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August 19, 2009

**VIA FIRST-CLASS MAIL**  
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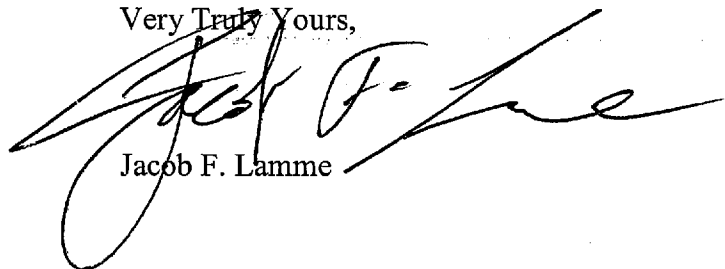
**RE: Lewis Family Farm, Inc. v. Adirondack Park Agency**  
**(Appellate Division Case Nos. 504626 and 504696)**  
**(Essex County Index Nos. 315-08 and 332-08)**

Dear Ms. Sheridan:

Pursuant to the attached Decision and Order of the Honorable Richard B. Meyer, dated July 2, 2008, which was affirmed by the Appellate Division, Third Judicial Department, on July 16, 2009, Salim B. Lewis and Barbara A. Lewis each have an outstanding judgment against the State of New York in the amount of \$100.00. Please direct the New York State Comptroller to satisfy these judgments forthwith.

Thank you for your attention to this matter.

Very Truly Yours,



Jacob F. Lamme

Enclosure

cc: Sandy and Barbara Lewis

(M0272258.1)

**Supreme Court of the State of New York**  
**FOR THE COUNTY OF ESSEX**

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Argued June 19, 2008

Decided July 2, 2008

Index No.: 315-08 - RJI No.: 15-1-2008-0109  
Index No.: 332-08 - RJI No.: 15-1-2008-0117

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**LEWIS FAMILY FARM, INC.**  
Petitioner,  
v.

**ADIRONDACK PARK AGENCY,**  
Respondent.

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**ADIRONDACK PARK AGENCY,**  
Plaintiff,  
v.

**LEWIS FAMILY FARM, INC.,**  
**SALIM B. LEWIS, and BARBARA LEWIS**  
Defendants.

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*Decision and Order on Motions to Dismiss*  
*Pursuant to CPLR Rule 3211*

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*McNamee, Lochner, Titus & Williams, P.C. (John J. Privitera, Esq., of counsel), Albany, New York, attorneys for the Petitioner and the Defendants.*

*Andrew M. Cuomo, Esq., New York State Attorney General*

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## LEWIS FAMILY FARM, INC. v. ADIRONDACK PARK AGENCY

## Decision and Order

(*Loretta Simon, Esq., Assistant Attorney General*), Albany, New York, attorney for the Respondent/Plaintiff Adirondack Park Agency.

*Arroyo Copland & Associates, PLLC* (*Cynthia Feathers, Esq.*, of counsel) and *Elizabeth Corron Dribusch, Esq.*, General Counsel, Albany, New York, for New York Farm Bureau, Inc., as *amicus curiae*, supporting the Petitioner/Defendant Lewis Family Farm, Inc.

In this consolidated Article 78 proceeding commenced by Lewis Family Farm, Inc. (Lewis Farm) on April 8, 2008, and action by the Adirondack Park Agency (Agency) to enforce the March 25, 2008 determination of the Agency's enforcement committee, the Agency moves<sup>1</sup> to dismiss eight of the sixteen causes of action in the amended petition pursuant to CPLR 3211(a)(5) and (7). Specifically, the Agency claims that the fourth and eleventh causes of action each fail to state a cause of action, and that Lewis Farm is collaterally estopped from asserting the claims alleged in the third, fifth, sixth, seventh, eighth, ninth, and tenth causes of action due to dismissal of a 2007 declaratory judgment action by Lewis Farm against the Agency which was converted to an Article 78 proceeding on consent. Lewis Farm, and the defendants Salim B. Lewis and Barbara Lewis, move<sup>2</sup> pursuant to CPLR 32311 to dismiss the Agency's

<sup>1</sup> The court has reviewed the following papers in support of the Agency's motion: notice of motion dated June 13, 2008; affirmation of Loretta Simon dated June 13 with exhibits A through N; affidavit of Paul Van Cott dated June 13, 2008 with exhibits A through C; affidavit of John F. Rusnica dated June 13, 2008 with exhibit A; answer in part, record and objections in point of law verified June 13, 2008. In opposition to the motion, the court has considered the affirmation of John J. Privitera, Esq. dated June 17, 2008 regarding the record, with exhibits A through C. The Court has also considered the parties' respective memoranda of law.

