

**REQUEST FOR ACTION BY:**

TOWN OF CLARENCE, N.Y.

- Appeal Board
- Planning Board
- Town Board

- Appeal
- Rezone
- Revise Ordinance
- Subdivision
- Limited Use Permit
- Other

Rec'd. by: Michael Hutchinson

Date May 10, 2013

**Action Desired** Applicant requests an appeal of the zoning decision(s) by the Town Board, Planning Board and Director of Community Development for the permitted use of a retail nursery/greenhouse at 8441 County Road. The property in question is located in the Agricultural Rural Residential Zoning District.

**Reason** A retail nursery/greenhouse is not a permitted use

Town Code Reference:

Chapter 229-37

PLEASE PRINT

**Name** Jennifer Dougherty

**Address** 3400 HSBC Center

Buffalo, NY 14203

**Town/City** Buffalo, NY **State** NY **Zip** 14203

**Phone** 574-5789

**Signed** SIGNATURE ON FILE

Requests for action on zoning should be filled out completely in above spaces if practicable; otherwise give brief description and refer to attached papers. The complete request with all necessary plans, maps, signatures, should be filed with the Secretary of the Planning Board. Requests (except appeals) may be filed with the Town Clerk or Town Board, but will generally be referred to Planning Board with subsequent loss of time.

**Initial Action**

- Approved
- Rejected  by ..... on ..... 19 .....
- Approved
- Rejected  by ..... on ..... 19 .....
- Published (Attach Clipping) ..... on ..... 19 .....
- Hearing Held by ..... on ..... 19 .....

**Final Action Taken**

- Approved
- Rejected  by ..... on ..... 19 .....
- Published (Attach Clipping) ..... on ..... 19 .....
- Filed with Town Clerk ..... on ..... 19 .....
- Filed with County Clerk ..... on ..... 19 .....



# Town of Clarence, New York

Planning Board Meeting

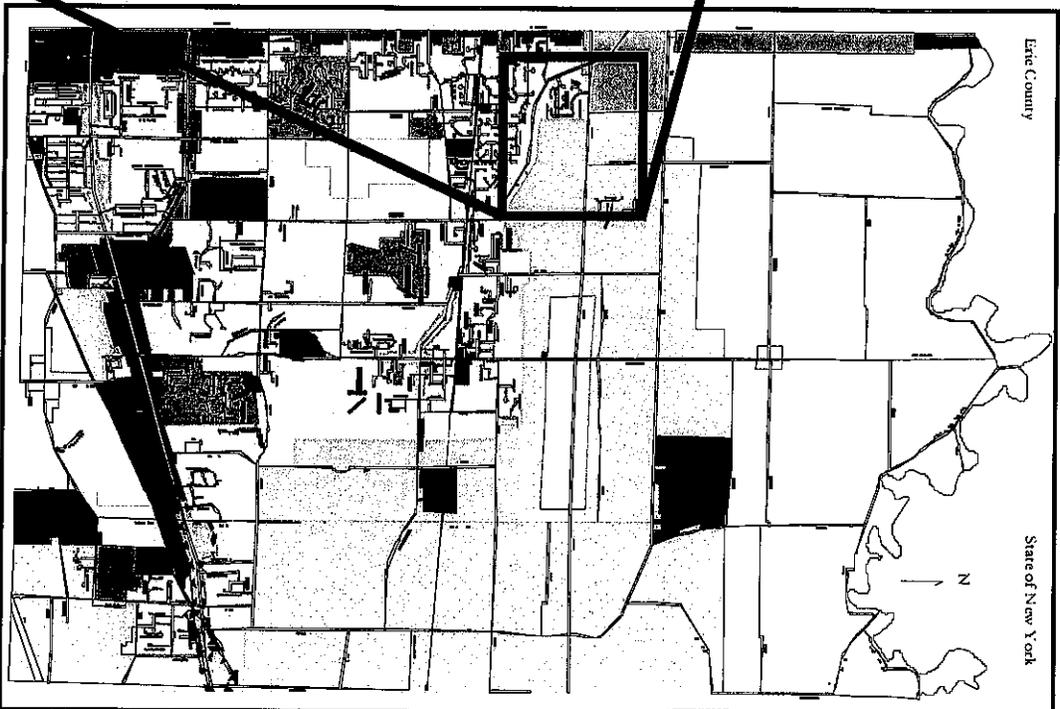
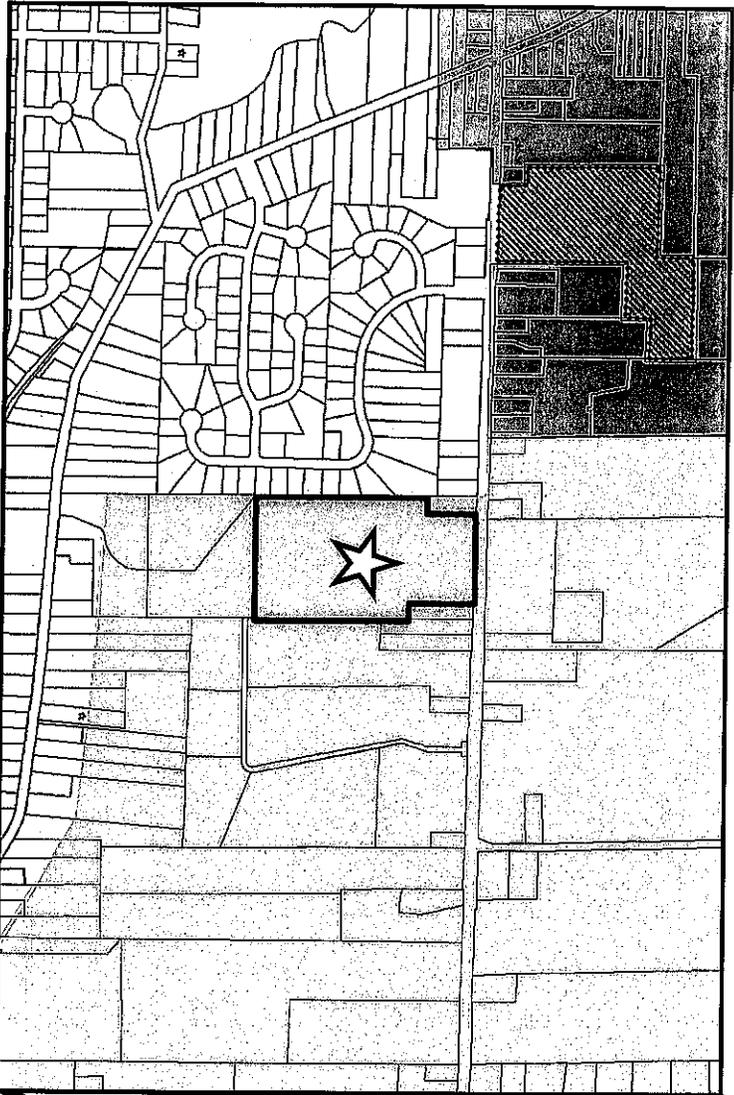
April 17<sup>th</sup>, 2013

Town of Clarence Official Zoning Map

## Lavocat's Family Nursery

- **Proposal:** Applicant requests review of a Proposed Nursery/Greenhouse Use in the Agricultural Rural Residential Zoning District

- **Address:** 8441 County Road





# Town of Clarence, New York

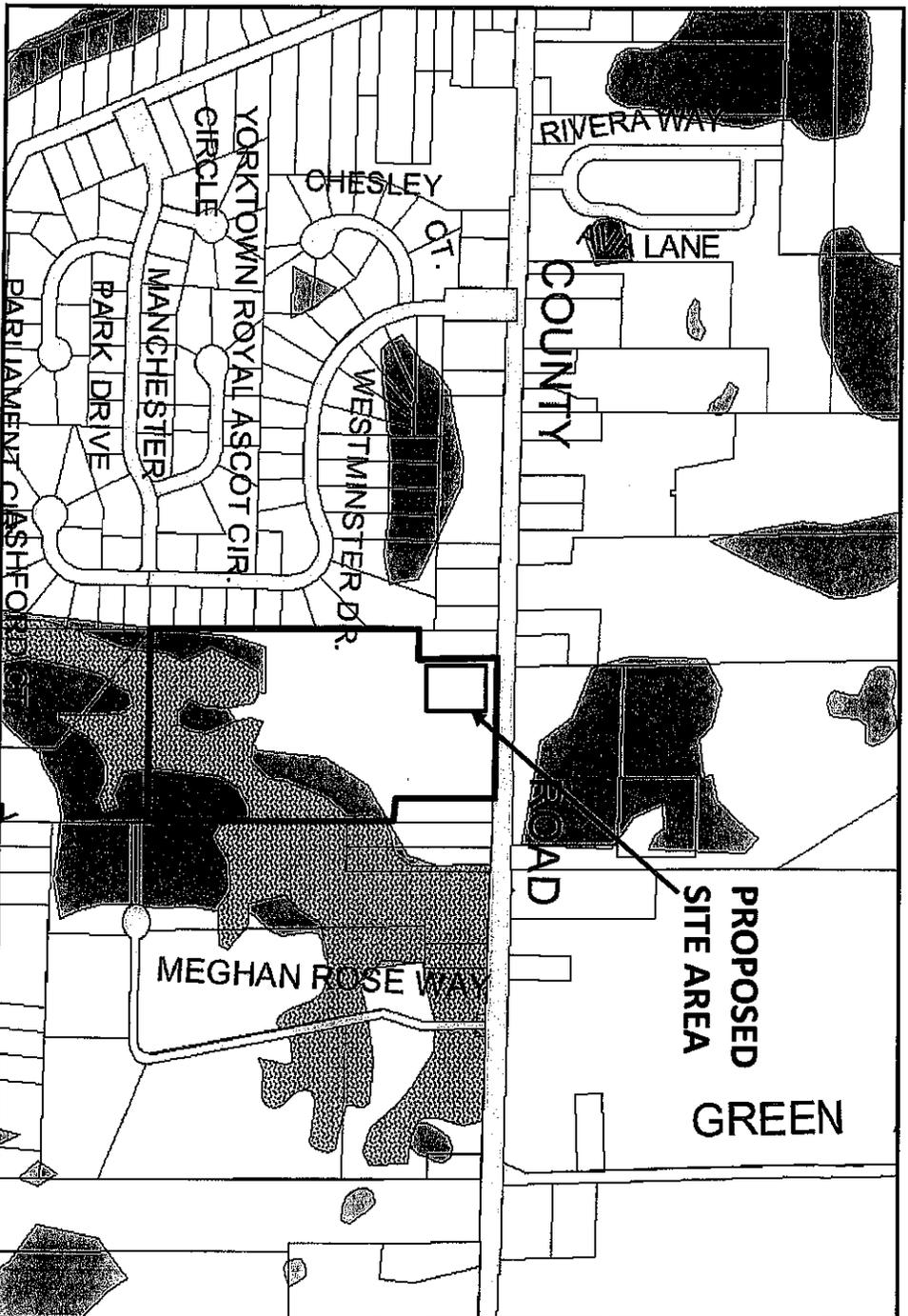
Planning Board Meeting

April 17<sup>th</sup>, 2013

Lavocat's Family Nursery

- *Proposal:* Applicant requests review of a Proposed Nursery/Greenhouse Use in the Agricultural Rural Residential Zoning District

