

Arundel Zoning Board of Appeals

Minutes

October 4, 2017

Members Present: Chairman, Paul Chansky; Vice Chairman Raffaella Reimer; John Bell; Stephen Dalzell and alternate David Berg

Also Present: Attorney Sally Daggett; Attorney Leah Rachin; Code Enforcement Officer, James Nagle; Town Planner, Tad Redway; Ricky Dubois, Randy Dubois, Marcel Dubois, Sol Fedder, Rich Ganong, Roger Morin, Chip Bassett; Selectman, Thomas Danylik; and Recording Secretary, Wendy Lank

1. Paul Chansky opened the meeting at 7:02 P.M. in the library of the Mildred L. Day School. Attendance was taken the Board was found to have a quorum.
2. **Administrative Appeal Application – Dubois Livestock, Inc., Applicant; Randrick Trust, Owner –** 2 Irving Road ; Map 19, Lot 6; Zoned R-4

Chansky opened the meeting to the applicant. Sol Fedder as Officer and Director of Dubois Livestock stated he was going to be the one to do most of the talking.

Fedder started with the issue involving the appeal that was taken in 2013 and resolved in 2014. Fedder stated that this keeps coming up and keeps being treated as some sort of resolve for all of the issues and problems they seem to have with the Land Use Ordinance that comes into question.

Fedder stated that in 2012 they were involved with a half dozen lawsuits. One of those went on to appeal and dealt with the preemption issue as to whether or not Maine Agriculture Protection Act and also know as MAPA preempted the Town Ordinances. Fedder stated that they had appealed this to the Supreme Judicial Court and it was determined that the preemption was not something that MAPA actually did. The statement from the courts said, “Although the act prohibits this municipality from determining the farms method of operation violates a local ordinance if the farm has used Best Management Practices”. There is no indication that when MAPA was activated the legislature intended to preempt any ordinance. Fedder stated that this was not the only thing that came out of that particular appeal. The Supreme Judicial Court determined that because composting was not defined as agriculture and because there is no raise in section 154, which was the particular section he mentioned here, that bars local ordinances from affecting a farm operation. That ended up creating a circumstance where the composting that we were doing on the farm was no longer protected under MAPA. What happened after that was that we went to the legislature based on this very case. Over the next year there was an amendment in MAPA that put in composting and manure as agricultural products and they included agricultural composting in the determination. We knew that based on the new amendment we did not need to follow any of the ordinances because we were following Best Management Practices to qualify as a farm. We went in and negotiated with a particular deal in this mediation that was reduced to a consent decree. The provision we are interested in is section 1B. It states, “The performance criteria specified in the LUO for the issuance and reissuance of all solid waste processing facility renewal permits at the Site, hereinafter shall be deemed to have been satisfied by the submissions described below or deemed inapplicable as a result of Dubois’ grandfathered status”. Fedder stated that there was an alternative there. The one thing we wanted to make sure of was that when we came back out of this mediation that we did not have to deal with the Planning Board in a circumstance they could deny our permit.

Fedder stated that they had enough belief in the statute that they did not have the opportunity or ability of actually enforcing their Land Use Ordinance against us. We put this particular provision in there as an alternative provision for the Planning Board. They could either deem it satisfied or they could deem it inapplicable. They refuse to read the “or” in this particular provision. We would not have settled for any other option, there is no question about it.

Fedder stated that it doesn't mean they get away scot free. Dubois Livestock has the Department of Environmental Protection and the Department of Agriculture who control what we do. Dubois is licensed through DEP. When they don't like something, no matter what it is, they come in, search the place and all sorts of other things. The problem is we wanted to eliminate any jeopardy we would have had with the Town of Arundel. Unfortunately, the situation that we are in the Town chooses to read and disobey the Consent Decree by denying our permit that we applied for.

Chansky asked the Board if they had any questions. John Bell asked Fedder if he was so intent on not having to deal with the Planning Board why did he agree with the Consent Decree in obtaining a letter from the Arundel Code Enforcement Officer that confirms their composting operation was in compliance with all applicable state licenses and regulations. Bell stated that Fedder made it very clear he did not want to deal with the Town and yet it is written right into the Consent Decree that he has to.