<sup>2</sup> The court has reviewed the following papers in support of the motion by Lewis Farm: notice of motion dated June 3, 2008; affirmation of John J. Privitera, Esq. dated June 3, 2008. In opposition, the Court has considered the reply affirmation of Loretta Simon, Esq. dated June 18, 2008. The Court has also considered the parties' respective memoranda of law.

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enforcement action as duplicative of the Agency's administrative enforcement proceeding, and also to dismiss all claims against defendants Salim B. Lewis and Barbara Lewis, individually, since neither was a party to the enforcement proceeding which culminated in the March 25, 2008 determination challenged in the Article 78 proceeding.

Lewis Farm owns and operates an eleven hundred acre organic farm designated as a single parcel of land on the official county tax maps and town tax rolls, located in the Town of Essex, Essex County. The property lies wholly within the Adirondack Park and within Essex County Agricultural District No. 4. The subject parcel is classified on the Adirondack Park Land Use and Development Plan Map as resource management, rural use and hamlet. It is undisputed that the portion of the property involved here is classified as resource management.

In or about November 2006, Lewis Farm commenced construction of certain single family dwelling units, to be used by employees working on the farm, on a portion of its property classified as resource management. A permit application<sup>3</sup>, signed by defendant Barbara Lewis, both as "project sponsor" and representative of the corporation, was filed with the Agency on March 14, 2007 seeking authorization to construct "three single family dwellings in a farm compound to be used by farm employees exclusively." By notice dated the following day<sup>4</sup>, Agency staff advised the applicants that the application was incomplete and requested additional information. A dispute arose between the parties, and following discussions between the parties and their representatives the Agency's staff sent a proposed settlement agreement<sup>5</sup> to Lewis Farm which called for Lewis Farm to apply for an after-the-fact permit and pay a \$10,000 civil penalty. On June 27, 2007 the Agency's acting executive director issued a cease and desist order<sup>6</sup> to Lewis Farm, binding upon "its agents, successors and assigns", prohibiting "any and all land use and development related to the construction of the single family dwellings . . . until this matter is resolved

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<sup>3</sup> Exhibit B to 06-18-08 Simon reply affirmation.

<sup>4</sup> Exhibit D to Agency's amended complaint.

<sup>5</sup> Exhibit E to Agency's amended complaint.

<sup>6</sup> Exhibit F to Agency's amended complaint.

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and the enforcement case is concluded." The next day, Lewis Farm commenced a declaratory judgment action<sup>7</sup> against the Agency challenging jurisdiction.

An amended complaint was filed on July 3, 2007, and Lewis Farm also applied for a temporary restraining order<sup>8</sup>. Lewis Farm alleged that its farm worker housing project was outside of the Agency's jurisdiction since the structures were "agricultural use structures" (Executive Law §802[8]) in a "resource management area" (Executive Law §805[3][g]), and thus exempt from Agency jurisdiction, and that any assertion of jurisdiction by the Agency violated Agriculture and Markets Law §305-a. In opposing the application, the Agency moved to convert the action to an Article 78 proceeding and dismiss the same for lack of subject matter jurisdiction, "as premature and not ripe for judicial review because the State defendant has not issued a final determination", citing CPLR §7801(1), and for failing to state a cause of action "because Agriculture and Markets Law §305-a does not preclude the APA from requiring a permit for subdivision of land and construction of single family dwellings"<sup>9</sup>.

At oral argument, Lewis Farm consented to convert the action to an Article 78 proceeding. Counsel for Lewis Farm argued that although a final determination is a prerequisite to judicial review "under normal circumstances"<sup>10</sup>, the "crux" of the amended complaint was the staff's requirement of an application for an after-the-fact permit and payment of the \$10,000 civil penalty<sup>11</sup> as a prerequisite to Agency review, and also Lewis Farm's concern that it has no ability to obtain a refund of the penalty should it ultimately prevail. The Agency asserted that Lewis Farm

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<sup>7</sup> Exhibit A to 06-13-08 Simon affirmation.

<sup>8</sup> Exhibit B to 06-13-08 Simon affirmation.

<sup>9</sup> The Court takes judicial notice of the 2007 proceeding, including the Agency's notice of motion dated August 1, 2007, the affirmations/affidavits of Sarah Reynolds (with exhibits A-D), Douglas Quinn (with exhibits A-C) dated July 20, 2007, John L. Quinn (with exhibits A-I), and John Banta dated July 23, 2007.

<sup>10</sup> Exhibit C to 06-13-08 Simon affirmation, at page 3, line 19.

