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November 12, 2019

Supervisor Ray Oberly and
Members of the Town of Clinton Town Board
1215 Centre Road
Rhinebeck, NY 12572

Re: Proposed Local Law of 2019 – “Events Law”

Dear Supervisor Oberly and Members of the Town Board:

We have been asked to review the Town’s proposed “Events Law,” and submit these comments for the Town Board’s consideration at the continued public hearing tonight. We ask that our comments be made part of the public record of the hearing. We appreciate the hard work that goes into preparing a local law and we thank the Town Board for its efforts to promote agriculture in the Town.

We comment on the local law’s regulations for “Agricultural Events Venues” to the extent that such “venues” are proposed on farm operations that qualify for protection under New York Agriculture and Markets Law Section 305-a (“Section 305-a”).¹ We believe that the provisions which treat agri-tourism and the marketing of products made or grown on the farm as discrete, one-time accessory activities; and not as a component of the primary use of land for agriculture, are inconsistent with the protection granted by the State under Section 305-a.²

The state’s definition for “farm operation” 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 operation.³ The Department of Agriculture and Markets (the “Department”) recognizes that direct marketing events are a component of the use of land as a

¹ To qualify as an Agricultural Events Venue, a Farm must meet the requirement for protection under New York Agriculture and Markets Law Section 305-a (“Section 305-a”) or must generate annual gross revenues of at least \$50,000 from Agricultural Operations as defined by Agriculture and Market Law Section 301(2) not including Event proceeds. (Proposed Events Law at Section 1, proposed definition for “Agricultural Events Venue.”)

² The definition for an Agricultural Events Venue states that such events are “permitted only as an Accessory Use for the purpose of promoting agri-tourism or marketing products made or grown predominantly on the Farm.”

³ Agriculture and Markets Law Section 301(11) (emphasis added).

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farm operation, not a series of separate, “accessory” activities which can be separately controlled and limited.⁴ Direct marketing events are protected by Section 305-a, which provides that local governments shall not *unreasonably restrict or regulate farm operations* within approved Agricultural Districts.⁵ When a municipality seeks to enforce a local law or regulation in a manner that is in conflict with the policy objectives of the Agriculture and Markets Law, the local law or regulation is subject to nullification on the principle that the local regulation is superseded by the State policy.⁶

By regulating events for “promoting agri-tourism or marketing products made or grown predominantly on the Farm” as an accessory use, the proposed local law comes into direct conflict with Section 305-a which protects such direct marketing as a component of the primary use of the property as a farm operation. Numerous regulations in the proposed local law may be deemed by the Department as an unreasonable restriction on farm operations seeking to hold direct marketing events. A few examples are discussed below.

- There is no acreage minimum to qualify as a “farm operation” under state law.⁷ Therefore, the minimum acreage requirements in the proposed local law restricting farms under 75 acres from hosting “events” would likely be considered an unreasonable restriction on agriculture if the farm is located with an Agricultural District and qualifies for protection under Section 305-a.
- The Department’s position is that any special use permit and site plan review for direct marketing activities as part of a farm operation should be a streamlined review.⁸ The

⁴ “Guidelines for Review of Local Laws Affecting Direct Farm Marketing Activities” 9/30/19 at pgs. 3-4. Guidance documents from the Department have been included for your convenience and are also available at <https://agriculture.ny.gov/land-and-water/section-305-review-restrictive-laws>.

⁵ Policy of local governments. a. Local governments, when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules or regulations, shall exercise these powers in such 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. *Agriculture and Markets Law §305-(1)(a)*.

⁶ *Inter-lakes Health Inc. v. Town of Ticonderoga Town Bd.*, 13 A.D.3d 846, 847 (3d Dept. 2004) [relying upon *Town of Lysander v. Hafner*, 96 N.Y.2d 558 (2001)]

⁷ “Guidelines for Review of Local Laws that Define ‘Farm Operation,’ ‘Farm,’ ‘Agriculture,’ ‘Farmland,’ or Any Similar Term.” 8/31/15 at pg 4

⁸ *Id.* at pg. 5. See also “Guideline for Review of Local Zoning and Planning Laws” 1/26/10 at pgs. 4-7. This streamlined process generally eliminates the need for expensive site plans and the public hearing



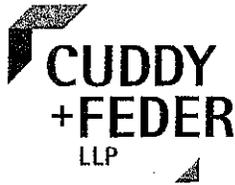
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proposed local law appears to incorporate the Town's standard special use permit and site plan requirements for these agricultural uses which are generally viewed by the Department as unreasonable as applied to farm operations within agricultural districts.

- The blanket restriction on the number of events the farm may host per year and the number of attendees at each event, without providing for consideration of the particular circumstances of each farm, may be an unreasonable restriction on agriculture.⁹
- The use of the term "for hire" in the definition of "Agricultural Events Venue"¹⁰ raises uncertainty as to whether the Town intends to regulate events hosted by the Farm itself or only events when the farm is rented. Notwithstanding this ambiguity in the proposed local law, rental events on farm operations may still receive the protection of Section 305-a if the rental fees received are incidental to the sale of farm crops, livestock or livestock products at the event.¹¹ The Department has opined wedding receptions and parties may help market the product of certain farm operations, and those events may be protected as a component of the farm operation.¹²
- The renewal of a special use permit on an annual basis is very burdensome, and potentially exceeds the limits on municipal exercise of the zoning power under applicable case law. The renewal procedure subjects the permit holder to constant threat of loss of an important use in which substantial investment has been made, by requiring annual public hearings on the use and unlimited amendments to the special use permit at the Planning Board's discretion. We would ask the Board to seriously consider eliminating the periodic

requirement which can delay approval on an application, and recommends the application be processed within 45 days. *Id.*

- ⁹ "Guidelines for Review of Local Laws Affecting Direct Farm Marketing Activities" 9/30/19 at pg. 1 (the degree of regulation depends upon the size and scope of the proposed activity).
- ¹⁰ "Agricultural Event Venue: A portion of a Farm, located in an Agricultural District, available for hire as a location for Events..." (Proposed Events Law at Section 1, proposed definition for "Agricultural Events Venue.")
- ¹¹ "Guidelines for Review of Local Laws Affecting Direct Farm Marketing Activities" 9/30/19 at pg. 4 (discussing that events/activities are "incidental" to the sale of the farm's crops, livestock and livestock products when certain fees, including facility rental/vendor fees, do not exceed 30% of total gross sales)
- ¹² "Guidelines for Review of Local Law Affecting Farm Operations Which Produce, Prepare and Market Crops for Wine, Beer, Cider and Distilled Spirits" 1/18/17 at pgs. 2-3.



