



STATE OF NEW YORK
DEPARTMENT OF AGRICULTURE AND MARKETS
1 WINNERS CIRCLE
ALBANY, NEW YORK 12235

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

November 5, 1998

Frederick Drummond
Supervisor, Town of Essex
Town Offices
Essex, New York 12936

Dear Supervisor Drummond:

The Department has reviewed the Town of Essex's proposed Local Law No. 2 of 1998 for compliance with Section 305-a(1) of the Agriculture and Markets Law in response to requests from the Lewis Family Farm and farmer Ray Rice. The proposed Local Law No. 2, 1998 would place a moratorium on the issuance of permits and approvals for special permit uses and for certain large scale agricultural uses and structures within the Town. We understand that a public hearing concerning this proposed local law will be held on Thursday, November 5, 1998.

In the Department's opinion, the enactment and administration of the proposed local law as currently drafted could unreasonably restrict farm operations within an agricultural district in violation of Section 305-a of the Agriculture and Markets Law. Although counties, towns and villages in New York State have broad powers to enact laws to govern their own affairs, State laws impose certain limitations on local government authority. One such restriction is found in Section 305-a which provides as follows:

Local governments, when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules or regulations, shall exercise these powers in such manner as may realize the policy and goals set forth in this article [Article 25-AA of the Agriculture and Markets Law], and shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of this article unless it can be shown that the public health or safety is threatened.

The Department reviews local laws on a case by case basis.

Frederick Drummond, Supervisor (cont.)

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Upon review of the proposed Local Law #2, 1998, it is the Department's opinion that the moratorium would burden the agricultural industry in the Town, both existing farm operations and proposed ones, in possible violation of Section 305-a of the Agriculture and Markets Law. The proposed Law would prohibit the issuance of permits and approvals for new large scale agricultural uses and structures, as well as the conversion, expansion or alteration of existing farm operations to become large scale agricultural uses and structures, thereby having a significantly adverse impact on animal agriculture within agricultural districts. The definitions of *Large Scale Agricultural Use* and *Large Scale Agricultural Structure* in Section 2 of the proposed law are vague and, thus, make it difficult for farmers to know what uses and structures are subject to the moratorium. The uncertainty engendered by the moratorium will impact farm planning and investments, and act as a "chill" on farm operations. The definition of *Large Scale Agricultural Use*, for example, depends upon an interpretation of the Zoning Board of Appeals that an Agricultural Use and Structure is "(a) of a greater scale or intensity than that now customarily found in the Town, (b) which is characterized by the intensive use of land and/or concentration of pigs, poultry or other livestock in one area, and (c) which has the potential for non-point source pollution, odor, or other noxious or undesirable emission or pollution on a greater scale or intensity than that now customarily associated with agricultural uses in the Town." This definition does not provide an objective means by which farmers can determine if their operations are subject to the moratorium. Further, Section 5 of the proposed law (Interpretation and Construction) does not allow a farmer to obtain an interpretation of the local law, unless the farmer "...can demonstrate to the satisfaction of the Zoning Board that he or she has expended substantial sums for the creation of plans for a use subject to the moratorium."

The definition of *Large Scale Agricultural Structure* is also problematic as it includes "any Agricultural Use and Structure...which exceeds 40 (forty) feet in height...or which exceeds 15,000 (fifteen thousand) square feet in interior size, measured by cumulating all usable space on all floors, lofts, or other interior areas." Thus, such common agricultural structures as grain silos would be subject to the moratorium. In addition, it appears that all but the smallest barns would be subject to the moratorium, as the definition speaks in terms of "interior size," rather than square feet of floor area. The moratorium excepts "ordinary repairs or maintenance", but does not make any provision for the replacement of structures, which may be necessary in cases of casualty loss. Additionally, the length of the moratorium is extensive and will also adversely impact farm planning. The proposed Law states that the moratorium would be in effect for one year upon the Law's filing with the Secretary of State of New York, and that time extensions can be made by the Town Board.

