ADIRONDACK PARK AGENCY

In the Matter of

LEWIS FAMILY FARM, INC.,

Respondent.

Agency File: E2007-041

REPLY MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S REQUEST FOR DISMISSAL OF THIS ENFORCEMENT PROCEEDING

Submitted by:

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INTRODUCTION

Respondent Lewis Family Farm, Inc., through its undersigned counsel, submits this reply memorandum of law in further support of the Farm's pending motion to dismiss, which thoroughly refutes staff's response and clarifies both the factual record and the law at issue in this proceeding. The pertinent facts in this proceeding are set forth in the accompanying Reply Affidavit of John Privitera, and the Affidavits of Barbara Lewis, Klaas Martens, and John Privitera contained in *The Right to Farm in the Champlain Valley of New York: The Matter of Housing at the Lewis Family Farm*, which was submitted to the Members of the Agency on or about January 22, 2008.

ARGUMENT

POINT I

THIS PROCEEDING SHOULD BE DISMISSED BECAUSE THE LEWIS FAMILY FARM EMPLOYEE HOUSES ARE AGRICULTURAL USE STRUCTURES

A. The Lewis Family Farm Employee Houses Are Agricultural Use Structures As A Matter Of Fact

Based on staff's response dated January 29, 2008, whereby staff failed to rebut any of the material facts set forth by the Lewis Family Farm, the following facts are unequivocally beyond dispute:

- The Lewis Family Farm, consisting of approximately 1,200 acres, is one of New York State's largest USDA Certified organic farms and a national leader in organic farming. (Lewis Aff., ¶¶ 2-3; Martens Aff., ¶ 4).

- In an effort to improve the infrastructure and operation of the farm, the Lewis Family Farm has cleaned up the land and demolished at least fifteen (15) residences that were beyond repair. (Lewis Aff., ¶¶ 5-6; Martens Aff., ¶ 6). The Lewis Family Farm also constructed at least fifteen (15) new farm buildings and other agricultural use structures including bridges and a 60-foot grain bin in support of the farm, all without Agency permits. (Lewis Aff., ¶ 7 and Exhibit H).

- As a successful large-scale organic farm, the Lewis Family Farm has a full-time manager, three full-time employees, and several interns and other farm workers working on the farm. (Lewis Aff., ¶¶ 8-10).

- The Lewis Family Farm's employees require on-farm housing in order to monitor and operate the farm. (Martens Aff., ¶ 12).

- Farm employee housing is a fundamentally sound agriculture practice that is crucial to the operation of the Lewis Family Farm. (Lewis Aff., ¶ 11; Martens Aff., 16).

- The Lewis Family Farm commenced an employee housing project involving four new houses on the Farm, three of which are built in a cluster on the footprint of buildings previously erected at the old Walker Farm. (Lewis Aff., ¶¶ 12, 30).

- The Lewis Family Farm employee housing cluster, which provides easy and energy efficient access to and surveillance of the adjacent barns, was specifically designed for use by farm employees only. (Lewis Aff., ¶ 14).

- The Lewis Family Farm did not subdivide its land to build the four employee houses. (Lewis Aff., ¶ 14)

- The three residences in the Lewis Family Farm employee housing cluster, which were specifically designed as a farmer community, share a common well, driveway, septic system and leach field located around a common courtyard. (Lewis Aff., ¶ 14).

- The Lewis Family Farm employee housing cluster is located on the edge of *or* within the Hamlet of Whallonsburg. (Privitera Aff., ¶ 13; Privitera Reply Aff., ¶ 5, Ex. B).[1]

- The Lewis Family Farm employee houses are agricultural buildings under the New York Right to Farm Law. (Privitera Reply Aff., ¶ 4, Ex. A).

- Staff's proposed "settlement agreement" demanded that the Lewis Family Farm waive the right to challenge Agency jurisdiction to regulate farming and submit to review by the Agency of all future farm buildings. (Lewis Aff., ¶ 22).

