

**Arundel Zoning Board of Appeals**  
**Minutes**  
**December 16, 2015**

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

**Members Absent:** Roger Scannell and David Berg

**Also Present:** Attorney Durward Parkinson , James Nagle, Tad Redway, Ricky Dubois, Randy Dubois, Marcel Dubois, Sol Fedder, Kevin Crowley, Richard Spencer, John Kuchinski, Rich Ganong, Bob Coon, Jon Der Kinderin, Marty Cain, Diane Robbins, Steve Katon, Florian Legros, Donna Butterazzi and Wendy Lank, Recording Secretary

1. In the absence of James Martemucci, John Webb opened the meeting at 7:20 P.M. in the library of the Mildred L. Day School. Webb stated that with the members present that the Board had a quorum. Webb stated that the Board will be first hearing the Dubois Livestock, Inc. Administrative Appeal.
2. **Administrative Appeal Applications – Dubois Livestock, Inc., Applicant; Randrick Trust, Owner – 191 Brimstone ; Map 19, Lot 6; Zoned R-4**

Webb stated that there were two actual appeals on the docket with respect to the Dubois and Randrick Trust matter. Webb asked Sol Fedder if he was going to be representing the Dubois' and he stated that he was.

Webb stated that the first appeal is related to two Notices of Violation, dated October 12, 2012 and June 29, 2015. The second appeal is related to the Notice of Violation dated October 20, 2015. Webb invited James Nagle, Arundel Code Enforcement Officer to start by giving the Board a synopsis of what entailed that matter and an outline of what happened and the nature of the violation.

Nagle stated that he would refer the Board to Exhibit 1 of his response to the appeal that was given to the Board a few weeks prior to tonight's meeting. Nagle stated that Dubois was advised that there were clear and outstanding land use violations. There was an increase of the volume of the compost based on information given to him by the Department of Environmental Protection. The DEP in fact had permitted a relatively large increase that he felt was in violation with the Conditional Use Permit that Dubois had previously received and it was in conflict with the Arundel Land Use Ordinance. Nagle stated basically it was a 5 times increased in compost. Nagle stated that he does not believe that is covered under the Right to Farm Act so he moved forward with the Notice of Violation.

Webb asked Nagle how this violation was different from the others. Nagle replied that it wasn't much different. The two previous ones were based on violations of the local land use ordinance interpretation and contracts with the Planning Board on their composting facility. They were operating without a license, there was clearly an increase and there had been no commitment to renew their permits with the Town of Arundel. Webb asked Nagle, with respect to the appeal, the subject to their appeal is to convince the ZBA to overturn the violation and find the uses conforming. Nagle agreed.

Fedder stated he was confused. He stated that Dubois Livestock have indicated that the farm has been a conforming use in the area we are in for years. Fedder stated that they have been informed by the Town that they are a non-conforming use. He stated that it comes as a surprise that the CEO attends to overturn the use to a conforming use. If that is to happen, we do not have an objection to that.

Webb asked Fedder to state for the Board what the basis of the Dubois appeal is and what they are asking for or wanting the ZBA to do. Fedder stated that they have two appeals. One consists of a revival of an October 12, 2012 order and a June 29, 2015 order that involves Randrick Trust and Dubois Livestock. Nagle stated that he does see the two appeals but his answer to Webb's question was on the Administrative Appeal for the October 20, 2015 Notice of Violation. Nagle stated that it was his opinion that the right to appeal the October 12, 2012 and the June 29, 2015 Notice of Violations had expired.

Webb stated that he agreed with Nagle that it was not filed in a timely manner and they were focusing on the latest Notice of Violation Appeal.

Fedder stated that the problem is it has been revived in relation to the Trust. Fedder commented that on the second page of the violation it states, "if these requirements aren't satisfied on or before October 30, 2015 then the Town will be seeking all available penalties. Webb stated that the Town has made a separate determination with respect to the October 20, 2015 violation. Webb stated at this point the October 12, 2012 and the June 29, 2015 issues were moot. Fedder stated that the Town has offered additional opportunities as property owners to correct these problems. We contend that back on December 9, 2014 we complied with the June 29, 2015 notice.

Webb stated that with respect to the appeal of October 20, 2015 violation he read the appeal and did not understand what remedy Dubois were seeking and asked Fedder what they would like the ZBA to do in regards to that appeal.

Fedder stated that they first raised the fact that the actions they took in relation to the composting operation has been in existence for 30 years. They contend that they are "grandfathered" and they are not required to get a permit. Fedder stated that he does not know why they keep bringing the issue of preemption in relation to the ordinance. The Maine Legislature changed the Agricultural Protection Act which now includes all composting operations. The Town cannot enforce the ordinance as long as the farm is performing Best Management Practices. Fedder stated that they are not saying they are a farm, we do not have to do that because the State Department of Agriculture and the State Department of Environmental Protection has already determined that they are a farm. Composting has been determined to be an Agricultural Farm.

Webb asked if Fedder believes that the Arundel Land Use Ordinance does not apply to Dubois Livestock. Fedder stated that the Land Use Ordinance does not apply to Dubois Livestock. The LUO does not apply to them as long as they keep performing Best Management Practices, it is just not forcible.

