

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

**In the Matter of Compelling Compliance with the :
provisions of Agriculture and Markets Law :
§305-a, subdivision 1 by :**

**The Village of Shortsville :
5 Sheldon Street :
P.O. Box 218 :
Shortsville, New York 14548 :**

**DETERMINATION
AND
ORDER**

PRELIMINARY STATEMENT

In June, 2005, Ms. Vikie Howell requested that the Department of Agriculture and Markets ("Department") review the Village of Shortsville's Code with respect to her ability to produce and market livestock on land located within Ontario County Agricultural District Number 6. The Department investigated to determine whether the Village of Shortsville administered the Village's Code in a manner consistent with the provisions of Agriculture and Markets Law (AML) §305-a, subd.1.a. Subdivision 1.a. mandates that when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules or regulations, local governments must do so in a manner as may realize the policy and goals of Agriculture and Markets Law Article 25-AA. The statute further provides 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."

The Department reviewed relevant portions of the Village of Shortsville Code; a Notice of Violation issued by the Village's Code Enforcement Officer; litigation papers in the action by the Village against Mr. Castro and Ms. Howell (Supreme Court, Ontario County; Index No. 96330-2005); and correspondence from the Village Attorney. The Department also interviewed the farm owner and conducted two site visits; one in 2003 and another in 2005. Based upon the relevant facts and information gathered, I hereby make the following findings and conclusions upon which this Determination that the Village of Shortsville has violated AML §305-a, subd.1 is made and an Order compelling compliance with such law is issued.

FINDINGS

1. By letter dated May 23, 2003, former Director of the Division of Agricultural Protection and Development Services, Kim Blot, notified former Mayor Ed Clark that

the Department received a request from Ms. Vikie Howell for a formal review of the Village's Code for compliance with AML §305-a. By letter dated August 11, 2003, the Department informed Ms. Howell that additional financial information was needed in order to determine whether her farm qualified for protection under AML §305-a. Because the information was not provided at that time, the Department discontinued its review of the Village's Code and its application to the farm.

2. On June 29, 2005, Ms. Howell submitted additional financial information to the Department to demonstrate that her operation meets the Agriculture and Markets (AML) definition of "farm operation." Under AML §301, subd. 11, "farm operation" means, in relevant part, "the land and on-farm buildings, equipment, manure processing and handling facilities, and practices which contribute to the production, preparation and marketing of crops, livestock and livestock products as a commercial enterprise." Upon review of such information and in consultation with Ms. Howell, the Department determined that the operation is a "farm operation" as defined in AML §301, subd. 11, and initiated a review of the Village's Code for compliance with AML §305-a.
3. Ms. Howell and Mr. Castro own approximately 23 acres of land, a portion of which is located in the Town of Manchester and a portion located in the Village of Shortsville, all within Ontario County Agricultural District No. 6. According to soil group worksheets prepared by the Ontario County Soil and Water Conservation District, 9.93 acres of this land is agricultural land, 10.13 acres is farm woodland and .60 acre is non-agricultural land. The farm operation has been in operation for four years and currently produces eggs, herbs, produce and livestock.
4. According to the Village's Petition for Injunction, a portion of the Castro/Howell property was annexed into the Village of Shortsville on February 18, 2003; the annexed portion of the Castro/Howell property is zoned "residential;" and the Village sent letters to Mr. Castro and Ms. Howell on May 2, 2003, May 12, 2004 and January 21, 2005 informing them that barnyard animals are not permitted within the Village limits. The Village's Petition alleges that certain activities conducted by Mr. Castro and Ms. Howell were permitted prior to annexation but that these same activities became non-conforming, pre-existing uses upon the annexation. According to Mr. Castro's and Ms. Howell's Answer to the Petition, they objected to the annexation of their property into the Village.
5. On July 13, 2005, William Kimball, Director of the Division of Agricultural Protection and Development Services, sent a letter to the Mayor of the Village of Shortsville stating that the Department received a request from Ms. Howell to review the Village's Zoning Code, and the application of the same, to her farm operation. Mr. Kimball encouraged the Village to submit any information or documentation that it would like the Department to consider in the conduct of this review.
6. By letter dated July 21, 2005, John E. Tyo, Esq., attorney for the Village of Shortsville, responded to Mr. Kimball's July 13th letter. Mr. Tyo indicated that a part

