



NEW YORK STATE
Adirondack
parkagency

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

Agency File E2007-041

LEWIS FAMILY FARM, INC.

Respondent.
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REPLY MEMORANDUM OF LAW IN SUPPORT
OF AGENCY STAFF'S
REQUEST FOR A DETERMINATION BY
THE ENFORCEMENT COMMITTEE
PURSUANT TO 9 NYCRR 581-2.6(d)

Respectfully submitted by:

Paul Van Cott, Associate Attorney
Adirondack Park Agency Staff

March 5, 2008

PRELIMINARY STATEMENT

This administrative enforcement proceeding is not about Respondent's right to farm. Rather, it concerns Respondent's deliberate and continuing violations of the Adirondack Park Agency Act and the Wild, Scenic and Recreational Rivers Act.

Respondent has woven a web of non-material facts and misread or inapplicable law in a disingenuous effort to cast this simple case as an Agency-orchestrated attack on Adirondack farmers. The reality is that the Adirondack Park Agency Act encourages and promotes the agricultural use of Resource Management lands in the Adirondack Park.¹ At the same time, Agency permits are required for new single family dwellings and for subdivisions in Resource Management and designated river areas. These are not mutually exclusive objectives. Respondent, like any other landowner in the

¹ Executive Law 805(g)

(1) Character description. Resource management areas, delineated in green on the plan map, are those lands where the need to protect, manage and enhance...agricultural resources is of paramount importance because of overriding natural resource and public considerations. Open space uses, including...agriculture... are found throughout these areas... Important and viable agricultural areas are included in resource management areas, with many farms exhibiting a high level of capital investment for agricultural buildings and equipment. These agricultural areas are of considerable economic importance to segments of the park and provide for a type of open space which is compatible with the park's character.

(2) Purposes, policies and objectives. The basic purposes and objectives of resource management areas are to protect the delicate physical and biological resources, encourage proper and economic management of forest, agricultural and recreational resources and preserve the open spaces that are essential and basic to the unique character of the park...

Adirondack Park, farmer or small business owner, rich or poor, young or old, had an obligation to get a permit from the Adirondack Park Agency prior to building its new single family dwellings on and subdividing Resource Management lands in a designated river area.

To respond to every misstatement of non-material fact made by Respondent would only serve Respondent's goal of confusing the record. Similarly, to respond to Respondent's reliance on misread or inapplicable legal authority serves no constructive purpose.

The facts and the law that are relevant respond to the issue in dispute: Did Respondent violate the Adirondack Park Agency Act and Wild, Scenic and Recreational Rivers Act by constructing its single family dwellings and undertaking a subdivision into sites? Agency staff maintain that Agency permits were required and that Respondent proceeded deliberately in violation of the law. Staff seek compliance and appropriate penalties for Respondent's violations.

POINT I
RESPONDENT'S SINGLE FAMILY
DWELLINGS ARE SINGLE FAMILY DWELLINGS

A. *Respondent's single family dwellings are single family dwellings as a matter of fact.*

Respondent placed three single family dwellings on the Lewis Farm in Resource Management, on lands within the

designated Boquet River Recreational River area, without an APA permit. Affidavit of Douglas Miller ("Miller Court Affidavit"), dated July 20, 2007, ¶¶ 4, 10, 20, Exhibits F and H; See also, Affidavit of Douglas Miller, dated December 12, 2007 ("Miller Affidavit"), and its exhibits; Reply Affidavit of Doug Miller, dated March 4, 2008 ("Miller Reply"), Exhibit A.²

Respondent obtained permits from the Town of Essex for the construction of these three single family dwellings. Respondent also applied for, but never obtained, an after-the-fact Agency permit for these three single family dwellings. Quinn Affidavit, ¶ 4; Miller Court Affidavit, ¶ 12.

Respondent's three single family dwellings are located at the intersection of Christian and Whallons Bay Roads. Miller Reply, Exhibit A. In settlement discussions, Agency staff proposed to consider one of these three new dwellings a replacement, since Respondent indicated its intent to tear down a pre-existing single family dwelling in the same vicinity as the three single family dwellings it was constructing. Id, ¶ 6. Unfortunately, settlement discussions never progressed to the point where the parties agreed on which dwelling would be deemed

² Respondent lawfully built a fourth single family dwelling on its Resource Management lands and outside the designated river area in the same vicinity as a pre-1973 dwelling that it replaced. This dwelling is located ½ mile away, at the intersection of Clark Road and Cross Road, from the location of the three single family dwellings that are the subject of this proceeding.

a replacement. Id. Respondent has subsequently torn down the pre-existing single family dwelling. Miller Affidavit, ¶ 5.

Exhibit A to Miller's Reply Affidavit references the three new single family dwellings that Respondent has constructed as Structure 1, Structure 2 and Structure 3. His affidavit also explains how those three dwellings relate to the pictures and description contained in his December 12, 2007 Affidavit.