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review. If it is not eliminated, please consider extending the interim between reviews to a more reasonable level, eliminate the possibility of revocation of the permit, and limit the review topics to reasonable specified performance problems, such as noise or traffic.

- The limitations on the number of events permitted per year also appear overly restrictive, as does the provision that any food service, lodging, recreational or other facilities would be limited to only serving event attendees and staff. It would be cost prohibitive to provide lodging and construct food service facilities that could not be used for two-thirds of the year.¹³ The Town should consider regulations to allow the reasonable use of these facilities for other uses, not simply attached to discrete one-time events.¹⁴

Both the Department and the landowner possess legal remedies to enforce Section 305-a. We would ask the Town to consult with the Department of Agriculture and Markets before adopting this local law.

Thank you for the opportunity to comment on the proposed local law.

Very truly yours,

A handwritten signature in cursive script that reads 'Rebecca A. Valk'.

Rebecca A. Valk

¹³ The local law permits no more than 30 events per year for up to four (4) days each. Therefore, at maximum, events could be held on 120 days per year.

¹⁴ The last two comments are relevant not only events to be held on a farm operation subject to the protection of Section 305-a, but to any landowner seeking a permit under the proposed local law.

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.

**Guidelines for Review of Local Laws That Define "Farm Operations",
"Farm", "Agriculture", "Farmland" or Any Similar Term**

Pursuant to Article 25-AA, the term "farm operation" is used to identify and define commercial enterprises, through the use of land, buildings, equipment and practices, to carry out an agricultural enterprise. Over the years, the State Legislature has amended the Agriculture and Markets Law (AML) to enhance the breadth of what constitutes a farm operation, including the type of crops, livestock and livestock products considered to be part of an agricultural enterprise.

In the administration of the AML regarding a municipality's definition of "farm," "agriculture," "farmland" or any similar term used to describe an agricultural/farm operation in its zoning code, the Department compares the municipal definition to the State's definition of "farm operation" as defined below. If a municipal definition does not encompass the breadth of crops, livestock, livestock products and farm enterprises identified in the AML, the local law may be deemed to be unreasonably restrictive and in violation of AML §305-a (1).

When a municipality examines its local laws for consistency with the AML, it is important to take into consideration certain aspects of the State's definition of "farm operation." Under the AML, a farm operation includes the production, preparation and marketing of crops, livestock and livestock products that are produced on land that is owned or rented, contiguous or non-contiguous to one another. Land can be owned or rented in another town or county and still be considered part of the farm operation. Furthermore, start-up farms may also be protected under the AML as long as the land is located within an agricultural district. Start-up farms will be described in another section of this document.

Definition of Farm Operation in the AML

301(11). "Farm operation" means 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, including a "commercial horse boarding operation" as defined in subdivision thirteen of this section, a "timber operation" as defined in subdivision fourteen of this section, "compost, mulch or other biomass crops" as defined in subdivision sixteen of this section and "commercial equine operation" as defined in subdivision seventeen of this section. Such farm operation may consist of one or more parcels of owned or rented land, which parcels may be contiguous or noncontiguous to each other.

301(2). "Crops, livestock and livestock products" shall include but not be limited to the following:

- a. Field crops, including corn, wheat, oats, rye, barley, hay, potatoes and dry beans.
- b. Fruits, including apples, peaches, grapes, cherries and berries.
- c. Vegetables, including tomatoes, snap beans, cabbage, carrots, beets and onions.
- d. Horticultural specialties, including nursery stock, ornamental shrubs, ornamental trees and flowers.
- e. Livestock and livestock products, including cattle, sheep, hogs, goats, horses, poultry, ratites, such as ostriches, emus, rheas and kiwis, farmed deer, farmed

buffalo, fur bearing animals, wool bearing animals, such as alpacas and llamas, milk, eggs and furs.

f. Maple sap.

g. Christmas trees derived from a managed Christmas tree operation whether dug for transplanting or cut from the stump.

h. Aquaculture products, including fish, fish products, water plants and shellfish.

i. Woody biomass, which means short rotation woody crops raised for bioenergy, and shall not include farm woodland.

j. Apiary products, including honey, beeswax, royal jelly, bee pollen, propolis, package bees, nucs and queens. For the purposes of this paragraph, "nucs" shall mean small honey bee colonies created from larger colonies including the nuc box, which is a smaller version of a beehive, designed to hold up to five frames from an existing colony.

301(13). "Commercial horse boarding operation" means an agricultural enterprise, consisting of at least seven acres and boarding at least ten horses, regardless of ownership, that receives ten thousand dollars or more in gross receipts annually from fees generated either through the boarding of horses or through the production for sale of crops, livestock, and livestock products, or through both such boarding and such production. Under no circumstances shall this subdivision be construed to include operations whose primary on site function is horse racing. Notwithstanding any other provision of this subdivision, a commercial horse boarding operation that is proposed or in its first or second year of operation may qualify as a farm operation if it is an agricultural enterprise, consisting of at least seven acres, and boarding at least ten horses, regardless of ownership, by the end of the first year of operation.

301(14). "Timber operation" means the on-farm production, management, harvesting, processing and marketing of timber grown on the farm operation into woodland products, including but not limited to logs, lumber, posts and firewood, provided that such farm operation consists of at least seven acres and produces for sale crops, livestock or livestock products of an annual gross sales value of ten thousand dollars or more and that the annual gross sales value of such processed woodland products does not exceed the annual gross sales value of such crops, livestock or livestock products.

301(16). "Compost, mulch or other organic biomass crops" means the on-farm processing, mixing, handling or marketing of organic matter that is grown or produced by such farm operation to rid such farm operation of its excess agricultural waste; and the on-farm processing, mixing or handling of off-farm generated organic matter that is transported to such farm operation and is necessary to facilitate the composting of such farm operation's agricultural waste. This shall also include the on-farm processing, mixing or handling of off-farm generated organic matter for use only on that farm operation. Such organic matter shall include, but not be limited to, manure, hay, leaves, yard waste, silage, organic farm waste, vegetation, wood biomass or by-products of agricultural products that have been processed on such farm operation. The resulting products shall be converted into compost, mulch or other organic biomass crops that can be used as fertilizers, soil enhancers or supplements, or bedding materials. For purposes of this section, "compost" shall be processed by the aerobic, thermophilic decomposition of solid organic constituents of solid waste to produce a stable, humus-like material.

