Supreme Court - Appellate Division
Third Judicial Department

Decided and Entered: January 15, 1998

In the Matter of PURE AIR AND WATER INC. OF CHEMUNG COUNTY,
Appellant,
v
DONALD DAVIDSEN, as Commissioner of Agriculture and Markets, et al.,
Respondents.

MEMORANDUM AND ORDER

Calendar Date: November 10, 1997

Before: Cardona, P.J., Mercure, Crew III, White and Spain, JJ.

Knauf & Craig (Alan J. Knauf of counsel), Rochester, for appellant.

Joan A. Kehoe, Department of Agriculture & Markets (Ruth A. Moore of counsel), Albany, for Donald Davidsen, respondent.

Adams, Theisen & May (Michael R. May of counsel), Ithaca, for Trengo Hog Partnership, respondent.

White, J.

Appeal from a judgment of the Supreme Court (Teresi, J.), entered September 25, 1996 in Albany County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to review an advisory opinion of respondent Commissioner of Agriculture and Markets.

Respondent Trengo Hog Partnership owns and operates a 166-acre farm in the Town of Chemung, Chemung County, on which it raises approximately 1,000 pigs. In February 1995, Trengo, pursuant to the State's Right to Farm Law (Agriculture and Markets Law § 308), requested an opinion from respondent Commissioner of Agriculture and Markets (hereinafter the

nuisance suit. This does not constitute a due process protected interest since a person does not have a vested interest in any rule of the common law (see, Montgomery v Daniels, 38 NY2d 41, 56-57). Thus, petitioner's due process argument fails.

Petitioner faults the Commissioner for his failure to comply with the State Environmental Quality Review Act (ECL art 8) (hereinafter SEQRA). Whether such compliance was required depends upon whether the issuance of an opinion under the Right to Farm Law is an "action" within the meaning of SEQRA and its implementing regulations (see, ECL 8-0105 [4]; 6 NYCRR 617.2 [b]). Petitioner contends that it is because the opinion gave Trengo "permission" or "entitlement" to create a private nuisance. Petitioner misinterprets the scope of the opinion. It was not a license or permit to act since Trengo could and, in fact, did undertake the manure management program without first having to obtain authorization from the Commissioner; rather the opinion was merely an assessment of an agricultural practice. Therefore, its issuance was not an "action" within the meaning of SEQRA. Moreover, even if deemed an action, SEQRA exempts agricultural farm management practices from review (6 NYCRR 617.5 [a], [c] [3]). For these reasons, compliance with SEQRA in this instance was not required.

We now address the issue of whether the Commissioner's opinion was arbitrary and capricious. To properly fulfill his responsibilities under the Right to Farm Law, the Commissioner must accommodate two distinct governmental policies -- the promotion of agriculture and the protection of the environment -- policies that now oftentimes conflict as new technologies and methodologies transform agriculture. To reach a proper accommodation, the Commissioner does not have to consider every conceivable environmental impact; rather he should analyze and assess those impacts that can be reasonably anticipated to flow from the particular agricultural practice.

In this instance, the record discloses that Matthew Brower, an Associate Environmental Analyst in the Department of Agriculture and Markets, conducted an investigation of Trengo's manure management practices that included, inter alia, a site review, discussions with two neighbors who expressed concerns about water quality and consultations with the person who prepared the Plan and the Director of Environmental Health for the Chemung County Department of Health. This individual, between March 17, 1995 and April 10, 1995, took samples of water from 11 wells in the vicinity of the Trengo farm. Tests on these samples showed that only one well exhibited high nitrate levels; however, a large horse manure pile was located within 30 feet of

ORDERED that the judgment is affirmed, without costs.

ENTER:

/s/ Michael J. Novack

Michael J. Novack
Clerk of the Court

State of New York
Court of Appeals

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Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207-1095

DECISION April 7, 1998

Mo. No. 431 SSD 22
In the Matter of Pure Air and Water Inc. of Chemung County,
Appellant,
v.
Donald Davidsen, as Commissioner of Agriculture and Markets, et al.,
Respondents.

Appeal dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

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EXHIBIT "A"

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-seventh *day of* August 1996

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

3-10 Mo. No. 698

In the Matter of Pure Air and Water, Inc. of Chemung County,

Appellant,

v.

