

Guidelines for Review of Local Laws Affecting Nursery Operations

The Agriculture and Markets Law (AML) definition of “farm operation” [AML §301(11)] includes “crops, livestock and livestock products” as defined in AML §301(2). Section 301(2)(d) defines “horticultural specialties” to include, but not be limited to, “...nursery stock, ornamental shrubs, ornamental trees and flowers.” The Department considers the production, preparation and marketing of products grown on the farm, from bare rootstock, seeds, cuttings, plugs, or other immature plants, and transplanting such products into larger containers, to be a farm operation. The Department also considers the production, preparation and marketing of woody mature plants that have been planted or healed into the ground at the nursery, or that are balled/burlapped, and cared for and grown on the property for one year or longer, to be a farm operation. The production of sod is also part of a nursery operation. A farm operation may consist of one or more parcels of owned or rented land that is contiguous or noncontiguous to each other.

Many nursery operations contain accessory buildings, such as greenhouses, for the production and sale of their agricultural products. The Department guideline entitled *Local Laws Affecting Temporary Greenhouses* should be consulted concerning such structures. Many nursery operations also sell product directly to the public. The Department guideline entitled *Local Laws Affecting Direct Farm Marketing Activities* should be consulted concerning such sales.

Local governments and growers/plant dealers should also consult with the Division of Plant Industry, Department of Agriculture and Markets, to assure compliance with State Laws. The Division of Plant Industry (<http://www.agmkt.state.ny.us/PI/PIHome.html>) is responsible for maintaining plant health, promoting integrated pest management practices, preventing the introduction of and controlling invasive species, registering nurseries and plant dealers and detecting and preventing the spread of bee diseases.

The following are some of the specific matters that the Department considers when reviewing a local law that affects nursery operations:

A. Nursery Operations as a Permitted Use

Nursery operations should be a principal permitted use in all local zoning districts located in a county adopted, State certified agricultural district, since the purpose of such districts is to encourage the development and improvement of agricultural land. Agricultural uses and structures within an agricultural district should generally not be subject to special use permits, use variances or non-conforming use requirements. Nursery operations may sell their products either retail or wholesale.

B. Product Origin

Some farmers import crops from other farms to sell at their stands to increase the diversity of products offered or to bridge periods of low supply of commodities produced on-farm. Product diversity may attract potential customers to a roadside stand or farm market. The Department believes the sale of some agricultural products grown off the farm should be allowed, but has not established a percentage of on-farm versus off-farm products for that purpose. The Department considers the facts of a particular case in making a determination whether a local law is unreasonably restrictive, but generally would view as reasonable a requirement for predominance of on-farm products. The needs of “start-up” farm operations should also be

considered. These farms often start by selling a large percentage of agricultural products grown off the farm in order to develop a customer base and maintain income while their farms are growing. Therefore, if a percentage of on-farm products were required by a locality, these farms should be allowed a reasonable period of time to meet the percentage.

The Department considers agricultural commodities produced “on-farm” to include any products that may have been produced by a farmer in his or her “farm operation” from bare rootstock, seeds, cuttings, plugs, or other immature plants, and transplanting such products into larger containers, to be a farm operation. The Department also considers the production, preparation and marketing of woody mature plants that are balled/burlapped or have been planted or healed into the ground at the nursery, and cared for and grown on the property for one year or longer, to be a farm operation. A “farm operation” may consist of a number of parcels owned or leased by that farmer throughout a town, county, or the State. The Department considers all such land as part of the farm operation.

C. Equipment Storage, Use and Maintenance

Local governments should allow farm operations within a county adopted, State certified agricultural district to store, use and maintain farm equipment for agricultural purposes in an amount and type consistent with the needs and scope of the farm operation. An on-site review of such equipment and the farm operation may be necessary to determine if the equipment is utilized for agricultural purposes as part of the farm operation.

