

**Arundel Zoning Board of Appeals
Minutes
January 24, 2013**

Members Present: John Webb, Norman Cloutier and Raffaella Reimer

Members Absent: Jim Martemucci, David Berg and Roger Scannell

Also Present: Ricky Dubois, Randy Dubois, Marcel Dubois, Sol Fedder, and Wendy Lank, Recording Secretary

1. Norm Cloutier opened the meeting at 6:25 P.M. in the library of the Mildred L. Day School. Cloutier stated that with the members present that the Board had a quorum.
2. **Findings of Fact - Administrative Appeal Application – Dubois Livestock, Inc., Owners – 191 Brimstone ; Map 19, Lot 6; Zoned R-4**

Cloutier asked the Board members if they had a chance to review the Findings of Fact that was sent to them and they had. Cloutier asked if there were and recommendations for changes from the Board. There were none. Cloutier asked Wendy Lank if the Planning Board and Code Enforcement Officer had received a copy of the draft Findings of Fact. Lank stated that they had not because they would first need to be approved by the ZBA.

FINDING OF FACTS

1. Dubois Livestock operates a composting operation off Irving Road in Arundel on an approximately 6 acre parcel owned by Randrick Trust (the “Property.”) The Property is identified on the Town’s tax maps as Map 19, Lot 6 and is located in the R-4 District.
2. Dubois Livestock’s composting operation is a non-conforming use. Solid waste processing and/or composting facilities are not permitted in the R-4 zone, pursuant to § 6.2 of the LUO, but they were permitted when the operation was commenced.
3. Dubois Livestock originally obtained a Conditional Use Permit from the Arundel Planning Board to operate its composting facility on February 24, 2000. Section 8.10.B.3 of the LUO requires that Conditional Use Permits for such facilities be reviewed every three years. Dubois Livestock received its most recent Conditional Use Permit from the Arundel Planning Board on February 24, 2011. Said permit contained a number of conditions. The two relevant conditions for the purposes of this appeal are Conditions #7 and #9.
4. Condition #7 is based on § 8.10.F.2.e of the LUO and requires Dubois Livestock to provide the Town with bills of lading and an annual summary report, no later than March 1st of each year, documenting the amount of material imported to the processing facility during the preceding calendar year.
5. Condition #9 requires the CEO and the Town Planner to make annual inspections of the facility with representatives of Dubois Livestock to insure: that the bituminous pad on which the compost is processed remains intact; that all facilities and infrastructure are maintained in working order; and that the facility is in compliance with all requirements of the Conditional Use Permit.

6. The CEO and/or the Town Planner sought to inspect the Property pursuant to Condition #9 and to secure the documentation required by Condition #7. Correspondence from Dubois Livestock to the Town dated October 19, 2012 and November 7, 2012 reflects Dubois Livestock's refusal to both provide said documentation and to allow access to the Property for inspection purposes.
7. Dubois Livestock candidly conceded at the January 10, 2013 ZBA hearing that its representatives denied the Town access to the Property and refused to provide the documentation required by its February 24, 2011 Conditional Use Permit.
8. Dubois Livestock's refusal to provide access and/or documentation was based on its stated belief that it was not subject to regulation by the Town of Arundel (either under the LUO or the February 24, 2011 Conditional Use Permit) because it was an "agricultural composting operation," as defined in § 7 M.R.S. §152(1) and under both the Department of Agriculture's Rules for the Agricultural Compliance Program and Maine DEP's "Solid Waste Management Rules." As set forth below, we conclude that this belief, while perhaps honestly held, was erroneous.
9. Based on Dubois Livestock's failure to provide the access and documentation required by the February 24, 2011 Conditional Use Permit, the CEO issued the NOV on October 30, 2012.
10. Dubois Livestock timely appealed the NOV on November 29, 2012, pursuant to § 10.5.A of the LUO. Dubois Livestock had sufficient right, title, and interest in the Property to give it standing to bring this appeal. *See* Easement Deed from Randrick Trust to Dubois Livestock, Inc. included in the appeal packet.
11. Dubois Livestock bases its appeal on the following three grounds:
 - (1) Its composting operation is not a non-conforming "solid waste facility" or a "processing facility" but is rather a permitted "agricultural" use, and therefore, not subject to the standards imposed by the LUO and/or its conditional use permit;
 - (2) Its composting operation is exempt from local zoning regulations because it is an "agricultural composting operation" under Maine law, including the Maine Agricultural Protection Act ("MAPA,") which is sometimes referred to as the "Right to Farm" law; and
 - (3) Because the Town failed to send a copy of § 8.10.F.2.e of the LUO to the Maine Commissioner of Agriculture for review and approval as required by the MAPA, said regulation (and Condition #9 based thereon) are not applicable to it.

CONCLUSIONS

Based on the above stated facts and the provisions of the LUO cited herein, the Board concludes as follows:

1. This Board rejects Dubois Livestock's first grounds for appeal (that its composting operation is not a "solid waste facility" and/or a "processing facility" under the LUO.) We find that it is both, according to the plain and unambiguous definitions of these terms contained in § 2.2 of the LUO.

2. “Solid waste” is defined as, “[s]olid material with insufficient liquid content to be free flowing, including but not limited to rubbish, garbage...”