Donald Davidsen, as Commissioner of Agriculture and Markets, et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Stuart M. Cohen

Stuart M. Cohen
Clerk of the Court

EXHIBIT "B"

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

PURE AIR AND WATER, INC.
OF CHEMUNG COUNTY,

Petitioner,

-against-

DECISION and ORDER
INDEX NO. 3-96
RJI NO. 0196ST6314

DONALD DAVIDSEN, as COMMISSIONER
OF AGRICULTURE and MARKETS,

Respondent and

THE TRENGO HOG PARTNERSHIP,

Interested Party

Supreme Court Albany County Special Term, May 10, 1996
Justice Joseph C. Teresi, Presiding

APPEARANCES:

Knauf & Craig, LLP
Attorneys for Petitioner
183 East Main Street, Suite 1250
Rochester, New York 14614

Joan A. Kehoe, Counsel
New York State Department
of Agriculture and Markets
Attorney for Respondent
(Ruth A. Moore, Esq., of Counsel)
1 Winners Circle
Albany, New York 12235

TERESI, J.:

Petitioners bring this CPLR Article 78 proceeding seeking to nullify Opinion Number 95-2 of the Commissioner of Agriculture and Markets dated September 7, 1995.

Respondents oppose the motion.

Petitioner argues the opinion was (1) illegal, arbitrary and capricious and not supported by substantial evidence as well as due

process violations and jurisdictional issues.

Initially, this Court finds that the Commissioner had jurisdiction to issue the opinion pursuant to AML §308(2). Next Court finds the Trengo Hog Partnership is engaged in agricultural type activities. In Holly Farms Corp. v. NLRB, 517 US _____, 134 L.Ed. 593 (April 23, 1996). The Supreme Court in a labor law case cites §3(f) of FLSA definition of "Agriculture" as:

> "'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or limbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market" 29 USA §203(f) [29 USCS §203(f)].

The Court also notes that this property is in an agricultural district and has agricultural taxation status. The Court finds this facility to fall within the definition of agricultural type activities, and finds that DWQR does not apply to sound agricultive practice opinions under either 1 NYCRR Part 362(2)(4) or 6 NYCRR Part 617.13

Lastly, the Court finds the Commissioner's opinion t be rational, reasonable and supported by the record.

In determining an Article 78 petition, the Court is guided by the following standards of rational basis:

> "In reviewing the finding of an administrative agency, the construction placed on the statute and implementing regulations by an agency is entitled to great weight and is to be uphold if reasonable (Matter of Johnson v. Joy, 48 NY2d 689). Nor may a court substitute its judgment for that of the administrative agency (Matter of Mid-State Mgt. Corp. v. New York City Conciliation & Appeals Bd., 112 AD2d 72, affd on opn below 66 NY2d 1032). Where the factual determinations are neither arbitrary nor capricious, nor an abuse of discretion, they must be upheld (Matter of Colton v. Berman, 21 NY2d 322)." Matter of Barklee v. New York State Division of Housing and Community Renewal, 159 AD2d 416 (1st Dept. 1990).

Therefore, the Court will defer to respondent's statutory interpretation and application if a rational basis is established. Abbatiello v. Regan, 205 AD2d 1027 at 1029 (3rd Dept 1994); Matter of Martone v. NYS Teachers' Retirement System, 105 AD2d 511 (3rd Dept 1984); Roloff v. Langlitz, supra. A court may not substitute its judgment for that of an administrative agency. Mtr of Barklee v. New York State Division of Housing and Community Renewal, 159 AD2d 416 (1st Dept 1990).

This Court after a full review of this record will not substitute its discretion for that of the respondent. This record reflects the Commissioner has fully assessed these practices, conducted analysis and made a rational decision. That petitioner disagrees with the decision does not mean that it is irrational nor does it make it an abuse of discretion.

The Court has examined petitioner's remaining contentions and finds them to be without merit.

The petition is dismissed.

All papers, including this Decision and Order, are being returned to the attorneys for the respondent. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED!

Dated: Albany, New York
September 23, 1996

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

(1) Notice of Petition dated January 4, 1996 with Attached Exhibits A - Q.
(2) Verified Answer dated May 2, 1996 with Affidavits of Matthew Brower dated May 1, 1996 and Thomas Kump dated May 26, 1996, with Attached Exhibits A - O.
(3) Exhibits A - O to Verified Answer dated May 2, 1996.
(4) Petitioner's Reply dated May 7, 1996 with Attached Exhibits A - C.
(5) Affidavit of LeRoy A. Denson dated May 6, 1996; Affidavit of Mary Ellen Patterson dated May 6, 1996; Affidavit of Ether J. Fors dated May 6, 1996; Affidavit of Patricia M. Ross dated May 6, 1996; Affidavit of Barbara Lewis dated May 6, 1996; and Affidavit of George Lewis dated May 6, 1996.
(6) Reply Affidavit of J. Ross Harris, Jr. dated May 6 1996, with Attached Exhibits A and B.