

KATHY HOCHUL

Governor

RICHARD A. BALL

Commissioner

December 14, 2022

By UPS Next Day Service and US Mail

The Honorable Eric Adams
Office of the Mayor
City Hall
New York, NY 10007

Stephen Louis, Esq. Chief The City of New York Law Department 100 Church Street New York, NY 10007

Dear Mayor Adams and Mr. Louis:

The Department of Agriculture and Markets hereby serves upon the City of New York the enclosed Final Determination and Order, dated December 7, 2022. Pursuant to AML §36, the City must notify the Department in writing of the receipt of the Order. In addition, the Department is requesting notification within 10 days of the receipt of the Final Determination and Order of the steps taken by the City to comply with the terms of the Order.

The decision of the Commissioner is final, unless within 30 days the City institutes a proceeding to review the decision in the manner provided by Article 78 of the Civil Practice Law and Rules.

If you require further information or have any questions, please contact me at (518) 457-1059.

Very truly yours,

Scott Wyner

Counsel

Enc.

CC:

Marcuse Henley, Vice President and General Manager HVFG

Sergio A. Saravia, Esq., La Belle Farm, Inc.



KATHY HOCHUL Governor RICHARD A. BALL Commissioner

December 14, 2022

By UPS Next Day Service and US Mail

The Honorable Eric Adams Mayor of the City of New York Office of the Mayor City Hall New York. NY 10007

Stephen Louis, Esq. Division of Legal Counsel 100 Church Street New York, NY 10007

RE: AML §305-a(1) Final Determination Concerning New York City's Ban on the Sale of "Force-Fed" Products as applied to Hudson Valley Foie Gras and La Belle Farm

Dear Mayor Adams and Mr. Louis:

The Department of Agriculture and Markets (the "Department") commenced an Agriculture and Markets Law ("AML") §305-a review of New York City Local Law 202 of 2019/NYC Admin. Code §17-1901 ("Local Law 202") by request of Hudson Valley Foie Gras, LLC ("HVFG") and La Belle Farm, Inc. ("LBF"), farm operations located in Sullivan County Agricultural Districts Nos. 1 and 4. Local Law 202 "proscribes the sale or provision of force-fed products" within the City of New York (the "City") because the City believes force-feeding of ducks to be a cruel on-farm practice.

By letter dated August 4, 2020, the Department made an interim determination that Local Law 202 unreasonably restricts the operations of HVFG and LBF, in possible violation of AML §305-a. The Department invited the City to submit documentation or other evidence to support any claimed public health or safety threats related to LBF and HVFG's production of "force-fed" livestock products.

The City's submission, by Stephen Louis, Esq. dated November 30, 2020, challenged the Department's authority to undertake an AML §305-a review of Local Law 202. The City argued that the prohibition of the sale and distribution in the City of poultry products produced using onfarm feeding practices it believes to be cruel is a legitimate exercise of the City's home rule powers. The City further argued that the Department is acting outside its jurisdiction because AML §305-a is limited to land use restrictions enacted by a local government affecting farms located in an agricultural district within that local government's boundaries.

For the reasons set forth below, as well as those set forth in the Department's August 4, 2020 letter, the Department finds that: (1) AML §305-a provides the Department with the authority to review Local Law 202; (2) that Local Law 202 unreasonably restricts the farm operations of HVFG and LBF; and (3) that Local Law 202 violates the policy and goals of AML Article 25-AA.

Discussion

HVFG and LBF, farm operations located in New York State agricultural districts, challenge Local Law 202 – a local law that prohibits the sale or provision in the City of poultry products produced using the gavage feeding method – as unreasonably restrictive. The City's justification for the prohibition is its belief that the feeding practice constitutes animal cruelty.

AML §305-a reviews are fact specific, case-by-case, technical reviews of local law restrictions and their impact on the operations of farm operations located in agricultural districts. The review process includes field investigations and a review of information provided by farm operations and local governments. The focus of such reviews is the reasonableness of a law or regulation, its impact on the farm operation, and whether the local government can demonstrate any threat to public health or safety.