of the Castro/Howell property was annexed into the Village; and that the Village gave Ms. Howell and Mr. Castro two years in which to move their farm uses to the Town/Village line. According to Mr. Tyo, when Ms. Howell and Mr. Castro refused, the Village brought suit for a mandatory injunction to require that their operations be moved. Mr. Tyo asserted that there are valid reasons for the Village to have taken this action including that the farm operation is very near two other neighbors, the farm has electrified fencing, and the owners have allowed farm animals to graze and occupy land within the Village. Mr. Tyo contends that this has caused the neighbors to suffer from manure odors, general animal odors, insects and rodents. He stated that "the neighbors across the road have had to deal with rats, but only since the initiation of the Castro/Howell operation." Mr. Tyo attached to his letter photocopies of photographs which he said show "...the proximity of the farm animals to the abounding residences." He also indicated that the Village had "a picture of rats killed by the Cummings, across the road." Mr. Tyo concluded that the Village of Shortsville's Code requirements "...do not constitute an unreasonable restriction or regulation of farm operations, and that it can be shown that those operations as currently carried out do threaten the public health and safety."

7. On August 10, 2005, Department Associate Attorney John Rusnica responded to Mr. Tyo's July 21st letter. Mr. Rusnica informed Mr. Tyo that the Department had concluded that the Village's requirements that the Castro/Howell farm operation comply with Village Code §§95-44 and 95-65 by obtaining approval from the Zoning Board of Appeals, and a certificate of occupancy, to use their land for the harboring and raising of livestock; or by removing their livestock from the Village limits; the Village's treatment of the farm operation as a non-conforming use; and its requirement that the farm operation's fences comply with the setback of Village Code §95-42, unreasonably restricted the Castro/Howell farm operation in possible violation of AML §305-a, subd.1. Mr. Rusnica noted that the Department had reviewed the information provided by the Village regarding alleged health or safety threats and encouraged the Village to provide any other evidence (including prints of any original photographs) that it may have of such a threat presented by the farm operation.
8. On October 4, 2005, Department Senior Attorney Danielle Cordier informed Mr. Tyo by letter that the Department had completed its review of the application and administration of the Village of Shortsville's Code to the Castro/Howell farm operation. Ms. Cordier noted that the Village had not responded to Mr. Rusnica's letter by providing any additional documentation or other information in regard to the public health and safety threats alleged by the Village. She further noted that the photocopies of photographs submitted with Mr. Tyo's July 21st letter were of poor quality, and did not appear to depict a health or safety threat. The photocopies simply show the proximity of the farm animals to the neighboring residences.
9. Ms. Cordier informed Mr. Tyo that Dr. Somers performed an unscheduled site visit

and inspection of the Castro/Howell property on August 1, 2005 and investigated the health and safety issues raised in Mr. Tyo's July 21st letter. Dr. Somers observed that there was not an accumulation of manure on the property. In his opinion, the farm had a light odor, but not an overbearing one. He observed that loose feed was properly stored in closed containers and that hay bales were stored in the locked paddock in the barn.

10. During Dr. Somers' inspection of the Castro/Howell horse barn, on August 1, 2005, he observed a 4' by 4' open pool of water on the Smallridge Patz boarding house property. Upon observing the pool of water and the topography in the area between the boarding house and the Castro/Howell parcel, he found that water drains toward the Castro/Howell property. In Dr. Somers' opinion, the open pool of water, if it contained raw sewage, could give rise to odors as well as harbor rodents. He further concluded that since the Castro/Howell home is located such a long distance from where the open pool of water is located, it is unlikely that the source of the septage is the Castro/Howell home.
11. While Mr. Tyo indicated that the Village had a picture of rats killed by the Cummings, no evidence of rodents was submitted. Dr. Somers did not observe any rodents or signs of infestation, and found the Castro/Howell farm to be clean. In any event, even if a rodent infestation existed it could be difficult to determine the cause. In Dr. Somers opinion, there are a number of places in proximity to the Cummings property where rodents could survive and thrive (e.g., overgrown fields surrounding the Cummings property, a barn used to store hay and other agricultural products is located approximately 75 feet north of the Cummings property, and a cabbage plant is located to the southeast of the Cummings house).
12. Dr. Somers observed that the Castro/Howell electric fence is located along the perimeter of the farm and that the fence posts facing the Bugbee house contain signs stating that the fence is electrified. He concluded that the fence was necessary to keep the farm animals on the property and keep predators outside. The fence includes a voltage regulator, which Ms. Howell states is rated at a maximum of five joules of current. Ms. Howell informed Dr. Somers that when the fence is tested it transmits three to four joules of electricity through the system. While this level of electric current is generally enough to keep the animals confined, it is not enough to cause significant injury to adults or children. Ms. Howell indicated that neighboring kids pass through the fence to pet the animals.
13. By her October 4, 2005 letter to Mr. Tyo, Ms. Cordier informed him of the Department's position that to require that the Castro/Howell farm operation comply with Village Code §§95-44 and 95-65 by obtaining approval from the Zoning Board of Appeals, and a certificate of occupancy by the Zoning Officer, to use their land for the harboring and raising of livestock; or by removing their livestock from the Village limits; the Village's treatment of the farm operation as a non-conforming use; and its requirement that the farm operation's fences comply with the setback of Village Code §95-42; unreasonably restricts the Castro/Howell farm operation in

