

FINDINGS

1. On August 30, 1994, Mr. Louis DeMario, a principal of LBD Enterprises, Inc. and owner of the Louis B. DeMario Farm on Jug Point Road in Verona, contacted the Department to request review of certain actions by the Town of Verona pursuant to local law to prohibit him from landspreading milk whey waste and composting municipal sludge for field spreading to improve soil quality.
2. By a Summons and Complaint dated September 1, 1994, the Town of Verona commenced an action in the Oneida County Supreme Court seeking to prevent Mr. DeMario from spreading milk whey waste and composting sludge on his Jug Point Road farm property in the Town of Verona and Oneida County Agricultural District #32.
3. The Supreme Court issued an Order to Show Cause and Temporary Restraining Order prohibiting LBD Enterprises from using the Jug Point Road farm as a depository for refuse, sludge, manufacturing by-products and/or other substances which was filed with the Oneida County Clerk on September 6, 1994.
4. On October 5, 1994, Dr. Robert Somers, Chief of the Department's Agricultural Protection Unit, visited the Jug Point Road farm to observe the facilities and discuss the land application of milk whey waste and the proposed composting process with Mr. Louis DeMario. Dr. Somers examined the field where the milk whey waste is applied and observed the equipment used to inject the material into the soil. Mr. DeMario conducted a tour of the existing structures and explained how the barn would be modified to accommodate the composting process. Dr. Somers next visited the 300 acre turf farm in the Town of Sullivan, Madison County, to examine the fields where the composted material is to be applied.
5. On October 24, 1994, the Court vacated the Temporary Restraining Order with respect to the land application of non-recognizable food processing by-products from the H.P. Hood plant in Oneida.
6. Mr. DeMario received a Part 360 solid waste permit from the Department of Environmental Conservation on October 26, 1994 to receive and compost municipal sewage sludge from the Oneida Waste Water Treatment Plant on the Jug Point Road farm property, and to landspread the resulting compost as a soil amendment on Mr. DeMario's turf farm in the Town of Sullivan, Madison County.
7. In a letter dated November 2, 1994, Thomas Hughes, Esq., attorney for the Town of Verona, informed Mr. DeMario that the composting and storage of wastewater sludge at the Jug Point Road site would be in violation of the Town's zoning ordinance since the Town considered it a commercial or manufacturing operation rather than agricultural activity.

8. In a letter dated November 9, 1994, the Department informed Dr. Maurice Deeley, the Town Supervisor, that it considers the subject activities to be agricultural practices since the compost material being produced is being used in the overall farm operation and not sold; DEC had issued the appropriate permits; and the Town therefore appeared to be in violation of Section 305-a of the Agriculture and Markets Law. The letter requested that the Town identify any health and safety threats it believed would be caused by the agricultural practices.

9. In a letter dated November 16, 1994, Town attorney Thomas Hughes rejected the Department's contention that the farm is an agricultural operation since portions of the farm lie outside the boundary of the agricultural district, and alleged that the composting of sludge is a commercial activity. He also stated that potential odor and the presence of fecal coliform in the milk whey waste posed a threat to the public health and safety. Department attorney Ruth Moore responded to Mr. Hughes' November 16 letter, stating that there is ample evidence that the farm qualifies as a farm operation and that the allegations of health and safety risks were unsupported.

10. On November 22, 1994, the Town filed an Article 78 proceeding against Mr. DeMario and his company, LBD Enterprises, the Department of Environmental Conservation, and the City of Oneida, seeking annulment of the Part 360 permit and a declaration that the composting operation is not a permitted activity under the Town's zoning ordinance. The matter has been adjourned until March 15, 1995.

11. In a letter dated December 2, 1994, the Department provided the Town with comments on the Town of Verona's proposed Local Law No. 5 which prohibits disposal, storage and/or composting of materials, including sludge, septage or "non-local manure" within the Town, including an assessment that the Law appeared to violate Sections 305(2) and 305-a(1) of the Agriculture and Markets Law.

12. On December 5, 1994, the Town of Verona enacted the proposed Local Law No. 5 without any revisions to address issues raised by the Department.