Frederick Drummond, Supervisor (cont.)

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Irregardless of whether a farm operation is large or small, the Department supports, through the administration of the Agricultural Districts Law, the right of a farm operation to produce, prepare and market crops, livestock and livestock products. The Agricultural Districts Law, among other things, protects farm operations engaged in animal husbandry, and such activities as the removal of hedgerows, landleveling, and the installation of subsurface drainage.

Therefore, it appears that the proposed local law would place unreasonable restrictions on agricultural land use and structures, whether large or small, in possible violation of the Agriculture and Markets Law. We urge the Town not to adopt the proposed local law prior to holding constructive discussions with the Department of Agriculture and Markets, including a discussion of any concerns you may have about threats to the public health or safety caused by the farm operations subject to the proposed moratorium.

I have enclosed copies of the Department's guidance document entitled "Local Laws and Agricultural Districts: How Do They Relate?" for your consideration. Please contact Robert Somers, Chief of the Agricultural Protection Unit, at (518) 457-2713 to discuss the proposed local law further. If the Town's attorney, Mr. Glennon, has any questions, please have him contact John Rusnica, Senior Attorney, at (518) 457-2775.

Sincerely,



Kim T. Blot
Director

Enclosure

cc: Robert Somers, Chief, Agricultural Protection Unit, Dept. of A&M
John Rusnica, Senior Attorney, Dept. of A&M
Robert Glennon, Esq., Town Attorney

Local Laws and Agricultural Districts: How Do They Relate?

Counties, towns, and villages in New York State have broad powers to enact laws to govern their own affairs. However, State laws impose certain restrictions on local government authority. One such restriction is found in Section 305-a of the Agriculture and Markets Law, as amended, which contains the following mandate:

Section 305-a(1)(a) states that: "Local governments, when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules or regulations, shall exercise these powers in such manner as may realize the policy and goals set forth in this article [Article 25-AA of the Agriculture and Markets Law], and shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of this article unless it can be shown that the public health or safety is threatened." (emphasis added)

Section 305-a(1)(b) states that: "The commissioner, upon his or her own initiative or upon the receipt of a complaint from a person within an agricultural district, may bring an action to enforce the provisions of this subdivision."

Section 301(11) defines "Farm Operation" as meaning: "...the land and on-farm buildings, equipment, and practices which contribute to the production, preparation and marketing of crops, livestock and livestock products as a commercial enterprise." The definition of "crops, livestock and livestock products is found in Section 301(2) of the Agriculture and Markets Law.

In evaluating whether a local law or ordinance is in compliance with Section 305-a, the Department considers several factors, including the following:

Is the affected farm located within an agricultural district?

Does the regulated activity encompass farm operations as defined in law?

Is the local law or ordinance reasonable in light of all the relevant facts and circumstances?

Can it be shown that the public health or safety is threatened?

Requests for general information or assistance should be directed to: Agricultural Protection Unit, NYS Department of Agriculture and Markets, 1 Winners Circle, Albany, New York 12235. Phone: (518) 457- 2715.

Local Laws and Agricultural Districts: How Do They Relate?

Counties, towns and villages in New York State have broad powers to enact laws to govern their own affairs. However, State laws impose certain restrictions on local government authority. One such restriction is found in Section 305-a of the Agriculture and Markets Law which contains the following mandate:

"Local governments, when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules or regulations, shall exercise these powers in such manner as may realize the policy and goals set forth in this article [Article 25-AA of the Agriculture and Markets Law], and shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of this article unless it can be shown that the public health or safety is threatened."

This brochure has been prepared by the New York State Department of Agriculture and Markets to assist municipalities in drafting local laws and ordinances which may affect farming in an agricultural district. It should not be substituted for legal advice from a municipality's attorney. The brochure also offers guidance to farmers on the application of Section 305-a.