- **Address:** 8441 County Road
- **Zoning:** Agricultural Rural Residential
- **Total Acreage:** 23.8
- **Frontage:** 556'
- **Depth:** 1,450'



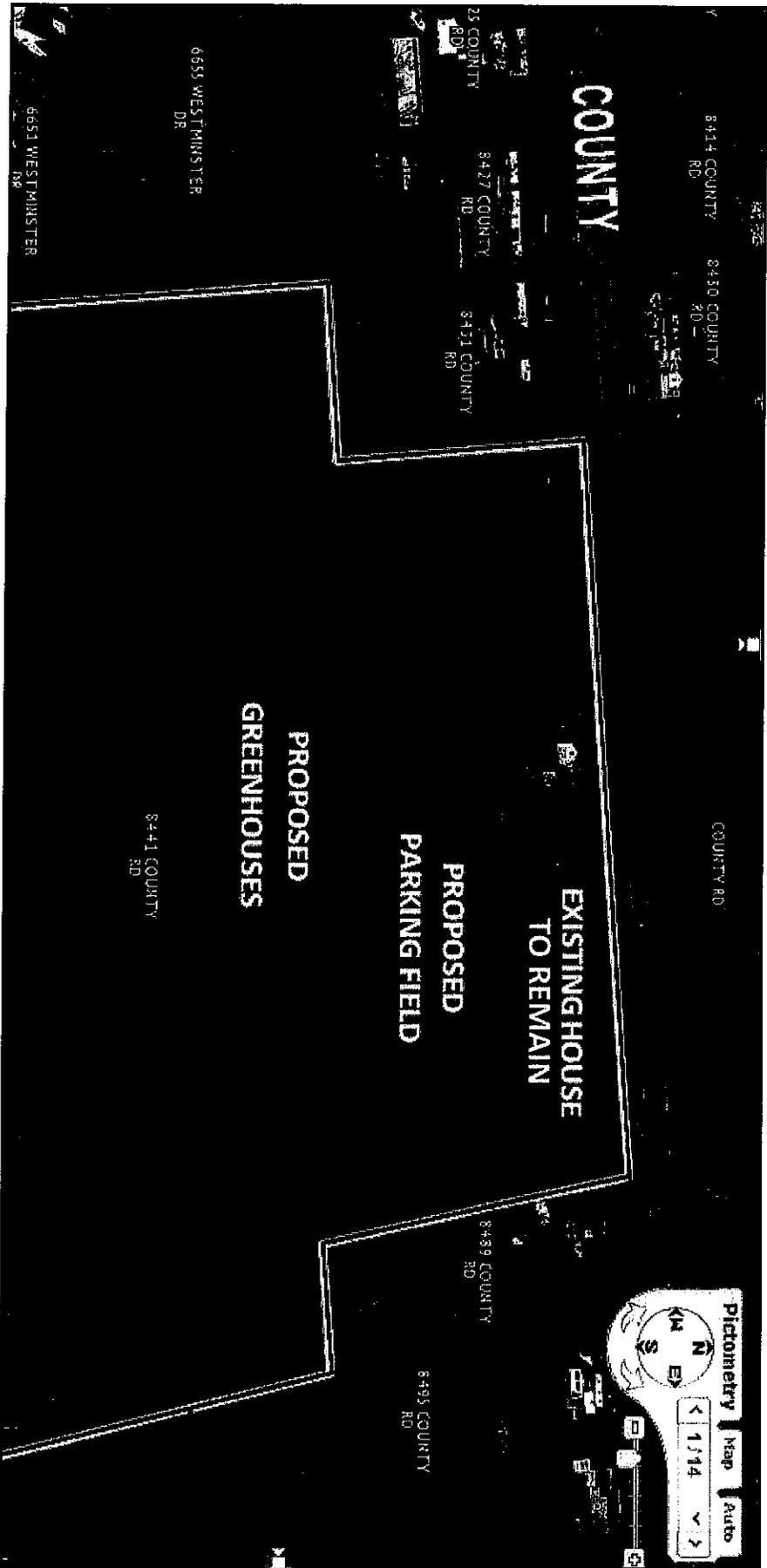
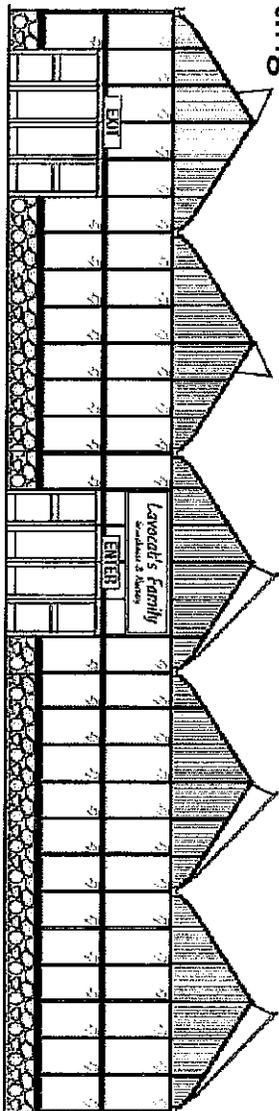


# Town of Clarence, New York

Planning Board Meeting

April 17<sup>th</sup>, 2013

Lavocat's Family Nursery







**Phillips Lytle LLP**

**Via Hand Delivery**

May 10, 2013

Chairman Daniel Michnik  
Zoning Board of Appeals  
One Town Place  
Clarence, New York 14031

Re: Appeal of Findings related to the Application of Lavocat's Family Nursery  
Retail nursery/greenhouse use at 8441 County Road ("Application")

Dear Mr. Michnik:

We represent Lisa Smith and John Zugarek, owners and residents of 6675 Westminster Drive, Clarence, New York. Pursuant to § 229-163 of the Town of Clarence ("Town") Zoning Law ("Zoning Law"), on behalf of Ms. Smith and Mr. Zugarek, we file this appeal of the decisions of the Town Board, Planning Board and James B. Callahan, the Director of Community Development, ("the Director") as related to the development of a retail nursery/garden center ("Proposed Use") at 8841 County Road, Clarence, New York. Pursuant to its express authority in the Zoning Law, we are requesting that the Zoning Board of Appeals ("ZBA") review the following erroneous determinations and make findings as noted in italics:

1. The Town Board, the Planning Board and the Director assumed that the retail nursery/garden center is in an Agricultural District ("Ag District"), certified and protected under New York State Agricultural and Markets Law ("Ag & Mkts Law"). *The Property is not in an Ag District.*
2. The Town Board, the Planning Board and the Director assumed that the commercial and retail aspects of the retail nursery/garden center are protected by Ag & Mkts Law. *A retail nursery/greenhouse at this Property is not protected under Ag & Mkts Law.*

Jennifer Dougherty  
Direct 716 504 5789 [jdougherty@phillipslytle.com](mailto:jdougherty@phillipslytle.com)

ATTORNEYS AT LAW



May 10, 2013

3. The Town Board, the Planning Board and the Director assumed that the retail greenhouse/nursery is a permitted use in an Agricultural-Rural Residential ("A-RR") Zone. *The retail nursery/greenhouse is not a permitted use in an A-RR Zone. The Application proposes a use of the Property, which is prohibited by the Zoning Law and which requires either a rezoning or a use variance.*

4. The Town Board, the Planning Board and the Director assumed that the retail greenhouse/nursery is exempt from complying with the Site Plan Review provisions of § 229-151 of the Zoning Law. *The retail greenhouse/nursery is not exempt from the Site Plan Review provisions of the Zoning Law.*

#### **ZBA Authority to Review these Determinations**

Pursuant to NYS Town Law §267-a(5)(b), the ZBA is empowered to hear or interpret any determination of any decision, interpretation or determination of any administrative official of the Town. NYS Town Law §267-a(5)(b) McKinney's 2013. The Town's Zoning Law reaffirms these powers. Section 229-163 of the Zoning Law states, the ZBA shall hear and decide appeals from and review any order, requirements, decision, interpretation or citation made by the Director of Community Development or designee, Building Inspector or designee, or the Town Board regarding any portion of this chapter and apply such interpretation to the particular fact situation.

#### **Procedural History**

The following is a description of the procedural history for the review of the above-referenced matter. On March 13, 2013, Lavocat's Family Greenhouse ("Applicant") submitted an Application to the Town. The Application requested the Town Board to review and approve Applicant's plans to develop a retail nursery/greenhouse and garden center at the Property.

On March 27, 2013, the Town Board reviewed the plans for an approximately 19,000 sq. ft. retail greenhouse/nursery, designed to grow and market products to the public, and a paved parking area for forty-eight (48) vehicles. The Town Board's March 27, 2013



May 10, 2013

meeting minutes are included as Exhibit A. The Director advised the Town Board that the Property consists of vacant land and that the Proposed Use is a permitted use within an A-RR Zone. See, Exhibit A. The Applicant's attorney then advised the Town Board that Ag & Mkts Law limits a municipality's power to regulate nurseries and greenhouses. The Applicant's attorney further advised the Town Board that because the Proposed Use is protected by the Ag & Mkts Law, the Proposed Use would not require any discretionary approvals from the Town and could be commenced with only a building permit. See, Exhibit A. In response, Councilman Casilio said he understood. The Town Board then made the following motion: "Motion by Councilman Kolber, seconded by Councilman Casilio to forward the request for the proposed nursery/greenhouse use at 8841 County Road to the Planning Board for their review to make the Project amenable and work." The motion was unanimously approved. Exhibit A. The Town Board's meeting minutes clearly show that the Town Board thought that the Ag & Mkts Law limited the Town Board's powers on this Proposed Use. See, Exhibit A.

On April 17, 2013 the Planning Board reviewed the Application. The minutes for the April 17, 2013 Board meeting are attached as Exhibit B. At this meeting, the Director advised the Planning Board that the Property consists of vacant land in an A-RR Zone and that the Proposed Use is permitted in an A-RR Zone. See, Exhibit B. The Applicant's attorney then provided an overview of the Application to the Planning Board. The Planning Board's minutes state, "Per State Law, the local municipality's ability to regulate this agriculture use is limited, however the applicant has agreed to certain conditions that were prepared by the Planning Department." See, Exhibit B. After some limited discussion, the Planning Board then moved to,

[I]dentify the proposed nursery/greenhouse operation located at 8841 County Road in the Agriculture Rural Residential Zone as an as of right use and as a Type 2 Action under SEQRA with the understanding that the proposed use is to sell the products grown on the property and such other products as identified and acceptable in Agriculture and Markets Law. See, Exhibit B.



The Planning Board then unanimously approved the motion.

**This Retail Nursery/Greenhouse is Not Protected under Ag & Mkts Law**

The Town Board and the Planning Board mistakenly believed that the Proposed Use was exempt from compliance with the Zoning Law and protected under Ag & Mkts Law. This mistake was perpetuated by the statements of Applicant's attorney. Ag & Mkts Law is designed to protect existing farming operations, including nurseries and greenhouses that are within certified Ag Districts. Its protections do not extend to proposed farming activities and certainly do not extend to proposed activities outside of Ag Districts. Section 305-a of Ag and Mkts Law states,

Local governments when exercising their powers to enact and administer comprehensive plans and local, ordinances, rules or regulations, shall exercise these powers in such manner as may realize the policy and goals set forth in this article, and shall not unreasonably restrict or regulate farm operations *within agricultural districts* in contravention of the purposes of the this article unless it can be shown that the public health or safety is threatened. Ag & Mkts Law § 305-a(1) McKinney's 2013. (Emphasis added.)

