

Arundel Zoning Board of Appeals
Minutes
January 10, 2013

Members Present: James Martemucci, John Webb, Norman Cloutier and Raffaella Reimer

Members Absent: David Berg and Roger Scannell

Also Present: Attorney Leah Rachin, Attorney William Dale, James Nagle, Tad Redway, Ricky Dubois, Randy Dubois, Marcel Dubois, Sol Fedder, Bob Coon, Dan Dubois, Roger Morin, Jon Der kinderin and Wendy Lank, Recording Secretary

1. James Martemucci opened the meeting at 7:06 P.M. in the library of the Mildred L. Day School. Martemucci stated that with the members present that the Board had a quorum.
2. **Executive Session pursuant to 1 MRS 405.6 (E) for legal advice from the Town's Attorney in regards to a Land Use Violation Enforcement matter** – Went into Executive Session at 7:09 P.M. to get legal advice and came out at 7:35 P.M.
3. **Administrative Appeal Application – Dubois Livestock, Inc., Owners** – 191 Brimstone ; Map 19, Lot 6; Zoned R-4

Ricky Dubois stated that Sol Fedder was going to be representing Dubois Livestock, Inc. at tonight's Public Hearing.

Fedder stated that he was the Director and Secretary of the Corporation and that he is a trusty of Randrick Trust.

Martemucci read into the record that there are two attachments that were submitted with the application. The first being a letter dated July 19, 2001 from the State of Maine Department of Agriculture to Randy Dubois, Dubois Livestock, Inc. The second being a letter dated December 13, 2011 from the State of Maine Department of Environmental Protection to Randy Dubois, Dubois Livestock, Inc.

Fedder stated that they did apply for a Conditional Use Permit with the Town of Arundel and that it was issued based on facts that it was a non-conforming commercial solid waste use of the composting property. Fedder stated that the process to acquire the permit took about one and a half years and it dealt greatly with the issue of the understanding by the Planning Board that there were a non-conforming use in an agricultural setting.

Fedder stated that the property is in the R-4 district. After the Public Hearing with the Planning Board Dubois Livestock felt compelled to make inquiry into whether or not they were actually a non-conforming use or a truly conforming use under the laws of the State of Maine. The portion of correspondence in the letter dated July 19, 2011 states that composting of these materials on the farm meets the Department definition of an "Agricultural Composting Operation, as described in Title 7, subsection 152(1) of the Maine Agriculture Protection Act. In the letter dated December 13, 2011 from the Department of Environmental Protection, Department Order S-021843-(G-A-N) states that the DEP permits their facility to compost up to 1733 tons of fish waste and up to 3,467 tons of horse manure annually. 06-096 CMR 400, Maine Solid Waste Management Rules, General Provisions (last revised 7/20/10) defines "Agricultural Composting Operation" as, "composting that takes place on a farm and uses only animal manure, animal carcasses and offal, fish waste, leaves, wood chips, animal bedding and other vegetated waste, produce and other vegetables and food waste".

Fedder stated that they did everything they could to establish that the composting operation was in essence, exempt from activities in relation to the town's ordinance when it comes to composting. The reason for that was not to avoid any types of regulations. We are completely regulated by the Department of Agriculture and even more regulated by the Department of Environmental Protection.

Fedder stated that they contacted the town and sent them the letters indicating that they have met the standards for a farming and agriculture composting operations. Fedder stated that a letter they received dated February 5, 2012 from the Code Enforcement Officer and the Town Planner indicates that they acknowledge that Dubois Livestock, Inc. have solicited and received letters of confirmation from both the Maine Department of Agriculture and the Maine Department of Environmental Protection confirming that the composting operation would be considered by those agencies to be an agriculture activity. Fedder stated that in the next paragraph however it states that "from the onset, please be advised that although we always appreciate hearing from our counterparts in the state agencies, the fact remains that the police power for regulation of land use activities within the municipal boundaries of Arundel are and remain within the sole jurisdiction of the Town of Arundel as granted by the State of Maine in 30-A MRSA, Section 3001-3006 and Sections 4351 and 4352".

After reviewing the letter dated February 5, 2012 (copy produced by Attorney Dale was actually dated February 10, 2012), Martemucci asked if this statute states that the ZBA can rule on a pre-empt.

Fedder stated, to be honest when it came down to contentions in relation to their non-compliance with the two particular requests to the CEO, we were determined to be a Agriculture Composting Operation and not a non-conforming type of an operation by the State of Maine, we were obligated at that point to comply with the statute and not an ordinance that was opposite.

Martemucci asked Fedder if he was making a pre-emption argument with the ZBA. Fedder stated yes. Martemucci asked Fedder if he were suggesting to this Board that they may have jurisdiction to rule on a pre-emption issue and Fedder stated yes. Martemucci asked Fedder if anywhere in this statute does it state that the ZBA can rule on a pre-emption argument.

Webb stated with respect to section 154 in Title 7, can't you really read that section to say the Municipality can regulate the nuisance itself. Isn't that really the issue of regulate the nuisance and not the operation of the plant.

Fedder stated that he believed in the sense of nuisance they tend to include all that particular area because anything that would be involved where the Town would have an issue is a nuisance. Fedder stated that ninety percent of the DEP licensing is going through and making sure there is no smell, there is no leakage into the water and it is very extensive.