George E. Pataki Donald R. Davidson
Governor Commissioner

The Commissioner of Agriculture and Markets may independently initiate a review of a proposed or existing local law or ordinance or proceed upon the request of a farmer in an agricultural district. The following describes the procedure for requesting review, how the local requirements are analyzed, and remediated, if necessary.

PROCEDURE

Questions concerning the impact of local laws and ordinances on farm structures or farming practices are solved far more easily at the drafting stage than after the provision is in place. Municipalities are, therefore, encouraged to contact the Department, either by phone or in writing, in advance of enacting a law or ordinance which may restrict farming in an agricultural district. The Department will provide an informal, non-binding response to such inquiries. Similarly, a farmer or other affected party in a district may seek the Department's informal opinion on a proposed or existing law or ordinance without filing a complaint.

If a farmer wishes to file a request for review with the Department, he or she must do so in writing. Such written request must contain at least the following information:

- the location of the farm operation, identification of the agricultural district in which it is situated, and the date of the farm's inclusion in the district;
- a brief description of the affected farm operation (e.g. size of farm, type of enterprise, years in operation);
- a description of the specific farm structures or practices involved and how they are affected;

- a copy of the complete local law or ordinance and identification of the specific section or sections involved;
- a listing of involved parties who can be contacted for further information (including addresses and phone numbers).

Subsequent to receiving a request for review of a local law or ordinance, the Department will contact the municipality involved and provide them with an opportunity to respond.

ANALYSIS

The Department examines several factors in evaluating whether a local law or ordinance is in compliance with Section 305-a. Tests which must be met in each case are as follows:

- **Is the affected farm located within an agricultural district?**

Section 305-a only applies to farm operations in an agricultural district.

- **Does the regulated activity encompass farm operations?**

Section 301(11) of the Agriculture and Markets Law defines "Farm Operation" as meaning: "...the land and on-farm buildings, equipment, and practices which contribute to the production, preparation and marketing of crops, livestock and livestock products as a commercial enterprise." The definition of "crops, livestock and livestock products" is found in Section 301(2).

Only farm operations are protected by Section 305-a. The Department draws on the expertise of its program and legal staff, and other resources as needed, to make these determinations.

- **Is the local law or ordinance reasonable?**

The evaluation of reasonableness consists of two parts: 1) whether the law or ordi-

nance is reasonable "on its face," and 2) whether it is reasonable as applied to a particular situation.

Some laws or ordinances are so vague that they inhibit farmers from undertaking certain activities or constructing certain buildings out of concern for violating the law or ordinance. In this case, it is possible that the law or ordinance, because of its vague construction, could be construed as unreasonably restricting farm structures or farming practices.

An ordinance may also appear reasonable in the abstract, but may unreasonably restrict or regulate a particular farmer. For example, many zoning ordinances impose setback requirements for structures in the interest of public safety or even aesthetics. These setbacks may be entirely reasonable under usual conditions, but may be construed as being unreasonable if applied to a farmer who, for example, constructs a building on a dead-end street, shielded from view, and near the only available water source.

A reasonable exercise of authority in one locality may translate into an unduly burdensome restriction on farming in another. In sum, reasonableness depends on the totality of circumstances in each case.

- **Is the public health or safety threatened by the regulated activity?**

Even if the Department determines that a particular law or ordinance is unreasonable, it must also ask whether the public health or safety is threatened by the regulated activity. If so, it could withstand the limitations of Section 305-a.

REMEDIES

If the Department determines that a local law or ordinance unreasonably restricts or regulates farm operations in an agricultural district, it will notify the involved municipi-

pality to that effect and attempt to arrive at a mutually satisfactory resolution. In the case where a municipality rejects the Department's attempts at remediation, the Commissioner of Agriculture and Markets is explicitly authorized by law to bring an action to enforce Section 305-a. Alternatively, the Commissioner may issue an Order to comply, pursuant to Section 36 of the Agriculture and Markets Law.

