SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

VILLAGE OF LACONA,

Petitioner,

-against-

Amended Decision, Order & Judgment

NEW YORK DEPT. of AGRICULTURE & MARKETS, NEW YORK DEPT. of ENVIRONMENTAL CONSERVATION, TIMOTHY ALFORD and RENEE ALFORD,

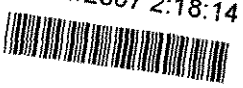
Respondents.

Motion Return Date : Albany County Special Term, November 17, 2006
(Final Submission: December 15, 2006)
RJI No.: 01-06-ST6999
Index No.: 5637-06

Present: Robert A. Sackett, JSC

Appearances:

Brickwedde Law Firm
Attorneys for Petitioner
One Park Place, Suite 400
300 State Street
Syracuse, New York 13202-2060
By: Richard J. Brickwedde, Esq.



Joan A. Kehoe, Esq.
Attorney for Department of Agriculture and Markets
10B Airline Drive
Albany, New York 12235
By: John F. Rusnica, Esq.

Hon. Eliot Spitzer
Attorney General of the State of New York
Attorney for Department of Environmental Conservation
The Capitol
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By: Lawrence A. Rappoport, Esq.

Mentor, Rudin & Trivelpiece, P.C.
Attorneys for Timothy and Renee Alford
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By: Thomas J. Fucillo, Esq.

Sackett, J.:

In this combined CPLR article 78 proceeding and declaratory judgment action, the Village seeks review of a Determination of the Commissioner of Agriculture and Markets dated March 21, 2006 which found Village Local Law #3 of 2002 to be unreasonably restrictive and directed the Village to comply with Agriculture and Markets Law 305-a (1) by not applying Village Local Law #3 of 2002 to farm operations located within a State certified agricultural district, including the Alford farm. The Village alleges that the Determination is affected by an error of law and is arbitrary, capricious and an abuse of discretion; the Village also seeks a declaration that requiring farmers within the State certified agricultural district to disclose their pesticide records to the Village is not a regulation of pesticides pre-empted by the Department of Environmental Conservation (DEC); a declaration that the Alfords, who operate a farm (with a Concentrated Animal Feeding Operation permit) within the State certified agricultural district, are subject to Village Local Law #3 of 2002 and in violation of that law for failure to submit applications for 2005 and 2006 with the required reporting data and for failure to disclose the pesticides used and to be used on the farm and a penalty against the Alfords for violation of the law.

The Department of Agriculture and Markets (the Department) opposes the petition and asserts objections in point of law seeking dismissal of the petition on the grounds that it fails to state a cause of action. The DEC opposes the petition and also seeks dismissal and argues that Environmental Conservation Law Article 33 preempts Village Local Law #3 of 2002 which empowers the Village to review pesticide records applicable to farmland in question. The Alfords oppose the petition assert objections in point of law seeking dismissal and, in the event that the first cause of action is granted, assert a counterclaim[1].

Motions to strike: Respondents also move to strike certain affidavits on the grounds that they add new information not part of the record of the administrative proceeding. Petitioner opposes the motions. Rather than request revocation or modification of the Commissioner's determination pursuant to AML 36-a, petitioner sought court review via Article 78. The record of this matter was closed when the Commissioner issued his Determination and Order (*see* Finch, Pruyn & Company, Inc. v Mills, 297 AD2d 406, 408 [2002], citing Matter of Featherstone v Franco, 95 NY2d 550, 554 [2000]). The affidavit of Todd Miller dated October 26, 2006 was not part of the original documentation provided by petitioner

[1]The Alfords' first counterclaim was withdrawn by letter dated December 5, 2006 following all parties entering into the Stipulation dated November 8, 2006.

during the investigation of the matter and cannot be considered on this proceeding. The affidavits of Peggy Manchester dated October 31, 2006, Margaret Kastler dated October 27, 2006 and Sherry Moore dated November 2, 2006 will be considered in support of the petition, to the extent that they offer admissible evidence and do not add any new information to the record. The affidavit of Richard J. Brickwedde, Esq. dated November 9, 2006 will be considered only to the extent that it comments on the answering papers of respondents. To that end paragraphs 3 and 4, together with Exhibit A, are not considered as they supply technical data not contained in the record. Paragraph 8 thereof contains inadmissible hearsay which will not be considered.

