STATE OF NEW YORK: ADIRONDACK PARK AGENCY

---X

In the matter of the apparent violations of Section 809 of the Executive Law by:

REPLY AFFIRMATION

Agency File E2007-041

LEWIS FAMILY FARM, INC.

Respondent.

---X

STATE OF NEW YORK)
) ss:
COUNTY OF ESSEX)

PAUL VAN COTT, an attorney licensed to practice law in the courts of the State of New York, affirms under penalty of perjury:

1. I have read Respondent's response ("Response") to Agency staff's Request for an Enforcement Committee Determination and submit this reply on behalf of Agency staff.

2. Respondent's "right to farm" is undisputed and has never been at stake in this matter. Instead, this proceeding is about the Agency's clear statutory authority to require a permit that imposes reasonable conditions on the single family dwellings that Respondent has illegally built on Resource Management lands and in a River Area. It is also about

Respondent's blatant and repeated disregard for lawful process and a lawful Cease and Desist Order that Agency staff issued. Accordingly, through this proceeding Agency staff seek Respondent's compliance with the laws it is violating and a penalty that will ensure Respondent's (and others') deterrence from future violations.

3. The Agency and the Department of Agriculture and Markets have exchanged recent correspondence regarding the Agency's jurisdiction over farms in the Park. This correspondence, including the November 26, 2007 letter from the Commissioner of the Department of Agriculture and Markets (also attached to the Privatera Affidavit) and the Agency's responses thereto, is attached hereto as Exhibit A.

4. In his August 16, 2007 decision, Acting Supreme Court Justice Kevin Ryan unambiguously confirmed the Agency's jurisdiction over Respondent's single family dwellings, despite Respondent's arguments for an agricultural exemption. See Van Cott Affirmation, dated December 13, 2007, Exhibit B, pages 4-7. He expressly ruled that the Agency has jurisdiction to review Respondent's single family dwellings pursuant to the Executive Law. Id.

5. Point II of Respondent's Memorandum of Law (Page 31) correctly points out that Agency staff inadvertently wrote **"single family dwelling"** instead of **"single principal building"** on page 13 of staff's Memorandum of Law. Respondent's counsel is incorrect, however, that this typographical error is somehow the "foundation of staff's only argument." Staff's argument regarding Agency jurisdiction over Respondent's activities is actually set forth on pages 11 and 12 of its Memorandum of Law. Simply stated, since Respondent's single family dwellings are being constructed on Resource Management lands and in a River Area, they are subject to the Agency's permitting jurisdiction under the Executive Law and the Rivers Act.

6. The discussion on page 13 of staff's Memorandum of Law that Respondent's counsel refers to, read correctly, only pertains to the relief that staff seek, noting the importance of having Respondent obtain a permit for its single family dwellings so that the overall intensity guidelines may be properly applied, including the statutory limitation that "all agricultural use structures and single family dwellings or mobile homes occupied by a farmer of land

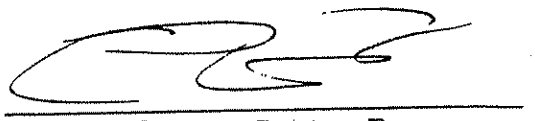
in agricultural use, his employees engaged in such use and members of their respective immediate families, will together constitute and count as a **single principal building.**" Executive Law § 802(50)(g). (Emphasis supplied)

7. In defining the term "principal building", Executive Law § 802(50)(g) argues against Respondent's position that its "single family dwellings" are somehow "agricultural use structures" under the Executive Law, since the statutory definition refers to those structures separately in the same paragraph. Moreover, the statutory definition of "agricultural use structure" in Executive Law § 802(8) does not include single family dwelling as one of the structures within that term. "Single family dwelling" is defined separately in Executive Law § 802(58). Since they are defined separately, this leads to the obvious conclusion that single family dwellings are not considered "agricultural use structures" under the Executive Law.