301(17). "Commercial equine operation" means an agricultural enterprise, consisting of at least seven acres and stabling at least ten horses, regardless of ownership, that receives ten thousand dollars of more in gross receipts annually from fees generated through the provision of commercial equine activities including, but not limited to riding lessons, trail riding activities or training of horses or through the production for sale of crops, livestock, and livestock products, or through both the provision of such commercial equine activities and such production. Under no circumstances shall this subdivision be construed to include operations whose primary on site function is horse racing, notwithstanding any other provision of this subdivision, an agricultural enterprise that is proposed or in its first or second year of operation may qualify as a commercial equine operation if it consists of at least seven acres and stables at least ten horses, regardless of ownership, by the end of the first year of operation.

Start-Up Farm Periods

In the administration of the AML, the Department has considered the needs of "start-up" farm operations when the land used for agricultural purposes is located within a county adopted, State certified agricultural district. The Department examines the activity to be conducted, level of investment and involvement in the farm; soil and topographic characteristics of the property; agricultural knowledge of the landowner; and other factors that may specifically apply to a proposed agricultural activity. Concerning protections afforded under AML §305-a to farm operations, including "start-up farms," municipalities should allow a reasonable period of time to establish the farm operation and its production of crops/livestock/livestock products. The Department considers the following start-up periods to be reasonable for a farm to achieve the level of production of its own goods that may be required by a local government for certain processing and marketing activities conducted by the farm¹:

Crops: 2 years

Hops: 3 years

Livestock: 2 years

Nurseries and Greenhouses: 2 years

Aquaculture: 2 years

Apiaries: 2 years

Christmas Trees: 8-10 years

Maple: 2 years

Orchards and Berries: 3-5 years

¹ Local governments may, of course, provide longer start-up periods in their discretion; and should consider weather, disease and other factors that may impact production.

Vineyards: 5 years

Woody Biomass: 3 years

Acreage and Gross Sales Requirements

Under the AML, a "farm operation" must be a "commercial enterprise." A "farm operation" is not required to be eligible for receipt of an agricultural assessment or meet the acreage and gross sales requirements to receive an agricultural assessment [AML §301(4) – *Land Used in Agricultural Production*].

In the absence of minimum acreage and gross sales requirements, the Department evaluates such factors as the acreage in production; capital investment and business assets; gross sales of crops, livestock and livestock products; the type of enterprise and number of years in operation. If needed, the Department also evaluates a number of other factors, including, but not limited to:

- 1) the landowner's intent (especially for "start-up" farms);
- 2) whether the farm is operated in a businesslike manner;
- 3) time and effort spent on farming;
- 4) whether the landowner, or their advisors, have the knowledge needed to carry on the farming activity as a successful business;
- 5) whether the landowner was successful, or has experience with, similar activities in the past;
- 6) whether the landowner can expect future appreciation of the assets used in the business; and
- 7) whether the landowner's investment is at risk.

Leased and Owned Land

If a farm leases land for inclusion into its operation, crops or livestock grown/raised on leased land are treated the same as crops/livestock grown/raised on owned land. In both instances, the farmer must be producing the crop or raising the livestock as part of their operation; i.e., the farmer must be at financial risk if the crop/livestock fails or succeeds. Farmers either plant themselves or hire custom operators to plant and harvest crops on owned and/or leased land. Farmers may also hire custom operators to raise their livestock. In both instances, however, it is the farmer that provides the seed/livestock, fertilizer, pesticide/herbicide, feed, etc. and pays for the labor and custom applicator to produce/harvest the crop or raise the livestock. In this manner, the harvested crop or livestock raised are the farmer's, whether the crop yields or finished weight of livestock are successful or diminished.

Conclusion

If an agricultural operation is determined to be a farm operation as defined in AML §301(11), whether it is an existing or start-up agricultural enterprise, it may be afforded protections under the AML if the land is also located within a county adopted, State certified agricultural district.

Guidelines for Review of Local Zoning and Planning Laws

Background and Objective

As communities adopt or amend zoning regulations, potential conflicts between farm operations and local land use controls may increase. This, coupled with continuing exurban development pressures on many of the State's agricultural communities, increases the need to better coordinate local planning and the agricultural districts program, and to develop guidelines to help address conflicts which may occur. Proactively, guidelines can aid in crafting zoning regulations by municipalities with significant farming activities.

Zoning and Farm Operations: Practical Limitations and Problems

Farms are host to several discrete but interdependent land uses which may include barns, commodity sheds, farm worker housing, garages, direct farm markets, silos, manure storage facilities, milking parlors, stables, poultry houses and greenhouses, to name but a few. The typical zoning regulation, in addition to establishing minimum lot sizes and separations between uses, often prohibits more than one "principal" structure on each parcel of record. Many zoning devices, then, are unable to distinguish between on-farm structures as part of a *farm operation* from the same building when it is used for an independent, freestanding use.

The minimum separation and "yard" requirements of zoning are designed to avoid over concentration, maintain adequate spaces for light and air, and to reduce fire hazard in more urban environments. The application of such requirements to suburban and rural communities and farm operations often results in the unintended regulation of farm operations and uses not as an integrated whole, but as separate improvements.

The rapidly changing nature of the agricultural industry does not always allow zoning and the comprehensive planning process to keep pace. This can result in the application of outdated regulations to contemporary land uses and gives rise to potentially unreasonable restrictions. Local governments may run afoul of the letter and intent of the Agricultural Districts Law by limiting the type and intensity of agricultural uses in their communities and by narrowly defining "farm" or "agricultural activity." This is sometimes problematic even in municipalities with a significant base of large, "production" level farming operations. Inadequately defined terms also give rise to conflict between the zoning device and farm operations.