Webb asked the Nagle if he believes the Arundel Land Use Ordinance regulates that. Nagle stated that he believes the Town of Arundel does regulate that. He also believes DEP licensed them as a Solid Waste Facility and referred the Board to Exhibit 2. Fedder stated in regards to the DEP Licensing, they had filed with the Town of Arundel in 2012 for the very license they are applying for and the town should have a copy because everyone received a copy of it. Webb asked, with respect to that then is your position with DEP Licensing incorrect? Fedder stated that it is incorrect and that they are an Agriculture Composting Facility and not a Solid Waste Facility.

James Martemucci, Chairman of the ZBA arrived to the meeting at 7:35 P.M. and Webb informs him of what has taken place so far.

Martemucci asked Fedder to justify how the October 20, 2015 letter by the CEO revives these prior decisions that were made in October 2012 and June 2015. Fedder stated that it is a Notice of Violation requiring Dubois to comply with these. There was discussion amongst the Board and those present regarding what revived meant and if it applied. Nagle stated it was the intent to notify the land owner, that in his opinion, a violation existed on their property.

Webb asked Fedder if he were there on behalf of the Trust or Dubois. Fedder replied both and that this was a Trust issue right now. Webb stated, as far as you and the Board are concerned tell us what you are appealing and tell us what you want us as a Board to do. Fedder stated that all these appeals deal with the issue of "Grandfathering". We contend that whether we are a conforming or a non-conforming use, the fact that the processes have existed for over 30 years, long before the ordinance was ever created, we were a use that has been grandfathered and shouldn't be required to secure a permit. Webb then asked Fedder if it is there position that the CEO has no standing to even serve them with a Notice of Violation. Fedder replied, because of the fact that they were not required to be or should never have been permitted in the first place. Fedder stated that he had sighted case law in the packets that were given to the ZBA members as to the constitutionality of "grandfathering". The second issue is the change in law that occurred in June of this year. The Right to Farm Act was amended to include all composting facilities and it also created a circumstance where composting and manure are now agricultural products. I keep hearing the word

preemption; we are not talking about preemption we are done with that because there is none. What there is under the Right to Farm Act or the Farm Protection Act is that the farm cannot be held in violation of an ordinance if it is using Best Management Practices. We also go on and say we were in compliance because we did file the application on December 9, 2014 and delivered it to the Town. The Planning Board was supposed to make a determination of whether the application was complete. The process of the Town of Arundel is the application went from the Clerk to the Town Planner and then he held on to it for four and a half months. During that period on June 15<sup>th</sup> he told the Planning Board that he received it and he did not believe that it was complete. The Planning Board refused to hear us on the amendments that had passed so we withdrew our permit. Then on June 29<sup>th</sup> after we withdrew our permit we received another Notice of Violation. During the period before June 11<sup>th</sup> we were trying to comply with getting the CEO and Town Planner to the farm. Nobody was working hard at it, nobody thought it was a big deal but we never ever told them not to do it. In fact on June 29<sup>th</sup> when we received the notice we sent Mr. Nagle a letter. On July 9<sup>th</sup> we responded to the fact that we had complied with whatever they wanted us to do in relationship to that particular Notice of Violation. We also told them that because of the fact that here was an issue involving farming that the Department of Agriculture had told us that when we had an inspection by the Town they were expecting to be there so we asked that to happen. Also Bills of Laden, I do not know how many times I have told everybody we just do not have Bills of Laden. We do not haul freight for anyone else. When it comes to moving the product, we go get it ourselves.

Fedder stated that on the Planning Boards Findings of Fact and Requirements from their original permit in 2011 was that we should dredge out the basin that we have of all the silt and vegetation. If we do that the DEP will come down and shut us down. We have told the Planning Board we cannot be doing that. It was ok and nobody said anything. We told them we had no Bills of Laden and they said it was ok but still had to put it in. Fedder stated, understand something, when you look at the license you will see that we did an application in May of 2010. Eight or Nine months later we were finally able to get a license. This letter also informs the CEO that we've given them the documents that they wanted.

Fedder stated that the volume, they have to give that to the DEP in March. We give it to the Town and then they say they do not have it so we give it to them again. Fedder stated that he knows that happened because he walked in to the Town Hall with Marcel with those documents and set them down so they would have them.

Webb stated that he was a little confused. After the explanation Fedder had given, that all goes to the use of the land and licenses, is that correct?

Fedder stated, the fact is that we complied like we were supposed to do.

Webb stated that their initial contention was that they do not really need to comply because it does not apply to them. Fedder stated no, now it doesn't because Title 7 was changed and we never raised the Grandfathered clause, which we have the right to do.

Webb asked where in the Arundel Land Use Ordinance he can find the Grandfathered clause. Fedder stated section 5.1. He also stated that on February 24, 2011 the Planning Board recognized them to be an exempt type of a business. In their own use of criteria they determined that the proposed use is not similar with other residential in the district but is consistent with the operation of an individual industrial mixed use farm complex. The use is not permitted in the R-4 district but is a pre-existing non-conforming use and cannot be used if expanded beyond the boundary it established for this Conditional Use Permit.

