

**STATE OF NEW YORK
DEPARTMENT OF AGRICULTURE AND MARKETS**

In the Matter of Compelling Compliance with	:	
the provisions of §305-a, subdivision 1 of	:	
the Agriculture and Markets Law by	:	DETERMINATION
	:	AND
The Town of Berlin Zoning	:	ORDER
Board of Appeals	:	
P.O. Box 93	:	
Berlin, New York 12022	:	
	:	

PRELIMINARY STATEMENT

Upon receiving a complaint concerning the administration of the Town of Berlin's Land Use Regulations (Local Law #2 of 1988), in Rensselaer County Agricultural District #7, the Department of Agriculture and Markets investigated to determine whether the Town Zoning Board of Appeals (ZBA) had administered its Land Use Regulations in a manner consistent with the provisions of 305-a, subd.1 of the Agriculture and Markets Law (AML).

§305-a, subd. 1 prohibits local governments from enacting or administering local laws that would unreasonably restrict farm operations located within an agricultural district unless it can be shown that the public health or safety is threatened.

The Department interviewed the farm owner, conducted a site visit and received information from the ZBA. Based upon the relevant facts and information gathered, I hereby make the following findings and conclusions which support a Determination that the Town of Berlin ZBA has violated AML §305-a, subd.1 and an Order compelling compliance with such law.

FINDINGS

1. On December 28, 1999 the Department received a request from Margaret Sicko concerning the Town of Berlin's and Town of Berlin Zoning Board of Appeals' action with regard to the construction of greenhouses on a parcel of land of approximately three acres leased by Mrs. Sicko and her husband, Andrew Sicko, located on New York State Route 22 in the Town of Berlin. Mrs. Sicko explained that the land is used for a greenhouse operation, known as "Twin Buds," which is engaged in the production of specialty flowers in greenhouses for wholesale, as well as occasional sale of flowers directly to the public from a roadside stand

on site. Mrs. Sicko indicated that the Town required a setback variance because the proposed location of one of her two temporary greenhouses did not meet the setback requirements in Local Law #2 of 1988, Land Use Regulations and that the Town required a variance for the lights used in one of the greenhouses under Article V, Section A(3) (Supplementary Regulations, General Performance Standards) of Local Law #2. This provision states that "No glare or heat shall be produced that is perceptible beyond the boundaries of the lot on which the use is located." The land in question is located within Rensselaer County Agricultural District #7.

2. On January 27, 2000, Matt Brower, Agricultural Resource Specialist in the Department's Division of Agricultural Protection and Development Services, met with Mrs. Sicko to examine the subject land and the Twin Buds farm. Mr. Brower found the farm to be a "farm operation" as defined in AML §301, subd. 11. The Twin Buds farm operation raises specialty flowers in greenhouses for wholesale distribution and retail sale, which constitutes the production of horticultural specialties as defined in AML §301, subd. 2, paragraph d. Mr. Brower also determined that the two existing green houses at the site are temporary greenhouses.
3. On January 20, 2000, Kim Blot, the Director of the Division of Agricultural Protection and Development Services, sent a letter to Town of Berlin Supervisor Stanton Goodermote, the Town of Berlin ZBA and the Town Planning Board informing them that the Department had received a request from Margaret Sicko to conduct a review of the Town of Berlin's Land Use Regulations (Local Law #2 of 1988) and the administration of that law by the Town, the ZBA and the Planning Board, for compliance with AML §305-a. Mr. Blot informed the Town, ZBA and Planning Board that the Department did not consider the requirement to apply for a setback variance unreasonable, but denial of the variance could be considered unreasonably restrictive depending upon the specific facts and circumstances concerning the administration of the Town's Land Use Regulations. Mr. Blot also advised that requiring a variance for the greenhouse lights appeared to unreasonably restrict the Twin Buds farm operation within an agricultural district, since it requires Mrs. Sicko to obtain a variance for a "normal agricultural activity." Mr. Blot noted that Article V, Section A of Local Law #2 states that "These standards are not intended to impede normal agricultural and residential activities" and that the greenhouse lights should be exempt from the regulations as they are used as part of a "normal agricultural activity."
4. On January 23, 2000, Richard Patsos, Secretary of the ZBA, wrote Mr. Blot and advised that the ZBA denied the request for a setback variance by Mr. and Mrs. Sicko. The minutes of the ZBA's decision, which are not dated, state that "ZBA decided to rule so that Ag and Markets review could be initiated if so desired by Sicko. ... Lighting was agreed not to be an issue in the vote."
5. Thereafter, the Department and the ZBA corresponded concerning the denial of the Sickos' application for a setback variance. Mr. Blot explained that the Town's 75 feet setback, which is calculated from the New York State Department of Transportation's 60 feet right-of-way, severely limits the number of greenhouses that can be constructed on the property; that the

