

LAND USE AND ZONING

Foie Gras Ban Reveals City/State Power Clash

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A recent case, *City of New York v. Ball*, 2024 N.Y. Slip Op. 24179 (Sup Ct, Albany County 2024), highlights a clash between the powers of New York State and one of its political subdivisions, New York City.

In June 2024, an Albany County Supreme Court upheld a determination of New York's Department of Agriculture and Markets (department) that concluded New York City's local law banning food establishments from selling or serving foie gras and other forced products ("foie gras ban") unreasonably restricted and regulated farming operations in New York State. At issue was whether an indirect, extraterritorial restriction or regulation falls within the purview of the state's farming protection framework, given that the city's foie gras ban affected farming operations in Sullivan County, approximately 70 miles north.

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In *Ball*, the court held that New York City's foie gras ban violates section 305-a of New York's Agriculture & Markets Law (AML). Section 305-a prevents local governments from enacting laws, ordinances, rules, or regulations that "unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of [the AML] unless it can be shown that the public health or safety is threatened."

Pro Farm v. Anti-Foie Gras

Article XIV, Section four of the New York State Constitution states that the policy of the State "shall be to...encourage the development and improvement of its agricultural lands for the production of food and other agricultural products." In the 1960s and early 1970s, New York state legislators were concerned that local



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land use regulations were jeopardizing the State's agricultural lands by restraining farming and extending nonagricultural development into farmlands.

In response, the New York State Legislature enacted Article 25-AA of the AML in 1971, which provides for the "protection and enhancement of New York State's agricultural land as a viable segment of the local and state economies and as an economic and environmental resource of major importance."

Under Article 25-AA, the New York Commissioner of Agriculture and Markets (the "Commissioner") can approve agricultural districts throughout the state whose land

The decision provides local legislative bodies food for thought when attempting to bring about social change by regulating agricultural products or services.

and farm operations within them are entitled to certain statutory benefits and protections. Municipalities, farm owners, and farm operators can petition the Commissioner to determine "whether farm operations would be unreasonably restricted or regulated by proposed changes in local land use regulations, ordinances or local laws pertaining to agricultural practices."

In 2019, New York City adopted its foie gras ban in response to public opposition to the production of foie gras, which involves the force-feeding of a male goose or duck to force its liver to grow up to 10 times the size of a non-force-fed bird. This could lead to adverse

complications for the goose or duck, such as bruising, perforation of the esophagus, asphyxiation, liver disease, and increased risk of premature death. Polls showed that many New York City residents opposed forced-feeding and supported the sales ban, including those who worked at retailers unwilling to sell foie gras.

Foie Gras Ban Challenged

Farmers in Sullivan County, New York, who produce foie gras requested the New York Department of Agriculture and Markets (the "department") review the foie gras ban under AML §305-a. They alleged New York City intended to restrict the farms' agricultural practices given New York City's market power as the largest market for foie gras products.

In December 2020, the department initial determination concluded that the foie gras ban appeared to violate State agricultural policy and AML § 305-a. It further determined that the foie gras ban was adopted as an animal welfare measure to discourage animal husbandry practices City officials deemed inhumane and therefore was unrelated to any public health or safety concerns, which would have been a permissible basis for restricting or regulating farm operations under AML § 305-a.

The department found that, among other things, the farmers' operations were within agricultural districts, the force-feeding of ducks to produce foie gras is a "customary agricultural practice," and the foie gras ban "would result in a significant loss of sales" for the farms by "restrict[ing] their access to one of their major markets, discourag[ing] investment in their farm properties, and threaten[ing] their

continued operation in the agricultural districts where they operate.”

In response, New York City argued that the foie gras ban did not have a direct impact on farm operations outside the city and that the department’s expansive reading of AML §305-a infringed upon the city’s home-rule powers.

In December 2022, the department issued a final determination and order declaring the foie gras ban violated AML §305-a. New York City commenced a CPLR Article 78 proceeding challenging the 2022 final determination.