Webb asked Fedder, so you concede if you apply the Land Use Ordinance, the license to your outfit you have exceeded the use, you have exceeded the volume, that you have exceeded your footprint and you have exceeded volume and waste? Fedder stated no, they have never exceeded their footprint. We are in 6 acres and we have always been in 6 acres. We have a license to increase our volume but I do not know if we have. Also we have proved case law that indicates an increase in volume is not a violation of a non-conforming use.

Webb asked Fedder if he could point him to a State or Federal Statute that says the ZBA can preempt or give the Dubois permission to operate when it may be in violation of State and Federal law. Fedder stated that they are not in violation of any State or Federal law. Webb then asked it is in your opinion that you

are not in violation of any DEP license? Fedder replied no. Webb stated, and that because the Maine Agricultural Protection Act gives you the right to do what you do. Fedder stated, but we are not in violation of our license nor have we ever been.

Webb asked the Board if anyone else wanted to ask any questions.

Martemucci stated that he read the application for appeal several times. Fedder sights 5.1 of the Land Use Ordinance as the Grandfathered Statute. Fedder stated that was as close as he could find. Martemucci stated that he has his book open to 5.1 and he sees nothing that refers it to a Grandfather Statute and asked Fedder why he calls it that. Fedder stated it is because that is just a general name for that part of the statute. Under the State case law it is called Grandfathered. Martemucci stated, just so we are on the same page, 5.1 of the Town of Arundel's Land Use Ordinance, General Provisions & Non-Conformance, is that right? Fedder stated he also believes it would be interpreted to include other types of uses for the fact that it cannot be interpreted to be unconstitutional. You have to have a Grandfathered clause in your Land Use Ordinance.

Martemucci stated Fedder also mentioned in his presentation that the company never should have been granted a permit to begin with. Fedder stated that they should never have been required to secure a permit in the first place. Martemucci asked when the first time they ever secured a permit. Fedder stated years ago. Martemucci asked Fedder how many times has that permit been renewed and Fedder replied that he did not know. Martemucci asked, so if it did get renewed, it would have been renewed multiple times, is that correct? Fedder replied yes. Martemucci then asked, if it had been renewed multiple times then why is it now Grandfathered and it does not need to be renewed? Fedder stated because now the Grandfather doesn't just disappear. The findings and the permitting of a Town entity does not become precedence. Martemucci asked if that means Dubois also made a mistake by continually applying for the permit and Fedder replied absolutely.

Martemucci asked with the exception of Fedder sighting 5.1 of the Land Use Ordinance could he sight anything else that supports this argument that it is grandfathered. Fedder stated that he did not know of any other statute in the ordinance but there probably is one.

Martemucci asked how the most recent letter from the CEO basically revives or renews these prior violation notices. Fedder stated that he believes the language of the violation of October 20, 2015 indicates very clearly that it is the intent that these notices are being reopened for purposes of compliance. The notice states that we had until October 30<sup>th</sup> to get it done, so that is a revival. Martemucci asked isn't it just giving the property owner additional time to rectify violations. Fedder replied yes, the October 12, 2012 and the June 29, 2015 violations. Martemucci stated that the letter itself actually sights that there have been violations since 2012, and it also says it is given the landowner opportunity by notice dated October 20, 2015 more opportunities to correct these violations. Fedder stated to comply with the October 2012 and the June 2015 violations.

Martemucci asked if Dubois received notice of violation in October 2012. Fedder stated they had and took it upon appeal. Martemucci asked the result of that appeal and Fedder replied that they had appealed it on preemption and it was found that there was no preemption. Martemucci asked if that was the case that went to court and Fedder replied yes. Martemucci asked if that case was resolved and Fedder said resolved as to preemption. Martemucci stated that the law court in our State ruled against you. Fedder replied yes on preemption. Martemucci asked Fedder if he thinks the ZBA can revisit that issue and change the law courts decision because of the October 20, 2015 letter. Fedder stated that the issue is not preemption.

Martemucci asked if the Dubois received the Notice of Violation dated June 29, 2015. Fedder stated that they had. Martemucci asked what was done in response to that if anything. Fedder stated that they had tried to set up dates for the CEO to come out but nothing ever came together.

Webb asked, with respect to the Dubois being designated as a Solid Waste Facility by DEP, have you ever done anything to modify or have that changed. Fedder stated no, we are a Agricultural Composting Operation. When you look at the license, you cannot abuse the expression Solid Waste. It is not one definition. It is very broad and encompasses everything. Webb asked Fedder if that license still exists and

Fedder replied amended yes, it has been in existence for 30 years. There is a particular section of DEP that deal with Agricultural Composting separate from everything else.