Given these undisputed facts, this Agency must find that the Lewis Family Farm houses are agricultural use structures as a matter of fact.

[1] The Hamlet of Whallonsburg seems to include the old Walker Farm, where the Lewis Family Farm employee housing cluster is located. Id. Housing in Hamlets is non-jurisdictional.

B. The Lewis Family Farm Employee Houses Are Agricultural Use Structures As A Matter Of Law

Staff makes a transparently weak, unconvincing attempt to argue that "single family dwellings" cannot be "agricultural use structures" under the Adirondack Park Agency Act (hereafter the "Act"). Staff does not even seem to convince itself in its sophistry. (Staff's Reply Aff., ¶ 7). Staff reveals its flawed logic by simply declaring that "single family dwellings" are not considered "agricultural use structures" because the terms are defined separately in the Act. (Id.). This is nonsense. Staff's contorted reading of the Act is a fatal consequence resulting from the lack of a pro-farm development policy within the Agency.

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). Since the term "**structure**" is defined separately in the Act, its definition must necessarily be incorporated into the definition of "agricultural use structure" by reference. See Friedman v. Connecticut Gen. Life Ins. Co., 9 N.Y.3d 105, 115 (2007) ("A court must consider a statute as a whole, reading and construing all parts of an act together to determine legislative intent, and...[give] effect and meaning...to the entire statute and every part and word thereof") (internal citations omitted)

The Act 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 is necessarily an "agricultural use structure" under the Act. See N.Y. Exec. Law § 802(8).

Here, the Lewis Family Farm has conclusively established by uncontested affidavits that (i) the buildings at issue in this proceeding are farm employee houses; and (ii) on-farm employee housing is a sound agricultural practice directly and customarily associated with agricultural use that provides the foundation for any self-sustaining farm. (See Lewis Aff., ¶¶ 11-12; Martens Aff., ¶ 16; Privitera Aff. ¶¶ 5-6, Ex. C and D).

Moreover, the Commissioner of the Department of Agriculture & Markets investigated the Lewis Family Farm employee housing and issued a formal opinion under New York State's Right to Farm Law that the farm employee houses at issue in this proceeding are agricultural use structures as a matter of law. On February 1, 2008, the Commissioner of the New York State Department of Agriculture and Markets issued a written opinion pursuant to Section 308(4) of the Agriculture and Markets Law, whereby he proclaimed that:

> Farm worker housing [is] an integral part of numerous farm operations. Farmers often provide on-farm housing for their farm laborers to, among other things, accommodate the long work day, meet seasonal housing needs and address the shortage of nearby rental housing in rural areas. The use of such homes for farm worker housing is a common farm practice. On-farm housing provides a practical and cost effective means for farmers to meet their farm labor housing and recruitment needs.

(Commissioner Hooker's February 1, 2008 Opinion Letter, pg. 2, Ex. A to Privitera Reply Aff.) After reviewing the facts in this case, the Commissioner issued this formal opinion under the Right to Farm Law, finding that farm worker housing is warranted at the Lewis Family Farm, and that the use of land for the employee houses in this case is undoubtedly "**agricultural** in nature." (Id. at 3) (emphasis added). Commissioner Hooker based this conclusive opinion on (i) information gathered by Dr. Robert Somers, Manager of the Department's Agricultural Protection Unit, during a site visit to the Lewis Family Farm on January 9, 2008; (ii) information

provided by the Lewis Family Farm and its manager, Dr. Marco Turco; and (iii) consultation with the Advisory Council on Agriculture. (Id.).

Thus, staff cannot deny that the Lewis Family Farm employee houses are "directly and customarily associated with agricultural use." The Commissioner of the Department of Agriculture & Markets has determined that the houses are agricultural structures as a matter of the Right to Farm Law, § 308(4). This renders them "agricultural use structures" under the Act. See N.Y. Exec. Law § 802(8).