The on-farm equipment and vehicle storage, use and maintenance, and activities of employees (e.g., parking), and the dispatching of such equipment and vehicles, which are necessary for the installation of nursery stock and plant material at a client’s site, is part of a “farm operation” under certain conditions. These include that the nursery stock and plant material be produced by the farmer in the farmer’s “farm operation” from bare rootstock, seeds, cuttings, plugs, or other immature plants or mature plants that have been planted in the ground at the nursery, or transplanted into larger containers, and cared for and grown on the property for one year or longer; the nursery offers a survivability guarantee for a period of at least three years (for sod, a guarantee of approximately four weeks, until it takes root); and the nursery stock and plant material is planted and cared for by staff employed by the nursery.

D. Storage and Use of Non-Plant Material

The Department has concluded that stockpiled soil and mulch are often necessary for the on-farm production, preparation and marketing of nursery stock. Soil and mulch are used on the farm to plant and care for nursery stock which is grown in the ground on the farm and to prepare the stock for sale. Soil and mulch are also sold to retail and wholesale customers for use in replanting nursery stock. Potting soil used by the nursery operation is also considered necessary for the production of horticultural plant material. Therefore, the storage, use and sale of soil, mulch and potting soil, in an amount consistent with the size and scope of the nursery, is part of the farm operation. In the Department’s view, however, the sale of hardscrabble, landscape timbers, masonry for the construction of retaining walls and firewood is not necessary for the production, preparation and marketing of nursery plants and, therefore, is not part of a “farm operation.”

E. Landscape Maintenance

The maintenance of nursery stock and plant material at a client's site is generally not part of a farm operation but rather landscape maintenance. Certain activities for the care and maintenance of nursery stock and plant material is part of the farm operation under the same limited conditions set forth in "C," above. Under such circumstances, the activity necessary to periodically fertilize planted nursery stock, water the plant material, and prune the same could be considered necessary to assure the survival of the plants. However, the Department does not view the following activities (not an exhaustive list) as necessary to guarantee plant survivability: grass cutting; leaf blowing; snow plowing and/or removal; lawn care and landscape maintenance services (except for periodic fertilization of planted nursery stock, watering of the plant material, and pruning the same as described above); masonry services; and general contracting services. Certain activities necessary to guarantee the survivability of sod are considered part of the farm operation, but only until the sod takes root (i.e., approximately four weeks): daily watering and, if the sod is planted in late fall when leaves are falling, removal of leaves from the newly planted sod.

F. Buffers/Screening and Fencing

Some municipalities impose buffer and screening requirements, often for aesthetic reasons. While aesthetics are an appropriate and important consideration under zoning and planning laws, the purpose of the Agricultural Districts Law is to conserve and protect agricultural lands by promoting the retention of farmland in active agricultural use. Local requirements include setbacks where vegetation, landscaping, a wall or fencing is required to partially or completely screen adjacent land uses. Often, the buffer area cannot be used or encroached upon by any activities on the lot. Requirements for buffers and screening or setbacks to construct fences and otherwise use land for agricultural purposes are generally concluded by the Department to be unreasonably restrictive. Buffers and associated setbacks may require farmers to remove land from production or otherwise remove land from use for the farm operation. The impact on nursery/greenhouse operations is especially significant since they are often conducted on smaller parcels of land. Maintenance of the buffer also creates a hardship to the landowner. If a setback is required for fencing, the farmer may have to incur the expense of double fencing the perimeter of the property, or portion thereof, to prevent encroachment by neighboring property owners.

A requirement to screen a farm operation or agricultural structures such as farm markets or greenhouses from view has been found by the Department to be unreasonably restrictive. Screening requirements suggest that farm operations and associated structures are, in some way, objectionable or different from other forms of land use that do not have to be screened. Farmers should not be required to bear the extra costs to provide screening unless such requirements are otherwise warranted by special local conditions or necessary to address a threat to the public health or safety.

G. Hours of Operation

Farmers tend to work until a job has been completed and such activities can last well into night or begin early in the morning before the commuting public begins the regular work day. If a nursery operation sells a portion of its product wholesale, it may be necessary to allow the farm market to open early in the morning to have the trucks loaded with product before the commuting public begins the work day. Retail farm markets at nurseries may also need to be

opened early in the morning and kept open into the evening during the farmer's peak seasons (e.g., spring and summer) to accommodate customers.