8. In Point VI of Respondent's Memorandum of Law, Respondent's counsel incorrectly argues that this proceeding is brought by Agency staff pursuant to 9 NYCRR Subpart 581-4. The requirements of Subpart

581-4 do not apply to this proceeding. The Notice of Apparent Violation commencing this proceeding seeks an Enforcement Committee determination pursuant to 9 NYCRR § 581-2.6(d) and describes in detail the process leading to such a determination. Staff's Notice of Request for an Enforcement Committee Determination also expressly references the Committee's jurisdiction over this matter pursuant to Subpart 581-2, not Subpart 581-4. Subpart 581-4 only applies to proceedings brought by staff to enforce the Freshwater Wetlands Act or seeking revocation, suspension or modification of an Agency permit. Point VI of Respondent's Memorandum of Law must therefore be disregarded.

DATED: Ray Brook, New York
January 29, 2008



Paul Van Cott, Esq.

REPLY AFFIRMATION OF PAUL VAN COTT
DATED JANUARY 29, 2008

EXHIBIT A

NEW YORK STATE
Adirondack
parkagency

December 4, 2007

Honorable Patrick Hooker
Commissioner
NYS Department of Agriculture and Markets
10B Airline Drive
Albany, NY 12235

Dear Commissioner Hooker:

Thank you for your letter of November 26 to Chairman Stiles regarding the Lewis Family Farms matter. Chairman Stiles asked that I respond as the matter will be before the Board for advice in the near future.

We appreciate your detailed explanation of the various privileges provided to farm housing by New York law and will add this information to the record before the Agency. However, the Agency jurisdiction over single family dwellings in the Resource Management land use area classification is unambiguous. Farm housing is given a special privilege exempting the dwelling units from the APA Act overall intensity guidelines, but not from the fundamental permit requirement in this particular zoning classification. Your letter acknowledges the responsibility to obtain basic local permits, and in our view this is an equally fundamental element of the regulatory framework for the Adirondack Park established by the APA Act, the NYS Wild, Scenic and Recreational Rivers System Act and the NYS Freshwater Wetlands Act, a view supported by Judge Ryan in his decision regarding the Lewis Family Farms.

Lewis Family Farms have simply resisted the jurisdiction of the Agency in this limited context. The Agency has successfully and amicably resolved apparent conflicts with agricultural uses in the past when they have been brought to our attention. However, the place to work out details of specific residential construction within the Resource Management land use area is within the Agency's permit process where status as farm housing gives privileges regarding overall intensity guidelines, as well as restrictions on future use for non-agricultural purposes.

We will continue to work closely with your staff regarding Agriculture District status of properties and appreciate their assistance as we have tried to be responsive to landowner concerns. However, the current Lewis Family Farm issue does not involve agricultural uses or agricultural use structures as our statute defines those activities, and to suggest the contrary confuses a clear exemption of those uses and structures from the basic regulatory structure of the APA Act.

We look forward to your Agency's continuing advice as we develop clear and consistent communications for the farm communities in Essex County and the Park.

Sincerely,

Mark E. Sengenberger
Interim Executive Director

MES:dal

cc: Curtis F. Stiles, Chairman
John S. Banta, Counsel

NEW YORK STATE
Adirondack
parkagency

December 3, 2007

Honorable Patrick Hooker
Commissioner
NYS Department of Agriculture and Markets
10B Airline Drive
Albany, NY 12235

Dear Commissioner Hooker:

Thank you for your letter of November 26 regarding Lewis Family Farms. As this is a pending matter before the Agency which the Board will have to address early in the New Year, I have forwarded your detailed information to Mr. Sengenberger for his attention and addition to the record in the matter.

Sincerely,

Curtis F. Stiles
Chairman

CFS:dal

cc: Mark E. Sengenberger

P.O. Box 99 • NYS Route 86 • Ray Brook, NY 12977 • 518 891-4050 • 518 891-3938 fax • www.apa.state.ny.us

STATE OF NEW YORK
DEPARTMENT OF AGRICULTURE AND MARKETS
10B Airline Drive, Albany, New York 12235
518-457-8876 Fax 518-457-3087
www.agmkt.state.ny.us

Eliot Spitzer
Governor

Patrick Hooker
Commissioner

November 26, 2007

Curt Stiles, Chairman
Adirondack Park Agency
PO Box 99
NYS Route 86
Ray Brook, NY 12977

Dear Mr. Stiles:

Congratulations on your recent appointment to Chairman of the Adirondack Park Agency. In that capacity, I am seeking your assistance in trying to resolve an issue between Sandy and Barbara Lewis, Town of Essex, Essex County and the Adirondack Park Agency. Mr. and Mrs. Lewis own and operate one of the State's largest certified organic farms. They have vastly improved their landholdings and have removed many of the older homes on the various farms that have been purchased to make up their landholdings. The Lewis' are in the process of constructing farm worker housing on the farm and were of the belief that such housing is exempt from the APA permitting process. The Department of Agriculture and Markets supports the Lewis' efforts in their attempt to provide modern, energy efficient housing for their employees. The Lewis farm is located within Essex County Agricultural District No. 4, a county adopted, State certified, agricultural district.