Fedder stated that the Town insisted that they really wanted a permit and we knew that the statute wouldn't let them come in and deny that permit. Fedder stated that in order to meet a compromise Dubois set it up as though there would be no jeopardy to their composting facility because the Town could not deny their permit. The Town could request them to get a letter from the Town CEO and we could get that done. Fedder stated that the other issue is the map. We believe that the map is fine, if the Town wants to whine about the map we could resolve that issue. The whole thing about it is, while this is going on there is no jeopardy as far as us composting and working.

Bell stated, in other words you are saying you can have a permit as long as you can do what you want and no one at the Town can object to it. Fedder replied no.

Fedder said that there was another option. If this wasn't to go through, if this wasn't going to work, the other option was to deem our permit under the other option. Nobody ever looks at the other option. How anybody can read it without reading both alternatives. Understand, it doesn't matter if you like it cause they don't. It doesn't matter if you want it to be that way. That is what we agreed on, that is exactly what it says and that is exactly what the Board is supposed to make a determination on. You can't just ignore it. Now understand, they are ignoring it which is a disobedience of the Consent Decree.

Steve Dalzell asked Fedder if he feels that they should be allowed to operate regardless of failing to comply with applicable state licenses and regulations. Fedder replied he did not understand. Dalzell rephrased the question by saying Subsection 2, paragraph B says that you shall obtain a letter from the Arundel Code Enforcement Officer confirming the composting operation is in compliance with all applicable state licenses and regulations. In that respect as I read this, the CEO is acting as a referrer of the state. Fedder stated, no he does not he acts independently. Dalzell replied that the CEO is to take the information from the State and refer it to the Planning Board. Fedder replied no, the confirmation of a license is one thing, telling us we can not give you a letter because I think you are not in compliance with a State law is something else. Fedder stated that they have not been found to be not in compliance and that their license is good. We are negotiating with the DEP like we have for years. Our licensing is in proper order; our composting is in proper order. If we have a problem with the State, we have to deal with the State.

Bell stated, while you are negotiating with the State you are obviously not in compliance with all the State licenses and regulations. Fedder replied, that is exactly the reason we wanted the Planning Board out of it because they take everything they need and they treat it as though there has been a conviction. There has not been anything that affects our license, the problem is keeping the Planning Board out of it was essential for this very reason. They do not understand what is going on with the DEP or the Department of Agriculture and it is not their job or duty to do so. As far as municipal ordinances, the ordinances that they would be enforcing would not apply to the composting operation. Dalzell asked Fedder if he could confirm for the Board that they are, as of this instant, fully in compliance with all State licenses and regulations. Fedder replied that they were.

David Berg stated that the Consent Decree says the CEO has to confirm that Dubois is in compliance with existing and applicable State regulations and licensing. Fedder already stated that, it's here in the decision. The Arundel CEO received a Notice of Violation sent by DEP. The CEO saw it and alleges he can not give you a letter because of that violation. Fedder stated, the Planning Board had an option to say you get out there, figure out the reason why this isn't happening and you get us a letter. The same thing

with the map. They could go ahead and deem our permits based on our grandfathered clause. Fedder stated the issue here is the Planning Board denied Dubois Livestock their permit based on the fact that they did not get a letter and based on the fact that didn't believe the map was sufficient without considering the fact that they're not permitted to deny the permit. They can force us to get a better map or enforce us to do whatever they want us to do to get them the letter but they can't deny our permit because the only options they have are a or b, that is what the provision says. Raffaella Reimer asked Fedder, then why are these provisions in the agreement and why are they in existence. Fedder stated because we had an option that created a circumstance that we could live with, that the Planning Board could not deny Dubois their permit. They could force us to meet these provisions. Reimer asked Fedder if they were willing to do that and he replied that they were. Bell stated that Dubois had a year from the time the Consent Decree was signed on June 27, 2016. Fedder replied that they applied for the permit just as they were supposed to, before July 1, 2017. If they had of wanted us to get the letter we would have gotten it for them. If they had of wanted the map, they could have said so and we would have gotten them the map. They can't say because you didn't do this we are going to deny your permit.