In this case, the Department's investigation included a review of correspondence and documentation submitted by HVFG and LBF; site review by both Dr. Robert Somers (the now retired Manager of the Department's Agricultural Protection Unit) and by Kathleen Tylutki (Department Environmental Analyst); a review of the City's correspondence dated November 30, 2020; and a review of Local Law 202 and its legislative history.

The submissions of HVFG and LBF establish that, should the farms continue their farming methods, the statutory denial of access to the City market will threaten the viability of their farm operations. Further, the City's intent and purpose of the ban is to induce the abandonment of the traditional feeding practice used by HVFG and LBF by denying the farms access to their principal market.

The City made no factual submissions to the Department. It limited its response to legal arguments that: (1) the City has the authority to enact a law designed to change on-farm animal husbandry practices by farms beyond its borders, and within agricultural districts, by closing its markets to a lawfully produced product; and (2) the Department lacks jurisdiction under AML §305-a to supersede a local law that precludes the farms' ability to sell or distribute its product in the City's markets.

The City did not contest the Department's findings in its August 4th letter that: (1) the feeding practices of HVFG and LBF are customary agricultural practices; (2) there are currently no commercially viable alternatives to handfeeding to produce foie gras; (3) HVFG and LBF are in compliance with the laws of New York State; and (4) there are no federal or State prohibitions on the production or sale of the farm products produced by HVFG or LBF due to their feeding practices.

The Department's findings, supported by the farms' submissions and the staff field investigation, demonstrated: (1) that HVFG's and LBF's ability to market their livestock products in the City supports their viability; and (2) that a statute-based sales ban will directly and severely impact their ability to operate. Indeed, the very purpose of Local Law 202's denial of access to

the City market is to induce HVFG and LBF to adopt feeding practices that the City deems acceptable, or to force them out of business by rendering them unviable.

The only reason proffered for the ban is the City's view that the on-farm animal husbandry practices used to produce foie gras constitutes animal cruelty. The City does not contend that Local Law 202 is designed to address a threat to public health or the safety of anyone residing in the City or elsewhere.

The Department has not typically received jurisdictional challenges during its AML §305a investigations and proceedings. However, given the City's arguments concerning the Department's authority, some background discussion of the protections afforded to agricultural lands found in the State's Constitution, and the protections available to farm operations in agricultural districts under the Agricultural Districts Law appears to be warranted. Moreover, over the years, the Department has been intimately involved in the administration of the Agricultural Districts Law. The Executive Branch has consistently worked with the Legislature in broadening the Department's statutory authority to protect farm operations from unreasonable regulations and restrictions imposed by local governments. The Department's expertise (which includes farm operations' sale, distribution, and marketing of agricultural products) is applied in the performance of its statutory oversight responsibilities in assisting local governments to comply with the policy objectives and requirements of the law. Accordingly, this expertise has resulted in judicial deference to the Department's analysis of the Agricultural Districts Law and the impact of local restrictions on farm operations. See, e.g., Town of Clarence v. Ball, Sup Ct, Albany County, Special Term, November 6, 2015, Melkonian, J. Index No 3897/2015, at 6-7, (Where the "interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute").

The City supports its promulgation of Local Law 202 arguing that municipal home rule gives local governments broad power to regulate with respect to "government, protection, order, conduct, safety, health and well-being of persons or property of its citizens," including the regulation of businesses, so long as those laws are not inconsistent with State law. (See, City's letter, dated November 30, 2020, p.7). However, the express delegation by the State of power to regulate in these areas is limited, and its exercise must relate to the purpose of the delegation. See, e.g., Good Humor Corp. v. City of New York, 290 N.Y. 312, 317 (1943) (New York City acts beyond its delegated power when it regulates street use for the sole purpose of protecting rent and taxpayers from lawful competition from those lawfully conducting business but who do not pay rent); People v. Cohen, 272 N.Y. 319 (1936) (New York City law barring sale or display of foodstuffs for human consumption to protect real estate values of an area in the city for the convenience and interest of a special class bears no relation to the public welfare and exceeds the local government's police power).

