

STATE OF NEW YORK  
DEPARTMENT OF AGRICULTURE AND MARKETS

---

In the Matter of Compelling Compliance with the provisions of Sections 305(2) and 305-a(1) of the Agriculture and Markets Law by:	:	
	:	DETERMINATION
	:	AND
The Town of Butternuts	:	ORDER
P.O. Box 42	:	
Gilbertsville, New York 13776	:	
	:	

---

**PRELIMINARY STATEMENT**

Upon receiving a complaint concerning the enactment and administration of the Town of Butternuts's Local Law #2 (1993), which prohibits the application of household septage as a beneficial soil amendment for agricultural purposes on land owned and/or leased by Bruce Giuda, dairy farmer in Otsego County Agricultural District #8, the Department of Agriculture and Markets investigated the complaint to determine whether the Town of Butternuts had administered its Local Law in a manner consistent with the provisions of Section 305-a(1), and enacted the Local Law consistent with the provisions of Section 305(2) of the Agriculture and Markets Law.

Section 305-a(1) prohibits local governments from administering their local land use laws, ordinances, rules or regulations in a manner which unreasonably restricts or regulates farm operations within agricultural districts unless it can be shown that the public health and safety is threatened. Section 305(2) prohibits local governments from exercising any of their powers to enact local laws or ordinances within an agricultural district in a manner which would unreasonably restrict or regulate farm structures or farming practices unless the restrictions bear a direct relationship to the public health or safety. The Department's investigation included interviews with the farm owner; discussions with Robert E. VanHouten, Waste Transporter Permittee; correspondence with Town of Butternuts officials; a site visit by Department employees; and consultation with the NYS Department of Environmental Conservation (hereafter "DEC").

Based upon this investigation, I hereby make the following findings and conclusions in support of the Determination that the Town of Butternuts has violated Section 305-a(1) and Section 305(2) of the Agriculture and Markets Law, and the Order compelling compliance with such law.

## FINDINGS

1. On September 6, 1996 Bruce Giuda wrote to the Department explaining certain actions taken by the Town of Butternuts pursuant to Local Law #2, which prohibits the landspreading of septage in the Town. Mr. Giuda provided the Department with letters to and from the Town Supervisor, Ken Nolan, a copy of Town of Butternuts Local Law #2, and a copy of the Waste Transporter Permit issued by the NYS DEC to VanHouten's Contracting Services Inc. for the disposal of waste on land owned/leased by Mr. Giuda. The Waste Transporter Permit, dated August 16, 1996, allows landspreading at Mr. Giuda's farm (Site #2) and at H.V.H. Enterprises property (Site #3), which Mr. Giuda leases.
2. Town Supervisor, Ken Nolan, wrote a letter dated June 20, 1996 to VanHouten's Contracting Services Inc. to inform them that regardless of whether the NYS DEC granted a Waste Transporter Permit, the Town of Butternuts Local Law #2 prohibits the dumping of "waste materials of any nature" on land within the Town. Therefore, if septage is dumped in the Town, Mr. Nolan stated that they would be in violation of the local law.
3. The NYS DEC issued a Waste Transporter Permit, effective August 15, 1996, to Mr. Robert E. VanHouten to "collect, transport household and restaurant septage and landspread waste at Bruce Giuda Farm...and at H.V.H. Enterprises property..." under certain conditions. The permit has been renewed by the DEC for the period from April 1, 1997 through March 31, 1998.
4. On September 23, 1996, John Rusnica, Senior Attorney with the Department of Agriculture and Markets, wrote Mr. Nolan to inform him of the request made by Mr. Giuda and state that the Department would review the Town of Butternuts's Local Law #2, 1993 for conformity with Sections 305(2) and 305-a(1) of the Agriculture and Markets Law. Mr. Rusnica informed Mr. Nolan that the Department considers the land spreading of septage, which supports the production function of the farm, to be an agricultural practice. Mr. Rusnica referenced the Waste Transporter Permit issued to Robert E. VanHouten by the NYS DEC and asked the Town to document any health and safety concerns which would justify the restrictive local law.
5. The Department received a letter from Mr. Nolan on October 10, 1996 which stated that the Town Board directed him to respond to the Department's September 23, 1996 letter as follows: "[b]ecause of the local law, and because of the practices herein, we do feel there is a health and safety hazard." No specific health and safety concerns were identified by Mr. Nolan.
6. On November 15, 1996 Kim Blot, Director of the Department's Division of Agricultural Protection and Development Services, wrote Mr. Nolan stating that the Department completed its review of the Town of Butternuts's Local Law #2 and found it to be in violation of Section 305(2) and Section 305-a(1) of the Agriculture and Markets Law. Mr. Blot requested the Town to modify the Local Law within 30 days to allow the disposal, storage and/or composting of septage, sludge, and composted sludge, or products derived therefrom, for agricultural purposes within a county adopted, State certified agricultural district.

