

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

---

LEWIS FAMILY FARM, INC.,  
Plaintiff-Appellant,

v.

NEW YORK STATE ADIRONDACK  
PARK AGENCY,  
Defendant-Respondent.

AFFIRMATION IN OPPOSITION  
TO APPELLANT'S SECOND  
REQUEST FOR AN EXTENSION  
OF TIME TO PERFECT APPEAL

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 related enforcement action, 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") second motion for an extension of time to perfect its appeal.

3. All three matters stem from Lewis Farm's construction of three single-family dwellings in the Adirondack Park, within a protected river corridor, without permits from the APA. See Affirmation of Loretta Simon dated May 15, 2008 ("Simon Aff. dated May 15, 2008").

4. In the declaratory judgment action giving rise to this appeal, the Supreme 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 Simon Aff. dated May 15, 2008, Exhibit D (Decision and Order of Justice Kevin K. Ryan, Lewis Farm I, Index No. 498-07 Sup. Ct. Essex Co., dated August 16, 2007).

#### **SUMMARY OF LITIGATION**

A summary of the three matters is provided in the Affirmation of Loretta Simon dated May 15, 2008 previously provided to this Court, and is not repeated herein.

THE INSTANT, SECOND MOTION FOR AN EXTENSION OF TIME

5. 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 would have been deemed abandoned was June 26, 2008. See Simon Aff. dated May 15, 2008, Exhibit F (September 26, 2007, Notice of Appeal).

6. Lewis Farm moved to extend its time to appeal by 90 days on May 8, 2008, and the State cross-moved for a conditional order of dismissal. This Court granted an extension of time for Lewis Farm to perfect its appeal to July 28, 2008, and further ordered that the appeal be dismissed unless appellant files and serves its record and brief on or before July 28, 2008. See Affidavit of Jacob F. Lamme dated July 3, 2008 ("Lamme Aff."), Exhibit A.

7. Lewis Farm's second request for an extension of time to perfect its appeal, notes that on July 2, 2008 the court in Lewis Farm II (Supreme Court, Essex County) (Meyer Acting J.S.C.) denied the APA's motion to dismiss certain claims on the basis of collateral estoppel. Notwithstanding this development, the State asserts that Lewis Farm has failed to justify a second extension of time, and its request should be denied.

8. 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."

9. Lewis Farm fails to provide a reasonable excuse for the delay, as required by 22 NYCRR § 800.12. Rather, Lewis Farm argues for a second extension on the grounds 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." See Lamme Aff. ¶ 16. The APA disagrees. Rather than making this appeal moot, a decision by this Court will likely clarify for the parties the jurisdictional issues determined by the court below and, in turn, their role in Lewis Farm II and III.

10. The APA is opposed to a further extension of time in Lewis Farm's appeal and seeks timely resolution of this matter to remove the continuing regulatory uncertainty caused by the pending appeal.

11. During the nine-month time period that Lewis Farm failed to perfect its appeal it brought an Article 78 proceeding against the APA, challenging again the APA's jurisdiction, and the APA's final determination dated March 25, 2008 (Lewis Farm II). Delay of this appeal has benefitted Lewis Farm, giving it the opportunity to re-litigate essentially the same jurisdictional and legal issues before a different Supreme Court

Justice.<sup>1</sup>

12. Delay in resolution of this appeal has been detrimental to the APA's ability to enforce violations of the APA Act and the Rivers Act. See Executive Law § 801, et. seq. and Environmental Conservation Law § 15-2701 et seq. The APA relied on Justice Ryan's jurisdictional findings in his August 16, 2007 Decision and Order and referenced it in its final determination, and was told by counsel for Lewis Farm that the action had not been appealed.

13. Specifically, at the time of the Agency Enforcement Committee meeting in March 2008, Lewis Farm's counsel represented that Justice Ryan's decision in Lewis Farm I had not been appealed. See Exhibit A, p. 44, line 24 through p.45, line 13 (Excerpt of Transcript from Agency Proceeding). In fact, a member of the APA Enforcement Committee asked twice whether this action had been appealed, to which counsel to Lewis Farm responded "Correct" and "No." Id Exhibit A, p. 45, lines 2 and 13. In fact, Lewis Farm's Notice of Appeal was filed some six months before.