Martemucci asked Tad Redway, Town Planner if he wanted to respond. Redway stated he and Nagle would both like to respond. Redway started by stating that he believes the issue is non-conformance. This operation did exist prior to changes that occurred in the zoning ordinance. This operation was required by DEP to file a Solid Waste Permit back in 2000 because they were operating without a DEP permit. At the same time the Town instituted Solid Waste Permit regulations as well within a zoning ordinance. It has been modified several times since then. It basically follows the State DEP Solid Waste Ordinance provisions with the same sort of classifications. At the same time as their 2000 license the Town gave Dubois a Conditional Use Permit for the activity of doing solid waste composting as a Solid Waste Processing Facility that they are composting material associated directly or indirectly by the farm. The Dubois renewed that application a number of times from 2000 to the latest provisions in 2011. Somewhere around 2007 the Towns people changed the ordinance in the R-4 zone and made the use of a Solid Waste Facility prohibited in that district and transferred it to the BI district. It has been a legal non-conforming use since those zoning changes occurred. Dubois has received permits for a limited amount of product that they could produce. Because of the non-conforming stature, because of section 5.1.B.4, a non-conforming use of land cannot be extended to any part of the remainder of that land. Basically you are frozen as a non-conforming use into the existing permitted use. Dubois was issued permits for about 5,000 tons of material. Redway stated they expanded their non-conforming use and that is why they received a Notice of Violation on October 20, 2015 and without benefit of a Planning Board permit which is required. It included expansion of the tonnage from around 5,000 to 29,000 tons, it included the expansion of a bituminous pad that was shown on a DEP application, referenced in the DEP site order and also shown on a NRCS as built plan given to the DEP showing a 30,000 sq. ft. bituminous pad that is in addition to the existing pad. Yes it is within a designated composting area but the pad is the area in which the composting operation mixture occurs. The 30,000 sq. ft. pad was a significant increase in the area and volume that was going to be produced and beyond what was permitted by the Planning Board in 2011. Then there is the compliance of the original Planning Board permit in 2011, but the principle issue was the major expansion of a non-conforming use. In addition, there was in building the pad over 100 cu. yds. Of earth material used in the excavation and construction of that and that requires under our zoning ordinance a permit from the Planning Board.

Webb asked, with respect to the DEP order from January 2012, was that ever complied with to your knowledge. Nagle stated he did not know. Nagle stated that he had only spoken with Mike from DEP and my understanding is the expansion did in fact take place but I have not been on site to verify. Redway stated that they do have the as built which is a survey showing what was built and it was done by the Federal NRCS.

Martemucci asked, this Notice of Violation, is it the Towns position that these violations occurred at the same time request for permission made and not granted. Nagle stated that was correct.

Fedder stated, first off I want to indicate that composting started in the 1980's and in 1998 the DEP came in and said we had to have a license. Fedder said, also the pads mean nothing when it comes to mixing. We can mix anywhere on that 6 acre area because of the Elmwood soils. The pad is only for mixing conveniences only. The pad can be used to stock pile the material.

Martemucci stated that the Town has made very specific allegations as to the non-conforming and compliance. Martemucci said to Fedder, they are saying you went from 1,733 tons of type 1 fish waste and you expanded it up to 8,000 tons. Fedder stated they expanded the license to that much. At this point we have not hit that particular market but we intend to. Martemucci asked Fedder what type of license is he talking about. Fedder replied in order to secure such a license we are required to file with the Town just like anyone else and give them the opportunity to object to the expansion. Fedder stated that they had to do this particular operation twice because they sent out notices, brought the thing to the Town and the DEP wanted us to change a couple of things so they sent it back to us and told us to start over. Martemucci asked Fedder who gave them the license. Fedder replied, the DEP gave them the license to go up to 8,000 tons.

Martemucci asked Fedder referring to page 5, C.2 of 10 of the response from the CEO, did you expand the pad the way they said you did? Fedder stated that they did add a 30,000 sq. ft. pad. Martemucci asked Fedder if they deposited more than 100 cu. yds. Of earth material when they were putting in the new pad? Fedder stated that he had no idea.

Martemucci asked Fedder if the Dubois had failed to file all the summary reports from 2012 to present. Fedder stated that was false. They had dropped them off at the Town and then were told they had never received them. We had done it 2 or 3 times. The DEP has them. We told them if they cannot find their stuff then go to the DEP because they have the same things. Martemucci asked Fedder if they had copies and he replied that they do not. Martemucci asked Nagle if the Town had copies and Nagle replied he had never had them. Fedder asked how they can make sure that they receive them. Martemucci asked if Dubois ever got any time stamps, receipts or anything when they have taken them to Town Hall. Fedder replied no. Martemucci asked if he had brought any reports to Town Hall in 2015. Fedder replied, absolutely. Martemucci asked when and Fedder replied that he thought it was in March. Martemucci asked if they gave the Town Hall an Annual Report in 2014 and Fedder replied yes. Fedder stated that when they had the law suit they had to bring several in at once.

Martemucci asked if Dubois had notified the Town Planner one business day in advance of any deliveries of type 1 material. Fedder stated that they cannot tell that. What they will have to do is send the Town notices every day when we think we might get some. Fedder stated that they just don't know a day ahead of time. Webb asked Fedder, when a truck comes, how do they know what is on the truck. Fedder replied that they do not get anything stating what is in the truck. Martemucci asked if Dubois pay for this fish waste and Fedder replied no.

John der Kinderin asked if Dubois receives money for the waste they receive and Fedder replied yes.

Martemucci asked Fedder what they get for it. Fedder stated at the end of the month they receive a bill for what they've hauled. We put that on the list and we send it every year to the Town and DEP. Martemucci asked if what they are receiving if it has a price for each load. Fedder stated no, they just receive a bill.