inability to expand the farm operation restricts production options and could severely impact the economic viability of Twin Buds, a small, startup farm operation; and that meeting the setback requirement would result in significant additional cost for the farm to install electric service for the greenhouse. Mr. Patsos responded by identifying several concerns that it had with the location of the Twin Buds greenhouse operation and concluded that the need for a variance was the result of poor site selection and that leasing adjacent or other land is an option for Twin Buds' expansion. Mr. Blot replied that absent an overriding local health or safety issue, requiring a farm operation to purchase or lease additional land to meet a setback appears unreasonably restrictive when expansion can be safely accommodated on the farm operation's existing land. Mr. Blot noted that Mr. Patsos' letter did not identify any health or safety concerns. Mr. Blot again requested that if the ZBA believed that the public health or safety would be threatened by approval of the setback variance for the temporary greenhouse, it should provide the Department with any evidence of that threat.

6. On June 6, 2000, Matt Brower, Department Agricultural Resource Specialist, received a memorandum, dated May 11, 2000, from Donald French, Chair of the ZBA, concerning the granting of a setback variance to Twin Buds Farm on May 22, 2000 to construct greenhouses on property in Rensselaer County Agricultural District # 7. The second condition attached to the variance states that the Sickos "...agree to forgo any improvements of temporary or permanent nature on a portion of the parcel in use by the Twin Buds farm operation or any successive operation. The restricted portion is defined to be the area within 100 feet from the mean high water mark of the waterway known as the Little Hoosic River now or as it may exist in the future." Mr. French explained that this condition was imposed to offer the river some protection from spills of concentrated fertilizers and pesticides that may be stored in the greenhouses.
7. On August 3, 2000 Mr. Blot wrote Mr. French and explained that the variance condition significantly restricts the use of a large portion of the Twin Buds farm operation for as long as they operate on the subject land. He noted that the impact of the condition on the farm operation is similar to that of the front yard setback: the 100 feet restricted zone will limit the number of greenhouses, and other necessary improvements, that can be constructed; thus restricting expansion and production options. Since Twin Buds is a small, startup farm operation, Mr. Blot explained the condition could severely impact its economic viability. He stated that absent an overriding local health or safety issue, requiring a farm operation to purchase or lease additional land to expand would be unreasonably restrictive when expansion can be safely accommodated on the farm operation's existing land. Mr. Blot noted that Article V (G)(1) of the Town's Land Use Regulations provides for special permit review for any development within 100 feet of a lake, pond or stream and that by mandating the 100 feet restricted zone in the variance, the Town denies the farm the opportunity for a review. He concluded that, at a minimum, the farm should have the ability to apply for a special permit, as set forth in the local law.

Mr. Blot also informed Mr. French that Department staff discussed the issue of storage of pesticides and fertilizers with the Department of Environmental Conservation (DEC). Mr. Blot advised that the DEC regulations pertaining to pesticides do not regulate storage and,

according to DEC, pesticide storage information is contained on the pesticide label. Mr. Blot also explained that in the discussion with DEC staff, DEC did not indicate a concern with applying pesticides, according to the label, inside a greenhouse within 100 feet of a stream/waterbody. Mr. Blot concluded by stating that the Department would like to work with the ZBA to resolve potential conflicts between the ZBA's administration of the local law and the Agriculture and Markets Law and stated that if the ZBA's primary concern is with the storage of pesticides and fertilizer near the river, the variance condition could be amended to state that pesticides and fertilizer will not be *stored* within 100 feet of the river. He noted that the provision of the local law requiring a special permit would still apply to any development. Mr. Blot advised Mr. French that the conditions imposed on the Twin Buds setback variance by the ZBA appeared to unreasonably restrict the Twin Buds farm operation within an agricultural district in possible violation of AML §305-a, subd.1 and requested that the ZBA advise the Department of any threats to the public health or safety which might occur if the variance conditions were removed.