Because of the inherent nature of zoning, there is essentially no discrete administrative authority to waive its standards, even when those standards are at variance with the community's land use policy and what may be deemed its "intent." A municipal zoning board of appeals may, consistent with specific tests

found in Town, Village and City Law, vary the use and area standards of a zoning regulation, and reverse or affirm determinations of the zoning administrative official. Such a remedy: i.e., an area or use variance, may, however, in and of itself be considered "unreasonably restrictive" if it is the only means available to establish, expand or improve a "farm operation" in a county adopted, State certified agricultural district.

These and other limitations and problems that can lead to AML §305-a violations may be avoided in the first instance by sound comprehensive planning. The Town Law, Village Law, General City Law and the Agricultural Districts Law are designed to encourage coordination of local planning and land use decision making with the agricultural districts program.

Agricultural Districts and County Agricultural and Farmland Protection Plans: Their Influence on the Municipal Comprehensive Plan and the Zoning Process

The preparation, adoption and administration of a municipal comprehensive plan and zoning regulation are not independent actions of local government, but should be part of a well thought out, seamless process. A zoning regulation is, in the final analysis, simply a device to implement the community plan and, in fact, "... must be in accordance with a comprehensive plan..." [Town Law §272-a (11)(a)]

The State Legislature has codified the intent, definition and content of the comprehensive plan (Town Law §272-a, Village Law §7-722 and General City Law §28-a). In so doing, the Legislature has given significant status to "agricultural uses" in general, and State certified agricultural districts and county agricultural and farmland protection plans created under Agriculture and Markets Law Articles 25-AA and 25-AAA in particular. Town Law §272-a (9) requires agricultural review and coordination with the comprehensive planning process:

"A town comprehensive plan and any amendments thereto, for a town containing all or part of an agricultural district or lands receiving agricultural assessments within its jurisdiction, shall continue to be subject to the provisions of article twenty-five-AA of the agriculture and markets law relating to the enactment and administration of local laws, ordinances, rules or regulations. A newly adopted or amended town comprehensive plan shall take into consideration applicable county agricultural and farmland protection plans as created under article twenty-five-AAA of the agriculture and markets law."

(The same language is found in Village Law and General City Law.)

Thus, the statutory influence the Agricultural Districts Law and the Agricultural and Farmland Protection programs have on the comprehensive planning process and zoning regulations is significant. State certified agricultural districts and

county agricultural and farmland protection plans are community shaping influences in much the same way as existing and proposed infrastructure; wetlands, floodplains, topographical features; cultural, historic and social amenities; economic needs; etc. are viewed. The Agricultural Districts Law is a valuable planning tool to conserve, protect and encourage the development and improvement of the agricultural economy; protect agricultural lands as valued natural and ecological resources; and preserve open space.

In addition to AML §305-a, limitations on local authority in Town Law §283-a and Village Law §7-739 were enacted to ensure that agricultural interests are taken into consideration during the review of specific land use proposals. Town Law §283-a (1) and Village Law §7-739(1), as recently amended by Chapter 331 of the Laws of 2002, require local governments to "...exercise their powers to enact local laws, ordinances, rules or regulations that apply to farm operations in an agricultural district in a manner which does not unreasonably restrict or regulate farm operations in contravention of the purposes of article twenty-five-AA of the agriculture and markets law, unless it can be shown that the public health or safety is threatened." The recent amendments make the Town and Village Law provisions consistent with AML §305-a regarding showing a threat to the public health or safety. AML §305-a, subd.1 is not a stand-alone requirement for coordination of local planning and land use decision making with the agricultural districts program. Rather, it is one that is fully integrated with the comprehensive planning, zoning and land use review process.

Application of Local Laws to Farm Operations within Agricultural Districts

In general, the construction of on-farm buildings and the use of land for agricultural purposes should not be subject to site plan review, special use permits or non-conforming use requirements when conducted in a county adopted, State certified agricultural district. The purpose of an agricultural district is to encourage the development and improvement of agricultural land and the use of agricultural land for the production of food and other agricultural products as recognized by the New York State Constitution, Article XIV, Section 4. Therefore, generally, agricultural uses and the construction of on-farm buildings as part of a farm operation should be allowed uses when the farm operation is located within an agricultural district.

Town Law §274-b, subdivision 1 allows a town board to authorize a planning board or other designated administrative body to grant special use permits as set forth in a zoning ordinance or local law. "Special use permit" is defined as "...an authorization of a particular land use which is permitted in a zoning ordinance or local law to assure that the proposed use is in harmony with such zoning ordinance or local law and will not adversely affect the neighborhood if such requirements are met." Agricultural uses in an agricultural district are not, however, "special uses." They are constitutionally recognized land uses which are protected by AML §305-a, subd.1. Further, agricultural districts are created

and reviewed locally through a process which includes public notice and hearing, much like zoning laws are adopted and amended. Therefore, absent any showing of an overriding local concern, generally, an exemption from special use permit requirements should be provided to farm operations located within an agricultural district.

The application of site plan and special permit requirements to farm operations can have significant adverse impacts on such operations. Site plan and special permit review, depending upon the specific requirements in a local law, can be expensive due to the need to retain professional assistance to certify plans or simply to prepare the type of detailed plans required by the law. The lengthy approval process in some local laws can be burdensome, especially considering a farm's need to undertake management and production practices in a timely and efficient manner. Site plan and special permit fees can be especially costly for start-up farm operations.

Generally, farmers should exhaust their local administrative remedies and seek, for example, permits, exemptions available under local law or area variances before the Department reviews the administration of a local law. 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. The Department has found local laws which regulate the health and safety aspects of the construction of farm buildings through provisions to meet local building codes or the State Building Code (unless exempt from the State Building Code¹) and Health Department requirements not to be unreasonably restrictive. Requirements for local building permits and certificates of occupancy to ensure that health and safety requirements are met are also generally not unreasonably restrictive.

Site Plan Review for Farm Operations within an Agricultural District

Many local governments share the Department's view that farm operations should not have to undergo site plan review and exempt farms from that requirement. However, the Department recognizes the desire of some local governments to have an opportunity to review farm operations and projects within their borders, as well as the need of farmers for an efficient, economical, and predictable process. In view of both interests, the Department developed a model streamlined site plan review process which attempts to respond to the farmers' concerns while ensuring the ability to have local land use issues examined. The process could be used to examine a parcel's current characteristics and its surroundings in relation to any proposed activities on the farm and their potential impact to neighboring properties and the community. For example, municipalities could specify that farm operations located within specific zoning districts must submit to site plan review. Municipalities may also elect to

¹ A discussion of the New York State Uniform Fire Prevention and Building Code follows below.

exempt farm operations, located within a county adopted, State certified agricultural district, from their site plan review process.