Chansky stated that the Planning Board has submitted the opinion that the Zoning Board of Appeals has no jurisdiction on hearing this appeal and asked Fedder if he wanted to comment on that. Fedder stated that it most certainly involves administrative review and the interpretation of Arundel's Land Use Ordinance.

Sally Daggett, Attorney representing the Arundel Zoning Board of Appeals asked Fedder if he agreed that under the Consent Agreement Dubois had to apply to the Planning Board for a Conditional Use Permit and if he in fact did so. Fedder stated, yes.

Daggett stated that under section of 9.2.11 on page 151 of the Arundel Land Use Ordinance it states that decisions of the Planning Board on Conditional Use Applications are not appealable to the Zoning Board of Appeal but may be appealed to the Superior Court. Daggett asked Fedder if that not applied and Fedder replied he did not. Fedder stated that he feels they are compelled to apply to the ZBA because they have a denial based on the Land Use Ordinance.

Leah Rachin, Attorney representing the Planning Board stated that she wanted to first and foremost apologize when submitting her submissions and that she had directed them to Mr. Bassett, Chairman of the Planning Board and no to Mr. Chansky, Chairman to the ZBA. She got her Chair's mixed up and so she does apologize for that.

Rachin stated what she wants to raise before the Board is the question of jurisdiction. As Attorney Daggett has pointed out, the ordinance itself sent out the proper mode of appeal. Secondly the ordinance talks about when this Board has authority to consider appeals. As we all know the discussion here this evening is not all about the Land Use Ordinance but the Consent Decree. So, I know your counsel advised you on this but it is our submission that the ZBA does not have jurisdiction to be interpreting court orders, what in essence is a contract. In addition there has been much discussion about the Maine Agricultural Protection Act otherwise known as the right to farm act and the law court, never mind the merits of the argument. The law court has been very clear that any consideration but in their submissions Dubois are talking about how MAPA, or the Right to Farm Act moves the ability of the Town to regulate their Composting Operation. That was one of the most pressing issues in the law courts decision and I would submit this states highest court has absolutely determined that MAPA does not take away the towns right to regulate a composting operation.

Rachin goes on and states this is a very simple case. You have the Consent Decree in front of you. Basically it sets out three things. First that Dubois Livestock must submit their application for the Conditional Use Permit Renewal on or before July 1, 2017. The second was that they must submit an accurate plan of the site. The Board found that was not accurate, it did not have in its title box who created it, the date it was created and therefore the Planning Board determined it was not sufficient, it did not meet that criteria. Third, Dubois Livestock was to submit a letter from the CEO basically confirming that Dubois is in compliance with all governing rules. In your packet you have already identified the Notice of Violation that was sent by the DEP. Even though that has not been litigated, the Consent Agreement required Dubois to obtain a letter from the CEO confirming that the Composting Operation is in compliance with all existing applicable State licenses and regulations. There was not just one but

fourteen separate and distinct violations of either conditions of their permit or the State Solid Waste Management rules. The CEO is incapable of issuing a letter stating that Dubois was in compliance. So with those three criteria they did not meet two of the three and the Planning Board had no other choice than to deny their permit.

Rachin goes on to read over the wording of the Consent Decree with the ZBA.

Rachin stated that the other main ground for Dubois appeal was the submission that the Maine Agricultural Protection Act does not allow the Town to regulate them. Again, I think that this is beyond this Boards jurisdiction to consider.

Reimer asked Rachin if she could define what “Grandfathered” meant. Rachin stated the whole concept of “Grandfathered” that is a term for what is called in the Land Use Ordinance as a non-conforming lot of record or non-conforming use of record. When this operation started in the early 1980’s it was perfectly legal to operate their business. Around the year 2000, the Arundel Land Use Ordinance was changed and a Solid Waste Processing Facility was no longer allowed in the R4 zone, which is where Dubois property is located. Due to the fact that this was a pre-existing use they are now considered “Grandfathered” which allows them to continue operating in that zone so long as they do not expand and they meet all the requirements in the LUO and apply every three years to renew their permit. As I understand it the last permit Dubois obtained was in 2011 and it expired in 2014. In Dubois defense, we have been litigating this Conditional Use Permit for years and so there was no enforcement on this because of the litigation. The Consent Decree is the product of this litigation. Dubois received another year to get the Town an application with the attachments by July 1, 2017 and they did not.