Exhibit A clearly shows the location of these dwellings in Resource Management and within a designated river area.

B. Respondent's single family dwellings are single family dwellings as a matter of law

It is a principle of statutory construction in New York that a particular definition will apply over a general definition unless the particular definition does not apply. Statutes § 238. Further, when "terms of art or peculiar phrases are used, it is supposed that that the Legislature had in view the subject matter about which such terms or phrases are commonly employed." Statutes § 233. These principles apply here.

The term "single family dwelling" is specifically defined in Executive Law § 802(58). This particular definition clearly applies to Respondent's single family dwellings over the more general definition of "agricultural use structures". The term "agricultural use structures" only specifically refers to

accessory structures such as barns, stables, sheds, silos, garages and fruit and vegetable stands. It also generally refers to other buildings or structures "directly and customarily associated with agricultural use".

Only by using the defined specific term, "single family dwellings", over the more general term, "agricultural use structures", can the requirements of the Agency laws and regulations be given proper effect. The definition of "principal building" specifically includes single family dwellings. Executive Law § 802(50)(a). It also refers separately to the term "agricultural use structures" and the terms "single family dwellings" used as farmworker housing in the same paragraph, indicating a clear intent that single family dwellings are not agricultural use structures for purposes of Agency jurisdiction. Executive Law § 802(50)(g). The law clearly intends for its definition of "single family dwelling" to apply to all single family dwellings, even if they are used for farmworker housing.

This is not "sophistry" as Respondent suggests. It is reading the law the way it is supposed to be read.

C. A permit is required in order to ensure consistency with the overall intensity guidelines

To promote agriculture in the Adirondack Park, the Adirondack Park Agency Act essentially exempts farmworker

housing from the overall intensity guidelines. However, if a farmer builds several single family dwellings on Resource Management lands for farmworker housing, but then decides to subdivide his property and sell the dwellings as non-agricultural, residential development, the overall intensity guidelines must be applied. An Agency permit, obtained prior to construction of the single family dwellings, ensures that the overall intensity guidelines will be properly applied in the event that the farmer decides to convert the use of the single family dwellings. The permit thus helps to implement the policy balance provided by the Act between promoting agriculture and protecting open space.

D. Contrary to Respondent's contention, Agency staff do not seek to ban all farmworkers with children from living on farms in the Adirondack Park

This point in Respondent's brief exemplifies how Respondent has placed hyperbole above material facts and law in its papers. The case before the Enforcement Committee is about whether Respondent's self-described single family dwellings require a permit from the Agency. The question of whether multiple family dwellings, or bunkhouses with all adults and no children, also require Agency permits is not at issue.

E. Respondent provides no proof that the requirement of an Agency permit will impose severe economic harm upon farmers.

Respondent provides no evidence in support of its position that staff's legal theory will somehow impose severe economic hardship upon farmers. Presumably, the Department of Agriculture and Market's finding that Respondent's single family dwellings are integral to its farming operation will ensure the treatment of those structures as a farm investment for taxing purposes. Real Property Law § 483 speaks for itself in allowing a tax exemption for "buildings used to provide housing for regular and seasonal employees and their immediate families who are primarily employed in farming operations". This point again shows the lack of foundation for Respondent's allegations of fact and law in its papers.

**POINT II
STAFF'S RESPONSE TO
RESPONDENT'S POINT II**

A. *The Adirondack Park Agency Act supports agriculture.*

As set forth in footnote 1 above, the Adirondack Park Agency Act embraces agriculture as an important open space use on private lands in the Adirondack Park. In administering the Act, Agency staff support this statutory policy.

B. As a sister state agency, the Adirondack Park Agency coordinates with the Department of Agriculture and Markets

As a sister state agency, the Adirondack Park Agency is not bound by the policies of the Department of Agriculture and Markets. However, the two state agencies do endeavor to coordinate their policies relative to the promotion and enhancement of agricultural lands in the Adirondack Park. The exchange of correspondence between the two agencies in the record supports this.

C. Staff unequivocally deny that the Agriculture and Markets Law applies in this case

Section 305-A(1)(a) of the Agriculture and Markets Law does not apply to state agencies such as the Adirondack Park Agency. It expressly only applies to local governments. Acting New York State Supreme Court Justice Ryan unequivocally decided that this statute does not apply to the Agency in his August 16, 2007 decision granting the Agency's motion to dismiss against Respondent.³ Van Cott Affirmation, Exhibit B.