In August 2023, the *Ball* court annulled the department’s 2022 final determination as arbitrary and capricious and remitted the matter for redetermination.

On Dec. 11, 2023, the Commissioner issued a second final determination that AML §305-a barred New York City from implementing the foie gras ban. Besides relying on the findings supporting its initial determination, the department found that the entire legislative history supported characterizing the law as an animal welfare measure, as no city legislator identified any threat to public health or safety as a motivating factor for the legislation.

Court Holds Ban Violates AML

New York City argued that its foie gras ban fell outside the scope of AML §305-a because it did not directly regulate or restrict farming operations in agricultural districts, and thus farms remained free to continue producing foie gras. The *Ball* court, however, affirmed the department’s determination, holding it was neither arbitrary nor capricious.

The court noted that the foie gras ban did not prevent farms from producing foie gras

but merely prevented shops and restaurants in the city from selling force-fed food products. However, the court ruled that the scope of AML §305-a was sufficiently expansive to encompass local sales bans—like New York City’s—designed to threaten the financial viability of farm operations using certain production practices.

While the court acknowledged that New York City enjoyed broad home-rule powers, it held that those powers were limited to regulating conduct within city boundaries. The court further acknowledged there was no precedent for a municipal government in New York banning the sale of agricultural products—legal under state and federal law—based on ethical objections to farming practices to alter those practices on farms outside the municipality’s jurisdiction.

Noting the principle that state laws could not be circumvented through indirect actions, the court examined the purpose and direct consequences of the foie gras ban. The court found that New York City did not challenge the Department’s determination that the foie gras ban was an animal welfare measure unconnected to public health or safety concerns, and that the law would cause farms across New York State to suffer a significant loss of sales as a direct consequence of farmers losing access to the State’s largest consumer market for foie gras.

The court observed that the intent and purpose of AML §305-a would be defeated if statutes like the foie gras ban avoided review under AML §305-a because they merely banned the sale of a particular product instead of banning

the farming practice that creates that product. The court endorsed the farmers' statement in their opposition that if the foie gras ban could do so, "it is easy to imagine municipalities using similar bans to indirectly restrict farming practices they deem objectionable or undesirable," such as municipalities banning "the sale of eggs produced by caged chickens, or the sale of beef produced by corn-fed cattle."

Finally, the court noted the same conclusion would follow from the application of federal law, which also embraces the principle that government officials could not do indirectly what they were legally barred from doing directly, since federal jurisprudence regularly considered the practical, indirect effects of sales bans in the context of preemption. The court rejected New York City's contention that the foie gras ban was sufficiently removed from farm operations, finding that the inevitable effect of the law was to force farmers to remove force-feeding from their production processes.

Noting that the New York State Legislature can "recalibrate the statutory balance" if it so chose, the court concluded by holding that AML §305-a prioritizes the interests of agriculture over animal-welfare concerns, unless human health or safety is threatened. New York State's policy of promoting agricultural land "as a viable segment of the local and state economies and as an economic...resource of

major importance" reflected in Article 25-AA of the AML supersedes New York City's desire to protect animals from certain agricultural practices.

Regulating Agricultural Practices: Considerations

Ball highlights the limits of municipal authority to adopt regulations that impact farming operations outside municipalities' jurisdictions because of the AML's comprehensive regulatory scheme. The *Ball* court's decision reinforces the broad reach and power of Article 25-AA of the AML and its ability to block local regulations deemed to unreasonably restrict or regulate farm operations within agriculture districts across the state when neither public health nor safety is threatened.

Assuming the New York State Legislature does not "recalibrate the statutory balance," and *Ball* is not overturned on appeal (New York City and non-party animal rights groups have filed appeals), the decision provides local legislative bodies food for thought when attempting to bring about social change by regulating agricultural products or services.

For now, municipalities contemplating regulating the sale of an agricultural product or service should keep *Ball* in mind and consider whether the broad sweep of AML § 305-a could gobble up animal welfare regulations that affect farm production and products outside their municipal jurisdiction.