13. In a letter dated January 6, 1995, Commissioner McGuire informed Supervisor Deeley that the Department had completed its review of the Town zoning ordinance as it had been applied to Mr. DeMario's farm operation, and the Town's Local Law No. 5 as adopted on December 5, 1994 restricting disposal, storage and/or composting of sludge and septage derivatives. The letter stated that the Department had concluded that the Town's application of the zoning ordinance to the DeMario farm operation, and Local Law No. 5, insofar as it prohibits the use of non-local manure and sludge and septage products for agricultural purposes within an agricultural district, violate Section 305-a of the Agriculture and Markets Law with respect to the zoning ordinance, and Section 305(2) and Section 305-a with respect to Local Law No. 5. The Department requested that the Town promptly discontinue enforcement of the ordinances against LBD Enterprises and Mr. DeMario and amend Local Law No. 5 to

be consistent with the Agriculture and Markets Law. The Commissioner requested that the actions be taken within 30 days.

14. On January 31, 1995, Department attorney Ruth Moore and Dr. Robert Somers participated in a meeting in the Town of Verona with the parties to the Article 78 proceeding. At that time, it was agreed that if meaningful progress toward a resolution could be made, the Department would extend its 30 day deadline imposed in the January 6 letter.

15. In a letter to Town attorney Thomas Hughes dated February 6, 1995, the Department suggested measures the Town should take to demonstrate meaningful progress toward removing unreasonable restrictions on the DeMario farm operation and other farm operations within affected Oneida County Agricultural Districts.

16. Mr. Hughes responded to the Department's February 6 letter in a letter dated February 14, 1995 which noted that he was reviewing Local Law No. 5 in light of Justice Shaheen's determination that landspreading of whey is an accepted practice. He also suggested that the Department forebear any separate legal action on the compost facility pending the outcome of the Article 78 proceeding.

17. Department of Environmental Conservation officials have confirmed to this Department that the composting facility as approved in the Part 360 permit does not pose environmental or public health risks.

18. The Town of Verona has not demonstrated that application of sludge, septage or septage products or non-local manure as specified in Local Law No. 5 poses health or safety risks.

19. The Jug Point Road property qualifies as a farm operation pursuant to Section 301 of the Agriculture and Markets Law since it consists of farm buildings and land used in agricultural production.

20. The on-farm composting of sludge for use as a soil amendment in the farm operation is a recognized agricultural activity which has been practiced for decades both in New York and in other states.

CONCLUSIONS

Based upon the above findings, I conclude the following:

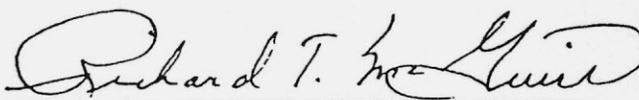
1. The Town of Verona's actions pursuant to its zoning law to prohibit operation of Mr. DeMario's composting facility unreasonably restrict a farm operation in an agricultural district.

2. Town of Verona Local Law No. 5 unreasonably restricts farming practices within Oneida County Agricultural Districts insofar as it prohibits the on-farm disposal, storage and/or composting of sludge, septage and non-local manure for agricultural purposes within an agricultural district.

DETERMINATION AND ORDER

Now, therefore, in consideration of the above-stated findings and conclusions, it is hereby determined that the Town of Verona has violated Sections 305-a(1) and 305(2) of the Agriculture and Markets Law, and it is hereby

ORDERED, pursuant to the provisions of Section 36 of the Agriculture and Markets Law, that the Town of Verona immediately comply with the provisions of Section 305-a(1) and Section 305(2) by discontinuing any enforcement actions against Mr. DeMario and LBD Enterprises with respect to the composting operation, and by amending Local Law No. 5 consistent with the requirements of Sections 305(2) and 305-a(1). Further, the Town shall notify the Department within ten business days whether the Order is accepted and will be obeyed.



RICHARD T. MCGUIRE
Commissioner of
Agriculture and Markets

Dated and Sealed this 6th
day of March, 1995 at
Colonie, New York

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of
TOWN OF VERONA, NEW YORK,

Petitioner,

-against-

DECISION and ORDER
INDEX NO. 1740-95
RJI NO. 0195ST5710

RICHARD MC GUIRE, COMMISSIONER OF
THE NEW YORK STATE DEPARTMENT OF
AGRICULTURE AND MARKETS and THE
NEW YORK STATE DEPARTMENT OF
AGRICULTURE AND MARKETS,

Respondents.