A portion of the Town, where farming is to be encouraged, is within a certified Ag District, specifically Erie County Ag District No. 14. A copy of a map showing the certified Ag Districts in Erie County is attached as Exhibit C. A close up of the location of the Property, with an overlay of the nearby Ag District, is attached as Exhibit D. As shown in both Exhibits, the Property is not within a certified Ag District. Furthermore, we have confirmed that the Property is not currently proposed as an addition to the certified Ag District. (Per telephone conversation with Rachel Chrostowski, Erie County Planner on May 9, 2013). As such, the Property is not within an Ag District or



May 10, 2013

within a currently proposed addition to an Ag District.<sup>1</sup> Therefore, neither the Property nor the Proposed Use can be afforded the protections provided to farming operations within an Ag District.

The protections found in Ag & Mkts Law are not applicable outside of Ag Districts. Aside from the plain language of Section 305-a(1), there is ample evidence in support of the propositions. For instance, Ag & Mkts has provided guidance on applying local laws to assist municipalities in determining the applicability of certain provisions. A copy of the Ag & Mkts brochure titled, *Local Laws and Agricultural Districts: How Do They Relate?* is attached hereto as Exhibit E.<sup>2</sup> The brochure includes several tests that must be met in order for the protections of Ag & Mkts § 305-a to apply. The very first question in the brochure is: "Is the affected farm located within an agricultural district?" The guidance states "Section 305-a [which offers protection from zoning requirements] only applies to farm operations *in an agricultural district.*" *Id.* at p. 1. (Emphasis added.) Additional guidance titled, *The Guidelines for Review of Local Zoning and Planning Laws*, also issued by Ag and Mkts is attached as Exhibit F.<sup>3</sup> As noted in this guidance,

In general, the construction of on-farm buildings and the use of land for agricultural purposes should not be subject to site plan review, special use permit or non-conforming use requirements *when conducted in a county adopted, State certified agricultural district.*" See, Exhibit F, p. 3. (Emphasis added.)

The language of the statute and the supporting guidance documents clearly demonstrate that Ag and Mkts Law does not apply to farming activities (including nursery/greenhouses) outside of an Ag District.

---

<sup>1</sup> We would note that we understand that the Applicant has recently submitted a request to the County to be added to the Ag District. This request will not be eligible for consideration by the Erie County Legislature until the next scheduled re-examination of the Ag District, which occurs annually in Erie County in November.

<sup>2</sup> (Available at <http://www.agriculture.ny.gov/AP/agservices/agdistricts.html>, last accessed on May 9, 2013.)

<sup>3</sup> (Available at <http://www.agriculture.ny.gov/AP/agservices/agdistricts.html>, last accessed on May 9, 2013.)



This conclusion is firmly supported by relevant case law from the New York Court of Appeals. The Court of Appeals has also reviewed Ag & Mkts § 305-a and the ability of Towns to restrict farming operations. *Tn. of Lysander v. Hafner*, 96 N.Y.2d 558, 563 (2001). As the first step in the analysis, the Court of Appeals noted that the Legislature gave each county the power to create "agricultural districts." *Id.* "*Lands falling within those 'agricultural districts' may be entitled to various statutory protections.*" *Id.* (Emphasis added.) Another case that is instructive on the issue is *Matter of Deerpark Farms, LLC v. Agricultural & Farmland Protection Bd. of Orange County*, 70 A.D.3d 1037, 1037 (2d. Dep't 2010). In that case, the owners of a pig farm petitioned Orange County to expand the Ag District so as to include their farm. The County denied the request. *Id.* The Second Department examined the County's reasons for refusing to include *Deerpark* in the Ag District. *Id.* at 1038. The County refused to include the farm because the County reasoned that if the farm was in the Ag District, the farmer could contravene the provisions of the zoning code. *Id.* In this particular case, the County did not want the farm operations to expand beyond the parameters of the zoning district, in which it was located, and create a nuisance to neighboring properties. *Id.* This also demonstrates that if a property is not within an Ag District, the provisions of Ag and Mkts Law are inapplicable and the Zoning Law is fully enforceable. (Copies of both the *Hafner* and the *Deerpark Farm* case are attached hereto as Exhibit G for the convenience of the ZBA.)

As shown by the text of Ag & Mkts Law § 305-a(1), Ag & Mkts guidance documents, and relevant court opinions, the protections of the Ag & Mkts Law are only applicable to properties within a certified Ag District. As such, the provisions of Ag & Mkts are inapplicable to Property and the standard provisions of the Zoning Code are fully enforceable relative to the Proposed Use.

Unfortunately, the Town Board, the Director and the Planning Board all believed that the provisions of Ag & Mkts Law were applicable and prohibited the Town from regulating the Proposed Use. For instance, the notes of the Town Board meeting state,



Chairman Daniel Michnik  
Page 7

May 10, 1013

The Town Board was further advised that the Ag & Mkts Law limits a municipality's power to regulate nurseries and greenhouses. Accordingly, the Applicant's representative advised the Town Board that it was his opinion that the Project does not require any discretionary approvals and only a building permit is required. In response, Councilman Casilio said he understood that. Exhibit A.

The Planning Board was also under the impression that the Property was in an Ag District, as evidenced by the Planning Board's motion which states,

[I]dentify the proposed nursery/greenhouse operation located at 8841 County Road in the Agriculture Rural Residential Zone as an as of right use and as a Type 2 Action under SEQRA with the understanding that the proposed use it to sell the products grown on the property and such other products as *identified and acceptable in Agriculture and Markets Law*. Exhibit B. (Emphasis added.)

Ag & Mkts Law protections were erroneously applied to the Application.

**A Retail Nursery/Greenhouse is Not a Permitted Use Under the Zoning Law**

Based upon this error, the Director, the Town Board and the Planning Board, concluded that the development of a retail nursery/garden center with 48 parking spaces is a permitted use in an A-RR Zone (See, Exhibit A & B). This determination is incorrect. In fact, the Zoning Law does not permit retail greenhouse/garden centers in a A-RR Zone.

Under § 229-37 of the Zoning Law, which governs A-RR Zones, permitted uses explicitly include "greenhouses or nurseries." However, a "retail nursery or greenhouse" is not listed as a Permitted Use except in a Commercial ("C") Zone. The fact that the Zoning Law differentiates "nursery/greenhouse" from "retail nursery/greenhouse" on the list of permitted uses clearly indicates two different types



May 10, 2013

of uses, the first for a personal use or a non-retail use, the second for a commercial or retail use. The mere presence of the word "retail" clearly indicates that the Town intended to distinguish between two different intensities of use, one involving growing (which is appropriate for a A-RR zone) and the other involving growing and selling nursery and other products to the public (appropriate for a C Zone). The plain language shows that the drafters intended to exclude retail nurseries such as the Proposed Use from an A-RR Zone and allow "retail greenhouse/nursery" uses only in a C Zone with other similar commercial and retail activities. This is readily apparent when reviewing the other permitted uses in an A-RR Zone, none of which include any type of retail components. See, Zoning Law § 229-37.<sup>4</sup>

As described above, pursuant to § 229-37 of the Zoning Law "greenhouses or nurseries" are permitted in an A-RR Zone and § 229-84, only allows "retail nursery/greenhouses" in a C Zone. The design of the statute indicates the clear intent of the drafters of the Zoning Law. To determine the intent of laws, the Courts will apply the rules of statutory construction. One of the long-standing rules of statutory construction is that each word must be given meaning and the statute must not be interpreted such that portions are rendered meaningless. *Soc'y of N.Y. Hospital v. Del Vecchio*, 70 N.Y.2d 634, 636 (1987) (The general rules of construction require that "all parts of a statute must be harmonized with each other and that every part must, if possible, be given meaning.") With this rule in mind, the Zoning Law reaffirms that the drafters intended two different types of uses in using the phrases "nursery/greenhouse" versus "retail nursery/greenhouse."

Accordingly, a retail nursery/greenhouse is only allowed in a C Zone. Any other interpretation would render the word "retail" meaningless. As such, we are requesting the ZBA to issue a determination that a retail nursery/garden center is not a permitted use in the A-RR Zone.

---

<sup>4</sup> Compare the uses found in §229-84 of the Zoning Law, which permits banks, convenience stores, and other "retail sale activities" in a Commercial zone.



**Site Plan Review is Required**

We are also appealing the decision of the Planning Board to the ZBA because it is in excess of the powers of the Planning Board. On April 17, 2013, The Planning Board's minutes state that the following action was taken:

Motion by George Van Nest, seconded by Gregory Todaro to *identify the proposed nursery/greenhouse operation located at 8841 County Road in the Agriculture Rural Residential Zone as an as of right use* and as a Type 2 Action under SEQRA with the understanding that the proposed use it to sell the products grown on the property and such other products as identified and acceptable in Agriculture and Markets Law...  
(Emphasis added.)

No site plan approval was granted. The Planning Board's motion clearly makes a finding that the Proposed Use is "an as of right use." Under §229-163 of the Zoning Law, and NYS Town Law 267-a(5) the ZBA is the entity authorized to interpret the Zoning Law. See also, *De Marco v. Vil. of Elbridge*, 251 A.D.2d 991, 991 (4th Dep't 1998) (Holding that the Planning Board interpretation of a permitted versus a non-permitted use expansion was outside of the Planning Board's jurisdiction.); *Matter of Woodland Community Ass'n, v. Planning Bd. of Tn. of Shandaken*, 52 A.D.3d 991, 993 (3rd Dep't 2008) (The Planning Board exceeded its jurisdiction by interpreting the Zoning Law and the resulting decision was of no effect.)

The Planning Board justified its decision to approve the retail nursery/greenhouse based on its interpretation of the Zoning Law as an "as of right use." The Planning Board's finding that a retail nursery/greenhouse is a permitted use is erroneous and in excess of the Planning Board's authority under NYS Town Law and the Town's Zoning Law. It appears (although it is not entirely clear) that because of this erroneous determination, the Planning Board also determined that no site plan approval was



May 10, 1013

required. This determination was made in clear violation of the site plan review requirements of the Zoning Law. Section 229-151(B) provides that site plan approval shall be required for all development except:

- (1) Accessory structures
- (2) An enlargement of a principal building by less than 10%
- (3) A change in principal use where such change would not result in a change in lot coverage or off-street parking spaces.

The proposed use does not involve accessory structures or an expansion of a principal building. In addition, it involves a significant addition of off-street parking to the Property and a significant change in lot coverage. As such, site plan review is clearly required and the ZBA should order that site plan review be undertaken.

#### SEQRA

The Proposed Use is not a Type II Action as described under 6 NYCRR 617.5(c)(3) of the regulations. Section 6 NYCRR 617.5(c)(3) states "agricultural farm management practices, including construction, maintenance and repair of farm buildings and structures, and land use changes consistent with generally accepted principles of farming" are Type II Actions. The Proposed Use is a change in use from a vacant parcel to a retail nursery/garden center, an unpermitted use in an A-RR Zone. This Proposed Use is not a "land use change consistent with generally accepted farm practices." The SEQRA Handbook provides examples of generally accepted farm practices exempt from SEQRA review, which include building dikes or ditches or erecting a farm stand. An activity is not exempt simply because it relates to farming. As explained by the Department of Environmental Conservation, for instance, if a farmer decides to build a home, such activity is not exempt from SEQRA review as a generally accepted farm practice. See SEQRA Handbook, p. 31.