Although requested to set forth any claim that Local Law 202 is supported by a threat to public health or safety, the City advanced no such argument or factual basis to support the claim that the closing of the City's markets to HVFG's and LBF's products was done for the protection of the health, safety, or welfare of its citizens. Nor does the City address the legislative history surrounding the adoption of Local Law 202 – specifically, the comments of the Chair of the City

¹ The fact that Local Law 202's effective date was delayed three years to offer producers time to find a commercially viable alternative production method and permitting the sale of foie gras using other feeding methods, precludes any viable claim the sales ban was enacted for public health reasons.

Council's Sub-Committee on Health, who describes the objective or possible impact of Local Law 202 as either to end the gavage feeding method due to the economic harm caused by the sales ban, or to induce the development of an alternative feeding method because gavage feeding is "clearly an inhumane practice." Further, while acknowledging the intended economic impact on foie gras producers, the Sub-Committee Chair justified the bill as one of those being considered that translates empathy for animals "into tangible policy, smart policy, for the animals in the city and beyond." See New York City Council Committee on Health October 29, 2019 Transcript of the Minutes, pages 3, 5-6.

Regardless, a determination of whether Local Law 202 is a proper exercise of the City's home rule powers is unnecessary for the Department's determination of whether Local Law 202 constitutes an unreasonable restriction of these farm operations located within agricultural districts. AML §305-a(1) provides the Department express statutory authority to supersede a local law if the Department finds that the law unreasonably restricts farm operations in agricultural districts unless the local government demonstrates that the public health or safety of its citizens are threatened. Town of Lysander v. Hafner, 96 N.Y. 558, 733 N.Y.S.2d 358 (2001).

As set forth in the Department's August 4, 2020 letter, the Department determined that the ban on the sale and distribution of foie gras was an unreasonable restriction on HVFG and LBF. In response, the City neither challenged the basis of the Department's reasonableness determination, nor argued that Local Law 202 is related to public health or safety.

The City's remaining defense of Local Law 202 is that the sales ban is beyond the reach of AML §305-a(1) because that section affords no protection to farm operations from laws promulgated by local governments outside the border of the agricultural districts within which the farms operate. However, AML §305-a(1), by its plain terms, reaches unreasonable local restrictions on farm operations operating in agricultural districts without regard to where the local governments are located. Well settled principles of statutory interpretation provide that "the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." Peyton v. New York City Bd. of Standards & Appeals, 36 N.Y.3d 271, 279, 164 N.E.3d 253, 258 (2020) citing Kuzmich v. 50 Murray St. Acquisition LLC, 34 N.Y.3d 84, 91, 108 N.Y.S.3d 431, 132 N.E.3d 624 (2019) rearg. denied 33 N.Y.3d 1135, 109 N.Y.S.3d 216, 132 N.E.3d 1096 (2019), cert. denied U.S. ___, 140 S. Ct. 904 (2020). Here, Section 305-a provides:

Local governments, when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules, or regulations, shall exercise the powers in such a manner as may realize the policy and goals set forth in this article, and 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 limitations that the City reads into AML §305-a are nowhere found within the express terms of the statute. Moreover, AML §305-a also imposes a duty on all local governments to exercise the powers they are granted to realize the goals of Article 25-AA – a duty the City has ignored.

As the express terms of AML §305-a provide no support for the City's construction of the law, the City selectively cites portions of the legislative history describing an earlier version of the statute that limited AML §305-a reviews to "comprehensive plans and <u>land use</u> laws, rules, or regulations" (Emphasis added). However, in 1997, the Legislature enacted major changes to

Article 25-AA by streamlining agricultural district administration, expanding both the scope of the protections afforded to farm operations in agricultural districts and broadening the Department's power to enforce those protections. The only change to the wording of AML §305-a(1) made by the Legislature in 1997 relevant to this proceeding was that "land use" was removed from the phrase "land use laws" — a dispositive change entirely ignored by the City.