<sup>11</sup> *Id.*, from page 3, line 17 to page 4, line 25.

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had the ability to present its case to the Agency's enforcement committee, comprised of five Agency commissioners, or to the full Agency, at a hearing and then challenge the committee's determination in court if it is still dissatisfied<sup>12</sup>:

"THE COURT: Suppose they don't want to lose that money, they don't want to pay?

MS. SIMON: They should ask for a hearing and/or await for the process to take them there and say to the staff, we're not interested in this settlement offer you made to us, we want to go to the full agency, we want a hearing, and then challenge that hearing decision if the don't agree with it.

THE COURT: And then they can go into Supreme Court.

MS. SIMON: Absolutely."

Time and again, the Agency's counsel stated to the court that there was no final determination and that Lewis Farm had to await such a determination before it could properly seek judicial review<sup>13</sup>.

By decision and order (Ryan, J.) dated August 16, 2007 the proceeding was dismissed, and the application for temporary relief denied. In its decision dismissing the proceeding, the court stated that the farm worker dwellings did not constitute "agricultural use structures" under the Agency's statutory scheme and therefore were within the permit jurisdiction of the Agency, and also that Agriculture & Markets Law §305-a did not apply to a state agency. Lewis Farm filed a notice of appeal, but the appeal has not been perfected. The Agency now claims that the dismissal of this prior proceeding as premature precludes Lewis Farm from now challenging the Agency's jurisdiction on the same grounds which it had asserted in that proceeding.

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<sup>12</sup> Exhibit C to 06-13-08 Simon affirmation, at pages 5-7.

<sup>13</sup> *Id.*, at pages 14-15, 26.

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A.

Collateral estoppel "precludes a party from relitigating 'an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point' (*Gilberg v. Barbieri*, 53 NY2d 285, 291, 441 NYS2d 49, 423 NE2d 807; see, *Schwartz v. Public Administrator*, 24 NY2d 65, 69, 298 NYS2d 955, 246 NE2d 725)" (*Kaufman v. Eli Lilly and Co.*, 65 NY2d 449, 455, 492 NYS2d 584, 588, 482 NE2d 63, 67), because "it is not fair to permit a party to relitigate an issue that has already been decided against it" (*Id.*). However, its application is limited to "issues of ultimate fact . . . determined by a valid and final judgment" (*McGrath v. Gold*, 36 NY2d 406, 411, 369 NYS2d 62, 65, 330 NE2d 35, 37). For the doctrine of collateral estoppel to be invoked, the party seeking it must establish that

- (1) the factual issue decided in the prior action was "material to the first action or proceeding and essential to the decision rendered therein (*Silberstein v. Silberstein*, 218 NY 525, 528, 113 NE 495; see, also, *Hinchey v. Sellers*, *supra*; *Ripley v. Storer*, *supra*; *Ward v. Boyce*, 152 NY 191, 46 NE 180)" (*Ryan v. New York Telephone Co.* 62 NY2d 494, 500, 467 NE2d 487, 490-490, 478 NYS2d 823, 826 (N.Y., 1984), and
- (2) the factual issue is identical to "the point actually to be determined in the second action or proceeding such that 'a different judgment in the second would destroy or impair rights or interests established by the first' (*Schuykill Fuel Corp. v. Nieberg Realty Corp.*, *supra*, 250 NY at p. 307, 165 NE 456 [Cardozo, Ch. J.]; see, also, *S.T. Grand, Inc. v. City of New York*, 32 NY2d 300, 304-305, 344 NYS2d 938, 298 NE2d 105)" (*Id.*), and
- (3) "the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination (*Gilberg v. Barbieri*, 53 NY2d 285, 291, 441 NYS2d 49, 423 NE2d 807; see also *Schwartz v. Public Administrator*, *supra*, 24 NY2d at

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p. 71, 298 NYS2d 955, 246 NE2d 725; *Koch v. Consolidated Edison Co.*, 62 NY2d 548, 554-555, 479 NYS2d 163, 468 NE2d 1, *cert. denied* 469 US 1210, 105 SCt 1177, 84 LEd2d 326; *Ryan v. New York Tel. Co.*, 62 NY2d 494, 500-501, 478 NYS2d 823, 467 NE2d 487" (*Kaufman v. Eli Lilly and Co.*, *supra.*).

