

Arundel Zoning Board of Appeals
Minutes
November 29, 2017

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

Members Absent: Alternate, David Berg

Also Present: Attorney Sally Daggett; Attorney Leah Rachin; Code Enforcement Officer, James Nagle; Attorney Clint Boothby; Ricky Dubois, Randy Dubois, Marcel Dubois, Sol Fedder, Nicholas Fedder and Recording Secretary, Wendy Lank

1. Paul Chansky opened the meeting at 7:00 P.M. in the library of the Mildred L. Day School. Attendance was taken. The Board was found to have a quorum.

2. **MINUTES**

John Bell made a motion to accept the October 4, 2017 minutes as written. Steve Dalzell seconded the motion with the vote being 4-0 in favor.

Bell made a motion to accept the October 10, 2017 minutes as written. Chansky stated that he believes one or two individuals that were also present were not listed in the minutes. Recording Secretary Wendy Lank explained that if they do not sign in to the meeting she has nothing to confirm if they were actually present. It was determined that Nicholas Fedder was also present at October 10, 2017 meeting. Raffaella Reimer seconded the minutes as amended and the vote was 4-0 in favor.

3. **Administrative Appeal Application – CONTINUANCE - Dubois Livestock, Inc., Applicant; Randrick Trust, Owner – 2 Irving Road; Map 19, Lot 6; Zoned R-4**

Chansky opened the Public Hearing. Chansky asked ZBA Attorney Sally Daggett for some guidance.

Daggett stated that since the October 10, 2017 meeting the Code Enforcement Officer issued a Notice of Violation dated October 18, 2017 which was received by Dubois Livestock on October 19, 2017. Dubois Livestock has supplemented their original Administrative Appeal Application that was filed back in September. Everything filed by Dubois on September 18, 2017 and November 16, 2017 is in front of you tonight. The material that was previously filed by the CEO and the Towns Attorney, along with the new material received November 28, 2017 are also in front of you for tonight's meeting.

There are two parts to the CEO's violation. The first is the violation of the Consent Decree and the second is a violation of Arundel's Land Use Ordinance, section 9.3.38.2, which requires a Conditional Use Permit to operate a waste facility.

Daggett stated that she felt the legal issues for the Board are the issue of preemption and if State Statute preempts the local ordinance. The Board needs to make a determination if they feel they have jurisdiction on the preemption issue. If they feel they do not have jurisdiction the Board would still need to make determination on the merits anyway.

Attorney Clint Boothby stated he was representing Dubois Livestock, Inc. Boothby stated that in their submission to the Board they spoke about the concept of agricultural composting and what it is and how it has been further defined by State Legislature. It is recognized as one of the activities that are entitled to the protection under MAPA. Farmers are to be treated fairly whether they are in Kittery, Arundel, Mapleton, or wherever they are across the state. There is recognition on the part of the legislature of the importance of farming, including agricultural composting, throughout the State of Maine.

Some years ago the MAPA was set up by the legislature. In 2015 there were amendments to various sections of MAPA which speaks directly to Agricultural Composting.

The argument here is that it is not that the Town can't regulate agricultural activities or agricultural composting, in fact it can. By having a Zoning Ordinance that says you can do certain agricultural activities in certain parts of this town, it does regulate where they are to be located. The issue becomes complicated for towns when that Town identifies things that have been specifically defined by the statute as something different and seeks to regulate them differently. The argument from the Town appears to be that yes, you are an agricultural Composting Operation as recognized under section 152 of MAPA but we are also going to declare you something else and by doing that we then can regulate you in a way that otherwise the MAPA would not permit.

Chansky asked if Best Management Practices are defined by the Commissioner. Boothby stated he did not know if they were. It would be up to the Commissioner to determine if there was a violation and that Best Management Practices were not being followed. Boothby stated that Dubois Livestock, Inc is in compliance until the Commissioner says they are not.

Boothby stated the issue with the Consent Decree was also raised by Code Enforcement Officer, Jim Nagle. The critical point here is the conjunction "or" in that Consent Decree. It is our contention that the Town is treating that conjunction as not being a part of that sentence.