The Agency admits in its public literature that all "agricultural use structures" are non-jurisdictional throughout the Park. (See Privitera Aff., ¶ 12, Ex. G). Accordingly, this enforcement proceeding should be dismissed in its entirety since the Agency lacks jurisdiction over the Lewis Family Farm's employee houses.

C. Staff's Untenable, Mistaken Reading Of The Act Does Not Further The Agency's Land Use Plan Because The Intensity Guidelines Exempt Farm Structures

The definitive proof of staff's mistaken reading of the Act, which would maintain that farm worker housing could never be treated as an "agricultural use structure," is contained in the Act's definition of "principal building." See N.Y. Exec. Law § 802(50).

The overall purpose of the Land Use and Development Plan that is administered by this Agency is to control intensity of development within the designated land use categories. See N.Y. Exec. Law § 805. If it were not clear enough to the ordinary reader that the definition of "agricultural use structures" includes structures such as farm employee housing, the Legislature reminded the reader of its intent in the definition of "principal building." N.Y. Exec. Law § 802(50). There, mindful of its comprehensive effort to carve out farming from any regulation by the Agency, the Legislature defined "principal building" as follows in relation to farms:

> [A]ll 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.

N.Y. Exec. Law § 802(50)(g).

Staff insists that it wants the Lewis Family Farm to obtain a permit for the employee houses "so that the overall intensity guidelines may be properly applied." (Staff's Reply Aff., ¶ 6). But the guidelines are applied by operation of law, not by a permit. Even if staff's untenable, contorted reading of the Act were to prevail, no purpose under the Plan is served because farm employee housing is not counted as a principal building, no matter how intense such farm employee housing may become.[2] The intensity guidelines are not impacted by farms. The legislature made a deliberate determination that farm growth is to be encouraged as immaterial to Park intensity, in deference to the Pro-farm development clause of the Constitution and the open space values of the Park Plan.

Staff must apply the intensity guidelines without illegally regulating farming because the count of principal buildings on farmland is always "one" no matter how many agricultural structures are present. See N.Y. Exec. Law § 802(50)(g). Thus, this enforcement proceeding serves absolutely no purpose that is within the Agency's mission and merely seeks to unconstitutionally misread the law to reach the desired punitive result of imposing a fine of $1,260,000.00[3] that will force the Lewis Family Farm to fail.

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[2] Staff concedes that this important definition of "principal building" is material to this proceeding. (See Affidavit of John Quinn dated December 12, 2007, ¶ 5). However, staff's visceral approach to this case blinds them from seeing that regulating the housing at issue here serves no land use purpose under the Act.

[3] Staff demands a penalty of $3,500 per day since the date of the Executive Director's unwarranted and illegal cease and desist order. (See staff's Memorandum of Law, pp. 15-19).

D. Staff's Legal Theory, Contrary To A Plain Reading Of The Act And In Derogation Of Its Legislative History, Bans All Farm Workers With Children From Living On Farms In The Adirondack Park

Staff does not argue, nor is there any evidence in this record, that staff has ever demanded a permit application from a farmer who builds a bunkhouse for migrant workers. These agricultural use structures, with common bath facilities and many single adults under one roof, are not conducive to sustained, year-round farm family life.

Staff's judgment about farm families is revealed in its approach to this case. Although staff has yet to identify by sworn statement which of the four farm employee houses built by the Lewis Family Farm are illegal, it appears that staff accepts the Lewis Family Farm's "dormitory" residence. (See Lewis Aff., ¶¶ 12, 15 and Ex. E). The North Family Cottage and the South Family Cottage, designed for two nuclear farm families with children living in close proximity to each other, are branded as illegal structures by staff. Staff's thesis is that a "single family dwelling" must always be treated as a "single family dwelling" under the Act, even if it is an agricultural use structure. (See Staff's Reply Aff., ¶ 7). This puts staff in the position of controlling the number of nuclear farm families, but not controlling unmarried farm workers living in common accommodations.