Chairman Daniel Michnik  
Page 11

May 10, 2013

Conclusion

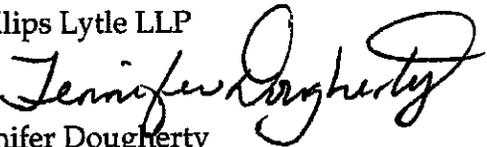
In conclusion, the Property is not located in an Ag District. Therefore, the Proposed Use is not protected by the Ag & Mkts Law and provisions of the Zoning Law are fully applicable and enforceable. As described above, a retail nursery/garden center is not a permitted use in an A-RR. The Town Board, the Director and the Planning Board improperly determined that the Proposed Use is a permitted use. The Applicant should have been required to seek a rezoning or a use variance and submit a Site Plan in complete conformity with the provisions of §§ 229-163 and 229-151. Moreover, the Application is properly described as a change in use, which is specifically excluded from the Type II Actions under SEQRA. As such, any future application should also comply with the provisions of the SEQRA.

We are therefore requesting the ZBA to make a determination that the Proposed Use is not a Permitted Use in an A-RR and to instruct Applicant to obtain all resulting necessary approvals prior to proceeding with the proposed retail nursery/garden center.

We look forward to having an opportunity to present this appeal at the next ZBA meeting. In the meantime, we note that NYS Town Law §267-a(6) mandates that "[a]n appeal shall stay all proceedings in furtherance of the action," unless the stay would cause imminent peril to life or property. Accordingly, this appeal automatically stays all proceedings in furtherance of the Application, including, but not limited to the processing of any Building Permits or any activities in furtherance of the Proposed Use at the Property. NYS Town Law §267-a(b) McKinney's 2013.

Very truly yours,

Phillips Lytle LLP

By   
Jennifer Dougherty



Chairman Daniel Michnik  
Page 12

May 10, 1013

J-D

Attachment(s)

cc: Town Board  
Planning Board  
James Callahan, Director of Community Services  
Lisa Smith, Esq.  
Adam Walters, Esq.

Doc #01-266664.1

**EXHIBIT A**

Regular meeting of the Town Board of the Town of Clarence was held on Wednesday, March 27, 2013 at the Clarence Town Hall, One Town Place, Clarence, New York.

Supervisor David Hartzell, Jr. called the meeting to order at 7:30 p.m. Pledge to the flag was led by James Blum; followed by a prayer read by Councilman Patrick Casilio.

Members of the Town Board present were Council Members Robert Geiger, Peter DiCostanzo, Patrick Casilio, Bernard Kolber and Supervisor Hartzell. Other Town officials present were Director of Community Development James Callahan, Town Attorney Lawrence Meckler, and Town Engineer Timothy Lavocat.

Motion by Councilman Casilio, seconded by Supervisor Hartzell to accept the minutes of the previous work session held March 6, 2013. Upon roll call – Ayes: All; Noes: None. Motion carried.

Motion by Councilman Kolber, seconded by Supervisor Hartzell to accept the minutes of the previous work session and regular meetings held March 13, 2013. Upon roll call – Ayes: All; Noes: None. Motion carried.

Motion by Supervisor Hartzell, seconded by Councilman Geiger to approve the following Special Events requests:

1. Rotary Club of Clarence - Walk for Celiac Awareness to be held May 11, 2013 from 8 a.m. to 6 p.m. in the Clarence Town Park. The walk route will begin and end at the Main Town Park per the submitted map. A current certificate of insurance has been provided.
2. American Legion Memorial Day Parade to be held on May 27, 2013 beginning at 11:00 a.m. The parade will begin at the Clarence High School and end at the Main Town Park.
3. St. Mary's Church 5K Chowder Chase Run - July 21, 2013 from 11 am to approximately 12:00 pm. This is in conjunction with their Annual Picnic. The Route will start at St. Mary's Church on Stahley Road and finish there as per the submitted map.
4. To grant a Special Events request from the Zion Lutheran Church for the "Miles for Haiti – 2 Mile Run" Fundraiser to be held September 29, 2013 from 1:00 p.m. until 3:00 p.m. subject to Town Attorney review and approval. A current certificate of insurance has been provided.

On the question, Supervisor Hartzell said all the appropriate agencies will be notified. Councilman Casilio said he is a member of Rotary, however this is ministerial and he will be voting. Councilman DiCostanzo and Councilman Geiger said they are both members also. Upon roll call – Ayes: All; Noes: None.

Motion by Supervisor Hartzell, seconded by Councilman Casilio to appoint Lorraine V. Hunt as School Crossing Guard P/T at the budgeted rate of pay of \$11.18/hour effective April 8, 2013. Upon roll call – Ayes: All; Noes: None. Motion carried.

Motion by Supervisor Hartzell, seconded by Councilman Geiger to adopt the following resolution:

**WHEREAS**, the Governor has proposed, as part of his Executive Budget, a provision that would restrict the ability of local courts to plea bargain traffic tickets; and

**WHEREAS**, this provision would unduly infringe upon the discretion of local judges to adjudicate matters on a case-by-case basis; and

**WHEREAS**, without the ability to plea bargain traffic tickets, there will be an increase in the number of trials held in the local courts which will have the result of significantly increasing the cost to the municipality to run its courts system; and

**WHEREAS**, this provision will take away an important funding source that municipalities rely on to run their court systems; and

**WHEREAS**, the Governor has also proposed, as part of his Executive Budget, a provision that would add an eighty dollar (\$80.00) surcharge to all stopping/standing/parking violations, regardless of the circumstances behind the violations; and



F. Shelia Bailey, 5701 Transit Road  
 G. Larry Engasser, 8346 County Road  
 H. Gregory Ribbeck, 5750 Shimerville Road  
 I. Rose Parlato, 4401 Transit Road  
 J. David Burghardt, 8694 Lapp Road

James Callahan said the Town Board approves certain uses on a temporary basis per the Zoning Law. The items on the above list are seeking renewal. Action requires a public hearing be held.

Motion by Councilman Casilio, seconded by Councilman Kolber to consider renewal of the following Temporary Conditional Permits: A. Edward Strickland, 5880 Salt Road; B. David Delagrange, 4545 Transit Road; C. Christopher Morgan, 10165 Main Street; D. Gene Metzger, 8325 Transit Road; E. Brian Thomas, 9920 Main Street; F. Shelia Bailey, 5701 Transit Road; G. Larry Engasser, 8346 County Road; H. Gregory Ribbeck, 5750 Shimerville Road; I. Rose Parlato, 4401 Transit Road; and J. David Burghardt, 8694 Lapp Road. On the question, Councilman Kolber said we have not had any complaints about any of these items. However, it has been determined that item f for 5701 Transit Road has not fulfilled all of the obligations of the original permit relative to landscaping. They will be notified that they must be taken care of before any renewal is granted. Upon roll call - Ayes: All; Noes: None. Motion carried.

Lavocat Family Nursery requests review of a proposed nursery/greenhouse use at 8841 County Road. James Callahan said the location is the south side of County Road, east of Westminster Drive consisting of vacant land in the Agricultural Rural Residential Zone. The request is for a permitted use in that zone.

Sean Hopkins was present with Don Lavocat, Sr., Don Lavocat, Jr. and other family members. The property is zoned Agricultural Rural Residential and one of the expressly enumerated uses listed in the Town Code is greenhouses or nurseries. There were concerns given earlier in the meeting that this would be like Walmart, Lowe's or Niagara Produce. That is absolutely not the case. The Lavocats have been in business for 32 years and intend to grow landscape and nursery products, plants, flowers, etc. on the site and sell them.

Mr. Hopkins said the Town adopted the Right-to-Farm Law several years ago. He read from that law adding that this project is very clearly an example of the potential conflicts of different land uses. The Right-to-Farm Law clearly specifies that those uses should be permitted. If you look at the definitions of this law and the New York State Ag and Markets Law, this use is permitted. This type of use is also regulated by the New York State Dept. of Conservation. They must get a building permit from the Town of Clarence and supply a drainage plan as part of that process.

Mr. Hopkins said they are willing to discuss various issues with the neighbors, but not about whether or not this is a permitted use. It is a Type II Action under SEQRA and does not require an environmental review. New York State Agriculture & Markets Law states that municipality's regulations for agricultural uses are very limited; categorically they are not subject to environmental review pursuant to SEQRA; and they can have a retail component. It is also appropriate to sell products from offsite locations. Anything that would be sold would be related to what they do. They are a local business who has made an additional personal investment. It is consistent with the Zoning Code, the Master Plan and Right-to-Farm Law. These types of businesses should be allowed to exist, grow and thrive.

Mr. Hopkins said it would be acceptable to them to go before the landscape committee to ensure that there is adequate landscaping and screening.

Councilman Kolber said when does something stop being agricultural as it moves to other products becoming a commercial operation. He does not know.

Councilman Casilio said his concern is that they make this investment and then have to be shut down by the Town. Is there a provision that crops have to be grown on the property for a year before they can be sold there? We all know this is going to be watched and he wants to make sure it is done the right way.

Don Lavocat said everything that they sell on this property will be grown here. They have wholesale growing contracts on Heroy Road and that will remain there.

Mr. Hopkins said that moving it from one site to another for sale is not regulated.

Councilman Casilio asked why they are not centering the operation on the site.

Mr. Lavocat said there is a house on the site that is being rented out. There is also a septic system, so it made more sense to move to the west side. They will use the driveway to the house as part of the driveway to the business.

Mr. Hopkins said, with all due respect, this does not require discretionary approval. They know they need approval for a building permit, drainage plan and oversight by the Town.

Councilman Casilio said he understands that if he follows that fine, but if he deviates from that he could be tested and shut down. If he puts a wheelbarrow out there for sale, the Town will be notified and there will be problems.

Mr. Lavocat said they do not do that now and do not plan to do it there. This is going to be strictly agricultural growing of their plants, shrubs and perennials. They have 30,000 sq. ft. at the Heroy Road site and this is 15,000 sq. ft.

Sean Hopkins said they are adding a 6 ft. fence on one side and screening along the parking area as shown on the plan.

Mr. Lavocat said they grow 900 varieties of plants. There was a lot of confusion and rumors spread about them when they presented this project. They grow everything. He does not understand why the Town would want to tie the hands of the growers.

Councilman Kolber said sometimes when you do a project right in the face of the neighbors, you create enemies for life or you can do it in a way that is harmonious.

Mr. Hopkins said they are willing to discuss screening and those types of options with the neighbors, but if it is a discussion of whether or not they are permitted, that they are not willing to engage in.

Motion by Councilman Kolber, seconded by Councilman Casilio to forward the request for the proposed nursery/greenhouse use at 8841 County Road to the Planning Board for their review to make the project amenable and work. On the question, Councilman Casilio said he thinks it is good to work this out and let everyone have a chance to participate in the discussion. Upon roll call - Ayes: All; Noes: None. Motion carried. 

