SUPREME COURT CHAMBERS
STATE OF NEW YORK
ANGELO A. DELSIGNORE CIVIC BUILDING
775 THIRD STREET
NIAGARA FALLS, NEW YORK 14302-1710
Hon. Frank Caruso
Justice of Supreme Court
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May10, 2016

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Re: Sustainable Bioelectric, LLC.
vs.
Town of Wheatfield, NY, Town Board of Wheatfield, NY, Robert Cliff, Gilbert Doucet, in the capacity of Supervisor of the Town of Wheatfield, NY, Arthur Gerbec, in the Capacity of of Councilman of the Town of Wheatfield, NY, Larry Helwif, in the Capacity of Councilman of the Town of Wheatfield, NY, Randy Retzlaff, in the Capacity of Councilman of the Town of Wheatfield, NY
Index # 152049

Counselors:

Enclosed please find a copy of the Decision and Order for the above referenced case. The original has been filed with the Niagara County Clerk's Office.

Sincerely,

Michelle Metz
Secretary to
Hon. Frank Caruso, J.S.C.

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STATE OF NEW YORK
SUPREME COURT: COUNTY OF NIAGARA

SUSTAINABLE BIOELECTRIC LLC,
Petitioner,

vs.

THE TOWN OF WHEATFIELD, NEW YORK,
THE TOWN BOARD OF WHEATFIELD, NEW YORK
ROBERT CLIFFE, in the Capacity of Supervisor of the Town of Wheatfield, New York,
GILBERT DOUCET, in the Capacity of Councilman of the Town of Wheatfield, New York,
ARTHUR GERBEC, in the Capacity of Councilman of the Town of Wheatfield, New York,
LARRY HELWIF, in the Capacity of Councilman of the Town of Wheatfield, New York,
RANDY RETZLAFF, in the Capacity of Councilman of the Town of Wheatfield, New York,
Respondents.

Decision & Order

Index No. 155291

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Caruso, J.

This decision and order results from a Petition brought by Sustainable BioElectric LLC (Sustainable) against the Town of Wheatfield (Town) over a law which was passed by the Town Board known as Local Law No. 3 of 2014, or the Biosolids Management Law and its subsequent amendments. Said law restricts the processing and use of biosolids containing human waste. Sustainable brings this petition as the operator of an anaerobic digestion facility in the Town known as Niagara BioEnergy, which produces digestate, commonly known as equate, which is then applied to farmland as fertilizer. The Town objects to the relief sought in the petition and brings a motion to dismiss before the Court asking that the petition be dismissed in its entirety.

Sustainable first argues that storage, treatment and land application of bioslids is part of both State and Federal regulations. In New York, it is the Department of Environmental Conservation (DEC) which in its Part 360 regulations set forth the technical and permitting requirements for such things. The regulations found there are more stringent than those imposed by the federal government through the Environmental Protection Agency (EPA). Sustainable obtained a permit from the DEC to operate their anaerobic digester facility which authorized them to receive and process manure, food waste, fats, oil, grease, biosolids, energy crops, and biogas production by-products. They also received approval from the DEC to apply equate to certain fields within Niagara County, including nine farm fields owned by Milleville Brothers Farms. They note that the new biosolids law passed by the Town grandfathers in their production facility (without expansion) but does not grandfather in land applications. It is claimed that this is an unreasonable restriction on farming operations as Milleville Brothers are prevented from applying equate for their nutrient management practices. Further, it is put forward that the permits acquired from the state from the DEC preempt such a local law.

Sustainable's petition then indicates that the Town's review under the New York State Environmental Quality Review Act (SEQRA) were deficient. It is alleged that the Town classified the biosolids law as an "Unlisted Action" and determined that there were no other involved agencies. As this law affects the entire town, it therefore affects zoning in twenty five or more acres making it a "Type I Action" under SEQRA, requiring advanced notice to other involved agencies so they have the opportunity to review and comment. As the law was improperly classified as an Unlisted Action, this was never allowed to take place as no other interested agencies were notified.