“Solid waste facility” is defined as, “[a]ny land use area, structure, location, equipment or combination of them, used for the handling of solid waste. These include but are not limited to solid waste transfer stations, landfills, incinerators, *processing facilities*, storage facilities, and agronomic utilization sites...” [emphasis added]

The term “Processing Facilities” is defined as, “[a]ny land area, structure, equipment, machine, device, system, or combination thereof, other than incinerators, which is operated to reduce the volume or change the chemical or physical characteristics of solid waste. Processing facilities include but are not limited to....*composting* or other stabilization techniques to reduce or otherwise change the nature of solid waste. Composting of animal manure *generated on site* shall not constitute a processing facility.” [emphasis added]

Dubois Livestock composts horse manure bedding and fish waste generated off-site. We find that this material constitutes “solid waste” under the LUO and that by composting such waste, Dubois Livestock’s operation is both a “solid waste facility” and a “processing facility,” as defined in the LUO.

3. Because Dubois Livestock’s operations constitute a “solid waste facility,” § 8.10.B.1 of the LUO clearly requires it to obtain a conditional use permit in order to lawfully conduct business in the Town. It duly secured such a permit back in 2000 and apparently complied with the 3-year renewal requirement set forth in § 8.10.B.3, obtaining its most recent permit on February 24, 2011.
4. Both the LUO and Maine law require applicants who are dissatisfied with any conditions of approval to appeal them within prescribed time periods. See Sold v. Town of Gorham, 2005 ME 24, ¶9 (“Except when otherwise provided by statute, challenges to municipal administrative functions must be brought within thirty days of notice of the municipal action or failure to act.”) Because (as in this case) the applicants in Sold did not challenge their conditional approvals within the 30 day period, they were time barred from doing so thereafter.
5. If Dubois Livestock wished to challenge Conditions #7 and #9, it was legally bound to do so within the prescribed appeal period (e.g., 30 days if appealing to the Board of Appeal, pursuant to § 10.3.C of the LUO, or, 30 days if to the Superior Court, pursuant to M.R.Civ.P., Rule 80B.) It is undisputed that Dubois Livestock did not appeal the conditions at issue here. Accordingly, any objection to said conditions is now time-barred. Because Dubois Livestock conceded that it did not abide by the applicable conditions, we find that the CEO did not err in issuing the October 30, 2012 Notice of Violation.
6. We also reject Dubois Livestock’s second ground of appeal (that the MAPA and applicable Maine DEP and Department of Agriculture regulations preempt any regulation of its composting operation by the Town of Arundel.) As a threshold issue, we do not believe that the jurisdiction granted to this Board by either § 10.3.A of the LUO or 30-A M.R.S. § 2691 permits us to make a determination on Dubois Livestock’s preemption argument. Even if we did have jurisdiction to address this issue, we find no language in any of the statutes or regulations cited by Dubois Livestock that would either expressly or impliedly preempt the Town’s LUO. Nor do we find anything in the Conditional Use Permit or the LUO’s regulations of solid waste processing facilities that would “frustrate the purpose” of the

MAPA. While the MAPA prohibits municipalities from finding that a method of agricultural operation is a violation of a municipal ordinance if that method constitutes best management practices, there is no allegation here that Dubois Livestock violated best management practices. See 7 M.R.S. § 154. Rather, the NOV is based on the fact that Dubois Livestock failed to comply with the clear conditions of its permit. Moreover, there was nothing in either of the letters from DEP or the Department of Agriculture that Dubois Livestock submitted in support of their appeal that would indicate that the state intended to preempt local land use regulation of composting operations. To the contrary, Dubois Livestock's solid waste license from DEP clearly provides that "the licensee shall secure and comply with all applicable ... local licenses, permits, authorizations, conditions, agreements, and orders prior to or during construction and operation, as appropriate."

7. We also reject Dubois Livestock's third ground of appeal, i.e., that the Town's attempt to assert jurisdiction over its composting operation was ineffective given its purported failure to provide a copy of § 8.10.F.2.e of the LUO to the Commissioner of Agriculture, pursuant to 7 M.R.S. § 155. Section 155 requires municipalities to provide the Commissioner with "a copy of any *proposed* ordinance that affects farm operations." [emphasis added] This provision of the MAPA was not enacted until 2007, whereas § 8.10.F.2.e was enacted in 2000. Section 155 only applies to "proposed" ordinances and § 8.10.F.2.e was already in place at the time of its enactment. There is nothing in the MAPA to suggest that § 155 applies retroactively.

DECISION

Based on the above facts and conclusions, on January 10, 2013, the Zoning Board of Appeals voted 4-0 to deny Dubois Livestock's administrative appeal and concluded that the CEO did not err in issuing the October 30, 2012 Notice of Violation.

APPEAL RIGHTS

Any appeal from this decision, to the extent permitted by law, must be made to the York County Superior Court within 45 days of the Board's decision, which was made on January 10, 2013.

Webb moved to accept the Findings of Fact as written. Rae Reimer seconded the motion with the all in favor

3. **ADJOURNMENT**

Webb motioned to adjourn at 6:30 P.M. Cloutier seconded with all in favor.

Respectfully Submitted,

Wendy E. Lank
Recording Secretary