8. Mr. French replied to Mr. Blot on August 15, 2000 that the ZBA was concerned with flooding and cited Article V (G)(2) of the Town's Zoning Law in support. Article V (G)(2) states "All development within one hundred (100) feet of the boundary of a wetland as mapped by the New York State Department of Environmental Conservation shall be prohibited." Mr. French also noted that the area in question is a "Special Flood Hazard Area," as set forth on the HUD Federal Insurance Administration Flood Hazard Boundary Map.
9. The area in question is not designated as a NYS DEC wetland and Mr. Blot informed Mr. French accordingly on August 28, 2000. Mr. Blot noted that Article V (I) of the Town's Land Use Regulations states that "All land use and development within the Flood Fringe Overlay shall be subject to special use permit review as provided by Article VI of this Local Law." Thus, if the land *is* in the Flood Fringe Overlay, it is clear that the Town's law provides for special use permit review, rather than prohibits any development within this area. Mr. Blot also noted that the ZBA had not provided any evidence that the construction of temporary greenhouses in this area would result in a threat to the public health or safety. Mr. Blot advised that the Department completed its review of the ZBA's grant of the setback variance to Twin Buds Farm and found it to be in violation of AML §305-a, subd.1. Mr. Blot requested that the ZBA take corrective action within 30 days.
10. In a letter to Mr. Blot dated October 6, 2000 Mr. French stated that "After careful consideration the board decided in a three to one vote to keep the conditions of the set back variance." Mr. French explained that structures within the special flood hazard zone are not constructed in such a way as to prevent them from being swept away in the case of a hundred-year flood and causing damage and danger to buildings and occupants downstream. He advised that the ZBA still believed that the storage of pesticides and fertilizers in bulk form would create a public health and safety hazard if a flood occurred.

CONCLUSION

Based upon the above findings, I conclude the following:

1. The Town of Berlin Zoning Board of Appeals' administration of the Town of Berlin's Land Use Regulations (Local Law #2 of 1988) unreasonably restricts the Twin Buds farm operation in Rensselaer County Agricultural District #7 insofar as it prohibits any improvements of a temporary or permanent nature within a restricted zone of 100 feet from the Little Hoosic River as set forth in the second condition of the ZBA's Attachment of Conditions, dated May 22, 2000, to the grant of the setback variance to Andrew and Margaret Sicko. Article V (G)(1) of Local Law #2 provides for special permit review for any development within 100 feet of a lake, pond or stream. By mandating the 100 feet restricted zone in the variance, the ZBA denies the farm the opportunity for a review. Also, if the subject land is in the Town's Flood Fringe Overlay, Article V (I) of Local Law #2 states that "All land use and development within the Flood Fringe Overlay shall be subject to special use permit review as provided by Article VI of this Local Law." Thus, the local law already addresses the concerns expressed by the ZBA, as described above in paragraph 10. Lastly, the ZBA's concern with storage of pesticides and fertilizers can be addressed by amending the variance condition to state that pesticides and fertilizers cannot be stored within 100 feet of the river, rather than prohibiting farm improvements.

DETERMINATION AND ORDER

Now, therefore, in consideration of the above-stated findings and conclusions, it is hereby determined that the Town of Berlin Zoning Board of Appeals has violated §305-a, subd. 1 of the AML, and it is hereby

ORDERED, pursuant to the provisions of §36 of the AML, that the Town of Berlin Zoning Board of Appeals comply with the provisions of AML §305-a, subd. 1 by removing the second condition of the ZBA's Attachment of Conditions, dated May 22, 2000, to the grant of the setback variance to Andrew and Margaret Sicko.

This Order shall take effect immediately upon service of a certified copy thereof on the Town of Berlin Zoning Board of Appeals, by mail to Donald I. French, Jr., Chair of the Town of Berlin Zoning Board of Appeals, at P.O. Box 93, Berlin, New York 12022.



Nathan L. Rudgers
Commissioner of
Agriculture and Markets

Dated and Sealed this 19th
day of January, 2001
at Colonie, New York