Staff's thesis does violence to the American farm family. The constitutional right to farm in New York is nothing but an unfulfilled, hollow promise if it does not include the fundamental human right to live with one's family and raise children on a farm.

E. Staff's Legal Theory Will Impose Severe Economic Harm Upon Farmers

Staff's legal theory, that a single family dwelling built for a farmer worker and his or her family can never be a non-jurisdictional "agricultural use structure" under the Act, destroys the financial structure of a farm that relies upon farm families. All agricultural use structures must

be treated carefully and assessed as such by Town Assessors. State and federal income tax treatment of farms is designed to allow all agricultural use structures—including all farm worker housing—to be treated as a farm investment. One limited example of New York's tax treatment of farm housing is the New York State Board of Real Property Services Form RP-483, which specifically encourages a tax exemption for all agricultural and horticultural buildings and structures, including "buildings used to provide housing for regular and essential employees and their immediately families who are primarily employed in farming operations." (See Privitera Reply Aff., ¶ 9, Ex. B). Staff stands alone among state employees as the only group seeking to destroy the tax treatment of farm worker housing.

POINT II

STAFF'S SILENT ADMISSION ON KEY ISSUES COMPELS DISMISSAL OF THIS PROCEEDING.

A. Staff Does Not Deny That The Agency Has Not Met Its Responsibility To Develop A Pro-Farm Development Policy

It is beyond dispute that Article 14 of the New York State Constitution imposes a mandatory duty upon the Agency to encourage the development and improvement of agricultural lands. (Respondent's *Right to Farm* Memorandum of Law, pp. 13-15). It is also undeniable that Article 25-AA of the Agriculture and Markets Law requires the Agency to encourage the maintenance of viable farming through its policies, regulations, and procedures—even if it requires changing Agency regulations. (Respondent's *Right to Farm* Memorandum of Law, pp. 16-19). Staff does not deny that the Agency has failed to develop and foster a pro-farm development policy pursuant to its constitutional and statutory duties. In fact, staff's reply affirmation fails to even mention these duties.

Accordingly, the Agency's attempt to regulate the Lewis Family Farm without a written pro-farm development policy is unconstitutional and must be prohibited.

B. Staff Does Not Deny That The Agency Must Defer To The Policy Of The Department Of Agriculture And Markets

With its lack of response to the Agency's constitutional and statutory duties to encourage pro-farm development, staff rests on a record that unquestionably confirms that the Agency lacks the requisite policy in violation of the New York State Constitution and the Agriculture and Markets Law. In the absence of an Agency policy implementing the pro-farm development clause contained in the New York State Constitution and Agriculture and Markets Law, the Agency is obliged to follow the policy of the Department of Agriculture and Markets and the Commissioner's formal, binding opinion pursuant to Section 308(4) of the Agriculture and Markets Law. (See Privitera Reply Aff., Ex. A).

The Lewis Family Farm cited several New York State Court of Appeals' cases supporting the proposition that the Agency must defer to the Department of Agriculture and Markets [i.e., Town of Lysander v. Hafner, 96 N.Y.2d 558 (2001) and Kurcsics v. Merchants Mutual Insurance Company, 49 N.Y.2d 451 (1980)]. (See Respondent's *Right to Farm* Memorandum of Law, pp. 19-20). Staff fails to present any law to the contrary.

C. Staff Does Not Deny That The Agency's Assertion Over Farm Buildings Violates The Agriculture And Markets Law

Staff's reply affirmation fails to rebut the proposition that the Agency's powers as a "local planning board and a local zoning entity" (see Hunt Bros. v. Glennon, 81 N.Y.2d 906, 909 (1993)) require it to adhere to Section 305-A(1)(a) of the Agriculture and Markets Law, which states that local governments cannot unreasonably regulate farm operations in agricultural districts. (See Respondent's *Right to Farm* Memorandum of Law, pg. 21).