Boothby wants to reference back to the case in 2014 before the statute was amended and there are clearly some differences of opinion between Nagle and Dubois about whether or not those changes make a difference. We believe those changes make a huge difference because they very clearly define what Dubois Livestock is, an agricultural composting operation. It is a farm and it does fall in the R-4 zone where this activity is permitted. With those changes to the statute it is our contention that the Arundel LUO in that very specific requirement of the non-conforming use permit frustrates the purpose of the act because it makes demands that are not contemplated under MAPA.

Town Attorney Leah Rachin stated she was here to speak on behalf of Code Enforcement Officer Jim Nagle. The CEO's notice of violation was based on two things. First there is the violation of the Land Use Ordinance, which is really a simple one. Section 9.3.38 of the ordinance requires all solid waste facilities, which under the towns' definition includes a Composting Facility, must obtain a Conditional Use Permit under the clear terms of the ordinance. Dubois last obtained a Conditional Use Permit in 2011 and under the clear terms of the LUO this permit expires every 3 years. Therefore, Dubois Livestock has been operating unlawfully without a permit since 2014.

With respect to the Consent Decree, it relates back to the LUO. In order to resolve a number of outstanding issues between the parties, the parties entered into a Consent Agreement which was put into a Consent Decree. Dubois was given the opportunity to renew the expired Conditional Use Permit by submitting an application by July 1, 2017 and one of the bargains struck between the parties was in exchange for Dubois being able to basically make very limited submissions, they provide only two things. Instead of making those submissions that are required under our LUO they were allowed to simply provide an accurate map and a letter from the CEO indicating that they were in compliance with all governing States rules, guidelines and licenses. Those are the two requirements they agreed to. Dubois met the guideline by filing that application by July 1, 2017, however they did not meet the requirement to submit that letter from the CEO, simply because they could not. Rachin referred to the minutes of the October 4, 2017 ZBA meeting and requested they be incorporated by reference into the record. Rachin stated that the CEO could not submit that letter because at the time there was a Notice of Violation from the Department of Environmental Protection indicating 14 separate violations. Since that time DEP has issued two additional Notice of Violations. Dubois Livestock appeared before the law court in, I believe, mid October to defend their refusal to allow DEP on their property to inspect as a result of numerous complaints of odor. Because Dubois has been operating without a permit, their operation is no longer a permitted use. The CEO does not dispute that they were once a permitted "Grandfathered" use. My understanding is up until about the year 2000, in the R-4 zone of the Arundel LUO, Composting Operations were allowed. Since 2000 they are not allowed. Because they were allowed before the amendment in 2000, they were allowed to continue that use so long as they met all other requirements of the ordinance and so long as they did not expand, but they let their permit lapse so they are no longer a

permitted use. The Consent Agreement states that the performance criteria specified in the LUO for the issuance and reissuance of all Solid Waste Processing Renewal Permits shall be deemed to have been satisfied by the submissions subscribed below or deemed inapplicable as a result of Dubois “Grandfathered” Status. Under the clear terms of the Consent Agreement they had a year to get that letter from the CEO, they did not do so. They are arguing that their interpretation is that they are entitled to some kind of alternative. On the one hand, either they will be deemed to have satisfied the Land Use submission criteria by submitting those two requirements or they will be deemed inapplicable. That language makes perfect sense for where we were at that time. This negotiation allows Dubois to not have to meet the criteria under the ordinance if they simply submitted those two things. Dubois interpretation is that they have a choice to do what they said they would do or not to do what they said they would do. That is not a bargain the Town would strike. That is not a bargain any reasonable person would strike.

Rachin stated that she recalled at the October 4, 2017 meeting Dubois stated that they purposely drafted the language in that way because they did not want anything to do with the Planning Board. If you look at the clear terms of the Consent Decree, the first sentence of the first paragraph says that they, Dubois, shall submit an application to the Planning Board. If they didn’t want to go before the Planning Board they would not have agreed to the Consent Decree.

Rachin stated that she would like to talk about MAPA. The argument here is that the amendments were made to MAPA in 2015, which you recall is after the law courts decision in 2014; it is Dubois submission that those amendments somehow override the law courts decision. The position that even with those amendments that somehow MAPA preempts local regulation is just unattainable. The court’s decision states, “even if Dubois’ operation were a farm the Agricultural Protection Act does not preempt the town’s ordinances”. Although the act prohibits a municipality from determining that a farms method of operation violates a local ordinance if the farm has used Best Management Practices, there is no indication in enacting the MAPA that the legislature intended to preempt any ordinance.

