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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

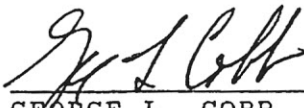
rational basis.

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.

**Supreme Court - Appellate Division
Third Department**

Decided and Entered: March 11, 1999

83293

In the Matter of the TOWN OF
BUTTERNUTS,
Appellant,

v

MEMORANDUM AND ORDER

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

Calendar Date: January 12, 1999

Before: Mikoll, J.P., Yesawich Jr., Spain, Carpinello and
Grafteo, JJ.

Hinman, Straub, Pigors & Manning (Lawrence H. Schaefer of
counsel), Albany, for appellant.

Joan A. Kehoe, Department of Agriculture & Markets (John F.
Rusnica of counsel), Albany, for respondent.

Grafteo, J.

Appeal from a judgment of the Supreme Court (Cobb, J.),
entered December 15, 1997 in Albany County, which dismissed
petitioner's application, in a proceeding pursuant to CPLR
article 78, to review a determination of respondent finding,
inter alia, petitioner in violation of Agriculture and Markets
Law § 305 (2) and § 305-a (1).

In an effort to reduce the use of commercial fertilizers on his cropland in the Town of Butternuts, Otsego County, Bruce Giuda sought to landspread restaurant and residential septage on 40 acres of his farmland. Working in conjunction with Giuda, in February 1996 Van Houten Contracting Services Inc. applied for a septic tank cleaner and industrial waste collector permit from the State Department of Environmental Conservation (hereinafter DEC) to engage in the landspreading at Giuda's farm which lies within the Otsego County Agricultural District. DEC issued a negative declaration after its environmental assessment in April 1996 but approximately two months later, residents of the Town of Butternuts voiced environmental concerns at a town meeting. DEC thereafter requested Van Houten to address certain issues raised by the Town.

Eventually, in August 1996, DEC issued a permit for the spreading of 400,000 tons per year of restaurant and household septage on Giuda's farmland. Nevertheless, the Town determined that the proposal was in violation of Local Law No. 2 of 1993 which prohibited the operation or maintenance of "dumps for the disposal of garbage and rubbish" in the town. Giuda thereafter sought the assistance of the State Department of Agriculture and Markets regarding the dispute. At the conclusion of an investigation, which included a site visit, the Commissioner of Agriculture and Markets determined that the Town's Local Law was in contravention of Agriculture and Markets Law (hereinafter AML) § 305 (2) and § 305-a (1) and directed the Town to amend its laws.

In July 1997 the Town filed a CPLR article 78 petition challenging the Commissioner's determination on the basis that respondent lacked authority to make its determination and that it was arbitrary and capricious. Supreme Court dismissed the petition and this appeal is addressed solely to the question of whether respondent was authorized by statute to declare the Town's Local Law in contravention of the AML.

Petitioner argues that in order to enforce AML § 305 (2) and § 305-a (1), the Commissioner was required to commence an action, rather than issue an order after an investigation.

Pursuant to AML § 305-a (1), local governments shall not unreasonably restrict or regulate farm operations within agriculture districts. Similarly, AML § 305 (2) provides that local governments shall not enact local laws which would unreasonably restrict or regulate farm structures or farming practices. While AML § 305 (2) provides that respondent may bring an action to enforce its provisions, AML § 305-a (1) does not contain such a provision.¹ AML § 36 (1) states that respondent may issue an order compelling compliance with a provision of the AML or regulation of the Department of Agriculture and Markets after an investigation is conducted by respondent if it is determined that any person, association or corporation² has failed to comply with or is guilty of a violation of such provision or regulation. An order under AML § 36 (1) is reviewable in the manner provided by CPLR article 78 (see, AML § 37).

Here, respondent's directive was issued after an investigation and was, therefore, proper pursuant to AML § 36 (1), especially since AML § 305-a (1) did not contain a provision mandating the manner by which respondent was to seek enforcement of local government's compliance with its laws and rules regarding the regulation of farm operations. Based on the

¹ Subsequent to the issuance of respondent's determination and order on June 18, 1997, AML § 305 (2) was repealed, effective November 3, 1997, by the Laws of 1997 (ch 357, § 9). Section 11 of said chapter amended AML § 305-a (1) to provide that the Commissioner upon his or her initiative, or upon the receipt of a complaint from a person within an agricultural district, may bring an action to enforce the provisions of this subdivision. We find, however, that the former versions of the statutes are applicable to this case since the amendments became effective after issuance of respondent's determination.

² Pursuant to General Construction Law § 65 (a) (1) and § 66 (1) (2), a municipality is deemed a corporation and, therefore, the Town of Butternuts is within the purview of AML § 36 (1).

foregoing, we conclude that respondent properly relied on AML § 36 (1) in its enforcement efforts and, therefore, we reject petitioner's contention that respondent was compelled to initiate a plenary action under the former provisions of AML § 305-a (1).

Mikoll, J.P., Yesawich Jr., Spain and Carpinello, JJ.,
concur.

ORDERED that the judgment is affirmed, with costs.

ENTER:

Michael J. Novack
Clerk of the Court