Motion by Councilman DiCostanzo, seconded by Supervisor Hartzell to grant approval for the following: Clubhouse Applications - A. Clarence Lions Club - April 6, 2013; Legion Hall Applications - A. Mindy Sauer - April 12, 2013; B. Patricia Foley - April 21, 2013; C. Shelley Strobel - May 18, 2013; D. Kathleen Fordham - June 9, 2013; E. Don Lavocat, Jr. - June 22, 2013; F. Maria Cahlstadt - Nov. 30, 2013; Pavilion Special Events - A. Rotary Club of Clarence - May 31, June 1 & 2, 2013; and B. Clarence Baseball Association - May 17, 2013. Upon roll call - Ayes: All; Noes: None. Motion carried.

Motion by Councilman DiCostanzo, seconded by Councilman Casilio to grant approval for use of the Nature Center Lodge to the Clarence Senior Center on May 16, 2013 for educational presentation. Upon roll call - Ayes: All; Noes: None. Motion carried.

Motion by Councilman Kolber, seconded by Councilman Casilio that after proper audit and review by the Town Board, the following bills of March 28, 2013 are approved for payment: General Fund - \$204,956.44; Highway Fund - \$63,291.38; Water District - \$1,641.12; Sewer Districts - \$82.90; Capital Fund - \$840.00; Trust & Agency 203 - \$660.00; Trust & Agency 202 - \$15,745.57; and Trust & Agency 205 - \$210.76 for a total amount of \$287,428.17. Upon roll call - Ayes: All; Noes: None. Motion carried.

"For the Good of the Town"

Hans Mobius said he is a member of the Farm Bureau and he is here to support Don Lavocat. The Right-to-Farm Law basically says that if you move to a nuisance such as a farm, that farm is protected. It also protects the neighbors from a farmer who is misbehaving. The Town can take action if this man misbehaves, but he doubts very much that he would.

David Stengel said March 10<sup>th</sup> they received a letter and it states right in it a high-end grower, greenhouse and garden center. Now they are saying it is not a garden center. The agricultural laws that he has been reading give the zoning board the authority to oppose anything they want and the farming laws do not apply. He spoke with Bob Summers from Agriculture & Markets and he said the same thing. Plants have to be in the ground for a year before they are sold.

Councilman Kolber said that is the point of the Planning Board review to flush out all of the issues. It is a permitted use.

James Blum said he was honored to stand in for Bob Fogelsonger to lead in the pledge tonight. He believes Mr. Fogelsonger is in his 90's and has given his whole life to the Town in many ways. He donated the land that became Glenwood Park. Mr. Blum asked the Town Board to consider renaming that park Fogelsonger Park before Mr. Foglesonger is no longer with us.

A resident from County Road said Lavocats might be very nice people who do a great job with growing their plants and all, but she had photos that they took at the site on Heroy Road. (Councilman Casilio suggested she take them to the Planning Board.) She believes there are code violations at the Heroy Road site including propane tanks that are not chained, garbage and stuff all over. It is visible from the road.

Don Lavocat said there is debris associated with a landscaping business. The landscaping portion of their business is not coming to County Road.

There being no further business, Supervisor Hartzell adjourned the meeting at 9:00 p.m. in honor of Dmytro Baranyckj, father of Parks Department employee Jean Ranney who recently passed away.

Nancy C. Metzger  
Town Clerk

# **Exhibit B**

**Town of Clarence**  
One Town Place, Clarence, NY 14031  
**Planning Board Minutes**  
Wednesday April 17, 2013

**Work Session 6:30 pm**

Status of TEQR Coordinated Reviews  
Review of Agenda Items  
Miscellaneous

**Agenda Items 7:30 pm**

Approval of Minutes

**Item 1**

Lavocat's Family Nursery  
Agricultural Rural Residential

Requests review of a proposed  
nursery/greenhouse use at 8441 County Road.

**Item 2**

Dominic Piestrak  
Residential Single Family

Requests Preliminary Concept Review of a  
proposed Open Space Design Subdivision located  
on the south side of Clarence Center Road, east of  
Creekview Drive.

**Item 3**

Northwoods Open Space Design Subdivision  
Residential Single Family

Public Hearing on Draft Supplemental  
Environmental Impact Statement (DSEIS).

Chairman Robert Sackett called the meeting to order at 7:30 p.m.

Richard McNamara led the pledge to the flag.

Planning Board Members present:

Chairman Robert Sackett  
Timothy Pazda  
Richard Bigler  
Steven Dale

2<sup>nd</sup> Vice-Chairman Paul Shear  
George Van Nest  
Gregory Todaro

Planning Board Members absent: Vice-Chairperson Wendy Salvati

Town Officials Present:

Director of Community Development James Callahan  
Junior Planner Michael Hutchinson  
Deputy Town Attorney Steven Bengart

## " Other Interested Parties Present:

Bill Coffed	Dave Horbinski	Ralph G. Schaller
Dorothy B. Schaller	Rick Ravjiu	Ann Marie Stengel
Jeffery Marquart	Lori Barany	Ronald Mohr
Lynn Honsberger	Sandra Honsberger	Rita M. Grabowski
Thomas Fini	Charles Greene	Chris Greene
Bill McGrath	Kenneth Peterson	Kenneth Moreno
Tom Gaffney	Phyllis Whitchurch	Lisa Smith
Susan Lozinak	Mark Lozinak	Mickey Druar
Jack Hesslink	Barb Walleshauser	Karen Willyoung
Rob Lane	Dan Ettiopio	Steven Jagord
Paul Hufnagel	Cheryl Hufnagel	Beverly Polito
Sharon Siminski	Bob Dickinson	Marilyn Jelliff
David Spoth	Peggy Spoth	Vincent Salvatore

In the absence of Vice-Chairperson Wendy Salvati, alternate Planning Board member Steve Dale will be participating in all discussions and voting on all agenda items this evening.

Motion by Paul Shear, seconded by Gregory Todaro, to **approve** the minutes of the meeting held on March 20, 2013, as written.

Steve Dale	Aye	Gregory Todaro	Aye
Richard Bigler	Abstain	George Van Nest	Abstain
Timothy Pazda	Aye	Paul Shear	Aye
Robert Sackett	Abstain		

MOTION CARRIED.

Motion by Paul Shear, seconded by George Van Nest, to **approve** the minutes of the meeting held on April 3, 2013, as written.

Steve Dale	Abstain	Gregory Todaro	Abstain
Richard Bigler	Aye	George Van Nest	Aye
Timothy Pazda	Abstain	Paul Shear	Aye
Robert Sackett	Aye		

MOTION CARRIED.

Chairman Sackett explained that Mr. Callahan will provide information on the projects and will advise whether the Planning Board has approval authority or if that authority lies with the Town Board for each project. The petitioner will discuss the project with the Planning Board. The public will be invited to speak. The Board and/or the petitioner will address the questions/comments from the public. The Planning Board will then take an action.

**Item 1**

Lavocat's Family Nursery  
Agricultural Rural Residential

Requests review of a proposed  
nursery/greenhouse use at 8441 County Road.

**DISCUSSION:**

Jim Callahan provided the history on the project noting that it is located on the south side of County Road, east of Westminster Drive. It is existing vacant land located in the Agricultural Rural Residential zone. The proposed nursery/greenhouse use is identified as a permitted use in the Agricultural Rural Residential zone. The project has been referred by the Town Board to review the specific site plan details associated with the project.

Sean Hopkins, of the Hopkins and Sorgi Law Firm, is representing the Lavocat family. Don Lavocat, Don Lavocat Jr., Chris Lavocat and various family members are present. Mr. Hopkins said that pursuant to §229-37 of the Town Zoning Code greenhouses and nurseries are permitted uses, thus the property is properly zoned. The project consists of a 19,000 square foot single story greenhouse. The Lavocat's purchased the property earlier this year, prior to proceeding with the closing of that purchase they checked to confirm that the property was properly zoned. The Lavocat family has been in business in Clarence for approximately 32 years. They currently have a nursery located at 9855 Heroy Road; it is also an agricultural use. They have a great reputation, no history of any problems with the Town of Clarence or any other governmental agencies. The project will create about 10 jobs. This is the next step in terms of the evolution of the Lavocat's family agricultural businesses, Mr. Lavocat hopes his children will continue the business. In terms of the SEQRA this is a Type II Action, meaning it is categorically exempt from any environmental review pursuant to SEQRA. The applicant has met with the Planning Board Executive Committee and was before the Town Board, they believe their attendance at those meetings, along with this meeting, is voluntary. They don't believe this project requires any discretionary approvals from any Town of Clarence municipal boards, but they recognize the importance of doing their best to working with the Town's boards as well as adjoining property owners and they will do their best to address their concerns.

The applicant's met with the Planning Board Executive Committee who suggested some changes to the plan. One suggestion was to move the parking spaces so vehicles won't shine headlights onto adjoining properties, that change has been made. Another suggested change had to do with deliveries to the site, the applicant now shows a driveway leading back to the middle of the greenhouse that will be utilized for such deliveries. A dumpster had been added and will be properly screened and landscaped. Green space and landscaping has been added along County Road. They will meet with the Town's Landscape Committee to finalize the landscaping.

The applicant was previously requesting a variance for a parking lot on County Road; they are no longer seeking that request.

Per State Law, the local municipality's ability to regulate this agriculture use is limited, however the applicant has agreed to certain conditions that were prepared by the Planning Department. Those conditions are: ?

- a. No outside storage of bulk materials in the required front yard setback areas; there will be no bulk storage along County Road.
- b. No equipment storage in the required front yard setback area. Any equipment stored outdoors would be on the east side of the proposed greenhouse.
- c. Parking areas and driveways to be paved.

- d. No other non-agricultural related businesses, including landscape contracting and sales of items not normally associated with a nursery/greenhouse operation.
- e. Subject to review and approval by the Town Engineer associated with grading and drainage facilities on the site including any necessary permits and stormwater management techniques.
- f. Subject to review and approval by the Town of Clarence Building Department for required building permits and compliance with NYS Uniform Fire Protection and Building Code.
- g. Subject to review and approval by the Erie County Health Department for on-site sanitary facilities.
- h. Subject to landscape plan approval by the Landscape Committee prior to final Certificate of Occupancy.

Mr. Hopkins said the site plan shows 48 parking spaces because they want to make sure all customers can park in the parking area and not on County Road, especially during their busy season. The applicant would like to start the project this year and be ready for occupancy by Spring of 2014. The hours of operation will be from 8:00am-8:00pm (sundown) during their busy season which is Spring to Fall.

Chairman Sackett asked for details on outside lighting. Mr. Lavocat said they did not get that specific with the plan, yet, but would have lights on the greenhouse shining onto the parking area, just facing the street. Any lighting would not go beyond the property line.

Mr. Dale asked where the bulk material would be stored. Mr. Hopkins said an example of storage would be mulch or equipment such as fork-lifts, those items would be stored behind the greenhouse, far away from the adjoining property owner on County Road. It is clarified that storage would be restricted from the front yard setback and also from the outdoor growing area.

Mr. Todaro asked if there was an expansion of parking where would that occur. Mr. Hopkins said additional parking could be added to the east side of the driveway that runs back to the dumpster and the greenhouse.

Mr. Hopkins said the Lavocat family has an existing landscaping business in which they provide landscape services, that business will remain at their existing location and will not be coming over to the County Road location.

Mr. Bigler asked about signage at the proposed location. Mr. Hopkins said signage has not been discussed yet, but the applicant would do something tasteful and they are aware of the requirement to obtain a sign permit.