On August 8, 2007 one of my staff, Robert Somers, Manager of the Department's Farmland Protection Program, met with Mark Sengenberger, John Banta, Anita Deming and others to discuss the APA's treatment of farm worker housing and temporary greenhouses under State Law. Dr. Somers informs me that the APA maintains that the Lewis' must obtain a permit from that agency prior to constructing such housing even though the Agricultural Districts Law is clear that under certain circumstances farm worker housing is an agricultural structure and part of a "farm operation".

AML §301, subd. 11, defines a "farm operation", in part, as "...the land and on-farm buildings, equipment, manure processing and handling facilities, and practices which contribute to the production, preparation and marketing of crops, livestock and livestock products as a commercial enterprise, including a "commercial horse boarding operation" as defined in subdivision thirteen of this section and "timber processing" as

defined in subdivision fourteen of this section. Such farm operation may consist of one or more parcels of owned or rented land, which parcels may be contiguous or noncontiguous to each other."

Farm worker housing, including mobile homes (also known as "manufactured homes"), modular or stick built structures, are an integral part of numerous farm operations. Farmers often provide on-farm housing for their farm laborers to, among other things, accommodate the long workday, meet seasonal housing needs and address the shortage of nearby rental housing in rural areas. The use of manufactured or modular homes for farm worker housing is a common farm practice. Manufactured, modular and stick built homes provide a practical and cost effective means for farmers to meet their farm labor housing needs. Farm labor housing used for the on-farm housing of permanent and seasonal employees is part of a farm operation.

The Department's *Guidelines for Review of Local Laws Affecting Farm Worker Housing* (copy enclosed) provides that the term "on-farm buildings" includes housing used as a residence for permanent and seasonal employees. Generally, in evaluating the use of farm labor housing under the AML, the Department considers whether the housing is used for seasonal and/or full-time employees and their families; whether the housing is provided by the farm operator (i.e., the farmer must own the housing); whether the worker is an employee of the farm operator and employed in the farm operation(s); and whether the farm worker is a partner or owner of the farm operation. The Department does not consider the residence of the owner or partner of the farm operation (and their family) to be protected under AML §305-a. The Department has interpreted a seasonal employee to mean migrant workers or workers employed during the season of a crop; i.e., from cultivation to harvest. The Department has not considered part-time employees to be "full-time or seasonal."

Although the Department considers farm worker housing to be part of a farm operation for the purposes of administering AML §305-a, the Department has found that local laws which regulate the health and safety aspects of the construction of farm buildings through provisions to meet local building codes or the State Building Code [unless exempt from the Uniform Code under Building Code §101.2(2) and Fire Code § 102.1(5)] and Health Department requirements for potable water and sewage disposal, are not unreasonably restrictive. Requirements for local building permits and certificates of occupancy to ensure that health and safety requirements are met are also generally not unreasonably restrictive.

State Building Code §101.2(2) provides an exemption from the Building Code for "[a]gricultural buildings used solely in the raising, growing or storage of agricultural products by a farmer engaged in a farming operation." State Building Code §202 defines an agricultural building as "[a] structure designed and constructed to house farm implements, hay, grain, poultry, livestock, or other horticultural products. This

structure shall not be a place of human habitation or a place of employment where agricultural products are processed, treated or packaged, nor shall it be a place used by the public." Therefore, a farm operator must obtain a local building permit for farm worker housing and the housing is subject to the requirements of the State Building Code. It is my understanding that the Lewis farm has obtained the necessary permits from the Town to construct such housing.