The arguments raised by petitioner for the first time in its reply memorandum of law that the CAFO general permit violates the Federal Clear Water Act and that the DEC has failed to enforce the CAFO permit provisions against the Alfords are impermissible at this stage of the proceedings (*see* Schulz v. New York State Executive, 233 AD2d 43, 46 [1997]).

Petition: In 2000, the Village enacted a local law prohibiting the landspreading of liquid manure within the Village. The Department determined that the 2000 law unreasonably restricted farm operations and ordered the Village to comply with AM L 305-a (1) and allow the landspreading of liquid manure (Determination and Order of Commissioner of Agriculture, September 12, 2001). Thereafter, the Village continued to negotiate with the Department for a local law which would address the Village's concerns that liquid manure use on farmlands located within the Village's municipal water supply recharge area threatens or could potentially threaten the Village's water supply. The Department, in consultation with the State Department of Health, informed the Village that a law which addressed basic nutrient management for nitrogen would be acceptable as a best management practice and that CAFO farms could be required to submit permit information and keep the Village abreast of permit changes.

The Village then drafted a new local law which was submitted to the Department in March, 2002 and forwarded by the Department to the DOH and the DEC for their review and comment. The Village held a public hearing on the proposed law on April 8, 2002. Thereafter several revised drafts of the proposed law were submitted to the Department and commented upon. Throughout the revision process, the Department consistently held that the requirement of basic nutrient management information to monitor nitrogen was appropriate and that CAFO farms could be required to submit permit information and keep the Village abreast of permit changes. The Department consistently held that pesticide regulation, phosphorous regulation, soil erosion plans, hydrology requirements and other farming practices violated the statutory prohibition on unreasonable regulation of farm operation set forth in AML 305-a. Additionally, the Department explained why it considered the $250 annual fee to be

unreasonably restrictive. The Department also conducted a site visit to the area to be regulated by the proposed local law and met with representatives of the Village, the DOH, the DEC, the USGS and the Oswego County Health Department to discuss the proposed local law.

On September 19, 2002 the Village filed Local Law #3 of 2002 with the New York Department of State. By letters dated October 30 and December 16, 2002, the Department notified the Village that the new law unreasonably restricted farm operations in the agricultural district and provided in detail which provisions were deemed to violate AML 305-a. The Village did not change the local law.

In July 2005 the Village sought to enforce the local law with regard o the Alford farm operation. In August 2005 the Alfords requested the Department to review the local law for compliance with AML 305-a. Thereupon the Department reviewed the law as administered with respect to the Alford farm operation. After review of the data and comments from the Village, the Department informed the Village that the local law unreasonably restricted the Alford farm operation in violation of AML 305-a (1). When the Village did not respond, the Commissioner issued his March 21, 2006 Determination and Order. This proceeding ensued.

AML 305-a (1)(a) directs that local governments "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." Where "the 'interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute' (Kurcsics v Merchants Mut. Ins. Co., 49 NY2d 451, 459 [emphasis supplied]; *see also*, Matter of Jennings v New York State Off. of Mental Health, 90 NY2d 227, 239)" (Town of Lysander v Hafner, 96 NY2d 558, 565 [2001]). In reviewing administrative action, the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether the administrative determination is rational and supported by the record (*see* Flacke v Onandaga Landfill Systems, Inc., 69 NY2d 355, 363 [1987]; Plante v New York State Department of Environmental Conservation, 277 AD2d 639 [2000]).

Petitioner's position that Village Law #3 of 2002 ensures public health and safety and is, therefore, exempt from AML 305-a (1) (a) is misplaced. A review of the record indicates that prior to enactment of Village Law #3 of 2002, the Department was actively involved in discussions with the Village and an investigation on the Village's concern that farm operations in the municipal water recharge area would contaminate the water supply and on how to draft a law to address those concerns

without violating AML 305-a. To that end the Department consulted with the Department of Health, Bureau of Public Water Supply Protection, and the Department of Environmental Conservation on the issues presented, attended the public hearing on the proposed local law and reviewed the data and documentation supplied by the Village.

Petitioner did not make any demonstrative showing that contamination of the municipal water supply from farm operations within the Village water supply recharge area was likely to occur, or that the State regulations for the use of pesticides and other farm practices in the recharge area were not sufficient to prevent contamination.