7. On December 2, 1996 attorney David Merzig responded, on behalf of the Town, to Mr. Blot's letter of November 15<sup>th</sup> to request clarification on the use of septage as a "normal" farming practice and procedure. Mr. Merzig indicated that the Town should have the right to restrict and regulate the dispersion of human waste in the Town.
8. In a letter dated December 13, 1996, Mr. Rusnica responded to Mr. Merzig's request stating "...that neither the Department nor the Commissioner questions a local government's right to control the importation and dispersion of human waste within its geographic boundaries." He explained that the Agriculture and Markets Law, however, constrains local governments from enacting and/or administering laws that would unreasonably restrict farm practices, structures or operations located within a county adopted, State certified agricultural district. Mr. Rusnica stated that the Department reviewed the Local Law under these sections and determined that the Law was unreasonably restrictive. Mr. Rusnica informed Mr. Merzig that the landspreading of septage is being performed under a permit issued by the NYS DEC.
9. The VanHouten Waste Transporter Permit was granted by the NYS DEC after full review pursuant to the Environmental Conservation Law ("ECL") and Regulations [ECL Article 27, Title 3; Title 6, Official Compilation of Codes, Rules and Regulations of the State of New York, Part 364]. The comments and concerns of local residents and the Town of Butternuts were considered as part of the permitting process and addressed in DEC's State Environmental Quality Review Negative Declaration, dated April 26, 1996, and "Response to Comments/Record of Decision," dated August 16, 1996.
10. The Town of Butternuts has not demonstrated that the disposal, storage and/or composting of septage, sludge, and composted sludge, or products derived therefrom, for agricultural purposes, as prohibited by Local Law #2 poses health or safety risks.
11. The Giuda/H.V.H. Enterprises property qualifies as a farm operation pursuant to Section 301 of the Agriculture and Markets Law since it consists of land used in agricultural production.
12. The landspreading of septage for use as a soil amendment is a recognized agricultural activity which has been practiced for years both in New York and in other states.

## CONCLUSIONS

Based upon the above findings, I conclude the following:

1. Town of Butternuts Local Law #2, 1993 unreasonably restricts farming practices within Otsego County Agricultural Districts insofar as it prohibits the disposal, storage, and/or composting of septage, sludge, and composted sludge, or products derived therefrom for agricultural purposes within an agricultural district. The local law's prohibition does not bear a direct relationship to public health or safety.
2. The Town of Butternuts's administration of Local Law #2, 1993, to prohibit the landspreading of household and restaurant septage on the Giuda/ H.V.H. Enterprises property, unreasonably restricts the Giuda farm operation in an agricultural district. The Town of Butternuts has not shown that the public health and safety is threatened by the subject farming practice.

## DETERMINATION AND ORDER

Now, therefore, in consideration of the above-stated findings and conclusions, it is hereby determined that the Town of Butternuts 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 Butternuts comply with the provisions of Section 305-a(1) and Section 305(2) by (1) allowing VanHouten's Contracting Services, Inc. to landspread waste consisting of household and restaurant septage at the Bruce Giuda and H.V.H. Enterprises properties in the Town of Butternuts, as authorized by the Waste Transporter Permit issued by the New York State Department of Environmental Conservation; and (2) by amending the Local Law consistent with the requirements of Sections 305(2) and 305-a(1).

This Order shall take effect immediately upon service on the Town of Butternuts, by mail to Kenneth Nolan, Supervisor, at P.O. Box 42, Gilbertsville, New York 13776.



DONALD R. DAVIDSEN, D.V.M.

Commissioner of  
Agriculture and Markets

Dated and Sealed this 18<sup>TH</sup>  
day of June, 1997 at  
Colonie, New York

Pursuant to Agric & Mkt's Law Section 20, I hereby certify that this document is a true copy of the original thereof on file with the Department of Agriculture and Markets.

Signature Jean Ateho  
Title Counsel Date June 18, 1997

RECEIVED

DEC 12 1997

DEPT. OF AGRIC. & MARKETS  
COUNSEL'S OFFICE

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ALBANY

---

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

Petitioner,

For a Judgment pursuant to Article 78  
of the Civil Practice Law & Rules

-against-

DONALD R. DAVIDSEN, D.M.V., as Commissioner  
of the Department of Agriculture and  
Markets of the State of New York,

Respondent.

---

(Supreme Court, Albany County Special Term,  
September 5, 1997. RJI 01-97-ST7955, Calendar #20)

(JUSTICE GEORGE L. COBB PRESIDING)

APPEARANCES:

Hinman, Straub, Pigors & Manning (Thomas D. Latin  
of counsel), for petitioner.

Joan A. Kehoe (Edward S. Rowley and John F. Rusnica  
of counsel), for respondent.

COBB, J.