³ "Since the APA does have authority over this buiding project, the next issue is whether the Agriculture and Markets Law § 305-a supercedes the APA authority. It does not....this section has no application to the Executive Law or the regulations promulgated by the APA pursuant to that law." Decision and Order of Acting Justice Ryan, Page 6 (Van Cott Affirmation, Exhibit B)

D. *Respondent has undertaken a subdivision into sites that required an Agency permit*

Pursuant to Executive Law §§ 809(2)(a) and 810(1)(e)(3) and 9 NYCRR § 577.5(c)(1), a permit is required for any subdivision of Resource Management lands or of Resource Management lands in a river area, respectively. Subdivision is defined in Executive Law § 802(63) to include any subdivision into sites. Pursuant to 9 NYCRR § 570.3(ah)(3), a subdivision into sites occurs where more than one dwelling or other principal dwelling is to be constructed on a vacant parcel of land.

Since Respondent placed three new single family dwellings on the subject property, Respondent undertook a subdivision into sites that required an Agency permit. Respondent's failure to obtain a permit is a violation of the Executive Law and 9 NYCRR Part 577.

E. *Respondent has violated the Rivers Act*

Respondent's position hinges on its misplaced theory that the three new single family dwellings it built are not single family dwellings for purposes of Agency jurisdiction. As explained above, and in staff's Request for an Enforcement Committee Determination, Respondent's single family dwellings are single family dwellings as defined in Executive Law § 802(58) for purposes of Agency jurisdiction.

9 NYCRR § 577.5(c)(1) requires an Agency permit for all subdivisions of land and all land use and development classified compatible uses in the Adirondack Park Agency Act. Single family dwellings are classified as secondary compatible uses on Resource Management lands. Executive Law § 805(g)(4). Thus, Agency permits were required pursuant to the Rivers Act for Respondent's subdivision and single family dwellings. Because of its failure to obtain a permit, Respondent is violating the Rivers Act by constructing its single family dwellings and subdividing its land into sites.

**POINT III
APPROPRIATE RELIEF AND
PENALITIES MAY BE IMPOSED**

This matter was properly brought by staff pursuant to 9 NYCRR Section § 581-2.6(b). Respondent has replied pursuant to § 581-2.6(c). There are no material facts in dispute, so there is no need for a hearing. Agency staff seek a determination pursuant to § 581-2.6(d) that the alleged violations are occurring. Agency staff have requested a determination of appropriate relief and penalties, and the Enforcement Committee has the authority make such a determination pursuant to § 581-2.6(d).

**POINT IV
RESPONDENT'S PURPOSEFUL DISREGARD
FOR LAWFUL PROCESS**

Despite Respondent's effort to make this case into something that it is not, the facts and law are clear. Respondent is in violation of the Executive Law and the Rivers Act, and the aggravating facts in this case are serious. Respondent installed the foundations of its three single family dwellings despite senior Agency staff having informed Respondent that a permit was needed. Banta Affirmation, ¶ 6. Respondent then applied for an after-the-fact permit from the Agency for its single family dwellings. Quinn Affidavit, ¶ 4. After refusing to settle its violations, Respondent proceeded with construction of its single family dwellings in defiance of a lawful Cease and Desist Order requiring it to stop work. Miller Affidavit, July 20, 2007, ¶ 20. Respondent then sued the Agency and lost. Van Cott Affirmation, Exhibit B. The court confirmed the Agency's jurisdiction over the single family dwellings that Respondent was constructing. Id. Despite this unequivocal court decision and written notice from Agency staff that the Cease and Desist Order remained in effect, Respondent continued with construction on its single family dwellings. Van Cott Affirmation, ¶ 5, Exhibit C; Miller Affidavit, December 12, 2007, and its Exhibits.

These facts are beyond dispute. They underscore what this proceeding is really about, i.e., Respondent's unwillingness to comply with the law like any other landowner in the Adirondack Park. Respondent purposefully disregarded advice given by senior Agency staff and purposefully defied a Cease and Desist Order issued by the Agency's Interim Executive Director. If Respondent had sought permits in the first instance, or promptly settled its violations, or even challenged in good faith the Agency's jurisdiction before the Enforcement Committee, before proceeding with construction of its single family dwellings, this would be an entirely different case. Instead, Respondent has defied the Agency, and now seeks to rationalize its actions based on non-material facts and inapplicable, after-the-fact legal theories.

CONCLUSION

Based on the record before the Enforcement Committee, Agency staff request a determination by the Enforcement Committee pursuant to 9 NYCRR § 581-2.6(d) that the apparent violations alleged in the NAV have occurred, and are occurring. Agency staff further request that the Enforcement Committee require Respondent to obtain an after-the-fact Agency permit for its illegal subdivision and single family dwellings, based on an application that contains the information described in the Affidavit of John Quinn. Finally, for the reasons discussed

above and in staff's initial Memorandum of Law, Agency staff request that the Enforcement Committee impose a substantial penalty upon Respondent for its violations. Absent a substantial penalty here, Respondent and others will not be deterred from future violations.