Rachin stated that the last issue was the allegation that Dubois operation is a conforming use. The R-4 zone does not permit any composting operation. It is a Solid Waste Facility and it is not permitted anymore. They were permitted, they let their approvals lapse and now they are not permitted any more, they are not considered Grandfathered any more.

Chansky stated that he thinks it is really hard for the Board to call whether Best Practices are being followed, but if a determination was made that the Best Management Practices are being followed, would the MAPA not come into play. Rachin stated that she did not think it would because MAPA does not preempt local ordinances.

Raffaella Reimer stated that in regards to the Consent Decree I find it difficult about the “or” negating their requirements. Why are the criteria there if it were irrelevant? Rachin stated that it is the clear reason for the CEO’s argument; it was part of the agreement. Reimer stated that compromise is when both parties get something.

Daggett asked Rachin what the effective date was of the 2015 amendments to MAPA. Rachin said she didn’t know but would look it up.

Boothby stated that Dubois was fully aware what MAPA said, when it entered into these negotiations with the Town of Arundel to end several lawsuits. The either, or was they understood that they had MAPA protection. So they would meet one set, make an application, either make the two submissions or be deemed Grandfathered. They very specifically negotiated for that, or deemed Grandfathered, because they knew they had the protection of MAPA. They were an active part of the legislature making the changes.

Daggett asked Boothby about his argument in regards to MAPA. How do you reconcile section 154 and section 155? What do you think the meaning of section 155 is?

Boothby stated that the legislature was clear that the towns would retain the ability to have some authority over where certain things are located in their towns and the town clearly has that ability. Part of the Town’s ability to regulate agricultural entities is to say that they happen in the R-4 zone. There are other things the Town can regulate around that. What you can’t do is find that they are in violation of a

municipal ordinance absent the finding the Commissioner of Agriculture finds they are not following Best Management Practices.

Reimer asked Boothby, so these alleged violations we shouldn't consider? Boothby stated that is exactly what I am saying. Daggett asked, so whatever the local ordinance provision is there can't be a violation of it unless there is a violation of the State's Best Management Practices? Boothby stated it would be my position that the Board of Appeals is not in a position to make that determination. It doesn't fall within your jurisdiction whether or not they are or are not in compliance with Best Practices. If they are not and the Commissioner determines that there is room for regulation there, otherwise it falls on the Commissioner to make that determination.

Reimer said, so that's yet to be determined. We do not have that evidence in front of us and that you are saying at this point it is only an allegation? Boothby stated, that Reimer was correct

Dalzell stated that he was having trouble reading section 155. It says that the Commissioner should review a proposed ordinance and advise the municipality whether the proposal restricts or prohibits the use of Best Management Practices. This section does not affect municipal authority to enact an ordinance. I can't see anything there where it says the Commissioner judges whether the operation is in compliance with Best Management Practices. Boothby stated to Dalzell, if you refer to section 154, that's what talks about whether a permitted agricultural activity is in violation of a municipal ordinance. Section 155 says you can enact ordinances. It doesn't prohibit towns from enacting ordinances. If you are enacting a new ordinance it should go before the Commissioner of Agriculture if it were to regulate agriculture. We are not talking about a new ordinance; we are talking about one that was in place at the time that this statute passed.

Daggett stated that she was looking at section 6.10 of the Arundel Land Use Ordinance. In terms of Conditional Use activities that are listed on page 110, where do you see that agricultural activities are permitted? Boothby stated that R-4 is the agriculture district. Daggett asked Boothby how the definition of agriculture differs from Solid Waste Facilities. Boothby said it is entirely different. The critical point there is, you have said we are going to define agricultural composting as something different, we are going to call it Solid Waste and therefore we can regulate it in ways the State Statutes do not permit. Reimer stated that the Town did that and Dubois got a permit for that. They believed at one time they were a Solid Waste Facility. Boothby stated that Dubois received a DEP permit and at one point they had a Town permit as well. They have a DEP permit that regulates their Agricultural Composting Operation. Daggett asked, but doesn't section 154 of MAPA get at the location issue and not the other requirements of the ordinance? Boothby stated he did not think that was the case. Daggett asked, so you interpret section 154 as saying Dubois Livestock can't be in violation of the Arundel Land Use Ordinance because section 154 of MAPA says and I am quoting you, unless Dubois Livestock doesn't operate in compliance with the Department of Agriculture's Best Management Practices there necessarily can't be any violation of the Land Use Ordinance.