The Office of Real Property Services also agrees with the Department's position that housing for farm workers is an agricultural structure. Farm worker housing may qualify for a 10-year real property tax exemption by filing with the local assessor RPT Form RP-483. This is a tax exemption that is applied to newly constructed agricultural and horticultural buildings and structures. I have enclosed the instructions page for the exemption which clearly states that under certain circumstances, farm worker housing is considered an agricultural building.

The Department's position on farm worker housing has been supported by the State's Court of Appeals (Town of Lysander v. Hafner, 98 N.Y.2d 556 [2001]) and pursuant to AML §305, subd. 3, "...it shall be the policy of all State agencies to encourage the maintenance of viable farming in agricultural districts and their administrative regulations and procedures shall be modified to this end..."

I would like to discuss this issue with you further. Please contact me at your earliest convenience.

Sincerely,

Patrick Hooker

Patrick Hooker
Commissioner of the New York Department
of Agriculture and Markets

Enclosures

NEW YORK STATE
Adirondack
parkagency

August 7, 2007

Mr. Bill Kimball
Director, Division of Agricultural
Protection and Services
NYS Department of Agriculture and Markets
10B Airline Drive
Albany, NY 12235

Dear Mr. Kimball:

Re: Agricultural Uses

Thank you for your letter dated June 29, 2007, received July 5, expressing an interest in further understanding of Agency jurisdiction over agriculture and related activities, and an interest in educating our staff as to your Department's responsibilities. We look forward to meeting with Department staff on August 8, and send this letter in order to further the progress of our meeting.

The Adirondack Park Agency Act generally excepts "agricultural use" and "agricultural use structure" from the regulatory provisions of the statute. However, much of the Park's agricultural land is zoned or classified Resource Management where all new subdivision, residential and commercial development requires an Agency permit including "agricultural service uses" and "mining." Therefore, it is important to understand the definitions and extent of various activities listed above under the Adirondack Park Agency Act.[1] Further, there are circumstances where agricultural structures are subject to Adirondack Park Agency Act shoreline setback criteria established as a matter of law in Section 806 of the statute, and to the requirements of the NYS Freshwater Wetlands Act or Wild, Scenic and Recreational Rivers System Act, both administered by the Park Agency within the Adirondack Park. (See 9 NYCRR Parts 577 and 578)

[1] NYS Executive Law, Article 27.

P.O. Box 99 • NYS Route 86 • Ray Brook, NY 12977 • 518 891-4050 • 518 891-3938 fax • www.apa.state.ny.us

Any analysis of Agency jurisdiction must start with the statutory definitions, NYS Executive Law §§802(4), (5), (6), (7), (8) and (17), quoted below:

> 4. "Accessory use" means any use of a structure, lot or portion thereof that is customarily incidental and subordinate to and does not change the character of a principal land use or development, including in the case of residential structures, professional, commercial and artisan activities carried on by the residents of such structures.
>
> 5. "Accessory structure" means any structure or a portion of a main structure customarily incidental and subordinate to a principal land use or development and that customarily accompanies or is associated with such principal land use or development, including a guest cottage not for rent or hire that is incidental and subordinate to and associated with a single family dwelling.
>
> 6. "Agricultural service use" means any milk processing plant, feed storage supply facility, farm machinery or equipment sales and service facility; storage and processing facility for fruits, vegetables and other agricultural products or similar use directly and customarily related to the supply and service of an agricultural use.
>
> 7. "Agricultural use" means any management of any land for agriculture; raising of cows, horses, pigs, poultry and other livestock; horticulture or orchards; including the sale of products grown or raised directly on such land, and including the construction, alteration or maintenance of fences, agricultural roads, agricultural drainage systems and farm ponds.
>
> 8. "Agricultural use structure" means any barn, stable, shed, silo, garage, fruit and vegetable stand or other building or structure directly and customarily associated with agriculture use.
>
> 17. "Commercial use" means any use involving the sale or rental or distribution of goods, services or commodities, either retail or wholesale, or the provision of recreation facilities or activities for a fee other than any such uses specifically listed on any of the classification of compatible uses lists.