It is further claimed that nutrient management through the land application of biosolids are critical components of farming. This is used to indicate that the Town's conclusion in their Environmental Assessment Form (EAF) that the new law would have little or no effect on farming is flawed. Sustainable alleged that the review must examine if such a law "may" have an impact, not if it currently does. This failure to properly conduct a SEQRA review and properly examine the environmental impact of the new law requires it be annulled.

Sustainable additionally alleges various procedural defects with the adoption of the biosolids law. It is pointed out that the law that was passed on July 28, 2014 was materially different from the one which was introduced and scheduled for public hearing. This includes captions, purpose, definitions, exclusions and existing activities. It is also alleged that the law was not properly aged by placing them on Town Board Members' desk at least seven days prior to their adoption pursuant to Municipal Home Rule Law §20(4).

Further, the amendments to the biosolids law were also not passed using proper procedure. On July 28, 2014 there were two proposed amendments put forth and a public hearing was scheduled for August 11, 2014. However, on the date of the public hearing, there was a third amendment on the agenda which exempts land application facilities from being classified as an

existing facility. There was not proper notice of this law given and this one as well was not properly aged.

Lastly, the petitioners allege that their vested rights have been violated by this new law. They have undertaken substantial action with Milleville Brothers Farms and expended significant money in reliance on the permits they obtained to perform land application of equate. This law improperly strips them of their rights under those permits and if the law is not declared invalid, they should be compensated through damages.

Respondents move to dismiss the petition first arguing that AML §305-a, which the petitioners rely on, does not allow for a private right of action. This law speaks in terms of local governments not being able to unreasonably restrict farm operations, but goes on to indicate that the commissioner of the Department of Agriculture and Markets (Department) shall issue an opinion about a law upon request from the municipality or farm owner or operator. Further, upon the receipt of a complaint of a person within an agricultural district or upon his own initiative, he may bring an action to enforce the law. It is alleged that the petitioner cannot step into the shoes of the commissioner and bring an action which the law only allows him to commence.

Additionally, even if §305-a did authorize a private party to bring an action, it is argued that the petitioner lacks standing to do so. The law allows a municipality or farm owner or operator to request an opinion from the Department and a person within an agricultural district to file a complaint with the Department. The petitioner does not fall into any of these categories. They clearly are not a farm owner or operator as they are a waste management and renewable energy company as stated in their petition and they do not own land or conduct operations within an agricultural district. Therefore, they do not have standing under the law to proceed.

Further, it is noted that the state law specifically authorizes a law such as the one passed by the Town. Environmental Conservation Law §27-0711 specifically allows for a local law so long as

said law is not inconsistent with the provisions within the State's laws or regulations. Here it is pointed out that the Town's law is stricter than that of the state, but it is not inconsistent. Additionally, it is not considered impermissible for a town to prohibit what the state may allow as they have broad home rule authority to protect public health and safety.

The Town also contends that the vested rights that Sustainable claims to have been violated cannot hold up as a cognizable legal claim. Here, while the law does ban the land application of biosolids throughout the entire Town of Wheatfield, there was only one 37.6 acre farm where the petitioner was permitted to use their product. For the petitioners to claim that this was an unjust regulatory taking of their property they must overcome a heavy burden that presumes the constitutional validity of the law. This cannot be done with a claim that they are disallowed from applying their product to a single 37.6 acre farm which they do not own. Regardless, this claim was never raised in their petition, only in their supporting memorandum. As such, the claim is not properly before the Court.

While still arguing that the petitioners lack standing or legal authority to bring an action for misapplication of SEQRA regulations, in the alternative the Town indicates that the claim is without merit. It is pointed out that the EAF clearly states that there is no zoning change requested within the new law and therefore there is no change in a zoning district affecting twenty-five or more acres which would trigger a "Type 1" classification for SEQRA. This was an amendment to the Town's current solid waste management regulations enacted under the express powers found in the Solid Waste Management Act (Article 27 of the ECL). The fact that the law covers the entire Town does not make it a zoning change.