The Court concludes that the Commissioner's investigation was thorough and considered the concerns of the Village, all data and documentation it supplied, as well as the data and comment of the Department, the DOH and the DEC. The Commissioner was entitled to rely on the data and recommendations of the Department's staff and reject petitioners' data and the conclusions drawn therefrom (*see* Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead, 98 N.Y.2d 190, 196 [2002]; Saratoga Water Servs. v Zagata, 247 AD2d 788, 790 [1998]; City of Rennselaer v Duncan, 266 AD2d 657, 660 [1999]).

The Commissioner noted that the Department agreed with the Village that monitoring basic nutrient management for nitrogen would be acceptable as a best management practice and that CAFO farms could be required to submit permit information and keep the Village abreast of permit changes; however, the Village local law, as enacted, far exceeded those parameters and was, therefore, unreasonably restrictive for the circumstances. The Commissioner also found that the Department, in consultation with the DEC, was correct in holding that the local law was pre-empted by ECL Article 33. Finally, Commissioner found that the Department considered the totality of regulatory fees and other related expenses which are required of farmers and determined that the Village's application fee was excessive under the circumstances. On this record, the Court finds that the Commissioner's Determination and Order is not arbitrary, irrational or capricious; it is not based on an error of law nor is it an abuse of discretion.

Article 33 of the Environmental Conservation Law regulates the registration, commercial use, purchase and custom application of pesticides in the State of new York. The Court agrees with the DEC that the local law, in so far as it requires farmers to make their pesticide use records available for inspection by the Village, is pre-empted by ECL Article 33 (*see* Long Island Pest Control Association, Inc. v Town of Huntington, 72 Misc 2d 1031 [Sup Ct, Suffolk Co 1973], *affirmed* 43 AD2d 1020 [1974]). Petitioner has not provided any law to the contrary that the legislature intended that the sole

jurisdiction of control and regulation of pesticides within the State would lie with the DEC. The Village is not entitled to a judgment declaring that the disclosure of pesticides is not a regulation of pesticides pre-empted by the Environmental Conservation Law.

Inasmuch as the Court has upheld the Commissioner's Determination and Order, the cause of action against the Alfords is unfounded and the Village is not entitled to a judgment declaring that the Alfords are subject to and in violation of Village Law #3 of 2002.

Having so decided, the Court need not reach the Alfords' remaining counterclaim or the issue of the Village's late filing of a reply to the counterclaim.

Therefore, it is

ORDERED that the motions to strike are granted to the extent set forth above; and it is further

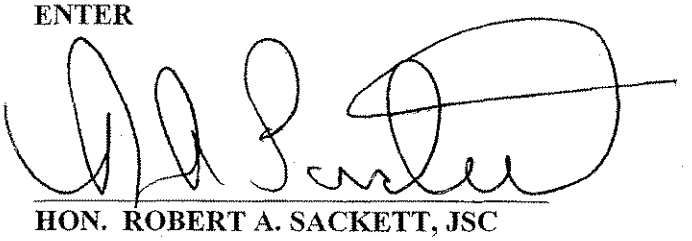
ORDERED & ADJUDGED that the petition is dismissed.

This shall constitute the decision, order and judgment of the Court. The original Decision, Order & Judgment and all papers are being forwarded to counsel for the Department of Agriculture and Markets. Counsel are not relieved from the provisions of CPLR 2220 regarding filing and service with notice of entry.

SO ORDERED and ADJUDGED.

Dated: Monticello, New York
February 13, 2007

ENTER



HON. ROBERT A. SACKETT, JSC

Papers considered:

Order to show cause of John J. Elliott, AJSC (Oswego Co.) dated April 21, 2006, verified petition dated April 15, 2006, affirmation of Richard J. Brickwedde, Esq. dated April 15, 2006, affidavit of Todd Miller dated April 13, 2006, affidavit of Todd Miller dated May 11, 2006; verified answer and objections in point of law of New York Department of Agriculture & Markets dated October 4, 2006, affidavit of Matthew J. Brower dated October 3, 2006; verified answer of New York State Department of Environmental Conservation dated June 2, 2006, affidavit of Margaret Sheen, Esq. dated May 30, 2006; verified answer , counterclaims and objections in point of law of Timothy Alford and Renee Alford dated October 9, 2006, affidavit of John Wagner dated October 5, 2006, affidavit of Renee Alford dated October 10, 2006; Stipulation dated November 8, 2006; reply of Richard J. Brickwedde, Esq. dated November 9, 2006, affidavit of Peggy Manchester dated October 31, 2006, affidavit of Margaret Kastler dated October 27, 2006, affidavit of Sherry Moore dated November 2, 2006.