The authorizing statutes for requiring site plan review are quite broad and under "home rule" municipalities retain significant flexibility in crafting specialized procedures (e.g., the selection of a reviewing board; uses which trigger submission of site plans; whether to have a public hearing and the length of time to review an application). Town Law §274-a and Village Law §7-725-a define a site plan as "a rendering, drawing, or sketch prepared to specifications and containing necessary elements as set forth in the applicable zoning ordinance or local law which shows the arrangement, layout and design of the proposed use of a single parcel of land... ." These sections of law further outline a list of potential site plan elements including parking, means of access, screening, signs, landscaping, architectural features, location and dimensions of buildings, adjacent land uses and physical features meant to protect adjacent land uses as well as additional elements.

Many municipalities have also added optional phases to the site plan review. While a preliminary conference, preliminary site plan review and public hearings may assist the applicant earlier in the review process and provide the public an opportunity to respond to a project, they can result in a costly delay for the farmer.

For the sake of simplicity, the model site plan process and the following guidance presume that the planning board is the reviewing authority.

Site Plan Process

The applicant for site plan review and approval shall submit the following:

- 1) Sketch of the parcel on a location map (e.g., tax map) showing boundaries and dimensions of the parcel of land involved and identifying contiguous properties and any known easements or rights-of-way and roadways.

Show the existing features of the site including land and water areas, water or sewer systems and the approximate location of all existing structures on or immediately adjacent to the site.

- 2) Show the proposed location and arrangement of buildings and uses on the site, including means of ingress and egress, parking and circulation of traffic.

Show the proposed location and arrangement of specific land uses, such as pasture, crop fields, woodland, livestock containment areas, or manure storage/manure composting sites.

- 3) Sketch of any proposed building, structure or sign, including exterior dimensions and elevations of front, side and rear views. Include copies of any available blueprints, plans or drawings.
- 4) Provide a description of the farm operation (existing and/or proposed) and a narrative of the intended use and/or location of proposed buildings, structures or signs, including any anticipated changes in the existing topography and natural features of the parcel to accommodate the changes. Include the name and address of the applicant and any professional advisors. If the applicant is not the owner of the property, provide authorization of the owner.
- 5) If any new structures are going to be located adjacent to a stream or wetland provide a copy of the floodplain map and wetland map that corresponds with the boundaries of the property.
- 6) Application form and fee (if required).

If the municipality issues a permit for the structure, the Code Enforcement Officer (CEO) determines if the structures are subject to and comply with the local building code or New York State Uniform Fire Prevention and Building Code prior to issuing the permit. Similarly, the Zoning Enforcement Officer (or the CEO in certain municipalities) would ensure compliance with applicable zoning provisions.

The Department urges local governments to take into account the size and nature of the particular agricultural activity, including the construction of farm buildings/structures when setting and administering any site plan requirements for farm operations. The review process, as outlined above, should generally not require professional assistance (e.g., architects, engineers or surveyors) to complete or review and should be completed relatively quickly.² The Department understands, however, that in some cases, a public hearing and/or a more detailed review of the project which may include submission of a survey, architectural or engineering drawings or plans, etc., may be necessary. The degree of regulation that may be considered unreasonably restrictive depends on the nature of the proposed activities, the size and complexity of the proposed agricultural activity and/or the construction of buildings or structures and whether a State agricultural exemption applies.

Time Frame for Review and Decision

Town Law §274-a and Village Law §7-725-a require that a decision on a site plan application be made within a maximum of 62 days after receipt of the application or date of a public hearing, if one is required. Town and Village Law authorize town boards and village boards of trustees to adopt public hearing requirements and local laws often provide planning boards with the discretion

² Please see discussion of Agricultural Exemptions below.

whether to hold a public hearing. The Department recommends that if the municipality requires construction of farm buildings and structures within a state certified agricultural district to undergo site plan review, that the review and decision be expedited within 45 days, with no public hearing. The Department recognizes that the Town Law allows municipalities to determine which uses must undergo site plan review, the time frame for review (within the 62 day maximum), and whether to conduct a public hearing. A protracted review of most agricultural projects could, however, result in significant economic impacts to farmers.

The process outlined above affords the community an opportunity to examine a proposed agricultural project and to evaluate and mitigate potential impacts in light of public health, safety and welfare without unduly burdening farm operations. Of course, the "process" must also be administered in a manner that does not unreasonably restrict or regulate farm operations. For example, conditions placed upon an approval or the cost and time involved to complete the review process could be unreasonably restrictive.

Agricultural Exemptions

State Environmental Quality Review (SEQR) - Agricultural farm management practices, including construction, maintenance and repair of farm buildings and structures, and land use changes consistent with "generally accepted principles of farming" are designated as Type II actions which do not require preparation of an Environmental Assessment Form (EAF) and are not subject to compliance with State Environmental Quality Review (SEQR). 6 NYCRR §617.5(a), (c)(3). [See *In the Matter of Pure Air and Water Inc. of Chemung County v. Davidsen*, 246 A.D.2d 786, 668 N.Y.S.2d 248 (3rd Dept. 1998), for application of the exemption to the manure management activities of a hog farm and *In the Matter of Humane Society of the United States v. Empire State Development Corporation*, 53 A.D. 3d 1013, 863 N.Y.S. 2d 107 (3rd Dept., 2008) where ESDC's classification of the issuance of a grant for the construction or renovation of on-farm buildings for treatment of manure and raising livestock as a Type II action was upheld.]

The SEQR regulations require localities to recognize the Type II actions contained in the statewide list.

New York State Uniform Fire Prevention and Building Code - While farmers must comply with local requirements which regulate health and safety aspects of the construction of farm buildings, many farm buildings are exempt from the State Uniform Fire Prevention and Building Code ("Uniform Code"). The Uniform Code recently underwent major revisions and now is comprised of seven sub-codes (the Building Code, Fire Code, Residential Code, Plumbing Code, Mechanical Code, Fuel Gas Code, and the Property Maintenance Code). The exemption for agricultural buildings has been incorporated in the following

portions of the revised Uniform Code and the Energy Conservation Construction Code, which became fully effective on January 1, 2003.