The Town additionally alleges that even if this were a "Type 1" action, the classification of "Unlisted Action" is harmless error as the Town would be the only involved agency. An "involved agency" pursuant to 6 N.Y.C.R.R. §617.2(s) is one that has jurisdiction to fund, approve, or directly

undertake an action. The petitioners are silent as to who these other involved agencies they wish to receive notice are and the Town proffers that there are none, other than the Town itself. Further, the Town took the required "hard look" at the impacts of the new law on the farming industry. There were extended findings and a large amount of environmental scrutiny making the decision to pass the law rational. In addition to a consultant, the Town Board examined information from many sources including the DEC, EPA, Department of Agriculture and Markets as well as members of the general public.

Regarding the petitioners claims that the passage of the law did not comply with the Municipal Home Rule Law (MHRL), the Town responds by arguing that the law was substantially complied with and that is all that is required. The MHRL indicates that it is to be liberally construed and that technical deficiencies should not invalidate a law passed. They note that the purpose of the statute was to provide notice to the public of a law that could affect individual and property rights. This was clearly done here and the public took the opportunity to make their voices heard on the subject. The petitioners themselves took the opportunity to vigorously comment on each proposed law the Town Board considered.

The Court has considered the following: Notice of Verified Petition by Paul F. Keneally, Esq. and George S. Van Nest, Esq. dated November 26, 2014; Verified Petition by Paul F. Keneally, Esq. and George S. Van Nest, Esq. dated November 26, 2014 verified by Jonathan Ratner, President of Sustainable BioElectric LLC on November 24, 2014 with exhibits attached thereto; Memorandum of Law in Support of Article 78 Petition by Paul F. Keneally, Esq. and George S. Van Nest, Esq. dated November 26, 2014; Notice of Motion to Dismiss by Steven J. Ricca, Esq. and Charles D. Grieco, Esq. dated May 21, 2015; Attorney Affirmation in Support of Motion to Dismiss by Steven J. Ricca, Esq. dated May 21, 2015 with exhibits attached thereto; Memorandum of Law in Support of Motion to Dismiss by Steven J. Ricca, Esq. and Charles D. Grieco, Esq. dated May 21, 2015 with exhibit attached

thereto; Affidavit of George S. Van Nest, Esq. sworn to June 11, 2015 with exhibit attached thereto; Affidavit of Bruce Bailey, sworn to June 5, 2015 with exhibits attached thereto; Affidavit of Nathan Carr sworn to June 10, 2015; Memorandum of Law in Opposition to Respondents' Motion to Dismiss by Paul F. Keneally, Esq. and George S. Van Nest, Esq. dated June 11, 2015; Affirmation of Steven J. Ricca, Esq. dated June 19, 2015 with exhibit attached thereto; and Reply Memorandum of Law in Support of Motion to Dismiss by Steven J. Ricca, Esq. and Charles D. Grieco, Esq. dated June 19, 2015; and

The Court begins with Agricultural and Markets Law §305-a which deals with local land use decision making in an agricultural district and is held up by the petitioners as a basis for their action. It is claimed that this section does not allow unreasonable restrictions on farming operations and this Court is asked to determine whether or not the actions by the Town Board are indeed such an unreasonable restriction. However, it is not this Court's place to make such a determination. It is true that §305-a(1) says that local governments "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 public health or safety is threatened." The statute further gives the method of enforcement of the law be vesting it within the commissioner of the Department of Agriculture and Markets, stating in subsection "c" that "[t]he commissioner, upon his or her own initiative or upon the receipt of a compliant from a person within an agricultural district, may bring an action to enforce the provisions of this subdivision." Thus enforcement of any claimed violation of this section is vested solely within the authority of the commissioner and it is not for the petitioner, or this Court, to step into his shoes and ask for relief.