violation of AML §305-a, subd. 1. Ms. Cordier indicated that the Department had further concluded that the Village had not demonstrated that the public health or safety is threatened by the Castro/Howell farm operation.

14. Mr. Tyo was informed that in order for the Village of Shortsville to comply with AML §305-a, subd. 1, the Village must not impose the requirements in question upon Vikie Howell's and Stephen Castro's use of their land for the harboring and raising of livestock; require the removal of their livestock from the Village limits; designate and treat the farm operation as a non-conforming use; or require that the farm operation comply with the Village Code setback. The Village was requested to confirm within 20 days that it would not impose such requirements on the farm operation and notified that if steps to comply were not taken, the Department may take appropriate action to enforce the provisions of AML §305-a, subd.1.a. No such confirmation was received from the Village. However, by letter dated October 13, 2005, Mr. Tyo challenged the Department's intervention on behalf of the Castro/Howell operation and its authority under AML §305-a.
15. By letter dated October 28, 2005, Ms. Cordier advised Mr. Tyo that while the term "land used in agricultural production" which is used to determine eligibility for agricultural assessment requires average gross sales of \$10,000, the definition of "farm operation", used for purposes of administering §305-a, does not contain a minimum sales threshold. Ms. Cordier reiterated that the Department determined that the Castro/Howell operation met the definition of farm operation and that the Department intended to enforce the provisions of AML §305-a, subd.1.a.

CONCLUSION

Based upon the above findings, I conclude the following:

1. The administration of the Village Code to require the Castro/Howell farm operation to comply with Village Code §§95-44 and 95-65 by obtaining approval from the Zoning Board of Appeals, and a certificate of occupancy by the Zoning Officer, to use their land for the harboring and raising of livestock; or by removing their livestock from the Village limits; the Village's treatment of the farm operation as a non-conforming use; and its requirement that the farm operation's fences comply with the setback of Village Code §95-42; unreasonably restricts the Castro/Howell farm operation in Ontario County Agricultural District No. 6.
2. While expressing health and safety concerns generally, the Village has not shown that the Castro/Howell farm operation presents a threat to the public health or safety.

DETERMINATION AND ORDER

Now, therefore, in consideration of the above-stated findings and conclusions, it is hereby determined that the Village of Shortsville has violated AML §305-a, subd. 1, and it is hereby

ORDERED, pursuant to the provisions of AML §36 that the Village of Shortsville comply with the provisions of AML §305-a, subd. 1 by not administering any provisions of its Code, or other local laws, with respect to the Castro/Howell farm operation, so as to prohibit or render nonconforming Ms. Howell and Mr. Castro's agricultural uses of land, including the harboring and raising of livestock within Ontario County Agricultural District #6, or to subject such uses of land to prior approvals from the Zoning Board of Appeals, or require a certificate of occupancy by the Zoning Officer, or require the removal of fences to comply with Village setback or other requirements.

This Order shall take effect immediately upon service of a certified copy thereof on the Village of Shortsville, by mail to Hon. Robert Woodhams, Mayor, Village of Shortsville, at 5 Sheldon Street, PO Box 218, Shortsville, New York, 14548.



Ruth A. Moore, First Deputy Commissioner

Dated and Sealed this 30th
day of January, 2006
at Colonie, New York