- Agricultural building is defined in §202 of the Building Code as "A structure designed and constructed to house farm implements, hay, grain, poultry, livestock, or other horticultural products. This structure shall not be a place of human habitation or a place of employment where agricultural products are processed, treated or packaged, nor shall it be a place used by the public."
- Building Code §101.2(2) provides an exemption from the Building Code for "[a]gricultural buildings used solely in the raising, growing or storage of agricultural products by a farmer engaged in a farming operation."
- Section 102.1(5) of the Fire Code of New York State provides that "[a]gricultural buildings used solely in the raising, growing or storage of agricultural products by a farmer engaged in a farming operation" are exempt from the provisions of the Fire Code pertaining to construction but are subject to applicable requirements of fire safety practice and methodology.
- Section 101.4.2.5 of the Energy Conservation Construction Code ("ECCC") exempts "nonresidential farm buildings, including barns, sheds, poultry houses and other buildings and equipment on the premises used directly and solely for agricultural purposes" from the provisions of the ECCC.

The above briefly highlights the agricultural buildings exemptions. Any specific questions regarding the interpretation and applicability of the revised State Uniform Fire Protection and Building Code should be directed to the Department of State's Codes Division at (518) 474-4073.

Professionally Stamped Plans - Education Law §7209(1) provides that no official of the State or any city, county, town or village charged with the enforcement of laws, ordinances or regulations may accept or approve any plans or specifications that are not stamped with the seal of an architect, or professional engineer, or land surveyor licensed or authorized to practice in the State. Thus, where local laws, ordinances or regulations require that plans and specifications for private construction be accepted or approved, they may not be accepted or approved without the required seal, subject to the exceptions set forth in the statute. 1981 Op Atty Gen April 27 (Informal).

However, the exceptions contained in Education Law §7209(7)(b) include "farm buildings, including barns, sheds, poultry houses and other buildings used directly and solely for agricultural purposes." As a result, plans and specifications for such buildings are not required to be stamped by an architect, professional engineer or land surveyor.³

³ Similar requirements and exceptions are also provided in Education Law §7307(1) and (5).

Against this backdrop, specific guidelines for review of zoning and planning regulations by local governments and the Department can best be understood.

Generic Review Guidelines

Generic reviews are those of entire zoning regulations or sections of zoning regulations that impact the municipality's farm community as a class or several farm operations in the same way. Examples of actions which might result in a generic review include the adoption or administration of an entirely new or substantially amended zoning regulation that results in a material change in the use and area standards applied to farm operations in a State certified agricultural district. In such cases, the Department recommends that the municipality ask itself the following questions:

- Do the regulations materially limit the definition of farm operation, farm or agriculture in a way that conflicts with the definition of "farm operation" in AML §301, subd.11?
- Do the regulations relegate any farm operations in agricultural districts to "non-conforming" status?
- Is the production, preparation and marketing of any crop, livestock or livestock product as a commercial enterprise materially limited, restricted or prohibited?
- Are certain classes of agriculture subject to more intensive reviews or permitting requirements than others? For example, is "animal agriculture" treated differently than crop production without demonstrated links to a specific and meaningful public health or safety standard designed to address a real and tangible threat?
- Are any classes of agricultural activities meeting the definition of "farm operation" subject to special permit, site plan review or other original jurisdiction review standard over and above ministerial review?
- Are "farm operations" subject to more intensive reviews than non-farm uses in the same zoning district?
- Are "farm operations" treated as integrated and interdependent uses, or collections of independent and competing uses on the same property?
- Is the regulation in accordance with a comprehensive plan and is such a plan crafted consistent with AML Article 25-AA as required by law?

If the answer to any of the first six questions is "yes," or if the answer to either of the last two is "no," the zoning regulations under review are likely to be problematic and may be in violation of AML §305-a, subd.1. Certainly such regulations would appear to be on their "face" inconsistent with the statutory requirement that *"Local governments ...shall exercise these powers in such manner as may realize the policy and goals set forth in this article [Article 25AA-Agricultural Districts]."*

Guidelines for Site Specific Reviews

AML §305-a zoning case reviews often involve application of zoning regulations to a specific farm operation. Such cases typically result from applying the site plan, special use permit, use or non-conforming use sections, yard requirements, or lot density sections of the municipal zoning device to an existing farm operation.

These cases often evolve because although the zoning regulation may appear to be consistent with the agricultural districts law, its application to a specific issue or set of facts is not. In such cases, the Department recommends that the municipality ask itself the following questions:

- Is the zoning regulation or restriction being applied to a use normally and customarily associated with a "farm operation" as defined in AML Article 25-AA?
- Does the regulation or restriction materially limit the expansion or improvement of the operation without offering some compelling public benefit?
- Is the regulation or restriction applicable to the specific farm operation in question or, under the same circumstances, would it apply to other farm operations in the community?
- Does the zoning regulation impose greater regulation or restriction on a use or farming activity than may already be imposed by State or federal statute, rule or regulation?
- Is the regulation or restriction the result of legislative action that rendered the farm operation a "non-conforming use"?

If the answer to any of these questions is yes, then the zoning regulation or restriction under review is likely to be problematic and may be in violation of the statutory prohibitions against unreasonably restrictive regulation of farm operations in an agricultural district, unless a threat to the public health or safety is demonstrated.

Guidance on Specific Zoning Issues

The following are some specific factors that the Department considers when reviewing local zoning laws⁴:

A. Minimum and Maximum Dimensions

Generally the Department will consider whether minimum and maximum dimensions imposed by a local law can accommodate existing and/or future farm

⁴ Please see other Department guidance documents for further information on issues related to specific types of farm buildings and practices.

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. Also, buildings specifically designed and constructed to accommodate farm activities may not meet the local size requirements (e.g., silos and barns which may exceed maximum height limitations). The size and scope of the farm operation should also be considered. Larger farms, for example, cannot effectively market their produce through a traditional roadside stand and may require larger farm markets with utilities, parking, sanitary facilities, etc.

B. Lot Size

Establishing a minimum lot size for farm operations within a zoning district that includes land within a State certified agricultural district might be unreasonably restrictive. The definition of "farm operation" in AML §301(11) does not include an acreage threshold. Therefore, the Department has not set a minimum acreage necessary for protection under AML §305-a and conducts reviews on a case-by-case basis. For example, a nursery/greenhouse operation conducted on less than 5 or 10 acres may be protected as a "farm operation" under §305-a if the operation is a "commercial enterprise" as determined by the Department.