An Article 78 proceeding "shall not be used to challenge a determination . . . which is not final or can be adequately reviewed by appeal to a court or to some other body or officer . . ." (*CPLR §7801(1)*). "[P]rohibition may be availed of only to proscribe a clear legal wrong . . . [and] even as to a clearly *ultra vires* act, prohibition does not lie against an administrative agency if another avenue of judicial review is available, absent a demonstration of irreparable injury to the applicant if he is relegated to such other course" (*City of Newburgh v. Public Employment Relations Bd.*, 63 NY2d 793, 795, 481 NYS2d 327, 328, 471 NE2d 140, 141). "Prohibition is an extraordinary remedy to be invoked only where a clear right to relief is established and the action taken or threatened is clearly without jurisdiction or in excess of jurisdiction (*Matter of Bloom v. Clyne*, 69 AD2d 956, 415 NYS2d 712)" (*Rainka v. Whalen*, 73 AD2d 731, 732, 423 NYS2d 292, 293, *affirmed* 51 NY2d 973, 435 NYS2d 721, 416 NE2d 1056; *see also Ashe v. Enlarged City School Dist. of Troy*, 233 AD2d 571, 571, 649 NYS2d 97, 98). In cases where there is or appears to be an act in excess of jurisdiction, "prohibition will not lie if there is available an adequate remedy at law which may bar the extraordinary remedy (*Matter of State of NY v. King*, 36 NY2d 59, 62, 364 NYS 879, 881, 324 NE2d 351, 353)" (*Id.*), and even in the absence of such a remedy prohibition "does not issue as a matter of right, but only in the sound discretion of the court in cases of supreme necessity" (*People ex rel. Hummel v. Trial Term, Part 1 (Criminal Branch) of Supreme Court for New York County*, 184 NY 30, 32, 76 NE 732; *see also Holtzman v. Goldman*, 71 NY2d 564, 566, 528 NYS2d 21, 23, 523 NE2d 297, 298; *Matter of Greenwald v. Scheinman*, 94 AD2d 842, 844, 463 NYS2d 303, *leave to appeal denied* 60 NY2d 551, 467 NYS2d 1025, 454 NE2d 126).

Also, "one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law (*e. g.*, *Young Men's Christian Assn. v. Rochester Pure Waters Dist.*, 37 N.Y.2d 371, 375, 372 N.Y.S.2d 633, 635, 334 N.E.2d



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586, 588)" (*Watergate II Apartments v. Buffalo Sewer Authority*, 46 NY2d 52, 57, 412 NYS2d 821, 824, 385 NE2d 560, 563) in order to "[relieve] the courts of the burden of deciding questions entrusted to an agency (*see 1 NY Jur, Administrative Law, §5, pp. 303-304*), [prevent] premature judicial interference with the administrators' efforts to develop, even by some trial and error, a co-ordinated, consistent and legally enforceable scheme of regulation and [afford] the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its 'expertise and judgment' (*Matter of Fisher [Levine]*, 36 NY2d 146, 150, 365 NYS2d 828, 832, 325 NE2d 151, 153; *see, also, 24 Carmody-Wait 2d, NY Prac, §145:340*)" (*Id.*).

Here, the issues before the motion court in the prior proceeding were issues of law - whether the amended complaint stated a cause of action for prohibition, namely to prohibit the Agency from exercising jurisdiction over the farm worker housing project, and for a violation of and Agriculture and Markets Law §305-a - not of fact. No final determination had yet been made by the Agency. Moreover the proposed requirement that Lewis Farm apply for an after-the-fact permit and pay a \$10,000 penalty, as well as the cease and desist order, were indisputably subject to review by the Agency's enforcement committee and full board of commissioners (*see 9 NYCRR Part 581*), and thereafter by judicial review in an Article 78 proceeding. It is not only clear that Lewis Farm had not exhausted its administrative remedies, but also that the Agency had not had an opportunity to "decide questions entrusted to" and "prepare a record reflective of its 'expertise and judgment' " (*Id.*).

To the extent that the motion court addressed whether the project involved "agricultural use structures", a "single family dwelling" and "subdivision"<sup>14</sup> (*Executive Law §802[8], [58], [63]*), such was only to indicate that Lewis Farm had not established a "clear legal wrong" (*City of Newburgh v. Public Employment Relations Bd., supra; see also Town of Huntington v. New York State Div. of Human Rights*, 82 NY2d 783, 604 NYS2d 541, 624 NE2d 678) or that the Agency was acting in excess of its jurisdiction (*see Cortland Glass Co., Inc. v. Angello*, 300 AD2d 891, 752 NYS2d 741). None of the court's determinations on those issues were

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<sup>14</sup> Exhibit D to 06-13-08 Simon affirmation, at pages 4-5.

