estoppel. See May 15, 2008 Memorandum, filed herewith.

30. By its cross-motion, APA seeks to remove the uncertainty caused by the pending appeal. In light of the extensive litigation on this matter, a timely resolution of this appeal will clarify to the court below and to the parties the jurisdiction of the Agency, thereby avoiding further unnecessary litigation.

31. Accordingly, this Court should reject Lewis Farm's request for an extension of time, and grant the APA's cross-motion to conditionally dismiss the appeal unless Lewis Farm perfects its appeal by June 26, 2008.

Dated: Albany, New York
May 15, 2008


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AFFIRMATION OF LORETTA SIMON IN SUPPORT OF APA
CROSS-MOTION AND IN OPPOSITION TO APPELLANT'S MOTION
FOR EXTENSION OF TIME TO PERFECT APPEAL

TABLE OF EXHIBITS

<u>Exhibit</u>	<u>Description</u>
A	Summons and Complaint (Index No. 498-07), dated June 26, 2007
B	Amended Order to Show Cause and Temporary Restraining Order, dated July 13, 2007 and Amended Complaint (Index No. 498-07), dated July 2007
C	Transcript of Proceeding (Index No. 498-07) on August 8, 2007
D	Decision and Order of Justice Kevin K. Ryan with notice of entry, dated August 16, 2007
E	Affidavit of Service (Tom Kehrer) dated August 31, 2007 (Service of August 16, 2007 Order)
F	Notice of Appeal, dated September 26, 2007
G	<u>Ex Parte Stay</u> and Order to Show Cause, dated April 8, 2008; Notice of Petition and Verified Petition (Index No. 315-08), dated April 7, 2008 Amended Order to Show Cause, dated April 9, 2008
H	Amended Verified Petition (Index No. 315-08), dated April 14, 2008
I	Transcript of Proceeding (Index No. 315-08) on April 11, 2008
J	Decision and Order of Justice Richard B. Meyer, dated April 11, 2008
K	Letter Decision of Justice Richard B. Meyer, dated April 25, 2008
L	Order to Show Cause signed by Justice Leslie E. Stein, dated April 28, 2008
M	Adirondack Park Agency Determination, dated March 25, 2008 Corrected Adirondack Park Agency Determination, dated April 18, 2008
N	Summons and Verified Complaint (Index No. 332-08), dated April 10, 2008 (without exhibits)
O	Request for Judicial Intervention (Index No. 315-08) dated April 7, 2008 Request for Judicial Intervention (Index No. 332-08) dated April 14, 2008