Notice of motion and affirmation of John F. Rusnica, Esq. dated November 16, 2006; affirmation of Lawrence A. Rappoport, Esq. dated November 15, 2006; letter of Thomas J. Fucillo, Esq. dated November 15, 2006; affirmation of Richard J. Brickwedde, Esq. dated December 4, 2006; reply letter of Lawrence A. Rappoport, Esq. dated December 8, 2006, reply letter of John F. Rusnica, Esq. dated December 11, 2006.

State of New York
Supreme Court, Appellate Division
Third Judicial Department

51 AD3d 1319

Decided and Entered: May 22, 2008 503747

In the Matter of VILLAGE OF LACONA,
Appellant,
v MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS et al.,
Respondents.

Calendar Date: March 24, 2008

Before: Cardona, P.J., Carpinello, Rose, Malone Jr. and Stein, JJ.

Brickwedde Law Firm, Syracuse (Richard J. Brickwedde of counsel), for appellant.

John F. Rusnica, New York State Department of Agriculture and Markets, Albany, for New York State Department of Agriculture and Markets, respondent.

Andrew M. Cuomo, Attorney General, Albany (Lawrence A. Rappoport of counsel), for New York Department of Environmental Conservation, respondent.

Mentor, Rudin & Trivelpiece, Syracuse (Thomas J. Fucillo of counsel), for Timothy Alford and another, respondents.

Elizabeth C. Dribusch, New York Farm Bureau, Inc., Albany, for New York Farm Bureau, Inc., amicus curiae.

Cardona, P.J.

Appeal from an amended judgment of the Supreme Court (Sackett, J.), entered February 21, 2007 in Albany County, which dismissed petitioner's application, in a combined proceeding pursuant to CPLR article 78 and action for a declaratory judgment, to review a determination of respondent Department of Agriculture and Markets finding that petitioner's Local Law No. 3 (2002) was unreasonably restrictive.

Concerned with the protection of its water supply, petitioner enacted Local Law No. 4 (2000) which, among other things, prohibited the use of liquified manure on property, including farmsteads, located within the Village of Lacona, Oswego County. Respondent Department of Agriculture and Markets (hereinafter the Department) found that law to be in violation of Agriculture and Markets Law § 305-a[1] because it "unreasonably restrict[ed] . . . farm operations." Accordingly, petitioner repealed that law and began drafting a new proposed Local Law. In doing so, the Department worked with petitioner, respondent Department of Environmental Conservation and the Department of Health in an attempt to resolve perceived problems with the restrictions that Local Law No. 4 placed upon farm operations. Despite various concerns from the state agencies, petitioner enacted Local Law No. 3 (2002) without any substantial revisions. Among other things, Local Law No. 3 purported to regulate field applications of nutrients, including fertilizers and manure, on the soils in the recharge area over petitioner's water supply aquifer. It also required farmstead operators within that area to apply to petitioner for approval of their plan to address

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[1] As relevant herein, Agriculture and Markets Law § 305-a (1) (a) provides: "Local governments, when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules or regulations, . . . 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."

farming operations such as the housing and feeding of animals, the storage of crops and feed, the storage and handling of fertilizer and manure and the mixing, handling and storage of pesticides. The law further imposed specific requirements for the field application of nutrients and provided petitioner with the right to review the use of pesticides in the recharge area. Additionally, Local Law No. 3, along with providing for civil and criminal penalties for noncompliance, imposed a $250 fee on the farmstead operator to defray petitioner's cost of reviewing the field application plan and pesticide use records.

Respondents Timothy Alford and Renee Alford contacted the Department and requested a formal review of Local Law No. 3, asserting that it placed an undue financial and regulatory burden on their farmstead. Following such review, the Commissioner of Agriculture and Markets ordered, in March 2006, petitioner to abstain from applying Local Law No. 3 to any farms located within a state-certified agricultural district "insofar as such law has been found to be unreasonably restrictive." Petitioner then commenced the instant combined CPLR article 78 proceeding and declaratory judgment action seeking review of that order. Supreme Court, among other things, upheld the March 2006 order and also declared that the provisions in Local Law No. 3 authorizing petitioner to review records of pesticide use were preempted by ECL article 33. The court dismissed the petition, prompting this appeal.