Nevertheless, while the City quotes a passage from the 1997 legislative history that focuses on the reasons for the consolidation of Sections 305(2) and 305-a, it completely ignores the portions of the legislative history that directly relate to the removal of the term "land use" from the statutory text. The 1997 Bill Memo's "Summary of Provisions" with respect to §305-a(1) states:

Section 305-a is amended by incorporating the language of paragraph (b) of Section 305(2), to authorize the Commissioner to bring an action to enforce the provisions of Section 305-a(1) and by expanding the scope of the Section to apply to all laws, ordinances, rules or regulations. (Emphasis added)

That same bill memo, in contrast, describes the then existing law, as follows:

Section 305-a(1) provides that local governments shall not enact or administer comprehensive plans and local land use laws which would unreasonably restrict or regulate farm operations within agricultural districts unless it can be shown that the public health and safety is threatened.

Therefore, the City's contention that AML §305-a currently applies only to local land use laws is without merit. It is unsupported by the express language of the statute and unequivocally contradicted by the relevant portion of the legislative history that describes the change that was ultimately adopted.

Further, the City's construction of AML §305-a(1) is inconsistent with long-standing State policy and statute. Article XIV, §4 of the New York State Constitution declares that "the policy of the state shall be to encourage the development and improvement of its agricultural lands for the production of food and other agricultural products." AML §300 provides, in part, that the "social-economic vitality of agriculture in this state is essential to the economic stability and growth of many local communities and the state as whole." It further provides that it is State policy to "conserve, protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products," and to "protect and enhance agricultural land as a viable segment of the local and State economies and as an economic and environmental resource of major importance." Article 25-AA provides numerous protections for farmland; and AML §305-a(1) expressly grants the Department the power to supersede local laws that unreasonably restrict or regulate farm operations within agricultural districts, absent a showing of a public health or safety threat.

The City contends that AML §305-a does not reach Local Law 202 because all the City has done is regulate the conduct of businesses within its jurisdiction. This argument, however, has no merit. AML §305-a prohibits local governments, not only from unreasonably regulating farm operations, but from imposing unreasonable restrictions on farm operations that are located within agricultural districts. Local Law 202's prohibition of the purchase, sale, or distribution of the "force-fed" products was enacted to restrict HVFG and LBF from accessing and selling its products in the City – a restriction subject to AML §305-a review. Cf. National Meat Assn. v. Harris, 132 U.S. 965, 973 ("...if the sales ban were to avoid the FMIA's preemption clause, then any

State could impose any regulation of slaughterhouses just by framing it as a ban on the sale of meat produced in whatever way the State disapproved. That would make a mockery of the FMIA's preemption provision."); Engine Mfrs. Assn. v. South Coast Air Quality Management Dist., 541 U.S. 246, 255 (2004) ("A command, accompanied by sanctions, that certain purchasers may buy only vehicles with particular emissions characteristics is as much an 'attempt to enforce' a 'standard' as a command, accompanied by sanctions, that a certain percentage of a manufacturer's sales volume must consist of such vehicles.") That the City lacks the power to directly regulate farm production methods beyond its jurisdiction, does not insulate its sales ban from the Department's §305-a power to supersede a local law that unreasonably restricts farm operations within agricultural districts from selling into the local government's market. To argue otherwise substantially erodes the State statutory protections afforded to farm operations in agricultural districts from unreasonable local governments restrictions, whether those restrictions are achieved by direct regulation or a sales' ban.

The City concludes its analysis with a review of some of the few reported cases addressing AML §305-a, noting that these proceedings all involved local laws adopted by governments affecting farms in agricultural districts located within their borders. From this, the City erroneously concludes that AML §305-a does not reach Local Law 202. However, it should come as no surprise that most, if not all, of the Department's AML §305-a proceedings involving agricultural districts arise out of challenges to laws adopted by jurisdictions with farms operating within agricultural districts. No conclusions can be legitimately drawn from the City's small sample of cases that have little or no relevance to the issues in this proceeding.