Mr. Shear explained that dark sky lighting means that all the lighting is down and remains on the property. The applicant understands this. Mr. Shear asked how many days a week the business will be open. Mr. Hopkins said the business hours will generally be 8:00am-5:00pm on Sundays, and 8:00am-8:00pm (or dark) Monday through Saturday.

Mr. Lavocat said they do not grow the Christmas trees that they will sell. Mr. Hopkins noted that this is permitted per the NY State Agriculture and Markets Law. Mr. Lavocat said they make Christmas wreaths to sell, as well.

Lisa Smith lives on Westminster Drive. She is an attorney with Phillips Lytle. She checked the zoning of this property before she purchased her home on Westminster Drive. It is her understanding that at the March 27, 2013 Town Board meeting they decided to send this project to this Board to define the parameters of what the Lavocat business can and cannot do on the property. This is a successful family business grown in Clarence that is very valuable and should probably be kept in the Town. On the other hand there is a neighborhood of adjacent homes that have been valued by the Town between \$400,000 and \$700,000; these are owned by people who are also making investments in the Town. Ms. Smith said the Town can be on the hook when a development causes water encroachment on neighboring property. She is concerned with two big issues: one, is this a use that is permitted in the zoning classification and two, what about the water? Where will it go and who will be responsible for damage caused by it? It is clear to Ms. Smith that the permitted use in the Agricultural Rural Residential zone does not include a retail nursery or greenhouse; a non-retail nursery or greenhouse is permitted. This project is clearly a retail operation as evident by the 48 parking spaces for customers. She referenced the Zoning Law and asked where a retail nursery and greenhouse is permitted. She said it is explicitly provided for in a Commercial zone under Article X. This property is not zoned Commercial so she would submit to the Planning Board that this is not a permitted use. She requested that this Board do a careful review and recommendation and make the recommendation back to the Town Board. She said there seems to be an acceptance that this particular use is within the zoning. She said half of the Lavocat property is designated FEMA floodplain and Federal Wetlands, some of her property is designated Federal Wetlands. What will this project do with the water? She believes that SEQRA review is required because of the wetlands; an environmental impact statement would be a good thing to have for this project for many reasons. It would protect the Town's and the taxpayer's interests. She has not heard anything regarding the use of fertilizers on this property.

Attorney Tom Gaffney is present on behalf of a few of the residents. He said the zoning issue is clear and crucial. The Agriculture and Markets Law has to be taken into consideration as well. That law says that if you grow something on a piece of property you are able to sell it there. Because of the distinction in the Zoning Laws a commercial operation cannot be operated in that location. Mr. Gaffney thinks that a greenhouse has already been determined to be a permitted use; how far the Lavocat's can go with it is what the Planning Board is here to determine. The idea that this is already approved isn't entirely true based on that limitation.

David Stengel lives 150' from the project. He holds up an aerial view of the Lavocat's current business location and voiced his concern regarding the appearance. He said they are in violation of the State Building Codes and the Agricultural Codes. Mr. Stengel presents six (6) copies of a report for review by the Planning Board members; the copies are distributed. He is looking for the Board's consideration; this project doesn't meet the zoning.

Ronald Mohr owns the property on the west side of the project site. He is concerned about the location of the parking lot and how close it will be to his property line. The whole project runs along the side of his property; he would have no privacy in his backyard. He is also concerned with what the applicant will store there, will there be chemicals? He voiced his concern with safety issues, County Road is busy, people jog and bike on that road. He questioned the need for so many parking spots. Of all the other businesses he sees in the area he does not know of anyone who has that many. He doesn't believe this business should be in his neighborhood, it should be down the road where it is zoned

differently. He thought that if it is considered a greenhouse what you grow there you can sell, but they talked about deliveries coming in there with mulch and other items. If they start with mulch, then they will bring in top soil and then what's next?

Lori Peroni, of 8522 County Road, has reason to believe that the Lavocat's intent is to operate a retail commercial business. If this is true, then it is not compatible with adjoining land uses. She wants to preserve the character of the neighborhood which consists primarily of single family homes in a country setting. A nursery garden center will not be consistent with the character of the neighborhood. The predominant land use is residential. As of 2012 there were a recorded 91 homes on County Road, any businesses are east of Heise Road in an industrial zone. This garden center is going to generate a significant increase in traffic resulting in a demand on community services like police and fire protection. In addition, they will be using herbicides and pesticides resulting in poor air quality as well as fumes from cars. The noise from the cars and daily operations will exceed ambient noise levels. Ms. Peroni said she has photos showing her concern over their housekeeping; she said town codes are being broken. She said all the neighbors are worried this will occur at this site too. The photos are distributed to the applicant to review. Ms. Peroni said the Lavocat's list this land as 23 acres, this is not correct. She explained that part of the acreage was divided and sold to seven different neighbors on Westminster Drive resulting in the Lavocat's owning only approximately 9 acres. She wants to know how much of that 9 acres is wetlands versus farmable land.

Mike Olsen lives behind the project site and asked what the distance is from the back of the greenhouse to the back property line. He asked if there would be lights shining on the back of the property.

Salvatore Mameli, of 8505 County Road, said he main concerns are nursery, growing outside, pesticides and other chemicals being used, drifting of the air, air quality, water quality. He is surrounded by wetlands. He is a disabled Vietnam Veteran with Agent Orange being one of the problems that he has; he tries to minimize being in the midst of any other exposure. It becomes a major issue when he goes out in his yard and he smells pesticides, it affects him.

Sharon Siminski, of 8485 County Road, is concerned with the water. She is surrounded by wetlands. Since the new gated community she has more water being pushed into her backyard and it doesn't dry out right away; she can't cut the yards until late into the Summer.

Mr. Hopkins addressed the comments that suggested this is not a permitted use, he referred to §229-37 (L) of the Zoning Code which lists greenhouses or nurseries as a permitted use. He addressed the comment suggesting that a SEQRA review is necessary and that the result of that review would be a Positive Declaration and the preparation of an environmental impact statement. Mr. Hopkins referred to the SEQRA Regulations 6NYCRR Part 617.5E & C3 which states: agricultural farm management practices, including construction, maintenance and repair of farm buildings and structures and other land use changes consistent with generally accepted principles of farming are designated Type II actions which do not require the preparation of an environmental assessment form and are not subject to compliance with the State Environmental Quality Review Act. There is also case law that states this standard repeatedly.

Mr. Hopkins said there are homes close by that are very valuable and very nice, but the site is zoned Agricultural Rural Residential and this proposal is an allowed use. For the past couple decades the Town has gone out of its way to ensure the agricultural uses that exist are protected, new agricultural uses are permitted and to preserve the agricultural heritage of the Town of Clarence, this is recognized

in the Zoning Code and Master Plan 2015, the Town's Right to Farm Law, etc. The Lavocat's will work with the neighbors to address their concerns as best they can; they want to be good neighbors.

Mr. Lavocat addressed the photos that were provided showing their business on Heroy Road. He said they are involved in a plastic recycling initiative where they take all of their plastic to Niagara Falls where it is shredded and used for diesel fuel. They even encourage their customers to bring back their plastic for recycling. The neighbor took pictures of those boxes/containers that hold the plastic. One of the other pictures shows a pile of cardboard because they recycle all of their cardboard as well. Mr. Lavocat addressed the water concerns noting that there will not be any more run-off from this property than there is now. The ditches in the area are in such poor shape that the applicant is going to get the County out there to clean up the ditches. As far as the pitch of the land, there is 3' of pitch on the front of the land from one corner of the property to the other so there will be no standing water problems; there is good drainage out there. Mr. Hopkins said they will have to technically prove that there will be no drainage problems and they are ok with that.

Chris Lavocat clarified that there is approximately 300' between the back of the greenhouse and the back property line. He goes on to say that they have already addressed the property line and will install a 4' hedgerow along the corner of the property to help buffer the neighbors of Westminster Drive. The applicant has no problem with the Board requiring Landscape Committee Approval.

Mr. Lavocat said they use minimal pesticides, they do not use herbicides. They use insecticides and fungicides but it will be minimal and only used in the back of the greenhouse. They use chemical auto-foggers which limits the amount of pesticides and limits the water so that there is no run-off. The auto-foggers are used at night and inside the greenhouse, there will be no drift in the air whatsoever. Mr. Lavocat is licensed by the DEC to use pesticides and his storage of pesticides was just recently inspected by the DEC. Shrubs will be grown outside the greenhouse but they do not spray the shrubs with pesticides or herbicides or insecticides or fungicides.

The applicant agreed that the Town Engineer will need to review and approve the stormwater management plan. The applicant will ultimately be responsible if the rate of run-off on the property has increased after development. The applicant's intention is to put a water collection system on the greenhouse so most, if not all, the water will be reused for water application inside the greenhouse.

Chairman Sackett said there is a 15' side yard setback requirement; the applicant shows 16' on the plan.

The applicant confirmed that there will be no lighting on the back of the property or on the growing fields.

Mr. Lavocat explained that this is not a commercial operation. Everything that will be sold on the site as far as plant material will be grown on site. They will grow perennials, annuals and shrubs which will then be sold from the site.

It is clarified that the location of any floodplains will be identified through the building permit issuance process and through engineering approvals.

**ACTION:**

Motion by George Van Nest, seconded by Gregory Todaro, to identify the proposed nursery/greenhouse operation located at 8441 County Road in the Agriculture Rural Residential Zone as an as of right use and as a Type 2 Action under SEQRA with the understanding that the proposed use is to sell the products grown on the property and such other products as identified and acceptable in Agriculture and Markets Law. This action is identified as per the site plan from Arete Architects dated 4-09-13 and subject to the conditions previously identified and stated by the applicant's council, Mr. Hopkins, and as agreed to by the applicant this evening, specifically conditions a-h.

**ON THE QUESTION:**

Condition (a) is amended to read: No outside storage of bulk materials in the required front yard setback or outdoor growing areas. Mr. Van Nest and Mr. Todaro both agree to the amendment.

All lighting is to be dark sky lighting; no lighting shall spill over to adjacent properties. This condition is added to the motion and agreed to by Mr. Van Nest and Mr. Todaro.

It is noted that in the area of the project site, there is primarily a south west wind so if there were emissions it would be carried in that direction.