Chansky asked Rachin what her interpretation of the “or” phrase when it got put into the Consent Decree. Rachin stated that retired Judge Crowley was the one who wrote it but was negotiated between both parties.

Rachin stated, just generally speaking, as has been pointed out, if as Dubois contends that they never wanted to get to the Planning Board, then why in the first paragraph of the agreement does it say, Dubois shall apply to the Planning Board no later than July 1st. They were there, they signed their names to that agreement, they agreed.

Richard Ganong, member of the Planning Board, wanted it noted that at the July 27, 2017 Planning Board meeting when they were looking at Dubois application for their composting renewal permit, none of the Dubois showed up to that meeting. They say we could have told them what the map meant but there was no one present to tell.

Bassett stated that as the Planning Board read the Consent Decree, we had no choice to deny the application. The Land Use Ordinance was rendered irrelevant. We needed three things which were the application, an adequate site plan and the letter from the CEO stating that there were no violations. These three things needed to be submitted before July 1, 2017. The most fundamental fact was that we were in the possession of a Notice of Violation from the Maine DEP dated June 26, 2017 with 14 specific points.

Chansky asked Fedder if he wanted to comment. Fedder stated that he can not say it enough that this is not an issue of preemption when it comes to the ordinance. A farm operation or an agriculture composting operation located in an area where agricultural activities are permitted may not be considered in violation of a municipal ordinance if the farm operation or Agricultural Composting Operation follows Best Management Practices as determined by the commissioner. What that means is that it is not preempting anything. We weren’t saying that MAPA preempts anything it just renders that particular ordinance that we are talking about unenforceable against the composting. Additionally, I can not stress the importance of the alternative in that particular section. Additionally, I can not stress the importance of the alternative in that particular section. I realize that everyone wants to make so much more on one section then the do the other section. We did not have to satisfy it. It was going to be deemed satisfied or deemed inapplicable. That was our option. We chose that option, we bargained for that option, we knew what that option meant when we walked out the door.

Chansky asked Fedder what Best Management Practice was and how they comply. Fedder stated that Best Management Practice is a whole system. Dubois has what is called a Nutrient Management Plan. We are required to get one every five years. Based on this plan, if you follow the certain criteria for it, which we always do, then we meet the standards of Best Management Practice. If there is any issue involving the Best Management Practice because of a complaint, an agent for the DEP will notify Dubois identifying the individual who is complaining and what they are complaining about. Then we are required to go and meet with these individuals so we can fix the problem. We have a license with the DEP which sets out our Best Management Practice. We are in full conformance with Best Management Practices.

Chansky asked Fedder, who develops the Best Management Practice Plan. Fedder stated that you would have to get it from the NRCS which is the Federal Government and the plan costs about \$10,000 every five years.

Chansky asked if the Board or anyone in the audience had any further questions. Rachin talked about the either, or, alternative choice. Under the Land Use Ordinance normally in order for someone to get a Conditional Use Permit or renewal would have to meet several different criteria. The Consent Decree basically allows Dubois Livestock to only do three of those criteria or they are deemed inapplicable because of the "Grandfather" status.

Bell moved to close the Public Hearing. Berg seconded with all in favor.

Dalzell made a motion that the Zoning Board of Appeals lacks subject matter jurisdiction based on section 9.2.11 of the Arundel Land Use Ordinance. Berg seconded the motion with the vote being 5-0 in favor.

3. **MINUTES**

Dalzell moved to accept the minutes of August 30, 2017 as written. Bell seconded the motion with the vote being 5-0 in favor.

4. **ADJOURNMENT**

Bell made a motion to adjourn the meeting at 8:16 P.M. Reimer seconded the motion with the vote being 5-0 in favor.

Respectfully Submitted,

Wendy E. Lank
Recording Secretary