Fedder stated that the Supreme Court also said that. The second sentence in that quote it talks about the prohibition. Although the act prohibits a municipality from determining a farms method of operation violates a local ordinance, if the farm has used Best Management Practices there is no indication that in enacting MAPA the legislature intended to preempt any ordinance or preoccupy the field. What it meant was is exactly what counsel is saying here. The issue is enforcement not preemption. MAPA limits the enforceability of the municipal ordinance.

Reimer stated that she was trying to make sense of all of this. So the compliance that was agreed to in the Consent Decree, why was that unreasonable? Fedder stated, what happens in mediation, there were 11 cases here, we were well aware of what we were doing. When we walked into that mediation we had no intention of settling. The whole idea was, we went in there and made a deal for exactly what that sentence says. We intended to make sure that we did not truly have to go before the Planning Board again. When someone came in with that particular proposal they way it is stated, we didn't want to do it because we didn't want to go back before the Planning Board. We knew we had a statute that said we didn't have to. The problem was, the elephant in the room was the 11 cases that we had. Do you know how long it takes to litigate? The Town was saying how they were paying \$50,000-\$60,000 for what they have done so far and we were just beginning to get cranked up. It was going to turn into an awful war where neighbors

hated neighbors and everybody was losing money, taxes were going to go up, it was going to cost us some real dough. So in order to do what our attorney said to let the town save face, you guys apply for a permit and there are a couple of criteria they would like you to do. If you do it, that's great, if not, you walk away under the Grandfathered clause and that is exactly why it was put that way. In mediation you don't get to redo something that was already done. We got a good deal. If they got fouled, it's their own fault.

Daggett asked Rachin if she had a chance to find out the effective date of the 2015 amendments to MAPA. Rachin stated that the 127th 1st regular session adjourned on Thursday, July 16, 2015 at 5:58 p.m. The effective date for nonemergency legislation was Thursday, October 15, 2015.

Rachin stated that she did not want to go back and forth but Best Management Practices are not the issue here. It has been testified that Dubois would never want to go before the Planning Board, they are trying very much to avoid that result. The first sentence of the first subparagraph of the Consent Decree says, Dubois shall apply to the Planning Board. If that is not what their intentions were then why would they have signed that?

Reimer asked Rachin why Dubois Livestock could not obtain a letter from the Code Enforcement Officer. Rachin stated that in the Consent Decree it says Dubois shall obtain a letter from the Arundel CEO confirming that the composting operation is in compliance with all existing and applicable state licenses and regulations. How can the CEO say yes they are in compliance with all state licenses and regulations unless he picks up the phone, communicates with those very entities, state agencies that are empowered to regulate those licenses and those rules. He did so and was told they were not in compliance and by the way we issued a 14 point Notice of Violation. The CEO cannot confirm that the Composting Operation is in compliance with all state licenses and regulations, he cannot do that.

Jim Nagle stated that he was asked by Dubois on June 26, 2017 to do my inspection. At that meeting I asked Rick Dubois to supply me with some information that they were in compliance with the DEP. I specifically asked him if he had a license or a letter that said he was in compliance and he said he wasn't sure. I said no problem but I can't compose this letter that I am required to submit to the Planning Board without some notification that you have a clean bill of health. The next morning, I called Rick at 7:45 a.m. asking him again for that letter. I requested a DEP Compliance Report and the urgency that we needed to meet a July 1st deadline. On the same day at 12:30 p.m. I called Rick again and I asked for verification. Rick told me he had spoken to Sol Fedder and that they did have something and he would get it to me. At 12:35 p.m. Sol Fedder called me and told me he would email me a copy of his license. Nagle stated that he works a four day week with Friday's off and we are going into the July 4th holiday. I took it upon myself to call Mike Clark of the DEP and was told Mike was on vacation and was put through to his supervisor, Carla Hopkins. Hopkins told Nagle that it was just coincidental but she had mailed a letter of violation and if the Dubois goes to their Post Office they will pick up their registered letter. Nagle asked Hopkins if she could email him a copy of that letter. Nagle stated, that is why we are here tonight.