Petitioner has commenced an article 78 proceeding  
challenging a determination of respondent Commissioner of  
Department of Agriculture and Markets which found that  
petitioner's Local Law No. 2 of 1993, which petitioner has  
interpreted to prohibit the spreading of residential and  
restaurant septage upon agricultural fields, unreasonably  
restricts farming practices within Otsego County agricultural  
districts in violation of subdivision 2 of section 305 of the

Agriculture and Markets Law. Petitioner contends that respondent Commissioner had no authority to make such determination pursuant to section 36 of the Agriculture and Markets Law, and that the determination was arbitrary and capricious in that the spreading of residential and restaurant septage clearly has a direct relationship to the public health or safety.

Section 36 of the Agriculture and Markets Law authorizes the Commissioner to issue compliance orders upon a finding that any "person, association or corporation" has failed to comply with the provisions of the Agriculture and Markets Law. Petitioner contends that as a town it does not constitute a person, association or corporation and that therefore section 36 of the Agriculture and Markets Law by its own terms is not applicable. Petitioner relies upon *Towner v. Jimerson*, (67 AD2d 817) for the proposition that the word "person" does not in its ordinary meaning include the state or a government. However, the General Construction Law at section 37 specifically provides that the word "person" may include the state or government under certain circumstances. Municipal corporations have been held to be included in the term "person" by the Courts, (*Ackert v. New York*, 156 App. Div. 836; *Matter of Village of Bronxville v. Francis*, 206 Misc 339, mod. on other grounds, 1 AD2d 236, affd. 1 NY2d 839). While not directly applicable, the regulations of the

Department of Agriculture and Markets at 1 NYCRR 367.1 (c), with respect to adjudicative hearings, define "person" to include any individual, partnership, corporation, association or public or private organization of any character other than the Department of Agriculture and Markets. In addition, pursuant to General Construction Law, § 65, subd. (a), par. 1 and § 66, subds. 1 and 2, a corporation includes a town. The Court therefore determines that petitioner town is subject to the provisions of section 36 of the Agriculture and Markets Law as both a person and a corporation. The Court also finds that the provisions of section 305-a of the Agriculture and Markets Law, which authorize a plenary action to enforce the provisions of section 305 and 305-a of the Agriculture and Markets Law is permissive and does not constitute the exclusive remedy. Accordingly, the Court finds that respondent Commissioner had authority to enforce the provisions of section 305 of the Agriculture and Markets Law through the procedure set forth in section 36 of the Agriculture and Markets Law.

Petitioner also contends that the determination that Local Law No. 2 of 1993 does not have any direct relation to the public health or safety is arbitrary and capricious. Judicial review of such claim is limited to the record before the agency, and the determination will be upheld unless it was arbitrary and capricious and without any rational basis

(*Matter of Felton v. Halperin*, 228 AD2d 595). Respondent's determination was based upon long-standing farming practices within the State of New York, expert opinion from acknowledged experts in the field and a negative declaration issued by the Department of Environmental Conservation with respect to the particular application which is the subject of this proceeding. Such negative declaration found that there would be no adverse environmental impact from spreading restaurant and household septage upon the particular farm fields involved. Petitioner did not seek any judicial review of such negative declaration or issuance of a permit, and also offered no evidence whatsoever of any direct relationship to the public health or safety to respondent Commissioner after specific requests for such proof.

The Court therefore finds that respondent's determination was based upon the expertise of the Department of Agriculture and Markets which is entitled to great deference, expert opinion and a final determination of the Department of Environmental Conservation. The only "evidence" in the record which could support a determination of a direct relationship to the public health or safety consisted of entirely conclusory and anecdotal assertions that the local law was directly related to public health and safety. Based upon such record, the Court must conclude that the determination was neither arbitrary or capricious and had a

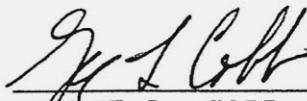
rational basis.

Accordingly, the instant article 78 proceeding is hereby dismissed.

SO ADJUDGED.

Dated at Catskill, N.Y.

December 9, 1997



GEORGE L. COBB  
Justice of the Supreme Court

Papers submitted returned to attorney for respondent.

Notice of petition dated July 17, 1997; petition verified July 17, 1997; affidavit of Kenneth Nolan sworn to on July 10, 1997; exhibits A-D; affidavit of Thomas D. Latin sworn to on July 17, 1997; exhibit A; affidavit of Mianda Morris sworn to on July 10, 1997; exhibit A.

Answer verified August 29, 1997.

Affidavit of Robert E. Van Houten sworn to on August 28, 1997; exhibit.

Affidavit of Edward S. Rowley sworn to on August 28, 1997; exhibits A-N.

Affirmation of John F. Rusnica dated August 29, 1997; exhibits A-O.

Affidavit of Dr. Robert C. Somers, Jr. sworn to on August 29, 1997; exhibits A-D.

Reply affidavit of Thomas D. Latin sworn to on September 4, 1997; exhibits A-B.