Webb stated that you can see Title 7, section 154 talks about nuisance and the way the state, municipal and Federal Law regulates it.

Fedder stated that the municipalities cannot interfere with the farms operation when they're using their best management practices.

Webb asked Fedder who determines what their best management practices are. Fedder stated the DEP and the Department of Agriculture.

Martemucci stated that he would like to turn this over to the CEO. Then if Fedder had any questions that the Board would give him ample time to respond.

Martemucci stated that the appeal was filed in a timely manner.

The Letter of Violation was October 30, 2012 and a completed application for an Administrative Appeal was received on November 28, 2012.

The Letter of Violation stated that the applicant failed to give Bills of Laden and failed to allow inspection of the premises.

Martemucci stated that is the appeal to the ZBA but he is not hearing any arguments as to whether or not Dubois Livestock, Inc. did this. Martemucci asked Fedder for the record, "do you concede that Bills of Laden were not given". Fedder replied yes. Martemucci asked Fedder for the record, "Do you concede that, in writing, that Dubois Livestock, Inc. was not going to give the CEO permission to inspect. Fedder replied yes.

Martemucci asked if Attorney Dale wanted to speak for the CEO. Dale stated he was there to represent James Nagle, CEO and Tad Redway, Town Planner.

Dale stated he wanted to raise two legal issues.

The first being, the applicant has a Conditional Use Permit from the town and they have two requirements that they are not complying with. Dale stated that his view is if they did not like those conditions attached to their approval when that approval was issued, they should have appealed them to Superior Court in a timely manner. Because they do not appeal the conditions in the appropriate amount of time they lose the right to appeal.

The second is that Dale did not feel that it was permissible under Maine law for a Municipal Administrative Board to make a determination about whether a statute is constitutional or not.

Dale asked, does the Maine Department of Agriculture Act preclude the Town of Arundel's Zoning Ordinance from applying here.

Dale state that he wanted to add as he did in his memo to the extend the Dubois want to argue, that he understands with some legitimacy, the Maine DEP is largely all over this issue both for their existing facility and a proposed expansion that is no in front of the ZBA tonight. Dale stated if they want to argue that they should go back to the Planning Board and ask to amend their conditions and change the two issue's before the ZBA tonight rather than ignoring the CEO, ignoring their Conditional Use approval under an ordinance that is not pre-empted by the statute. With all due respect, what they ought to be doing is going to the Planning Board and saying we do not like conditions 7 & 9 and ask for the Planning Board to amend them.

Martemucci asked if no matter what the ZBA decides can this corporation go back to the Planning Board and say they do not like these provisions. Dale responded and said yes. Martemucci stated, so they have not lost their right to do that. Dale relied no. What they have lost is the right to go from the Planning Board directly to court and ask the court to strike those conditions down. Dubois has not lost their right to go back to the Planning Board and request a change in conditions of their Conditional Use Permit.

Webb asked Fedder if his position now is that the Land Use Ordinance does not apply to them because they are essentially a solid waste facility now under the State statute. Fedder stated that they are an Agricultural Composting Operation. Webb asked if they were a processing plant. Fedder stated no, that they were a composting operation. Webb asked Fedder what type of relief he came to the ZBA for tonight and what he wishes the Board to do. Fedder stated what they would like the Board to do is make a determination that the citation that was issued against them is not valid based on the facts they are a farming operation and they were not composting under the original permit.

Martemucci opened up questions and conversation among the Board. Martemucci referred to the Arundel Land Use Ordinance section 10.3.A Powers and Duties of the Board. Martemucci stated that he believes the ZBA does not have pre-emption power and is pretty confident of that. There are no laws or statute's stating that they do. The candor of the applicant's is that they did not comply with conditions 7 & 9 or even 8.10 for the Land Use Ordinance. I actually think no matter how compelling it is that the hands of the ZBA are tied and that we have to adhere to the only powers that we have.

Norm Cloutier stated that he agreed with Martemucci.

Webb stated that he feels the Board has no authority or jurisdiction at the body they are.

Martemucci stated that the CEO does not have the authority and that he has to enforce the Land Use Ordinance.

Leah Rachin asked as a point of clarification, the findings have to be clear. Rachin stated she heard the ZBA does not have jurisdiction to make this decision. Rachin stated she heard that the 30 day appeal period from the time of the Planning Board decision of their original conditional use permit and any renewal, which the most recent being February 24, 2011 has passed. Rachin asked is the argument that the ZBA does not have jurisdiction because there was an appeal that should have been taken and it wasn't or because the ZBA does not have the jurisdiction to deal with pre-emption issues or both.

Martemucci stated he feels that the ZBA absolutely has jurisdiction to hear this appeal. He goes on to say that they do not have the power or authority to hear a pre-emption argument. No, this Board does not have the power or authority.

Webb moved that the appeal that was timely and properly filed by Dubois Livestock, Inc. should, be for the reason of the previous motion, be denied.

Cloutier seconded the motion with all in favor.

The applicant's were told that Attorney Rachin will draft up the Findings of Fact and the Board will meet again on January 24, 2013 at 6 P.M. to review the findings. Dubois Livestock, Inc will have 30 days from today to appeal the decision of the Zoning Board of Appeals.

4. **ADJOURNMENT**

Cloutier made a motion to adjourn at 9:00 P.M. All were in favor.

Respectfully Submitted,

Wendy E. Lank
Recording Secretary