

**Arundel Zoning Board of Appeals  
Minutes  
November 18, 2015**

**Members Present:** James Martemucci, John Webb, Norman Cloutier and David Berg

**Members Absent:** Roger Scannell and Raffaella Reimer

**Also Present:** Attorney Leah Rachin, James Nagle, Tad Redway, Ricky Dubois, Randy Dubois, Marcel Dubois, Sol Fedder, Rich Ganong, Bob Coon, Dan Dubois, Jon Der Kinderin, Marty Cain, Diane Robbins, Steve Katon, Paul Sfreddo and Wendy Lank, Recording Secretary

1. James Martemucci opened the meeting at 7:05 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. **Administrative Appeal Application – Dubois Livestock, Inc., Applicant; Randrick Trust, Owner – 191 Brimstone ; Map 19, Lot 6; Zoned R-4**

Martemucci stated what documents that had been submitted by the applicants and Sol Fedder stated that the Board had everything. Tad Redway asked that the Board also consider the submission the Planning Board made on September 28, 2015 prior to the meeting on September 29, 2015 as part of the packet.

Martemucci stated that the first thing to discuss as a Board is our jurisdictional issue, whether or not we believe as a Board if we have jurisdiction to hear this appeal pursuant to various provisions in the Land Use Ordinance.

John Webb stated that he believes they have two issues to decide. We have to decide under section 10.3.C of the Land Use Ordinance whether the 30 day requirement has been met in respect to the appeal and the issue given how the last hearing was decided, and under section 10.7.A if there is an issue in respect to this appeal already have been decided and if this appeal tonight violates the two year jurisdictional bar with respect to further appeals that concern the same issue or issues brought before the Board initially.

Martemucci stated section 10.3.C reads “Any aggrieved party may appeal the decision of the Code Enforcement Officer, Planning Board or Review Board, within 30 days after applicant has been notified of a decision”. Martemucci stated so based upon the documents that we have, one of the issues is whether or not we have a timely appeal made from the Arundel Planning Boards decision on August 13, 2015. Martemucci also stated he believes there is a sub-issue to that, whether or not we consider that the true decision or do we look at the Town Planners letter to the appellants dated September 2, 2015, either date we should be running 30 days from that.

There was discussion between the Board members as to what date they should go by.

David Berg stated that whichever date that the Board chooses the 30 day rule is not met.

Martemucci stated under section 10.5.C.4 of the LUO, because we had decided in our Findings of Fact that the appeal was withdrawn last time without prejudice it would give the appellants the right to re-file. Given the later date of September 2<sup>nd</sup> to appeal from that still brings them to October 2<sup>nd</sup> to file an appeal and their application was filed on October 19, 2015. Martemucci stated it appears to be late and they have no jurisdiction over it. Martemucci stated just so we are clear, what I am referring to is when I say September 2, 2015 is the letter to Dubois Livestock at 2 Irving Road, Arundel sent by both US Mail and email from the office of the Town Planner, Tad Redway. It discusses the August 13, 2015 meeting where the Planning Board determined the application and material submitted on July 10, 2015 for the renewal of the February 24, 2011 Conditional Use Permit for a Solid Waste Processing Facility as being incomplete. Norm Cloutier stated he wanted to hear what the Town Attorney’s opinion was on this.

Leah Rachin stated with respect to the timeliness, we need to go back to the provisions that have been cited and really it is about whether or not the appeal has been made 30 days after applicant has been notified of the decision. What I think the Board needs to do is make a decision whether there was notice. I think another issue to consider is under section 10.5.C.4 which in your Findings of Fact last time was the determination that the application had been withdrawn and that the specific language is that it was withdrawn without prejudice to re-file. Does that mean the governing appeal period would apply?

Martemucci stated he agreed with that. The question is do we stick with the ordinance and it is 30 days from August 13<sup>th</sup>, September 2<sup>nd</sup> or is it 30 days from another day. Martemucci stated he didn't see that it is 30 days from another day.