Martemucci asked if Dubois sends a bill for each time it hauls. Fedder stated that they usually send it monthly. Martemucci asked if the bill reflects how many hauls there have been and Fedder said yes. Martemucci asked Fedder, how come they cannot give that to the Town? Fedder replied it is not a Bill of Laden and they are not required to do that. Fedder stated, understand this, there is an issue of whether we run our business or the Town runs our business. Webb stated, just to know we are on the same page, that at the end of the month you know how many trucks have come and Fedder replied yes. Webb asked if they know what the capacity of the trucks are and Fedder replied yes. Webb asked, and you know what you are getting per load. Fedder replied yes.

Der Kinderin who currently sits on the Planning Board stated that he was on the Board when the original permit was negotiated for the composting. There was a lot of discussion regarding Bill of Laden. The Planning Board wanted to know how much material was coming in and what the material was. We discussed various methods and we all agreed a Bill of Laden and the Dubois agreed this was the best way to do this. It became a condition of part of the permit that the Bill of Laden's be supplied to the Planning Board. Fedder replied by saying they did not agree. Fedder stated that they bring in exactly what their license says we can bring in and nothing else.

Martemucci stated to Fedder, you made a comment that is very interesting to me. You want to run your business, you do not want the Town to run your business, is that correct? Fedder replied yes but it is one thing for reasonable regulation and to some degree I think the regulation of the DEP can get a little bit unreasonable. Fedder stated that Dubois tests their water, they test their product, they test everything. We supply these test for them.

Martemucci asked if the applicant was taking the position that the Town has no right to regulate their business in any way shape or form. Fedder stated that what he is saying is we have 4 or 5 different types of businesses on/in that area and the Town regulates all of these particular businesses. What we are saying in relationship to this is if we are performing Best Management Practices they shouldn't apply. Also we are taking about grandfathering and whether or not we have to get this permit. We are not trying to avoid

regulations; we can't because DEP regulates us to the extreme. Martemucci asked Fedder if he felt the Town has the right to regulate them as well and Fedder replied no.

Webb stated that it has been 22 months that Dubois Livestock has operated without a valid permit. Webb asked if that is because you feel you do not have to be permitted by the Town of Arundel. Fedder replied no, we were going through the permit process. We filed permits, we were trying to get things together. The CEO is required to prepare a report, which really shouldn't be seen by the Planning Board because of the fact we feel it would create bias. In respect to that, the CEO has not prepared a report. We have sent him letters asking him to prepare the report. Fedder stated he believes Webb's question has a slanted affect. It makes it sound like we have not tried to comply all these months. If we do not have a permit it is because it was excused or we were incapable of getting it based on the Towns requirements of certain functions we could not do and the fact that we wanted the issue resolved in relation to the Farm Protection Act. Fedder stated he would just like an answer by the Planning Board and the ZBA if the Farm Act affects them and/or are they required to get a permit. Webb asked if the overall theme that you were grandfathered, in your mind that all would be moot, wouldn't it. Fedder stated Grandfathered would be moot but in the breath we are still looking at the issue of the statute. Grandfathered would end everything.

Martemucci asked Fedder if the February 24, 2011 Conditional Use Permit required among other things that Dubois permit the CEO and Town Planner to come on the premises for annual inspections. Fedder replied yes. Martemucci asked if Dubois has permitted that to occur during the last two years. Fedder replied yes. Martemucci asked when the last time was that they were permitted. Fedder stated that they went back and forth trying to get the guys there along with the Department of Agriculture. Martemucci asked when was the last time Dubois permitted them? Fedder stated they could come on the property but needed to find a time that the guy from Department of Agriculture could come. Martemucci stated, your position is they can come on and inspect but you want someone from Department of Agriculture and Fedder stated yes it was but not now. Martemucci asked Fedder if that had occurred at all during the calendar year's 2015, 2014, 2013, or 2012. Fedder replied no. Martemucci asked when the last time it occurred and Fedder replied that he could not remember. Martemucci asked since the Conditional Use Permit that was granted in February of 2011, there has never been a site visit permitted because your position is, it can only occur when someone from the Department of Agriculture is present and you couldn't coordinate that happening. Fedder stated that they had only been contacted a couple of times and both times it just didn't work.

Rich Ganong, Planning Board Chairman spoke in regards to the last application filed. Martemucci stated that that has already been resolved.

Diane Robbins a resident of the Town of Arundel spoke of the permitting in 2011.

Martemucci asked if any other ZBA Members had anything they wanted to say.

Norm Cloutier stated he did not feel there was a Grandfathered clause in the Land Use Ordinance.

Raffaella Reimer stated the Land Use Ordinance is there for everyone. Reimer asked Fedder if he still feels the Land Use Ordinance does not apply to their business. Fedder stated, for the farm composting he does not.

Cloutier asked Fedder who sets the Best Management Practices and isn't there standards that have to be met. Fedder stated they have to file an application. It is a Nutrient Management Plan. We have had one that has been in effect for 4-5 years now. We have already started the process of getting another one for the next 5 years. Reimer asked if they had documentation of how they apply for that. Fedder stated that they have a water test and they test the compost. Fedder stated the DEP gets those tests.