It is clear that "agricultural uses" involve the growing of crops and raising of animals, as well as the customary actions necessary to be able to sell those items (i.e., actions necessary to move the farm product off the farm in saleable form). "Agricultural service use" is a separately defined term, and clearly includes actions which involve the further processing of agricultural products. Under the jurisdictional scheme of the Adirondack Park Agency Act (Executive Law, Article 27), agricultural uses are generally non-jurisdictional. However, agricultural service uses are treated almost identical to commercial uses: they are Class A or B regional projects, depending on size. Hence, the difference between agricultural use and agricultural service use is critical to a determination of Agency jurisdiction.

The question has arisen as to what "processing" (if any) of farm products by a farmer is allowed before that activity becomes an agricultural service use. A strict reading of the agricultural service use definition alone would result in a permit requirement for on-farm processing of agricultural products. There are two other considerations, however:

(1) By the language including the "sale of products" as part of the agricultural use definition, it is clear that "processing" necessary to move the product off the site is contemplated. For example, apples are typically stored, graded and packaged for market in bags and boxes rather than being sold in bulk as "orchard run." These "processing for sale" activities would be accessory to the agricultural use.

(2) The definition of "accessory use" contemplates the possibility that all other listed land uses may, in fact, have accessory use activities associated with them. The parameters for being "accessory" are established in the definition of "accessory use." Therefore, it is clear that an "agricultural use" may have accessory uses associated with it (as could an agricultural service use).

In general, the Agency has treated on-farm processing of the agricultural products produced on that farm as accessory to the agricultural use. To retain that characterization, the activity must be "customary" for a farm operation, and must be both "incidental and subordinate" to the farm operation, such that it does not change the character of operations from the principal use, the agricultural use.

There is no clear-cut rule regarding operations involving the processing of the products of other farms, in addition to the products of the farm operated by the processor. Shared processing of Farm A and Farm B products at Farm A might remain "customary, incidental and subordinate" to the agricultural use on Farm A. However, where significant new land use and development is required to undertake such activity, it may not be considered "accessory." Hence, any farm contemplating new development to facilitate processing of farm products, particularly products from other farms, should seek written advice from the Agency in the form of a "jurisdictional determination."

Another matter that is given special status by the Adirondack Park Agency Act is the construction of employee housing on-farm. The definition of "principal building", the core concept behind the Park's overall intensity guidelines and jurisdiction over new subdivision, provides:

> All agricultural use structures and single family dwellings or mobile homes occupied by a farmer of land in agricultural use, his employees engaged in such use and members of their respective immediate families, will together constitute and count as a single principal building. (802[50][g])

The practical import of this is that all single family dwellings and mobile homes placed on a farm for use by farm employees will not constitute "principal buildings." The separate itemization of "agricultural use structure," "single family dwelling" and "mobile home" in the above definition preserves the separate character of these uses for purposes of the jurisdictional criteria of Section 810 of the Act. Section 810 contains the lists of Class A and B regional projects which are subject to Agency jurisdiction.[2]

Barns, stables and silos need no Class A or B regional project permit from the Agency because they are agricultural use structures.[3] A single family dwelling not associated with a jurisdictional subdivision requires no permit except in areas classified Resource Management or Industrial Use.[4] New two-

---

[2] In addition, the "compatible use" lists of Section 805 separately itemize these uses (uses not listed as "compatible" are also jurisdictional under the provisions of Section 810).

[3] As noted in the first paragraph, these structures may require a shoreline variance or a wetlands or rivers permit from the Agency.

[4] See footnote 3.

family and larger multiple family dwellings require an Agency permit in all land use areas except Hamlet. If a new residential structure requires a permit due to numbers, lot size, location, or because it is a multiple family dwelling, it is a Class A or B regional project (requires a permit) regardless of the intent to use the housing for farm employees. Finally, for those residential structures which are single family dwellings and mobile homes, they will not constitute a separate "principal building" provided they are occupied by the farmer of land or his farm employees.

Purchasers of land that is subject to a recorded and effective Agency permit take the land subject to the permit as it was recorded. This may raise questions of conflict between permit conditions intended to address the new development originally contemplated in the permit (for instance, screening, landscaping and vegetation cutting restrictions) and newly proposed farm operations that involve agricultural uses and agricultural use structures. This will be particularly true if the agricultural uses involve the land which is already identified as the location of the permitted dwellings or appurtenant facilities, or which is subject to specific conditions regarding vegetative cutting or planting. The Agency will require permit amendments to reflect the necessary change in the existing permit. The amended permit will address the new agricultural uses, may treat them as minor amendments, and may also release them from further review. Minor amendments can be routinely and promptly processed; however, the landowner must obtain the amendment if the original project design or permit conditions will not be adhered to.