Steve Dale	Aye	Gregory Todaro	Aye
Richard Bigler	Aye	George Van Nest	Aye
Timothy Pazda	Aye	Paul Shear	Aye
Robert Sackett	Aye		

**MOTION CARRIED.****Item 2**

Dominic Piestrak  
Residential Single Family

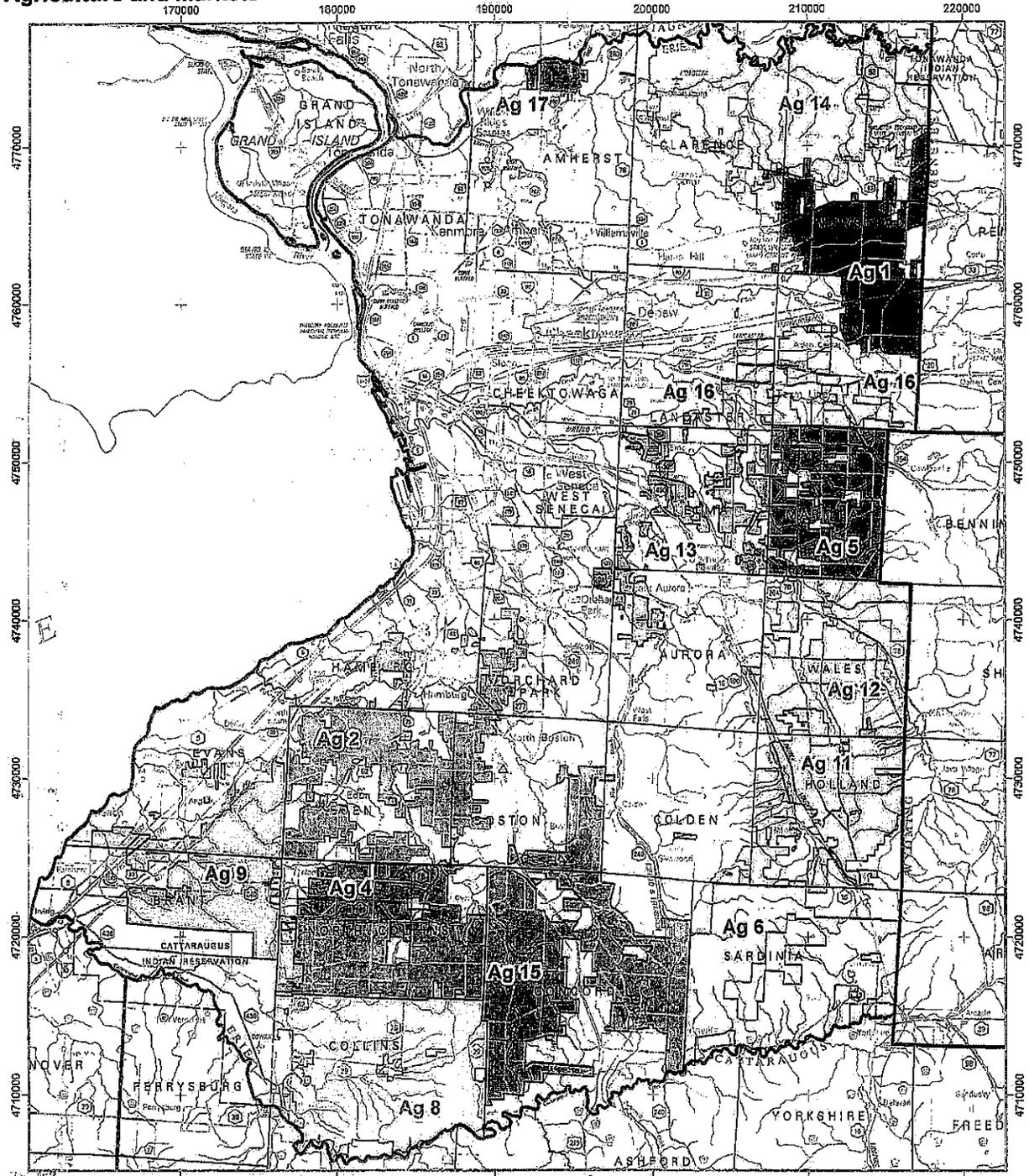
Requests Preliminary Concept Review of a proposed Open Space Design Subdivision located on the south side of Clarence Center Road, east of Creekview Drive.

**DISCUSSION:**

Jim Callahan provided the history on the project noting that it is existing vacant land located in the Residential Single Family zone. The applicant is present to discuss an Open Space Design Development and to request an initiation of an environmental review. The project was previously referred by the Town Board and introduced to the Planning Board in May 2012. The action was tabled pending additional information.

Dominic Piestrak is present. He explained that the plan involves an alley way and houses that you would expect to be built in the early 1900's. The lot sizes vary. A public hearing was held and some concerns included traffic, density and water problems. Mr. Piestrak is proposing the continuation of the alley way to Kamner Drive with a blockage of a break-away pole in case the fire department ever had to gain access. He could accommodate three ranch style homes but that is not the style he wants to do.

# Exhibit C



**MAP PROJECTION**  
UTM Zone 18, NAD83 meters



KEY			
Ag. District 1	Ag. District 5	Ag. District 11	Ag. District 15
Ag. District 2	Ag. District 6	Ag. District 12	Ag. District 16
Ag. District 4	Ag. District 8	Ag. District 13	Ag. District 17
Ag. District 9	Ag. District 14	overlap of districts	

**MAP SOURCE INFORMATION**  
Map created at Cornell IRIS (Institute for Resource Information Sciences) <<http://iris.oss.cornell.edu>> for the NYS Department of Agriculture and Markets  
Agricultural Districts boundary data is available at CUGIR (Cornell University Geospatial Information Repository) website: <<http://cugir.mannlib.cornell.edu>>  
Base Map: state250\_bw.tif 1998 Scale: 1:250,000;  
County boundaries imported from the file nysshore.e00 from the NYSGIS Clearinghouse website: <<http://gis.ny.gov>>

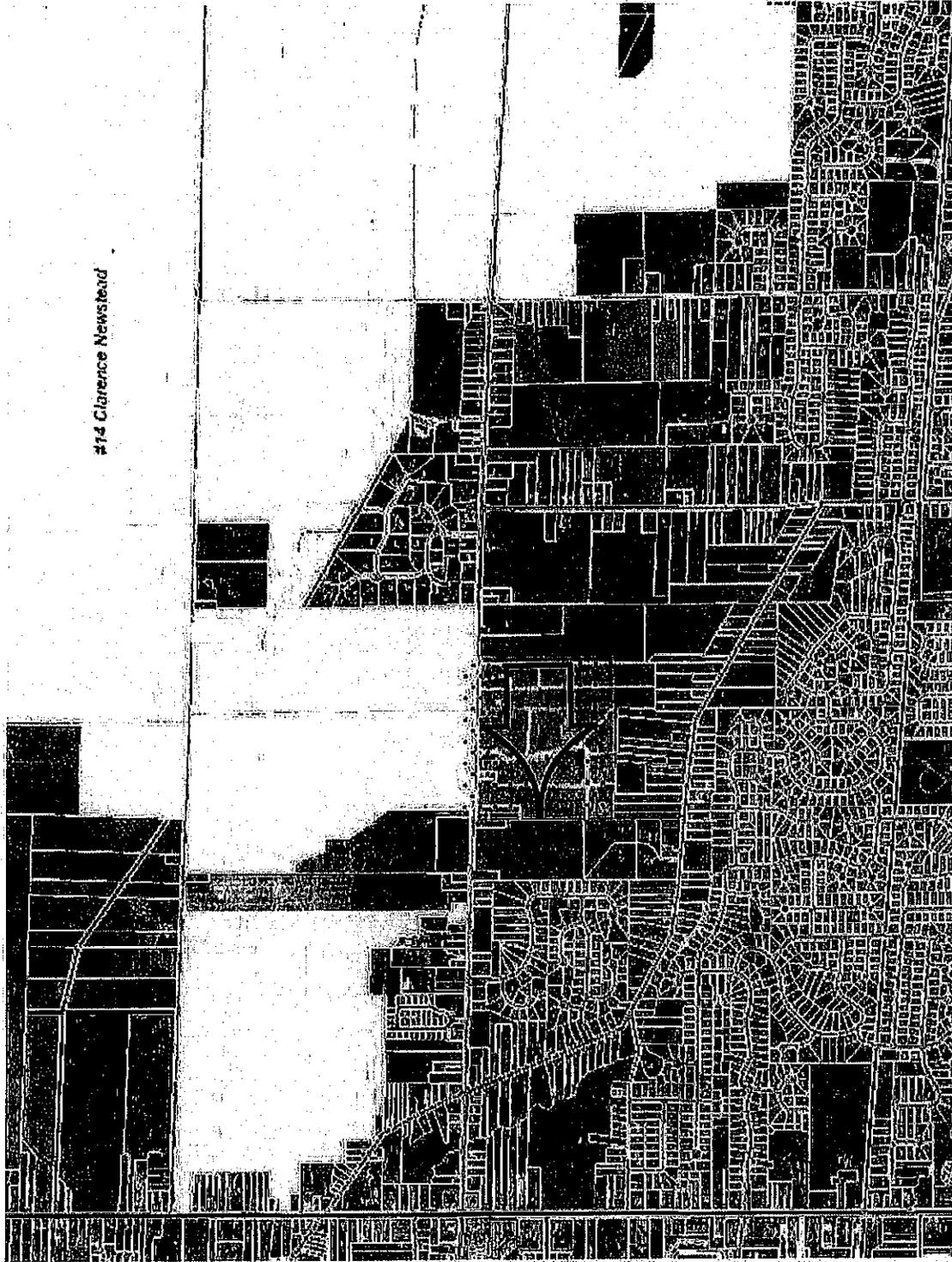
DISTRICT CERTIFICATIONS and TOWNS			
<b>DISTRICT 1</b> CERTIFIED 1/28/2005 Alden Clarence Newstead	<b>DISTRICT 5</b> CERTIFIED 6/26/1998 Marilla	<b>DISTRICT 9</b> CERTIFIED 4/14/2004 Aurora Evans North Collins	<b>DISTRICT 12</b> CERTIFIED 9/22/2011 Aurora Wales
<b>DISTRICT 2</b> CERTIFIED 7/23/2003 Boston Eden Hamburg Orchard Park	<b>DISTRICT 6</b> CERTIFIED 4/29/1999 Holland Sardinia	<b>DISTRICT 11</b> CERTIFIED 9/19/2011 Colden Holland Sardinia Wales	<b>DISTRICT 13</b> CERTIFIED 9/22/2011 Aurora Elma Orchard Park
<b>DISTRICT 4</b> CERTIFIED 6/26/1998 North Collins	<b>DISTRICT 8</b> CERTIFIED 11/17/2000 Collins North Collins	<b>DISTRICT 14</b> CERTIFIED 1/28/2005 Clarence Newstead	<b>DISTRICT 15</b> CERTIFIED 11/30/1998 Boston Colden Concord North Collins
			<b>DISTRICT 16</b> CERTIFIED 9/22/2011 Alden Lancaster
			<b>DISTRICT 17</b> CERTIFIED 11/24/1999 Amherst

**Contains data copyrighted by the NYS Office of Cyber Security**

**DISCLAIMER**  
This is a general reference to Agricultural District boundaries; not a legal substitute for actual tax parcel information.  
Boundaries as certified prior to January 2012  
Open Enrollment Annual Additions are not included in this data. Check with county agencies to confirm the status of individual parcels.

# Exhibit D

# Agricultural Districts



- Legend**
- Parcels
  - Agricultural Districts
    - Alden
    - Alden Newstead
    - Artherst
    - Braut Evans
    - Clarence Newstead
    - Collins
    - Concord
    - Eden
    - Elma
    - Holland
    - Lancaster Alden
    - Manilla
    - North Collins
    - Sardinia
    - Wales
  - Municipal Boundaries
  - 2011\_bdy

0 2,646.30 5,292.6 Feet  
 WGS\_1984\_Web\_Mercator\_Auxiliary\_Sphere  
 THIS MAP IS NOT TO BE USED FOR NAVIGATION

ERIE COUNTY  
 DEPARTMENT OF ENVIRONMENT & PLANNING  
 OFFICE OF GIS

This map is a user generated static output from an internet mapping site and is for reference only. Data layers that appear on this map may or may not be accurate, current, or otherwise reliable.