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules

RECEIVED
SEP 20 1996
DEPT. OF AGRIC. & MARKETS
COUNSEL'S OFFICE

Supreme Court Albany County Special Term, April 28 1996
Justice Joseph C. Teresi, Presiding

APPEARANCES:

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TERESI, J.:

Petitioners bring this CPLR Article 78 proceeding seeking judicial review of a determination and order of the commissioner of Agriculture and Markets made on or about March 6, 1996. Respondents oppose the petition and seeks its dismissal. This Court previously stayed determination of this petition pending

determination of a pending Oneida County Supreme Court case. The resolution of that case has not addressed the key issue in this case, namely the determination by the Commissioner, finding that the composting of municipal sewage sludge is a agricultural activity protected by the provisions of Article 25 AA of the Agriculture and Markets Law, dated march 6, 1995.

This record indicates that petitioner enacted Local Law #5 of the year 1994 in direct contravention of both §305(2) and 305(a) of the Agricultural Districts Law which prevents unreasonable restrictions of farming practices within agricultural districts. Regardless of whether they are enforced or not these ordinances are prohibited. This record further indicates that §36 of the Agriculture and Markets Law was not violated in issuing this order.

The issue before this Court is whether the March 6, 1995 Order is supported by a rational basis.

The standard for the Court was recently stated by the Court of Appeals in Consolation Nursing Home, Inc. v. Commissioner of New York State Department of Health, 85 NY2d 326, 331-332 (1995) is:

"The standard for judicial review of an administrative regulation is whether the regulation has a rational basis and is not unreasonable, arbitrary or capricious (see, Matter of New York State Assn. of Counties v. Axelrod, 78 NY2d 158, 166; Matter of Bates v. Toia 45 NY2d 460, 464). An administrative agency's exercise of its rule-making powers is accorded a high degree of judicial deference, especially when the agency acts in the area of its particular expertise (see, Matter of Memorial Hosp. v. Axelrod, 68 NY2d 958, 960; 5 Davis, Administrative Law §29:3, at 343 [2d ed]). Accordingly, the party seeking to nullify such a regulation has the heavy burden of showing that the regulation is

unreasonable and unsupported by any evidence (see, Matter of New York State Health Facilities Assn. v. Axelrod, 77 NY2d 340, 349-350; Matter of Society of N.Y. Hosp v. Whalen, 47 NY2d 331, 343.)

Although documented studies often provide support for an agency's rule making, such studies are not the sine qua non of a rational determination. As we have previously stated, in a rate-fixing decision 'the commissioner, of course, is not confined to factual data alone but also may apply broader judgmental considerations based upon the expertise and experience of the agency he heads' (see, Matter of Catholic Med. Ctr. v. Department of Health, 48 NY2d 967, 968-960."

After a full review of this record this Court cannot state the Commissioner's determination and order is not supported by a rational basis. The Commissioner after an investigation which included site visits and interviews determined the questioned activity to be agricultural practice. The record reflects that the Commissioner considered the fact that DeMetto intends to use all of the compost product as an input for the production of turf on his farm property, distinguishing this case from Matter of Moody Hills Farms v. ZBA, 199 AD2d 964 (3rd Dept, 1993). This is a rational determination and the Court will not substitute its discretion for that of the Commissioner.

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

The petition is denied.

All papers, including this Decision and Order, are being returned to the attorneys for the respondents. 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 20, 1996


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

- (1) Notice of Motion dated March 30, 1996 with Petition dated March 28, 1996, with Attached Exhibit "A".
- (2) Affidavit of Thomas P. Hughes, Esq. dated April 26, 1996, with Attached Exhibits A - F.
- (3) Verified Answer dated April 21, 1996, with Attached Exhibit "A".
- (4) Affidavit of Robert C. Somers, Jr. dated April 21, 1996, with Attached Exhibits A - I.
- (5) Affidavit of Ruth A. Moore, Esq. dated April 27, 1996.
- (6) Letter Dated July 10, 1996 from Thomas P. Hughes, Esq. with Attachment.
- (7) Letter dated July 16, 1996 from Ruth A. Moore, Esq. with Attachment.