We look forward to continuing our dialogue. Agency staff appreciates the opportunity to communicate and build awareness of farm concerns because, at least when properly functioning, Agency programs rarely directly involve farm activities.

Very truly yours,

John S. Banta
Counsel

JSB:dal

cc: Dr. Robert Somers
Ross Whaley, Chairman
Mark Sengenberger, Acting Executive Director
Stephen Erman, Special Assistant for Economic Affairs

STATE OF NEW YORK
DEPARTMENT OF AGRICULTURE AND MARKETS
10B Airline Drive
Albany, New York 12235

Division of Agricultural Protection
and Development Services
518-457-7076
Fax. 518-457-2716

June 29, 2007

John Banta, Esq.
Chief Counsel
Adirondack Park Agency
PO Box 99
NYS Route 86
Ray Brook, New York 12977

Dear Mr. Banta:

Over the past two months, the Department has received several inquiries concerning enforcement actions taken by the Adirondack Park Agency against farm operations located within the Adirondack Park. One of the farms is located within a county adopted, State certified, agricultural district, but the other farm is not located within a district. According to the landowner, however, she has requested that her property be included in the corresponding agricultural district upon its next review.

The Commissioner's Office has asked me to obtain information on the APA's administration of its statute and regulations as applied to farm operations. I have read portions of Article 27 of the Executive Law, but several questions concerning the Law and its application to farm operations remain.

It appears that "agricultural use" and related "agricultural use structures" are exempt from APA's permitting requirements (Executive Law § 810, subd. 1). According to the "Summary of Adirondack Park Agency Authority Over Land Use and Development and Subdivisions" table provided on the APA web site, agricultural use and agricultural use structures are considered non-jurisdictional projects and no APA permits are required, regardless of the land classification where the property resides. If this interpretation is correct, when would a permit from the APA be required for an agricultural use or the construction of associated structure(s)?

One of the farmers that contacted the Department has been cited by the APA for constructing farm worker housing without first receiving a permit from the Agency. The landowner indicated that prior to construction, a building permit was obtained from the Town. These new residences, five in total, were intended to replace numerous older

homes that had been removed from the farm. Although the demolished homes may have been located on more than one parcel, under the Agriculture and Markets Law, "farm operations" are defined, in part, as consisting of owned or rented land that may be contiguous or non-contiguous to one another. The Department also considers "farm worker housing" to be agricultural structures and also protected under the AML. Does the APA consider farm worker housing to be an agricultural use structure as defined in § 802, subd. 8 of the Executive Law? If so, why would a farmer be required to obtain a permit from the APA to construct an "agricultural use structure?"

Another farmer received a letter from the APA concerning the placement of a temporary greenhouse on their start-up farm. In 1992, the Executive Law was amended to define temporary greenhouses as "specialized agricultural equipment." [Executive Law §372(17)] Executive Law §372(3) states that temporary greenhouses are not buildings for purposes of the State Building Code. Real Property Tax Law §483-c exempts temporary greenhouses from taxes, special ad valorem levies and special assessments because they too, consider such greenhouses as "specialized agricultural equipment" and not a building or structure. The Department has protected the erection and use of temporary greenhouses as part of a farm operation for nursery/greenhouse operations, produce farms and livestock farms. It would seem that the APA would also consider such greenhouses to be equipment and not a structure. Would the APA consider "temporary greenhouses" to be equipment or if not, wouldn't such structures, if used for agricultural purposes, be considered an agricultural use structure and exempt from the APA permitting requirements?

In order to better advise agricultural enterprises within the Park, it is important that the Department understands how the APA's rules and regulations are applied to farm operations. There are many viable agricultural enterprises that are located within both the Park and an agricultural district.

I look forward to working with you so that both Agencies can clarify their interpretations as to what constitutes an agricultural use, practice and structure. If you have any immediate questions concerning this request, please contact Robert Somers, Manager of the Department's Agricultural Protection Unit, at 457-8887.

Sincerely,

Bill Kimball
Director