What is unusual, however, is the City's effort to use its police powers and business regulatory authority to bar the sale of a lawfully produced farm product – not for reasons of the health, safety, or welfare of its citizens – but to change animal husbandry practices occurring on farms outside its jurisdiction to which it objects. That this issue appears to be one of "first impression" simply indicates that few, if any, local governments have had the desire or the market power to engage in this type of legislative overreach to change conduct beyond its jurisdiction that poses no threat to the health or safety of its residents or visitors. On the other hand, the City's sales ban will have a severe economic impact on HVFG and LBF, their workers, and the local economy of the surrounding community.

In short, Local Law 202 is a local law that unreasonably restricts HVFG and LBF from selling and distributing their products within the City. The City's jurisdictional objection lacks merit; and the City has demonstrated no threat to the public health and safety.

Conclusion

By reason of the foregoing, Department finds that: (1) the City violated AML §305-a(1) and the policy and goals set forth in Article 25-AA by enacting Local Law 202; (2) Local Law 202 unreasonably restricts HVFG and LBF farm operations in violation of AML §305-a(1); and (3) the City has not demonstrated that the public health or safety is threatened by the sale or provision of livestock products produced by HVFG and LBF.

The Department requests that the City confirm that it will not enforce its ban on the sale of force-fed products marketed by HVFG and LBF and herewith serves the City with an administrative Order enforcing the provisions of AML §305-a(1) and this Final Determination.

Should you have any questions, please contact Danielle Cordier, Senior Attorney, at (518) 457-2449.

Very truly, yours,

Scott vvyner/

cc: Marcus Henley, Vice President and General Manager, HVFG Sergio A. Saravia, Esq., La Belle Farm, Inc.

STATE OF NEW YORK DEPARTMENT OF AGRICULTURE AND MARKETS

In the Matter of Compelling Compliance with the Provisions of Section 305-a(1) of the Agriculture and Markets Law

ORDER

TO: The City of New York

City Hall

New York, NY 10007

Attn: Hon. Mayor Eric Adams

The City of New York Law Department

100 Church Street

New York, NY 10007

Attn: Chief Stephen Louis, Esq.

WHEREAS, the Department, upon the request of Hudson Valley Foie Gras, LLC (HVFG) and La Belle Farm, Inc. (LBF), farm operations located in Sullivan County Agricultural Districts Nos. 1 and 4, has undertaken a review of City of New York Local Law No. 2019/202, see NYC Admin Code §17-1901, et seq, ("Local Law 202"), which regulates and proscribes the sale of force-fed products within New York City; and

WHEREAS, the Department has conducted an investigation, including a site visit, and has received submissions from HVFG, LBF and New York City; and

WHEREAS, by its Interim Determination, dated August 4, 2020 and its Final Determination, dated December 7, 2022, the Department found that Local Law 202 unreasonably restricts HVFG and LBF's farm operations and on-farm practices, and said farm operations are located in county adopted, State certified agricultural districts; and

WHEREAS, New York City neither contends nor has submitted any information demonstrating any public health or safety threat in connection with the prohibition of the sale of force-fed products within New York City; and

WHEREAS, the Department has issued its Final Determination, ruling that Local Law 202, NYC Admin Code §17-1901, et seq., violates Section 305-a(1) of the Agriculture and Markets Law, and the policy and goals of Agriculture and Markets Law Article 25-AA, it is hereby

ORDERED, pursuant to the provisions of Section 36 of the Agriculture and Markets Law, that the City of New York immediately comply with the provisions of Section 305-a of the Agriculture and Markets Law and not take any action, whether direct or indirect, in the administration of or pursuant to Local Law 202, NYC Admin Code §17-1901, et seg. that would restrict HVFG's and/or LBF's ability to sell their

product in the New York City market due to their on-farm gavage feeding practices; and it is further

ORDERED, that this Order shall take effect immediately upon the service of a certified copy thereof on the Mayor of New York City, by mail to Eric Adams, Mayor of the City of New York, City Hall, New York, NY 10007; and it is further

ORDERED, that the City of New York shall notify the Department within ten business days of the service of the Final Determination and Order whether the Order is accepted and will be obeyed.

Dated and Sealed this // day of December 2022 at Colonie, NY

RICHARD A. BALL

Commissioner of Agriculture and Markets of the State of New York