For agricultural assessment purposes, however, AML §301(4) states that a farm must have "land used in agricultural production" to qualify (either seven or more acres and gross sales of an average of \$10,000 or more in the preceding two years or have less than seven acres and average gross sales of more than \$50,000 in the preceding two years). AML §301(4) also provides for an agricultural assessment on seven or more acres which has an *annual* gross sales of \$10,000 or more "...when such land is owned or rented by a newly established farm operation in the first year of operation." AML §301(4)(h).

Local requirements for minimum lot sizes for farm buildings raise concerns similar to those involving minimum and maximum building dimensions. A farmer may be unable to meet a minimum lot size due to the configuration of the land used for production or lying fallow as part of a conservation reserve program. The need to be proximate to existing farm roads, a water supply, sewage disposal and other utilities is also essential. Farm buildings are usually located on the same property that supports other farm structures. Presumably, minimum lot size requirements are adopted to prevent over concentration of buildings and to assure an adequate area to install any necessary utilities. Farm buildings should be allowed to be sited on the same lot as other agricultural use structures subject to the provision of adequate water and sewage disposal facilities and meeting minimum setbacks between structures.

C. Setbacks

Minimum setbacks from front, back and side yards for farm buildings have not been viewed as unreasonably restrictive unless a setback distance is unusually long. Setbacks that coincide with those required for other similar structures have, in general, been viewed as reasonable.

A farm operation's barns, storage buildings and other facilities may already be located within a required setback, or the farm operation may need to locate new facilities within the setback to meet the farm operation's needs. Also, adjoining land may consist of vacant land, woodland or farmland. The establishment of unreasonable setback distances increases the cost of doing business for farmers because the infrastructure needed to support the operation (e.g., water supply, utilities and farm roads) is often already located within, and adjacent to, the farmstead area or existing farm structures. Setbacks can also increase the cost of, or make it impracticable to construct new structures for the farm operation.

D. Sign Limitations:

Whether or not a limitation on the size and/or number of signs that may be used to advertise a farm operation is unreasonably restrictive of a farm operation depends upon the location of the farm and the type of operation. 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 who may need directional signs to direct the public to the farm. The size of a sign needed may depend on whether the sign is used to advertise the farm's produce or services (e.g., for a commercial horse boarding operation) as part of the farm's direct marketing, or just for directional purposes.

E. Maximum Lot Coverage

Establishing a maximum lot coverage that may be occupied by structures may be unreasonably restrictive. For example, it may be difficult for horticultural operations to recoup their investment in the purchase of land if they are not allowed to more fully utilize a lot/acreage for greenhouses. Farm operations within an agricultural district should be allowed the maximum use of available land, consistent with the need to protect the public health or safety. Generally, if setbacks between buildings are met and adequate space is available for interior roads, parking areas (where required), and safe operation of vehicles and equipment, health and safety concerns are minimized.

F. Screening and Buffers

Some municipalities impose buffer requirements, including 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 or setbacks to graze animals, construct fences and otherwise use land for agricultural purposes are generally 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 labor housing 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. 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.

**Guideline for Review of Local Laws Affecting Farm Operations Which
Produce, Prepare and Market Crops for Wine, Beer, Cider and Distilled Spirits**

The following Agriculture and Markets Law (AML) provisions are relevant when evaluating whether farms which produce, prepare and market crops for wine, beer, cider and distilled spirits are protected as a "farm operation" for purposes of AML §305-a¹ :

AML §301(11) "farm operation" – "...means the land and on-farm buildings, equipment,... and practices which contribute to the **production, preparation and marketing of crops, livestock and livestock products** as a commercial enterprise. ... Such farm operation may consist of one or more parcels of owned or rented land, which parcels may be contiguous or noncontiguous to each other." (emphasis added)

Definition of "**crops, livestock and livestock products**" as contained in AML §301(2) (a) includes, but is not limited to "...corn, wheat, oats, rye, barley..." and [hops] and §301(2) (b) "[f]ruits," including "...apples, peaches, grapes, cherries and berries."

The on-farm "**production, preparation and marketing**" [AML §301(11)] of grains, grapes and other fruits are considered part of a farm operation. The Department considers agricultural commodities produced "on-farm" to include any products that may have been produced by a farmer on his or her "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 the processing, distillation, brewing and fermentation activity and the on-farm buildings and equipment which are needed to produce, store, distill, brew and/or ferment grains, grapes or other fruits as part of the farm operation to the extent that the distilled or brewed product, cider and/or wine that is prepared is composed predominantly of grain, hops, grapes or other fruits produced on the farm.^{2,3} In addition, the on-farm marketing of distilled and brewed products, cider and wine, when the distilled and brewed products, cider and wine is composed predominantly of on-farm produced grain, hops, grapes or other fruits, is part of the farm operation.

¹ Please see the Department's *Guideline for Review of Local Laws Affecting Preparation and Marketing Activities by Start-Up Farm Operations* for information about how the Department evaluates start-up farms that use their crops for the production and sale of beverages and other value-added products.

² On an annual basis, distilled or brewed products, cider and wine must be composed of 51% or more on-farm produced grains, hops, grapes or other fruits (if grapes or fruits are imported as whole fruit, then gross weight of the on-farm produced grapes/fruit must be at least 51% of the finished wine; if juice is imported, then the gross volume of juice from on-farm produced grapes/fruit must be at least 51% of the finished wine). Therefore, while an individual alcoholic beverage may be produced at the farm entirely from off-farm agricultural crops, at least 51% of the agricultural crops used to produce all of the farm's alcoholic beverages, on an annual basis, must be from the farm's own production. The farm must also grow a portion of each of the major ingredients used to make the alcoholic beverage. For example, a farm that wants to market its crops as beer must grow both grains and hops.

³ While the Department sets standards for protection of "farm operations," the Alcoholic Beverage Control Law (ABC Law) provides the standards which must be met for farm brewery, cidery, winery and distillery licenses. Licensees must comply with the ABC Law standards to qualify for their licenses. While a license issued by the State Liquor Authority may allow for the sale of alcoholic beverages which are not made from crops grown by the farm, the Department does not consider such beverages to be part of a farm operation. Therefore, the production and sale of such beverages would not be protected under AML §305-a.