Martemucci asked Nagle if the Dubois have communicated with him about needing someone from the Department of Agriculture to be there when he was to do the sight walk. Nagle said yes he had correspondence with both DEP and Agriculture but the 3<sup>rd</sup> ruling authority would be the Planning Board and what DEP is studying or what they are interpreting may not necessarily be what the Planning Board is looking for. Nagle stated that he isn't arguing there isn't regulations they are supposed to adhere to, the argument here is that in addition to the DEP and Department of Agriculture as a regulating authority, there is also the Town of Arundel's Planning Board.

Martemucci asked if the Town still takes the position that Dubois must submit a permit renewal application with the Planning Board and fore fills all of the required submission criteria and Nagle replied yes.

Martemucci asked if anyone had anything else to add. There was none.

Martemucci stated that on the first appeal with the 11 grounds of appeal, with respect to the Notice of Violations dated October 12, 2012 and June 29, 2015, we have had discussion as to the timeliness of it and the argument is that it is Grandfathered.

#### Findings of Fact

1. On November 19, 2015, Randrick Trust (“Randrick”) filed an appeal with this board from the October 12, 2012 and June 29, 2015 Notice of Violations and Orders to Correct (the “NOVs”) issued by the Town’s Code Enforcement Officer (“CEO”) to Dubois Livestock, Inc.
2. At the December 16, 2015 meeting, Sol Fedder, Trustee of Randrick Trust, presented written and oral testimony in support of the Administrative Appeal.
3. Randrick contends that the CEO erred, abused his discretion and acted without jurisdiction when he issued the NOVs. A separate Notice of Violation dated October 20, 2015, is the subject of a separate appeal by Randrick Trust, through Sol Fedder, Trustee
4. Randrick further contends in part that the NOVs conflict with its “grandfathered” rights under the Arundel Land Use Ordinances (“LUO”) and is in violation of the Maine Agricultural Protection Act §7 M.R.S. §151 et seq.
5. Section 10.3C of the LUO states that “any aggrieved party may appeal the decision of the Codes Enforcement Officer, Planning Board or Review Board within 30 days after applicant has been notified of a decision ...”
6. Contrary to the Appellants’ contention, the Board finds that the October 20, 2015 NOV does not “revive” the right to appeal the NOVs issued on October 12, 2012 and June 29, 2015.

Webb stated with being consistent with our past practices, I’d make a motion that the appeal be denied because of the fact that it is ruled lack of timeliness. Cloutier seconded the motion with the vote being 4-0 in favor.

Martemucci stated that on the second appeal also with 11 grounds of appeal claiming the CEO made an error, abused his discretion and acted without jurisdiction when he issued a Notice of Violation dated October 20, 2015.

#### Findings of Fact

1. On November 19, 2015, Dubois Livestock, Inc. (“Dubois”) and Randrick Trust (“Randrick”) filed an appeal with this board from the October 20, 2015, Notice of Violations and Orders to Correct (“NOV”) issued by the Town’s Code Enforcement Officer (“CEO”) to Dubois Livestock, Inc. and Randrick.

2. Dubois and Randrick assert that the CEO erred, abused his discretion and acted without jurisdiction in issuing the NOV.
3. Dubois and Randrick contend further that the NOV includes improper reporting requirements to the Town concerning operations at the agricultural composting facility as well as other legal arguments that the facility is “grandfathered” and enforcement is barred under the Maine Agricultural Protection Act.
4. The CEO testified that the October 20, 2015 NOV was intended to notify the Appellants of additional violations at the facility separate and apart from the prior NOVs, which have been confirmed by the Maine Supreme Judicial Court.
5. Contrary to the Appellants’ contention, the Board finds that the October 20, 2015 NOV does not “revive” the right to appeal the NOVs issued on October 12, 2012 and June 29, 2015.
6. We note that the Maine Supreme Judicial Court has prohibited local boards from considering both constitutional issues and those relating to preemption of local ordinances by state law. See *Cf., Minster v. Town of Gray*, 584 A.2d 646 (Me. 1990); *Dubois livestock, Inc. v. Town of Arundel*; 2014 ME 122 . Accordingly, we decline to address either Dubois’ constitutional claims or those which assert or imply that local regulation is preempted by the Maine Agricultural Protection Act.
7. The Board finds that the Appellants did not meet their burden of proof in establishing the CEO erred, abused his discretion and acted without authority in issuing the NOV. The Board finds the CEO’s testimony about additional violations at the facility to be credible.

Webb made a motion that in respect to all three prong of the appeal as presented by the petitioner that none of those allegations occurred and that the appeal should be denied. Cloutier seconded the motion with the vote being 4-0 in favor.

The appellant through the representative gave the Chairman two documents in addition to what they had already filed. The first was dated July 9, 2015 to James Nagle from Dubois and it is in response of correspondence dated June 29, 2015 and it is a four page document. The second is a one page document titled Arundel Land Use Ordinance 8.10.E.1.

### 3. **MINUTES AND FINDINGS**

Webb informed Martemucci that Dubois Livestock submitted a document prior to tonight’s meeting. Dubois has some specific objections to the draft Findings of Fact. Martemucci after reviewing Dubois objections asked Attorney Parkinson to review them as well.