Martemucci asked Fedder if he wanted to comment on the issues of the dates. Fedder stated that the statute is not jurisdictional of the 30 days. Fedder stated such appeals shall retake within 30 days of the decision the appeal is from and not otherwise, except the Board, upon showing of good cause, may waive the 30 day requirement. That means the 30 days is not etched in stone. It is merely an advisor that you could make or change at will. Fedder stated the problem here is we have always contended we did not get notice. Notice from the Town Planner that something has occurred in Planning Board meeting is not sufficient notice to start the statutory period of running. Fedder stated they did file the documents within the 30 day period of when it was supposed to. Then we received a notice that within the 30 day period to come to this particular agenda and put on our case, except for the fact it was a public notice, which we mistook as a public notice as opposed to a date set for hearing. At that time you determined that what we did was considered to be withdrawn, you deemed it a withdrawal. Based upon that you have to rely on the statutes which deal with the result of a withdrawal. To treat the 30 days as a factor within this particular statute it creates a decision in which the appeal can only be re-filled with prejudice. Our contention is 1) they did not get notice, and 2) we had to re-file our appeal exactly as we did. To find otherwise is to create an absurdity within the confines of this particular ordinance.

Martemucci asked Fedder, when he first started reading from the ordinance, I believe you were reading from 1010.3.C about the 30 days and you used the phrase that it is the Board's decision. Where were you reading that from?

Fedder replied that it is in the ordinance. Martemucci asked Fedder what section of the Land Use Ordinance it is in. Fedder stated he believes it is in section 10.5. Rachin spoke up and stated it is in section 10.4.A. Martemucci asked Fedder, aren't you reading for an appeal of a Code Enforcement Officers decision and aren't you appealing the decision of the Planning Board which falls under section 10.3.C? Fedder stated that he does not believe section 10.5.A only deals with CEO issues.

Martemucci asked Fedder, when you referred to section 10.5.C.4, without prejudice, are you are trying to present to the Board that it is not prejudice the 30 day window does not apply? Fedder replied absolutely. There was more discussion regarding the meaning of this section.

Fedder stated that they did not get original notice. Fedder contends the 30 day notice can not start because the Town Planner decides to send us notice when he is not qualified to do so. For instance, when we get notice from the ZBA, we get it from your secretary. The Planning Board had a secretary and she could have sent the notice or one of the Planning Board Members.

Martemucci stated that this raises another question he has in his mind. Martemucci asked Fedder if they are arguing that the Planning Board did not make a decision in August and they did not make a decision on September 2, 2015. Fedder stated a decision was made. Martemucci asked Fedder, so what were you appealing when you came to this Board? What decision were you appealing on September 29<sup>th</sup>? Fedder stated that he could not tell him a date but they were at the hearing and the Planning Board determined their application incomplete. Fedder stated he could not remember if it was in August or September.

Martemucci asked if anyone from the Planning Board wanted to say anything. Planning Board Chairman, Richard Ganong stated that there was a hearing on August 13, 2015 to determine the completeness of the application. This was after numerous attempts by the Planner to notify them that the application was incomplete. The Dubois' notified them that the Town Planner did not have the authority to do so. Ganong then wrote Dubois a letter telling them that the application was incomplete

sighting the reasons why. The Dubois' then told Ganong he did not have the authority that the entire Planning Board needed to have that meeting. Ganong stated that the Planning Board met on August 13, 2015, looked at the application, which was a two page application and missing all of the necessary attachments. The Planning Board then deemed the application was incomplete and that all four of the appellants were in the audience at that time and knew it was incomplete.

John Webb made a motion that the Zoning Board of Appeals does not have jurisdiction over this appeal stating the timeframe is outlined in section 10.3.C. Cloutier seconded the motion and the vote was all were in favor.

Martemucci stated to the Board that the applicants have been before the ZBA twice now. Martemucci stated on the chance that Dubois Livestock, Inc. will want to go to court and the court says our ZBA was wrong, I don't see any prejudice on the Board hearing the merits of this appeal today. Fedder stated that there is no way that was going to happen because the Board just shut them down. Martemucci asked what he meant when he said we just shut you down. Fedder stated the Board made their decision that they had no jurisdiction. Martemucci stated for the record that he appreciates Fedder saying that and he appreciates him being patient but be clear no one has voted on it yet. Martemucci asked Fedder, you don't want us to even discuss it as an option? Fedder replied he does not believe the Board can and that he did not have time to go through it and even though he loves to do this sort of stuff, he believes he would be wasting the Boards time because they can not make a decision on it.

3. **MINUTES**

Cloutier made a motion to accept the minutes of October 15, 2015 as written. Berg seconded the motion with the vote being all in favor.

4. **ADJOURNMENT**

Webb made a motion to adjourn. Berg seconded the motion with the vote being all in favor.

Respectfully Submitted,

Wendy E. Lank  
Recording Secretary