CASE HISTORIES

The following summaries of selected cases addressed by the Department pursuant to Section 305-a, and its predecessor Section 305(2), are provided as examples of the review process in action:

1. Issue: Whether an ordinance that restricts the number of mobile homes on a farm to one and requires that the mobile home be situated "as nearly as possible to the center of the farm's operations" unduly restricts farming practices and structures.

Facts: The Department received a complaint from a farmer who had one mobile home on his property and wanted to add another to house a relief milker. He also wanted to choose the location of the mobile home. The local zoning ordinance restricted these activities as outlined above.

Department's Response: The Department determined in this case that using mobile homes to house dairy farm workers is a common farming practice in New York State. On-farm housing in general is beneficial to both the farm worker and farmer. The farmer can attract farm labor to rural areas where rental housing is scarce. On-farm housing also accommodates the long farm work day. In this case, no facts were presented which indi-

cated that the ordinance addressed a public health or safety issue. Therefore, this ordinance was judged to unreasonably restrict both farm structures and practices.

2. Issue: Whether a 100-foot setback required for buildings constructed along state roads and a 75-foot setback for buildings constructed along county roads unreasonably restricts farm structures.

Facts: The Department received a complaint from a farmer generally opposing local setback requirements. The farmer did not cite any specific impact upon either his operation or any other farmer in the municipality. The setbacks required by the ordinance applied equally to farmland and land used for other purposes. The municipality justified the ordinance as an effort to "lessen congestion in the roads" and "facilitate adequate provision of transportation."

Department's Response: The ordinance did not, upon information available, unreasonably restrict or regulate farm structures.

3. Issue: Whether a proposed local law prohibiting the disposal and landspreading of food processing waste, septage, sludge and composted sludge unreasonably restricts farming practices.

Facts: A town requested advice concerning a proposed local law which would prohibit disposal and landspreading of food processing waste, septage, sludge and composted sludge, except under strict permit conditions. The Department reviewed and commented on several drafts of the proposed local law.

Department's Response: The Department determined that the proposed local law would place unreasonable restrictions on agricultural land use, nutrient management practices and on-farm compost-

ing. The spreading, storage and/or composting of food processing waste, sludge, septage and manure and products derived therefrom to support the production function of the farm, are agricultural practices. These materials have a beneficial use for the production of crops. The State Environmental Conservation Law and solid waste regulations (6 NYCRR Part 360) address disposal and landspreading of food processing waste, septage, sludge and composted sludge. The Department considers DEC standards and permitting requirements in evaluating whether restrictions on agricultural land use, nutrient management practices and on-farm composting are reasonable. The proposed local law was not consistent with DEC standards, and the town did not show a threat to the public health or safety was involved.

4. **Issue:** Whether a proposed ordinance which would limit the size of a roadside stand to 150 square feet, require that agricultural commodities sold be limited to products raised solely on the premises and limit the zones in which roadside stands are permitted unreasonably restricts farm buildings.

Facts: The Department received a request from a farmer to review a proposed zoning law which impacts on agriculture by restricting roadside stands.

Department's Response: The proposed restrictions, by themselves, are not violative of Section 305-a and roadside stands are not exempt from local regulation. However, 150 square feet for a roadside stand may not be sufficient to meet the needs of existing and/or future farm operations; the zones in which stands are allowed may not encompass all of the land within the agricultural district; and some farmers need to import produce

from other farms to sell at their stand to increase diversity of products offered to bridge periods of low supply of commodities produced on-farm. Application of the ordinance to particular roadside stands is critical in determining whether or not it is unduly restrictive.

These cases are offered for illustration only. Each of the responses relates to the specific factual situation involved and should not be interpreted as applicable to other cases which may differ.

Requests for general information or assistance, and formal written complaints alleging violations of Section 305-a, should be directed to:

**New York State Department of Agriculture and Markets
1 Winners Circle
Albany, NY 12235**

Phone: (518) 457-2713