Martemucci stated the document is dated October 19, 2015 and titled Dubois Livestock’s Objections to the Arundel Zoning Board of Appeals Findings of Fact and Conclusions – Re: Dubois Livestock’s Administrative Appeal dated October 19, 2015. Martemucci added that he assumes it is the Findings of Fact and Conclusions from the November 18, 2015 meeting.

Attorney Parkinson reviewed the objections he went through each one and explained why those findings were legal.

Cloutier made a motion to accept the Findings of Fact and Conclusions for the Public Hearing heard on November 18, 2015. Webb seconded the motion. The vote was 3-0 in favor with Reimer abstaining because she was not present at that meeting.

4. **Variance Request for Lot Coverage – Regional School Unit 21 – 600 Limerick Road; Map 17, Lot 25; Zoned R-2**

Martemucci opened the Public Hearing for a variance as request by RSU 21. Martemucci asked who was there to represent the school. Richard Spencer is an Attorney from Drummond Woodsome, Kevin Crowley is the Principle for Mildred L. Day School and John Kuchinski is the Engineer from Hariman Architects & Engineers.

Martemucci for the record went through the items that were submitted with their application. Martemucci asked if one of them would explain why they were there tonight.

Kevin Crowley stated in a nutshell this is really an inadvertent mistake. In 2008 when Arundel joined Kennebunk and Kennebunkport to form RSU 21, the Reorganization Committee took this one big lot and divided it into two and ended up creating two non-conforming lots.

Richard Spencer stated that when Arundel joined SAD71 to form RSU 21 it was one lot of land which would meet all the requirements of the zoning ordinance. There is an extensive area of woods and fields to the rear and the area that is covered by the building is a very small percentage of the total lot. When the school reorganization law passed it required penalties if school units did not reorganize and consolidate into larger units. In the reorganization plan that was done by the Reorganization Committee it showed that the land in the front along with the buildings would be transferred to RSU 21 and the back of the lot in the area of the fields which is used almost inclusively by the Town would be transferred from the School Department to the municipality of Arundel. That plan was developed by this committee and mandated. The plan was then submitted to the Commissioner of Education and approved. Now the RSU after a vote from residents received approval for renovating Mildred L. Day School which will consist of taking down a section of the building, rebuilding, build an addition and redo the parking area of the school. The CEO looked at this situation and said that he would not be able to give the RSU a building permit because they would exceed the lot coverage requirement. Right now on the front lot the lot coverage is 30% and it will increase to 40% when the new project is completed. Not only did the division of the lot do that but it also made the Towns property non-conforming because that property is required by ordinance to have a 50' strip off of a public way and it does not. The reorganization plan managed to create out of one conforming lot, two non-conforming lots.

Spencer stated the only way to solve the problem on the school lot is to take down the building or half of it to meet the 20% lot coverage. The other thing is that if this building is not renovated it is not going to be suitable for a school because it has very serious structure problems. The RSU went to the Arundel Board of Selectmen and said this situation obviously has to be fixed. One way we might be able to fix it would be if the Zoning Board of Appeals would grant a variance based on this hardship situation. Then the RSU would deed the Town of Arundel a 50' strip out to the road and then the Town would deed the RSU the same amount of land out of the swampy area in the back. That would make the rear lot conforming. Spencer submitted to the ZBA a copy of the agreement between the RSU and the Town of Arundel which is in the event a variance is granted. Spencer asked the ZBA to grant the RSU a variance for the new school project on the grounds that it would be a terrible hardship if this property, which is a dedicated school property couldn't be used for the school and essentially would not have any economic value because one, it is sinking and secondly, it is not adaptive to any other use.

Webb stated that he sees it as a Department of Education issue not really an RSU issue.

Spencer stated it is clearly a hardship, it is a unique circumstance and it would not change the essential character of the neighborhood.

Cloutier asked if the school uses the field at all. Spencer stated that the school uses the field on limited occasions. Cloutier asked who was currently maintaining the fields. Crowley stated that it is the Town that maintains them.

Martemucci stated that one of the possible resolutions would be if the Town conveyed monetarily or by court order those fields to RSU 21. Spencer stated that if they were combined into one lot then it would meet the requirements. Cloutier asked when construction was supposed to start. Spencer stated that they were hoping in April. Spencer stated that if the project gets delayed it would vastly increase the cost because interest rates are starting to rise.

Martemucci stated, going through the 5 criteria they would have to meet, two of them in my mind are real easy. The one I want to make sure we have a good record on is the first criteria; the land in question cannot yield a reasonable return unless the variance is granted. So if you wouldn't mind spending a little time repeating your position on that.

Spencer stated he believes that there are two answers to that. The first one is that this property is dedicated to school purposes. It is not a financial operation so the standard of yielding a reasonable return has to be interpreted for a school property. The answer to that is without the variance this property cannot be used productively for school purposes. Then the second, you have to interpret as an economic standard in the zoning law and you have to make that apply to an educational property. Even if you didn't do that the reason the property wouldn't yield a reasonable return is that the current economic use of the property is as a school. The current school exceeds the lot coverage requirement by 50%, the proposed school coverage doubles. So in order to meet the lot coverage requirement you would have to take down a lot of this building and then you would have half of a school building on a piece of land. That would have no economic value.

