

Guidelines for Review of Local Laws Affecting Direct Farm Marketing Activities

Agriculture and Markets Law (AML) §300 provides that it is the policy of the State to conserve, protect and encourage the development and improvement of agricultural land for the production of food and other agricultural products. The promotion of on-farm marketing of crops, livestock and livestock products supports and promotes the viability of farm operations, as well as, preserves the land base. The definition of “farm operation” [AML §301(11)] specifically includes the land, buildings, equipment and practices that contribute to the production, preparation, and marketing of crops, livestock and livestock products as a commercial enterprise. The primary purpose of a farm operation’s marketing events or activities must be to sell the farm’s crops, livestock and livestock products. Further, the events or activities must be sufficiently related to the farm operation and the farm must produce enough of its own crops or livestock products to substantiate the need for a particular type of marketing tool.

Typically, “direct farm marketing” encompasses roadside stands, farm markets, farmers’ markets, “u-pick” or “pick your own operations” and to a limited extent, cafes. However, the Agriculture and Markets Law (AML) definition of “farm operation” [§301(11)] has been amended in recent years to include “commercial horse boarding operation,” “compost, mulch or other organic biomass crops,” “commercial equine operation” and “timber operation.” Each of these activities may require an on-farm marketing component that may differ from the typical direct farm market. Additionally, greenhouse and nursery operations may also market agricultural products produced on their farms directly to the public.¹

Direct farm marketing should be allowed in all areas within a county-adopted, State certified agricultural district. The degree of regulation of the various forms of direct farm marketing that is considered unreasonable, however, depends on the nature of the proposed activities and the size and complexity of the proposed structure. A requirement to apply for a permit is generally not unreasonable. Depending upon the size and scope of the retail facility or activity, greater regulation, such as site plan review, may be reasonable.² The Department urges local governments to take into account the size and nature of the particular farm market or activity when setting and administering such requirements. For example, to require a small farm market which sells only a minimal amount of off-farm product to obtain site plan approval, may be unreasonably restrictive.

In some instances, farmers should exhaust their local administrative remedies and seek, for example, certain permits, exemptions available under a local law or area variances, before the Department reviews a local law or its administration. However, an administrative requirement/process may, itself, be unreasonably restrictive. The Department evaluates the reasonableness of the specific requirement/process, as well as the substantive requirements imposed on the farm operation. Local laws that the Department has found not to be unreasonably restrictive include those which regulate the health and safety aspects of the construction of farm buildings through provisions to meet local building codes or the State Uniform Fire Prevention and Building Code [(“Uniform Code”) [unless exempt from the Uniform Code under Building Code §101.2(2) and Fire Code §102.1(5)] and Health Department requirements (e.g., for concessions, sanitary facilities, drinking water, etc.). Requirements for

¹ Please see *Guidelines for Review of Local Laws Affecting Temporary Greenhouses and Review of Local Laws Affecting Nursery Operations*.

² Please see *Guidelines for Review of Local Zoning and Planning Laws* for discussion of Site Plan Review and State Building Code.

local building permits and certificates of occupancy to ensure that health and safety requirements are met and a review of a site's ingress and egress as well as parking requirements are also generally not unreasonably restrictive. Noise may also become an issue. Farmers need to work with the municipality and neighbors to mitigate noise impacts and/or place reasonable limits on the hours of operation.

The following are some of the specific matters that the Department considers when reviewing a local law that affects direct farm marketing:

A. Maximum Dimensions:

Generally, the Department considers whether maximum dimensions imposed by a local law are sufficient to meet existing and/or future farm needs. For example, many roadside stands are located within existing garages, barns, and outbuildings that may have dimensions greater than those set by a local ordinance. Buildings specifically designed and constructed to accommodate the sale of farm products may also not meet the local requirements. The size and scope of the farm operation is also considered. Larger farms, for example, cannot effectively market their produce through a traditional roadside stand

B. Sign Limitations:

Whether or not a limitation on the size and/or number of signs that may be used to advertise a roadside stand is unreasonable depends upon the location of the stand and the type of produce sold. A farmer who is located on a principally traveled road probably will not need as many signs as one who is located on a less traveled road and may need directional signs to direct the public to their stand. The size of a sign needed may depend on whether the farmer needs to advertise the availability of several different types of produce or just one or two products.