Accordingly, the Agency's attempt to regulate the Lewis Family Farm violates the New York Right to Farm Law, Section 305-A(1)(a) of the Agriculture and Markets Law, and must be prohibited.

D. Staff Fails To Rebut The Argument That Construction Of Agricultural Use Structures Is Not A Subdivision

Staff's reply affirmation fails to address the Lewis Family Farm's contention that a subdivision has not occurred. As previously set forth, the Lewis Family Farm has not subdivided its land, as that term is defined in the Act. (See Respondent's *Right to Farm* Memorandum of Law, pp. 33-35).

Interestingly, on January 28, 2008, *The Legislative Gazette* published an article by Associated Press writer Michael Virtanen entitled "New Effort Against Illegal Adirondack Subdivisions", which describes the Agency's new "computerized enforcement initiative against illegal subdivisions". (See Privitera Reply Aff., ¶ 7, Ex. D). According to the article, the Agency determines whether or not a subdivision has occurred by looking into real estate transaction data at the County Clerk's office. (Id.).

Here, despite staff's failure to address the subdivision issue, the Agency's subdivision determination method conclusively demonstrates that the Lewis Family Farm has not subdivided its land. No subdivision of the Lewis Farm has occurred as can be verified by the County Clerk. (See Lewis Aff., ¶ 14). Accordingly, staff's attempt to craft an alleged violation must fail.

E. Staff Does Not Deny That The Rivers Act Allows The Lewis Family Farm To Develop Its Land In Recreational River Areas

Staff's reply affirmation fails to address the Lewis Family Farm's argument concerning its right to construct agricultural use structures in recreational river areas. (See Respondent's *Right to Farm* Memorandum of Law, pp. 35-37). Section 15-2709(2)(c) specifically states that lands

in recreational river areas "may be developed for the full range of agricultural uses." ECL § 15-2709(2)(c). Moreover, Agency regulations provide that construction of agricultural use structures in recreational river areas do not require a permit. See 9 NYCRR § 577.4(b)(3(ii).

Staff has no response to these provisions of law. Thus, it is unequivocally beyond dispute that the Lewis Family Farm did not violate the Wild, Scenic and Recreational River System Act. Accordingly, staff's attempt to craft an alleged violation must fail.[4]

POINT III

NO PENALTY MAY BE IMPOSED AND NO FINDING OF LIABILITY MAY BE MADE WITHOUT A HEARING

In its Answer to the Notice of Apparent Violation, dated October 4, 2007, the Lewis Family Farm demanded all substantive and procedural safeguards available, including those set forth by the United States Constitution, New York State Constitution, the State Administrative Procedure Act ("SAPA"), and 9 NYCRR Part 581. (See Respondent's Answer).

Staff may quibble as to which subpart of Part 581 is mandatory; however, this is immaterial. No person can be subjected to a finding of liability and a fine in excess of $1,000,000.00 without being provided with the right to cross-examine the witnesses identified by staff, among other protections of SAPA. See N.Y. A.P.A. § 306(3).[5]

[4] Staff's mistaken legal argument serves no recreational goal under the Rivers Act either. There is a hamlet and an active rail line between the new farm houses and the Boquet River. (See Respondent's Memorandum in Support of Dismissal, pg. 7) (Digital Image).

[5] Staff identified three witnesses, Mr. John Banta, Mr. John Quinn and Mr. Douglas Miller. (See Respondent's Memorandum in Support of Dismissal, pg. 18, n. 11) (regarding Mr. Banta's current incapacity as counsel).

CONCLUSION

Based on the foregoing, Respondent Lewis Family Farm, Inc. prays that this proceeding be dismissed with prejudice and that the Cease and Desist Order be annulled.

Dated: Albany, New York
February 26, 2008

Respectfully submitted,

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