Initially, we conclude that Supreme Court correctly held that ECL article 33 preempts the pesticide provisions in Local Law No. 3. Significantly, the Commissioner of Environmental Conservation has exclusive "[j]urisdiction in all matters pertaining to the distribution, sale, use and transportation of pesticides" (ECL 33-0303 [1]). Such exclusive jurisdiction reveals the state's intent to occupy the field where matters of pesticide use and control are concerned (see generally Matter of Ames v Smoot, 98 AD2d 216 [1983], appeal dismissed 62 NY2d 804 [1984]). Where the state enacts a comprehensive regulatory scheme that implicitly occupies a field such as pesticide use and control, it must supercede any local regulation pursuant to the preemption doctrine (see Albany Area Builders Assn. v Town of Guilderland, 74 NY2d 372, 377-378 [1989]; Matter of Ames v Smoot,

98 AD2d at 218). Here, ECL article 33 strives to conform with pesticide laws established by other states and the federal government and provides that the Commissioner of Environmental Conservation "may cooperate" with any other agency or political subdivision "for the purpose of carrying out the provisions of this article and of securing uniformity of regulations" (ECL 33-0303 [4], [6]). Accordingly, Supreme Court correctly determined that Local Law No. 3 was an attempt by petitioner to regulate pesticide use and, therefore, was invalid to the extent that it had been preempted by state statute.

Next, we do not agree that the March 2006 determination was arbitrary and capricious. Clearly, where local governments enact laws which "unreasonably restrict or regulate farm operations within agricultural districts" and cannot demonstrate that such ordinance is necessary to preserve the public health and safety, the Department and its Commissioner are vested with the authority to take action against such local laws (Agriculture and Markets Law § 305-a [1] [a]; see Matter of Inter-Lakes Health, Inc. v Town of Ticonderoga Town Bd., 13 AD3d 846, 847-848 [2004]).

Here, petitioner's proof did not establish that Local Law No. 3 was necessary to address any threat posed to its water supply by the application of liquid manure in the subject area. Notably, petitioner submitted studies and a report from its consultant expressing concern that, although "the practice of manure application has been safely employed in the past without significant environmental detriment," proposed manure usage in watershed areas could endanger public drinking water supplies. However, after reviewing this information, the Department of Health disagreed, noting that, for example, the amounts of liquid manure necessary for the Alfords' farm would not pose any public health risk and the "farm had operated previously with minimal impact on [petitioner's] wells." Moreover, the Department concluded that the compliance of farms with the general permit regulations already in place would sufficiently address any public health and safety concerns related to the application of liquid manure. Given this and other proof in the record and according deference to the Department's interpretation and application of Agriculture and Markets Law § 305-a, we conclude that the determination that various provisions of Local Law No. 3

were unreasonably restrictive in violation of the statute was rational and need not be disturbed (see Town of Lysander v Hafner, 96 NY2d 558, 564-565 [2001]; Matter of Inter-Lakes Health, Inc. v Town of Ticonderoga Town Bd., 13 AD3d at 848).

Petitioner's remaining arguments, including its claim that Supreme Court improperly excluded from its review evidence submitted after the administrative record had been closed (see Matter of Lippman v Public Empl. Relations Bd., 296 AD2d 199, 203 [2002], lv denied 99 NY2d 503 [2002]), have been examined and found unpersuasive.

Carpinello, Rose, Malone Jr. and Stein, JJ., concur.

ORDERED that the amended judgment is affirmed, without costs.

ENTER:

Michael J. Novack
Clerk of the Court

State of New York
Supreme Court, Appellate Division
Third Judicial Department
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July 10, 2008

Honorable Gary D. Spivey
State Reporter
New York State Law Reporting Bureau
17th Floor
One Commerce Plaza
Albany, NY 12210-9990

Re: 503747 - Matter of Village of Lacona v New York State Department of Agriculture and Markets

Dear Mr. Spivey:

The Court rendered a memorandum and order in the above-entitled case on May 22, 2008. Would you please delete the word "petitioner's" in line 6 on page 2. Also, please insert the words "of Village of Lacona" after "(2002)" in line 7 on page 2.

Very truly yours,

Michael J. Novack
Clerk of the Court

By: Janis Cohen
Janis Cohen

sao

cc: Richard J. Brickwedde, Esq.
John F. Rusnica, Esq.
Lawrence A. Rappoport, Esq.
Thomas J. Fucillo, Esq.
Elizabeth C. Dribusch, Esq.
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