Reimer asked Boothby if there was anything he wanted to say regarding that. Boothby stated it must be just a coincidence but that letter arrived that day. In the letter it stated that they were not taking Dubois permit away, you can continue to operate, we think there are some things that need to be fixed. It is different than them finding that they are not in compliance. Reimer asked if the issues have been resolved and Boothby replied that it had not been resolved and they are still operating under their permit.

Fedder stated that they do not want the Board to think that they ignore the DEP. When the DEP says we think you did something wrong, we get a hold of them and we fix anything we have, whether it is in compliance or not.

Chansky asked for closing arguments.

Boothby stated that they ask the Board to look carefully at the language. The language of the Consent Decree, if you accept the towns reading of that and the conjunction "or" is meaningless and second part the language bargained for is meaningless. I understand and recognize the Town argues the exact opposite of that. If you look at the statute it is so every town in the State operates in the same way. Do you call one operation something else so you can regulate it in a different way? Agriculture is important to this State. Agricultural Composting is important to this State and the State Legislature has made this clear. As

a result of that, farmers and people engaged in those activities are entitled to those protections. They are entitled to be treated in every Town the same and not differently.

Rachin stated quickly, first, the Land Use Ordinance says very clearly that Dubois is required to have a permit. They have not had a permit for three years and it is unlawful to operate without a permit. Secondly, the Consent Decree, the Town would not have bargained for nothing, to allow Dubois to essentially do what they wanted. That would not have happened, that did not happen, that is not the language of this Consent Decree. And finally, with respect to MAPA, as I said I believe that the law court basically anticipated if it were to be considered a farm, it wasn't at that time, but even if it were it would still not preempt local regulations.

Chansky closed the Public Hearing. The Board Members and Zoning Board of Appeals Attorney started their discussion with MAPA. Bell stated if they looked at the court's decision in 2014, even if Dubois operation was a farm, MAPA does not preempt the Town's Ordinance. Unless there is something that happened when MAPA was modified, if MAPA does not preempt the Town's ordinance then I think it is the Town's Ordinance that we need to be looking at. Chansky stated he cannot get his hands around Best Management Practices. I can't make the leap and say they are not conforming to BMP. Reimer stated that she sympathizes with farmers as she is a farmer herself but the Town has regulations on how many animals she can have per acre. I understand MAPA and how important that is but also I think the Town Ordinance is there to protect the farmer and the people who live in town.

Daggett stated in regards to MAPA that she thinks the Board has to make two determinations. The first is if the Board has jurisdiction. Dalzell made a motion that the Board has no jurisdiction to decide that MAPA preempts the Town's Land Use Ordinance. Bell seconded the motion with the vote being 4-0 in favor.

Reimer made a motion that that even if the Board did have jurisdiction and they had the authority to interpret MAPA they would find that MAPA does not preempt the local Land Use Ordinance regulations. Dalzell seconded the motion with the vote being 3 in favor with 1 opposed (Chansky).

Dalzell made a motion that the Code Enforcement Officer properly determined that there has been a violation of the Consent Decree. There was some discussion in regards to the conjunction "or" that is in the Consent Decree. Bell seconded the motion with the vote being 3 in favor with 1 opposed (Chansky).

Bell made a motion that the Code Enforcement Officer properly determined that Dubois was in violation of section 9.3.38.3.a of the Land Use Ordinance and has been operating without a conditional use permit since 2014. After some discussion Reimer seconded the motion with the vote being 3 in favor with 1 opposed (Chansky).

Based on the above Findings of Fact the Board of Appeals denied the Administrative Appeal.

4. **ADJOURNMENT**

Dalzell made a motion to adjourn the meeting at 9:15 P.M. Bell seconded the motion with the vote being 4-0 in favor.

Respectfully Submitted,

Wendy E. Lank

Recording Secretary