C. Product Origin:

Some farmers import produce 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 requiring a "predominance"³ of on-farm products as reasonable. The needs of "start-up" farm operations should also be considered. These farms often start out 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. If a percentage of on-farm products were required by a locality, allowing such farms a reasonable period of time to meet the percentage would be reasonable (see the

³ At least 51% of the agricultural crops, livestock and livestock products sold, on an annual basis, must be from the farm's own production. Crops, livestock and livestock products that are imported from other farms must be representative of the crops, livestock and livestock products that the farm grows/raises and sells. See *Guideline for Review of Local Laws Affecting Preparation and Marketing Activities by Start-Up Farm Operations*).

Department's *Guideline for Review of Local Laws Affecting Preparation and Marketing Activities by Start-Up Farm Operations*).

The Department considers agricultural commodities produced “on-farm” to include any products that may have been produced by a farmer on their “farm operation,” which could include a number of parcels owned or leased by that farmer throughout a town, county, or the State. The Department considers all such land, when it is located in a State certified agricultural district, as part of the farm operation.

D. On-farm preparation and sale of processed foods:

Some larger farm markets may have facilities for the on-site preparation of processed foods (e.g. a kitchen, bakeshop, etc.), as well as facilities for the consumption of foods (e.g., a café). The Department considers these practices to be part of the farm operation as long as the products that are prepared are predominantly composed of ingredients produced on the farm. 100% of products sold from the on-farm kitchen/cafe must be predominantly composed of ingredients produced on the farm.⁴ Crops, livestock and livestock products that are imported from other farms to be used to prepare the farm’s processed foods must be representative of the crops, livestock and livestock products that the farm raises. The Department recognizes, however, that a *de minimus* percentage of the overall composition of the food product(s) prepared on-site may include some ancillary ingredients, such as condiments, veggies and bread or rolls (e.g. the farm sells burgers, sandwiches, wraps, tacos/tortillas, soups, etc. using the farm’s own meats or vegetables.)

The primary purpose of on-site preparation and sale of processed foods must be to market the farm’s crops, livestock and livestock products and the farm must demonstrate that there is a clear connection to the on-farm produced crops, livestock and livestock products. The farm’s products must be prominently featured at the point of sale. Marketing materials (e.g. signage noting that the value-added product is composed of on-farm products; brochures, pamphlets, presentations, photos, branded items, etc.) must be prominently displayed.

In all cases, it would not be unreasonable for the municipality to require that the farmer provide proof that their facilities comply with local Health Department and/or Federal, State or reasonable local law requirements.

E. Ag-tourism/recreational activities:

Many farm markets offer some form of on-farm recreational activity such as hayrides, a petting zoo, or a cornfield maze. These activities are often an important component of farm markets since they are a useful tool to attract customers. If it can be shown, on a case by case basis, that an activity will “...*contribute* to the production, preparation and marketing of crops, livestock, or livestock products...” [AML §301(11), emphasis added] it may be considered by the Department to be part of the farm operation. However, the activity, e.g., hayrides, a petting zoo, or a cornfield maze, must be used as part of the direct marketing strategy of the farm operation and the primary purpose of the activity must be to sell the farm’s products/services, not to serve as a recreational use of the land. Crops, livestock or livestock products must be grown or raised and sold through direct marketing to the public at the time the activity is in use since these

⁴ The Department does not protect the sales of pre-packaged, processed products that are customarily sold at retail outlets. However, some municipalities may allow the sale of a certain percentage of these products that are locally produced.

activities are designed to attract potential customers to the property so they may purchase crops, livestock or livestock products.⁵

Similarly, the Department has concluded that on-farm special events, such as harvest festivals, help market the farm operation's crops, livestock and livestock products. These activities, as well as on-farm recreational activities, are evaluated on a case-by-case basis to determine whether they are protected as part of the farm operation. The Department interprets AML §301(11) to include such activities as part of a farm operation under certain conditions. The events and activities must be: 1) directly related to the sale and promotion of the crops, livestock and livestock products produced at the farm⁶; 2) incidental and subordinate to the retail sale of the farm's crops, livestock and livestock products; 3) hosted by the farm; and 4) feature the farm's crops, livestock and livestock products.