On-farm marketing of distilled, brewed, cider and wine-related products (e.g., food products such as cheese, pies and ice cream made with wine or on-farm produced fruit⁴, as well as products used for transport, preparation and consumption of distilled or brewed products, cider or wine, such as shot glasses, cork screws, chillers and wine/beer/cider glasses) is also part of the farm operation when the amount of annual sales of such products is consistent with the size and scope of the farm operation and is incidental to the annual sales of the farm's distilled or brewed products or wine. **Farm operations must keep sufficient records to prove that these requirements are met.** The needs of "start-up" farm operations should also be considered. These farms often start out selling distilled or brewed products, cider and/or wine which is composed entirely, or primarily, of grain, hops, grapes/fruit grown off the farm in order to develop a customer base and maintain income while their crop (such as hops or grains) or vines/fruit trees are growing. These farms should be allowed a reasonable period of time to meet the predominance standard.⁵

MARKETING ACTIVITIES (e.g., WEDDING RECEPTIONS, PARTIES and SPECIAL EVENTS)

The Department has concluded that on-farm wedding receptions, parties and special events (e.g., harvest festivals or distillery, brewery, cidery and wine tastings), including charitable events, held at farms which market their crops as wine, beer, cider and distilled spirits, help market the farm operation's product. These 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 receptions, parties and special events held on-farm as part of a farm operation under certain conditions. The events, whether public or private, must be: 1) directly related to the sale and promotion of the beverage produced at the farm (from at least 51% on-farm produced grain, hops, grapes/fruit/juice); 2) incidental and subordinate to the retail sale of the beverage on-site; 3) hosted by the farm or customers of the farm (not outside, unrelated parties); and 4) feature the beverage produced at the farm (from at least 51% on-farm produced grain, hops, grapes/fruit/juice).

The Department considers events to be "incidental" only when the gross annual sales from the non-beverage portion of event sales (including any facility rental/vendor fees, admission fees, catering charges, sales of other alcoholic beverages, etc.) does not exceed 30% of total gross sales from the retail sale on-site of the beverage produced at the farm (from at least 51% on-farm produced grain, hops, grapes/fruit/juice) at such events, plus the retail sale of any other crops, livestock or products or beverage-related food products (produced on the farm) that may be sold at such events.⁶ All products must be sold at a cost no higher than the current retail price of such products sold at the farm. **Farm operations must keep**

⁴ Food products must be composed predominantly (at least 51%) of the farm's wine or fruit. Please see the Department's *Guidelines for Review of Local Laws Affecting Direct Farm Marketing Activities*, "On-farm preparation of processed foods."

⁵ Please see the Department's *Guidelines for Review of Local Laws Affecting Preparation and Marketing Activities by Start-Up Farm Operations* for the Department's view of reasonable time frames for various crops.

⁶ When farm event customers arrange for their own catering, alcoholic beverage service, etc., and the farm does not charge for such items, these costs would not, of course, be counted as gross sales to the farm. Admission fees or minimum donations which are donated to a charity are also 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 distilled or brewed products, cider or wine. 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.

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 holds a special event as part of its overall marketing strategy, the event is open to the general public, and no admission, facility rental or vendor fees are involved, an evaluation of fees versus sales of the farm's distilled or brewed products, cider and/or wine and wine-related food products would be unnecessary.

In all cases where on-farm wedding receptions, parties and special events are offered, the primary purpose of the events must be to market the farm's distilled or brewed products, cider and/or wines and the events must be sufficiently related to the farm operation. The Department examines the specific activities/events to determine whether they are part of the farm operation. In addition, these activities are subject to any State or federal requirements applicable to the processing, storage and sale of alcoholic products.

Information concerning the marketing of product grown and produced on the farm may be obtained from the *Guideline for Review of Local Laws Affecting Direct Farm Marketing Activities* (<http://www.agriculture.ny.gov/AP/agservices/guidancedocuments/305-aFarmMarket.pdf>).

CAN THE TYPES OF MARKETING ACTIVITIES CONDUCTED BY A FARM BE LIMITED? CAN THE NUMBER AND SIZE OF RECEPTIONS, PARTIES AND SPECIAL EVENTS BE LIMITED?

The types, size and scope of marketing activities that a farm growing crops for beverage production needs varies depending upon the amount of crops that the farm grows and uses for its beverage products and how the farm wishes to market its crops. Farms may market their beverages through a variety of methods: tastings, food pairings, beverage-themed dinners, wedding receptions, parties, fundraisers, etc. The Department considers these practices as part of the farm operation as long as the farm produces enough of its own crops or livestock to substantiate the need for these types of marketing tools. For example, a start-up farm that only grows a minimal amount of crops (and consequently a limited amount of beverages) would not require the same marketing tools as a larger, established farm.

The Department evaluates whether local restrictions, such as limits on the number and size of special events, are unreasonably restrictive of a farm operation. Therefore, a farm that has a limited amount of crop-based beverages to sell, 1,000 gallons of wine for example, would not need multiple, large-scale events to market such beverages. The size and number of events can be limited each year, based upon the previous year's production.

CONDITIONS TO ENSURE THAT THE PRIMARY PURPOSE OF RECEPTIONS, PARTIES AND SPECIAL EVENTS IS TO MARKET FARM'S DISTILLED OR BREWED PRODUCTS, CIDER AND/OR WINES; AND TO ENSURE THAT THE EVENTS ARE SUFFICIENTLY RELATED TO THE FARM OPERATION

In addition to the conditions discussed on page 2:

- The farm's distilled or brewed products, cider and/or wines must be prominently featured at all locations in which the event is conducted on the site. Marketing materials (e.g., brochures, pamphlets, presentations, photos, branded items, etc.) must be prominently displayed; and the farm's distilled or brewed products,

cider and/or wines must be available for purchase at all locations and for the duration of the event.

- Any person serving the farm's distilled or brewed products, cider and/or wines must be thoroughly familiar with the farm and the products being served (not just a bartender); and the farm can only charge the customer for this service to the extent allowed by the ABC Law.

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 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 crop-based beverages 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.

WHAT TYPES OF ACTIVITIES CAN BE OFFERED AT A FARM'S MARKETING EVENTS?

While events held at a farm which markets its crops as beverages may generally 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.