Even if such action were permitted by §305-a, the petitioner still would not have standing under the law. Petitioner is not a landowner within an agricultural district nor does it operate a farm within one. Rather, Sustainable only has a permit to sell and apply a product to a farm owned

by Milleville Brothers within the Town. It is Milleville Brothers who are responsible for "farm operations" which is protected within the statute. In order to have standing, the petitioner must show that it has sustained an injury in fact, or have a legal stake in the matter and that such injury falls within the zone of interests sought to be promoted. (See *Society of the Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 784-785 [1991]). Even if it were held that the petitioners have an injury through a legal stake in a law that affects the product they produce, such an injury would seem to affect only their ability to sell their product. Agriculture and Markets Law §305-a is clearly intended to protect farm operations and with petitioner's potential injury being rooted in commerce and not farming, their alleged injury does not fall within the zone of interests sought to be protected by the statute. (See *Matter of ADM, LLC v. Village of Macedon*, 101 A.D.3d 1717 [4th Dept. 2012]).

It also cannot be said that the permits the petitioner acquired might preempt the local law passed by the Town. Environmental Conservation Law §27-0711 makes it clear that that such laws passed by a town shall not be superseded by the state statute so long as they are not inconsistent. The state gave broad powers to local municipalities to manage their own waste (see *Town of Concord v. Duwe*, 4 N.Y.3d 870 [2005]) and it is not required to allow an action simply because it has been approved by the DEC (see *Matter of Zagoreos v. Conklin*, 109 A.D.2d 281 [2nd Dept. 1985]). In fact the Town remains free to impose additional standards or prohibit the action altogether. Id. So the mere fact that permits were acquired by the petitioner does not prohibit the Town from imposing other restrictions, or even a complete ban.

Even if petitioner did have proper standing to bring this action, the challenge to the SEQRA review must also fail. While the law passed by the Town does encompass the entire Town of Wheatfield, this alone does not make this a "Type 1" action. This law has no effect on zoning and does not involve itself in dividing up the town for specific uses of the land itself, but rather regulates what can be done within those land usages. (See *Niagara Recycling v. Town of Niagara*, 83 A.D.2d

316 [4th Dept. 1981]). Petitioner points to the notice provision of 6 NYCRR 617.6(b)(3) in arguing that fatal error was made noting that the regulation requires notice to all involved agencies. However, no agencies are mentioned as to who should have received notice and the Court can find none besides the Town itself as they are the only ones who would fund, approve or undertake any action with respect to the law. (See NYCRR 617.2(s)). So even if this were somehow misclassified by the Town, this constitutes harmless error at best since they still complied with the requirements of a Type 1 action through a full Environmental Assessment Form. (See *Matter of Hartford/North Bailey Homeowners Assn. v. Zoning Bd. Of Appeals of Town of Amherst*, 63 A.D.3d 1721 [4th Dept. 2009]).

This environmental assessment took the required hard look at potential environmental impacts of the law. The Town imposed a moratorium so that the public health and environmental threats could be properly assessed as well as retaining the services of a consulting firm with expertise in the field of biosolids. The Town worked with their consultant in obtaining information from the general public, the DEC, EPA, Department of Agriculture and Markets and even from the petitioners themselves. When combined with the public hearings the Town clearly had a great deal of information before it prior to passing the law in question here.

It cannot be stressed enough that it is not the role of the Court to examine this information and come to its own conclusion as to what the proper answer is. The only determination to be made is if the procedure has been properly followed and the result is not arbitrary or capricious taking care to not substitute the Court's judgment for the Town's. (See *Matter of Jackson v. New York State Urban Development Corporation*, 67 N.Y.2d 400 [1986]). Here, the Court determines that the Town followed proper procedures and took the appropriate "hard look" at the environmental concerns. *Id.* at 417.

Regarding the alleged defects in the procedure in actually passing the law, the Court first notes MHRL §51 which states that the laws under Chapter 36-A are to be liberally construed.