Martemucci stated that he was happy to have John Kuchinski there and wanted to know if he had anything to add to what Spencer had just said. Martemucci asked as part of this plan I would assume projected costs have gone into it for renovations. Has there been a projected cost if this variance is not granted. Kuchinski stated that they had not figured that into the projected costs. He stated that there isn't any room in that cost for delay's and such.

Spencer stated if the RSU had to take down part of the building and they would not be able to continue with the renovations then with only half of the school it would not meet the educational needs and it wouldn't be well suited to any other economic use. Martemucci stated that if that happened then basically the actuality would be that the school in Arundel would be shut down. Spencer agreed.

Martemucci stated that a plan marked as Exhibit A, of the Memorandum of Understanding between the RSU and Board of Selectmen was a map showing the land swap as explained to them at the site walk. Kuchinski explained that the access will still be by the current right-of-way easement to the field. There were discussions regarding the abutting property owned by the Maine Turnpike.

Der Kinderin stated that the applicant claims this will not set precedence but he feels if you grant this it would. If you grant this you are saying that this 50' access strip is for paper only because it cannot be developed.

Martemucci asked if anyone had anything else to add. Hearing none Martemucci asked the Board if they were ready to proceed.

### **FINDINGS OF FACT**

The Board considered the variance request and made the following findings:

**1. The land in question cannot yield a reasonable return unless the variance is granted.**

The Mildred L. Day school lot is dedicated to school purposes and requires a variance in order to meet the educational needs of Arundel's elementary students. The building is not suited for non-school economic uses and would have almost no economic value for other uses. Furthermore, in order to meet the 20% lot coverage requirement, it would be necessary to tear up much of the paved driveway and parking area and/or tear down portions of the existing building.

**2. The need for the variance is due to the unique circumstances of the property and not the general conditions in the neighborhood.**

The property is unique because it is the only public school property in an otherwise rural residential neighborhood. The property is physically separated from the surrounding houses by wooded buffer areas, the Limerick Road and the Maine Turnpike. The school site was in compliance with the lot coverage requirements of the Arundel Zoning Ordinance until the

School Reorganization Plan prepared by the statutory Reorganization Planning Committee required that the front of the site with school buildings and impervious driveways and parking areas be separated from the rear of the site containing playing fields and undeveloped wooded areas. The need for a variance is unique to this public school property and granting the variance will not set a precedent in other situations because of general conditions of the neighborhood.

**3. The granting of the variance will not alter the essential character of the locality.**

The area surrounding the Mildred L. Day School is a rural residential area with single family homes on large lots that are buffered from nearby properties by fields and woods. The school property is separated from nearby houses by the Maine Turnpike, the Limerick Road and wooded areas. The proposed addition to the school and redesign of the parking areas, driveways and traffic circulation on the site will not have any negative impacts on the surrounding locality. This property has been used as a school site for many years and granting the requested variance will not alter the essential character of the locality in any way.

**4. The hardship is not the result of action taken by the applicant or a prior owner.**

The hardship was the unfortunate result of government versus government action not involving the town or RSU 21. The hardship that requires a variance was not created by RSU 21, or the Town of Arundel. The hardship was created by the Maine Legislature when it passed the 2007 School Reorganization Law and by the Reorganization Planning Committee that required that the site of the Mildred L. Day School be divided into two separate parcels – a school building parcel to be conveyed to RSU 21 and a playing fields parcel to be conveyed to the Town of Arundel. RSU 21, the current owner of the property had not yet been formed at the time that the Reorganization Plan was approved. The special circumstances and facts of this Application justify the granting of a variance –but it should not be viewed as precedent for future cases with differing facts and circumstances.

**5. Based on clear and convincing evidence presented by the applicant, the proposed use would not cause unsafe, or unhealthful or nuisance conditions.**

The proposed use will not cause unsafe, unhealthful or nuisance conditions. On the contrary, the proposed school construction project will improve health and safety conditions on the property by replacing portions of the Mildred L. Day School that have documented structural problems due to settling of portions of the existing building.

Webb stated that this is a rare instance where you have a variance which involves a government entity on government entity crime. You are forced by the Department of Education to take action and you did. So I do not think the same balancing test that this Board has engaged in in the past is necessarily the same as it would be with private citizens and other entities and that is what really distinguishes this from everything else that we have done. That is why I feel that this does not create a precedence of any kind unless government entities are involved. The introduction with the RSU or the marriage between the RSU and Arundel was born through the will of the people. That is the reason why I feel this criteria has been met.

Webb made a motion as presented with respect to the variance request that it be granted as requested by the RSU and supported in the agreement with the Town of Arundel and that all 5 criteria have been met. Cloutier seconded the motion and the vote was 4-0 in favor.

**7. ADJOURNMENT**

Martemucci made a motion to adjourn the meeting at 9:45 P.M.. Cloutier seconded the motion with the vote being 4-0 in favor.

Respectfully Submitted,

Wendy E. Lank  
Recording Secretary