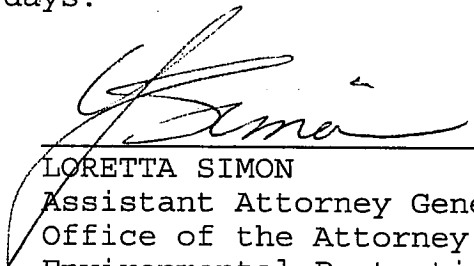
---

<sup>1</sup> As the State has previously noted, Lewis Farm's counsel failed to disclose its first proceeding when it filed RJI Forms in Lewis Farm II and Lewis Farm III as required by 22 NYCRR §§ 202.3., and 202.6. See Simon Aff. dated May 15, 2008, Exhibit O ("Related Cases"). Consequently, Supreme Court was not alerted to the prior related action (Lewis Farm I) assigned to Acting JSC Kevin K. Ryan, and Lewis Farm II and Lewis Farm III were assigned to Acting JSC Richard B. Meyer.

14. The Agency seeks expeditious resolution of this appeal particularly as it relates to the jurisdictional determinations that are directly related to and relied upon in the Agency's subsequent March 25, 2008 enforcement determination.

15. Accordingly, this Court should reject Lewis Farm's request for a further extension of sixty days. To the extent the Court considers granting an extension, the APA has no objection to a brief extension of fourteen days.

Dated: Albany, New York  
July 11, 2008



LORETTA SIMON  
Assistant Attorney General  
Office of the Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, New York 12224-0341  
(518) 402-2724



\*\*\*\*\*

IN THE MATTER OF  
LEWIS FAMILY FARMS, INC.

\*  
\*  
\*  
\*

\*\*\*\*\*

The above-referenced matter was held March 13, 2008,  
at the Adirondack Park Agency Headquarters in Ray Brook,  
New York, before Lisa L. Tennyson, Certified Shorthand  
Reporter, Registered Merit Reporter and Notary Public in and  
for the State of New York.

APPEARANCES: CECIL WRAY  
FRANK MEZZANO  
ELIZABETH LOWE  
ARTHUR LUSSI  
LANI ULRICH  
RICHARD BOOTH  
MARK SANGENBERGER  
CURTIS STILES  
JAMES BANTA  
JAMES TOWNSEND  
RICHARD HOFFMAN  
WILLIAM THOMAS  
CHRISTOPHER WALSH  
FRED MONROE

PAUL VANCOTT, ESQ.

McNAMEE, LOCHNER, TITUS & WILLIAMS, P.C.  
Attorneys for Lewis Family Farms, Inc.  
677 Broadway  
Albany, New York 12207-2503  
By: John Privitera, Esq.



1 in a final opinion.

2 MR. LUSSI: So that's not land use.

3 MR. PRIVITERA: Right.

4 MR. LUSSI: I'm fine.

5 MR. WRAY: Mr. Townsend?

6 MR. TOWNSEND: I think I have three  
7 questions. One, you just added to my list at  
8 the end. The commissioner does not use the term  
9 agricultural use structure, he uses agricultural  
10 nature. Correct?

11 MR. PRIVITERA: Yes.

12 MR. TOWNSEND: And the Lysander case that  
13 you referred to does not say that the town is  
14 powerless. It says it has to exercise it --  
15 cannot exercise its controls unreasonably.  
16 Assumes some opportunity to control.

17 MR. PRIVITERA: Yes and as interpreted by  
18 the Department of Ag and Markets, that means  
19 complying with building code only.

20 MR. TOWNSEND: There is in essence a  
21 compliance in that, right?

22 MR. PRIVITERA: Yes, and in our record we  
23 are in compliance.

24 MR. TOWNSEND: And then the third question  
25 I have, you haven't appealed Judge Ryan's

1 decisions, is that correct?

2 MR. PRIVITERA: Correct.

3 MR. TOWNSEND: And in it, at page 4 he  
4 said, "The Court does not agree with plaintiff's  
5 assertion that the APA has no authority over  
6 this building project."

7 MR. PRIVITERA: Yes.

8 MR. TOWNSEND: Isn't that a pretty clear  
9 statement that he concurred that the agency does  
10 have jurisdiction over this?

11 MR. PRIVITERA: That's what he thought.

12 MR. TOWNSEND: And you did not appeal that.

13 MR. PRIVITERA: No. Because it's not  
14 binding. As we briefed. It's not binding on  
15 this agency.

16 MR. TOWNSEND: Okay.

17 MR. WRAY: Okay. Any other questions?

18 Mr. Monroe?

19 MR. MONROE: Just like to make a comment.  
20 This is the type of situation that I believe was  
21 discussed when we were talking about civil  
22 penalty guidelines. Where there's a good faith  
23 dispute as to jurisdiction, and I think our  
24 argument on behalf of the review board was in  
25 those situations there should not be a fine