However, this does not mean that the laws and rules must not still be substantially complied with. (See *Bareham v. City of Rochester*, 246 N.Y. 140, 151 [1927]). Petitioner notes various differences from what was initially proposed to what was ultimately adopted on July 28, 2014. These differences include, but are not limited to, such changes as going from "terms defined below" to "terms defined below in this Article I" in the Definitions section and "Restrict the operations of solid waste disposal" with "Prohibit the construction and operation of new Anaerobic Digestion Facilities" in the Purpose section. These changes are "technical at best" and do not require the Court to invalidate the law. (See *Alscot Inv. Corp. v. Laibach*, 65 N.Y.2d 1042 [1985]). Petitioners note a section which was actually added to the final law which imposed a requirement that an existing facility provide copies of reports, applications and communications from governmental or regulatory agencies to the Town. This record keeping provision does not affect the substance of the law and only impacts the petitioner which has participated fully in each step of the process. Therefore the Court also finds this change to be inconsequential and does not necessitate invalidation.

Petitioner also takes issue with the amendments which were proposed at the July 28, 2014 meeting and more specifically with an amendment which was not specifically proposed at that meeting but adopted after the hearing on August 11, 2014. This amendment exempted a Land Application Facility from being considered an "Existing Facility." However, the purpose of the procedures of the Municipal Home Rule Law is clearly to give notice to those whose individual and property rights may be affected. (See *Preble Aggregate v. Town of Preble*, 247 A.D.2d 697 [3rd Dept. 1998]). As this addition primarily affects the petitioner it is important to note again that they participated fully in each step of the process including being heard at the hearing where they commented on the laws as they were adopted. Therefore, there is no prejudice to the petitioners as they were fully heard on the issue. (See *Matter of Joseph Realty Co. v. Town of Babylon*, 250

A.D.2d 614 [2nd Dept. 1998]). As such, the Court finds there was substantial compliance with Municipal Home Rule Law and no procedural reasons exist to invalidate the law passed.

With respect to the vested rights the petitioner claims have been violated, it is essentially being asserted that the permit issued by the DEC gave them a vested right to apply equate to one farm located in the Town of Wheatfield. Nothing in the law however, prevents the manufacture of the petitioner's product or its application elsewhere within Niagara County, where there are eight other farms petitioner's permit applies to. Petitioner points to *Town of Orangetown v. Magee* (88 N.Y.2d 41 [1996]) as an example of a permit holder being deemed to have a vested right taken by way of a Town Law. While the Court of Appeals did find in that case there was an unconstitutional deprivation of property rights, other factors which were pointed out require a different result here. It should first be noted that *Town of Orangetown* deals with the rights of a "landowner." (See also *Glacial Aggregates LLC v. Town of Yorkshire*, 14 N.Y.3d 127 [2010]). Here, the petitioners do not own the land which is ultimately affected by the prohibition the Town enacted and has little to no impact on the land they actually do own. However, even ignoring that fact brings us to the value of what is alleged to have been lost. "Neither the issuance of a permit...nor the landowner's substantial improvements and expenditures, standing alone, will establish the right. The landowner's actions relying on a valid permit must be so substantial that the municipal action results in serious loss rendering the improvements essentially valueless." *Town of Orangetown* at 47-48. Here, the actions taken by the petitioner and the permit they hold allow them to produce their product within the Town and use it elsewhere. It cannot be said that the actions of the Town has rendered Sustainable's actions in obtaining a permit or building their facility valueless because one 37.6 acre farm is now off limits. The facts here do not hold up to the standard set by Town of Orangetown and as such there is no violation of any vested rights.

For the reasons stated above, the Court finds the Biosolids Law was properly passed with the appropriate amount of scrutiny and without violating the rights of the petitioner. Therefore, the respondent's motion to dismiss the petition is hereby granted in all respects.

FRANK CARUSO
Supreme Court Justice

Dated: May 6, 2016
Niagara Falls, New York

GRANTED

MAY 06 2016

BY: _____
CORINNE CLERI, COURT CLERK