The Department considers events/activities to be "incidental" only when the gross annual receipts from facility rental/vendor fees, admission fees, sale of non-agricultural products⁷, etc. at such events/activities does not exceed 30% of total gross sales from the retail sale on-site of crops, livestock and livestock products at such events. All products must be sold at a cost no higher than the current retail price of such products sold at the farm. The primary purpose of the event/activity is to sell the farm's agricultural commodities and not to gain admission fees or rental income. **Farmers must keep sufficient records to prove that this requirement is met. Further, local governments can require the farm to submit an annual report to the locality showing that these conditions have been met.**

In cases where the farm operation offers a recreational activity or holds a special event, including charitable events, as part of its overall marketing strategy, the event is open to the general public, the farm's agricultural products/services are sold at the event and no admission, facility rental and/or vendor fees⁸ are involved, these activities are part of the farm operation and an evaluation of fees versus farm product sales would be unnecessary. The primary purpose of the events must still be to market the farm's agricultural commodities and the events must be sufficiently related to the farm operation.

F. Local Permits and Approvals for Marketing Activities

In regulating these activities, local governments may require farm landowners that hold such events to undergo an expedited site plan review process and/or obtain an event permit

⁵ Horse boarding services would be marketed for a "commercial horse boarding operation"; commercial equine services for a "commercial equine operation"; woodland products for a "timber operation"; and "compost, mulch or other biomass crops" for farms removing excess agricultural waste. This guidance document applies to these services/products as well as to "crops, livestock and livestock products."

⁶ Crops, livestock and livestock products from other farms may be sold at events/activities when they are representative of the crops, livestock and livestock products that the farm grows/raises and sells and the annual sales of these "off-farm" produced agricultural products does not exceed 49% of total gross sales of all crops, livestock and livestock products.

⁷ If a farm offers food and beverages for sale at such events/activities through vendors, as a convenience to its customers, and the farm is not charging the vendor or sharing in the profits from the sale of these non-agricultural products, these sales would not, of course, be counted as gross sales to the farm.

⁸ Admission fees or minimum donations which are donated to a charity are, of course, not subject to this condition. Further, the fact that admission fees or all, or a portion of sales, from the event are donated to a charity does not mean that the primary purpose is not to market the farm's agricultural products. The Department evaluates all AML §305-a matters on a case-by-case basis. Therefore, if necessary, the Department would examine the specific event(s) to determine whether it is part of the farm operation.

from the regulating municipality. The Department discusses an expedited site plan review process in its *Guideline for the Review of Local Zoning and Planning Laws* (<http://www.agriculture.ny.gov/AP/agsservices/guidancedocuments/305-aZoningGuidelines.pdf>).

If the municipality requires the farm landowner to obtain an event permit, the permit should be issued on an expedited basis and not be excessively costly to obtain. For example, an event permit application meeting these standards might request information on such things as the date(s) of the event, type of event being held, the anticipated number of people in attendance, parking, whether catered food or food prepared on-site, the fee charged to rent the facility or the cost of admission and a description of the buildings to be used during the event. The permit could also make provisions for any inspections that must be made by the Code Enforcement Officer/Building Inspector, Fire Marshall and/or Health Department, and other reasonable requirements that may be pertinent to the holding of such events.

While special use permits should not generally be required for a farm that markets through a limited number of small-scale events; farms which market their produce through multiple, large-scale events on a regular basis could be required to obtain a special use permit. The Department supports such an approach, in certain cases, when the permit process is streamlined, since it allows local governments to comprehensively address specific facts and circumstances presented by the farm's events. If a farm claims that the process to obtain a permit, or the conditions imposed, are unreasonably restrictive, the Department could review the matter under AML §305-a.

The Department reviews all matters under AML §305-a on a case-by-case basis. A Department determination that a farm's marketing activities are part of a farm operation and, therefore, eligible for protection under AML §305-a; does not extend to the sale of products or the use of marketing activities that were not reviewed by the Department. Therefore, a local approval based upon the Department's enforcement of AML §305-a could be revoked if the farm changes the products that it sells or the marketing activities used.

G. What Types of Activities Can Be Offered at a Farm's Marketing Events?

While events held at a farm which markets its crops, livestock and livestock products may be considered part of a farm operation; not all activities which may be offered at such events are part of a farm operation. Specific marketing activities, and the components of those activities, are evaluated on a case-by-case basis. For example, the Department previously found that the following activities/uses at a certain farm's festival were not part of the farm operation: hot air balloon rides, fireworks, pedal karts, cow train and activities such as a jumping pillow and gemstone mining. The town involved in that matter explored a site plan review law to examine public events/venues and gatherings at farms.

The Department carefully evaluates farm marketing activities to ensure that the primary purpose of the events is to sell the farm's products; and that the activities are sufficiently related to the farm. For example, a corn cannon and pumpkin launcher were found to be part of the referenced farm's protected marketing activities since the farm's products were sold and directly used for the activity.