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essential to its ultimate decision to dismiss the proceeding as "not ripe for judicial intervention"<sup>15</sup>. Significantly, the court indicated that its decision did not preclude Lewis Farm from subsequent judicial review after the Agency performed its administrative functions:

"The Commissioners of the APA have the authority to review this situation under Executive Law §809. If, after receiving a determination from the Commissioners, the plaintiff is still dissatisfied, they are free to file an Article 78 proceeding at which time this Court may review the actions of the APA. Until that time, this matter constitutes an internal matter in which the Court will not interfere."<sup>16</sup>

Furthermore, Lewis Farm did not have a full and fair opportunity to litigate those, or any other factual, issues since on "a motion by the defendant to dismiss the complaint on the ground of its insufficiency made before service of an answer, allegations of fact contained in the complaint are not in issue, and the court can determine only the question of law whether the pleading is sufficient to withstand challenge by demurrer or by its statutory modern substitute motion to dismiss" (Rockland Power & Light Co. v. City of New York, 289 NY 45, 51, 43 NE2d 803, 806).

The Agency has failed to establish the any of the required elements for collateral estoppel to be applied here, and its motion to dismiss the third, fifth, sixth, seventh, eighth, ninth, and tenth causes of action on collateral estoppel grounds is denied. However, the doctrine of *res judicata* bars Lewis Farm from asserting a violation of Agriculture and Markets Law §305-a in the third cause of action, but not for dismissal of the entire cause of action<sup>17</sup>. "Under the doctrine of *res judicata*, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter" (In re Hunter, 4 NY3d 260, 269, 794 NYS2d 286, 291, 827 NE2d 269, 274). The

<sup>15</sup> Exhibit D to 06-13-08 Simon affirmation, page 6.

<sup>16</sup> Exhibit D to 06-13-08 Simon affirmation, page 7.

<sup>17</sup> The third cause of action in Lewis Farm's amended petition alleges both a violation of Agriculture and Markets Law §305-a and the legal precedents stated in Town of Lysander v. Hafner, 96 NY2d 558, 733 NYS2d 358, 759 NE2d 356.

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Agency's motion to dismiss the third cause of action is partially granted to the extent that Lewis Farm's claims under §305-a are dismissed.

The Agency's motion to dismiss the fourth cause of action is, however, granted as a matter of law since there is no legal requirement that the Agency defer to an opinion of the Commissioner of Agriculture and Markets when interpreting the Agency's own statutory scheme. The motion to dismiss the eleventh cause of action, alleging that the Agency failed to consider the recommendations of, and consult with, the Adirondack Park Local Government Review Board as provided in Executive Law §803-a and §805, is denied as an issue of fact is presented that cannot be determined from the four corners of the amended petition and without resort to the record.

**B.**

As to the motion to dismiss by Lewis Farm, Salim B. Lewis and Barbara Lewis, the motion is granted as to the individual defendants, but otherwise denied. The Agency is statutorily empowered, through the Attorney General, to "institute in the name of the agency any appropriate action or proceeding to prevent, restrain, enjoin, correct or abate any violation of, or to enforce, . . . the terms or conditions of any order or permit issued by the agency pursuant to this Article" (*Executive Law §813(2)*). The notice of apparent violation which initiated the administrative enforcement proceeding before the Agency's enforcement committee (9 NYCRR §581-2.6) named only Lewis Farm as a respondent, and its March 25, 2008 determination refers only to Lewis Farm. To the extent that the determination is an "order" (*see 9 NYCRR §581-1.2*), enforcement proceedings through the Attorney General are limited by Executive Law §813(2) solely to Lewis Farm.

The motion by defendants Salim B. Lewis and Barbara Lewis to dismiss the Agency's amended complaint seeking enforcement of the March 25, 2008 determination of the Agency's enforcement committee is granted, with costs including \$100 motion costs for each defendant, and the Clerk of the Court is hereby directed to enter judgment accordingly.

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C.

Within twenty (20) days of the date of this decision and order with notice of entry hereof, the Agency shall serve and file its answer to the amended petition and any additional record, as well as any affidavits or other evidentiary proof establishing the need for a trial of any issue of fact (*CPLR §7804[e], [f]*), and Lewis Farm shall serve and file its answer to the amended complaint (*CPLR §3012[a]*). Any motion for summary judgment by Lewis Farm must be served and filed within ten (10) days thereafter.

**IT IS SO ORDERED.**

**ENTER**

  
Richard B. Meyer  
Acting Supreme Court Justice

ENTERED

  
JOSEPH A. PROVONCHA  
ESSEX COUNTY CLERK

DATED: 7/2/08

ELIZABETHOWN, NY 12932

08 JUL -2 PM 12:31

ENTERED AND FILED  
ESSEX COUNTY CLERK