1: 31,756



# Exhibit E

# Local Laws and Agricultural Districts: How Do They Relate?

Counties, towns and villages in New York State have broad powers to enact laws to govern their own affairs. However, State laws impose certain restrictions on local government authority. One such restriction is found in Section 305-a of the Agriculture and Markets Law which contains the following mandate:

"Local governments, when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules or regulations, shall exercise these powers in such manner as may realize the policy and goals set forth in this article [*Article 25-AA of the Agriculture and Markets Law*], and shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of this article unless it can be shown that the public health or safety is threatened."

This brochure has been prepared by the New York State Department of Agriculture and Markets to assist municipalities in drafting and administering local laws and ordinances which may affect farming in an agricultural district. It should not be substituted for legal advice from a municipality's attorney. The brochure also offers guidance to farmers and municipalities on the application of Section 305-a.

*The Commissioner of Agriculture and Markets may independently initiate a review of a proposed or existing local law or ordinance or proceed upon the request of a farmer or municipality in an agricultural district. The following describes the procedure for requesting review, how the local requirements are analyzed, and remediated, if necessary.*

## PROCEDURE

Questions concerning the impact of local laws and ordinances on farm operations are solved far more easily at the drafting stage than after the provision is in place. Municipalities are, therefore, encouraged to contact the Department, either by phone or in writing, in advance of enacting a law or ordinance which may restrict farming in an agricultural district. The Department will provide

a response to such inquiries. Similarly, a farmer or other affected party in a district may seek the Department's opinion on a proposed or existing law or ordinance without filing a complaint.

## Farmers

A request for review must be provided in writing and include at least the following information:

- the location of the farm operation and identification of the agricultural district in which it is situated;
- a description of the affected farm operation (e.g. size of farm, type of enterprise, years in operation);
- a description of the specific farm buildings, equipment or practices involved and how they are affected;
- a copy of the complete local law or ordinance and identification of the specific section or sections involved;
- a listing of involved parties who can be contacted for further information (including addresses and phone numbers).

Subsequent to receiving a request for review of a local law or ordinance, the Department will contact the municipality involved and provide them with an opportunity to respond.

## Municipalities

A request for review must be provided in writing and include at least the following information:

- the identification of the agricultural district(s) affected;
- a description of the specific law or proposed law and how farm buildings, equipment or practices are or may be affected
- a copy of the complete local law or ordinance and identification of the specific section or sections involved;
- a listing of involved parties who can be contacted for further information (including addresses and phone numbers).

## ANALYSIS

The Department examines several factors in evaluating whether a local law or ordinance is in compliance with Section 305-a. Tests that must be met in each case are as follows:

- **Is the affected farm located within an agricultural district?**

Section 305-a only applies to farm operations in an agricultural district.

• Does the regulated activity encompass farm operations?

Section 301(11) of the Agriculture and Markets Law defines "Farm Operation" as meaning: "...the land and on-farm buildings, equipment, manure processing and handling facilities, and practices which contribute to the production, preparation and marketing of crops, livestock and livestock products as a commercial enterprise, including a 'commercial horse boarding operation' as defined in subdivision thirteen of this section, a 'timber operation' as defined in subdivision fourteen of this section, 'compost, mulch or other biomass crops' as defined in subdivision sixteen of this section and 'commercial equine operation' as defined in subdivision seventeen of this section. Such farm operation may consist of one or more parcels of owned or rented land, which parcels may be contiguous or noncontiguous to each other." The definition of "crops, livestock and livestock products" is found in Section 301(2).

Only farm operations are protected by Section 305-a. The Department draws on the expertise of its program and legal staff, and other resources as needed, to make these determinations.

• Does the local law or ordinance unreasonably restrict or regulate?

The evaluation of reasonableness consists of two parts: 1) whether the law or ordinance is unreasonably restrictive "on its face," and 2) whether it is unreasonably restrictive as applied to a particular situation.

Some laws or ordinances are so vague that they inhibit farmers from undertaking certain activities or constructing certain buildings out of concern for violating the law or ordinance. In this case, it is possible that the law or ordinance, because of its vague construction, could be construed as unreasonably restricting a farm operation.

An ordinance may also appear reasonable in the abstract, but may unreasonably restrict or regulate a particular farmer. For example, many zoning ordinances impose setback requirements for structures in the interest of public safety or even aesthetics. These setbacks may be entirely reasonable under usual conditions, but may be construed as being unreasonably restrictive if applied to a farmer who, for example, constructs a building on a dead-end street, shielded from view, and near the only available water source.

A reasonable exercise of authority in one locality may translate into an unduly burdensome restriction on farming in another. In sum, reasonableness depends on the totality of circumstances in each case.

• Is the public health or safety threatened by the regulated activity?

Even if the Department determines that a particular law or ordinance is unreasonably restrictive, it must also ask whether the public health or safety is threatened by the regulated activity. If so, it could withstand the limitations of Section 305-a.

**REMEDIES**

If the Department determines that a local law or ordinance unreasonably restricts or regulates farm operations in an agricultural district, it will notify the involved municipality to that effect and attempt to arrive at a mutually satisfactory resolution. In the case where a municipality rejects the Department's attempts at remediation, the Commissioner of Agriculture and Markets is explicitly authorized by law to bring an action to enforce Section 305-a. Alternatively, the Commissioner may issue an Order to comply, pursuant to Section 36 of the Agriculture and Markets Law.

*Requests for general information or assistance, and formal written complaints alleging violations of Section 305-a, should be directed to:*

**Agricultural Districts Program Administrator  
New York State Department of Agriculture  
and Markets  
10B Airline Drive  
Albany, NY 12235**

**Phone: (518) 457-2713**

# **Exhibit F**

## Guidelines for Review of Local Zoning and Planning Laws

### **Background and Objective**

As communities adopt or amend zoning regulations, potential conflicts between farm operations and local land use controls may increase. This, coupled with continuing exurban development pressures on many of the State's agricultural communities, increases the need to better coordinate local planning and the agricultural districts program, and to develop guidelines to help address conflicts which may occur. Proactively, guidelines can aid in crafting zoning regulations by municipalities with significant farming activities.

### **Zoning and Farm Operations: Practical Limitations and Problems**

Farms are host to several discrete but interdependent land uses which may include barns, commodity sheds, farm worker housing, garages, direct farm markets, silos, manure storage facilities, milking parlors, stables, poultry houses and greenhouses, to name but a few. The typical zoning regulation, in addition to establishing minimum lot sizes and separations between uses, often prohibits more than one "principal" structure on each parcel of record. Many zoning devices, then, are unable to distinguish between on-farm structures as part of a *farm operation* from the same building when it is used for an independent, freestanding use.

The minimum separation and "yard" requirements of zoning are designed to avoid over concentration, maintain adequate spaces for light and air, and to reduce fire hazard in more urban environments. The application of such requirements to suburban and rural communities and farm operations often results in the unintended regulation of farm operations and uses not as an integrated whole, but as separate improvements.

The rapidly changing nature of the agricultural industry does not always allow zoning and the comprehensive planning process to keep pace. This can result in the application of outdated regulations to contemporary land uses and gives rise to potentially unreasonable restrictions. Local governments may run afoul of the letter and intent of the Agricultural Districts Law by limiting the type and intensity of agricultural uses in their communities and by narrowly defining "farm" or "agricultural activity." This is sometimes problematic even in municipalities with a significant base of large, "production" level farming operations. Inadequately defined terms also give rise to conflict between the zoning device and farm operations.

Because of the inherent nature of zoning, there is essentially no discrete administrative authority to waive its standards, even when those standards are at variance with the community's land use policy and what may be deemed its "intent." A municipal zoning board of appeals may, consistent with specific tests

found in Town, Village and City Law, vary the use and area standards of a zoning regulation, and reverse or affirm determinations of the zoning administrative official. Such a remedy: i.e., an area or use variance, may, however, in and of itself be considered "unreasonably restrictive" if it is the only means available to establish, expand or improve a "farm operation" in a county adopted, State certified agricultural district.

These and other limitations and problems that can lead to AML §305-a violations may be avoided in the first instance by sound comprehensive planning. The Town Law, Village Law, General City Law and the Agricultural Districts Law are designed to encourage coordination of local planning and land use decision making with the agricultural districts program.

### **Agricultural Districts and County Agricultural and Farmland Protection Plans: Their Influence on the Municipal Comprehensive Plan and the Zoning Process**

The preparation, adoption and administration of a municipal comprehensive plan and zoning regulation are not independent actions of local government, but should be part of a well thought out, seamless process. A zoning regulation is, in the final analysis, simply a device to implement the community plan and, in fact, "... must be in accordance with a comprehensive plan..." [Town Law §272-a (11)(a)]

The State Legislature has codified the intent, definition and content of the comprehensive plan (Town Law §272-a, Village Law §7-722 and General City Law §28-a). In so doing, the Legislature has given significant status to "agricultural uses" in general, and State certified agricultural districts and county agricultural and farmland protection plans created under Agriculture and Markets Law Articles 25-AA and 25-AAA in particular. Town Law §272-a (9) requires agricultural review and coordination with the comprehensive planning process:

*"A town comprehensive plan and any amendments thereto, for a town containing all or part of an agricultural district or lands receiving agricultural assessments within its jurisdiction, shall continue to be subject to the provisions of article twenty-five-AA of the agriculture and markets law relating to the enactment and administration of local laws, ordinances, rules or regulations. A newly adopted or amended town comprehensive plan shall take into consideration applicable county agricultural and farmland protection plans as created under article twenty-five-AAA of the agriculture and markets law."*

(The same language is found in Village Law and General City Law.)

Thus, the statutory influence the Agricultural Districts Law and the Agricultural and Farmland Protection programs have on the comprehensive planning process and zoning regulations is significant. State certified agricultural districts and

county agricultural and farmland protection plans are community shaping influences in much the same way as existing and proposed infrastructure; wetlands, floodplains, topographical features; cultural, historic and social amenities; economic needs; etc. are viewed. The Agricultural Districts Law is a valuable planning tool to conserve, protect and encourage the development and improvement of the agricultural economy; protect agricultural lands as valued natural and ecological resources; and preserve open space.

In addition to AML §305-a, limitations on local authority in Town Law §283-a and Village Law §7-739 were enacted to ensure that agricultural interests are taken into consideration during the review of specific land use proposals. Town Law §283-a (1) and Village Law §7-739(1), as recently amended by Chapter 331 of the Laws of 2002, require local governments to "...exercise their powers to enact local laws, ordinances, rules or regulations that apply to farm operations in an agricultural district in a manner which does not unreasonably restrict or regulate farm operations in contravention of the purposes of article twenty-five-AA of the agriculture and markets law, unless it can be shown that the public health or safety is threatened." The recent amendments make the Town and Village Law provisions consistent with AML §305-a regarding showing a threat to the public health or safety. AML §305-a, subd.1 is not a stand-alone requirement for coordination of local planning and land use decision making with the agricultural districts program: Rather, it is one that is fully integrated with the comprehensive planning, zoning and land use review process.

#### **Application of Local Laws to Farm Operations within Agricultural Districts**

In general, the construction of on-farm buildings and the use of land for agricultural purposes should not be subject to site plan review, special use permits or non-conforming use requirements when conducted in a county adopted, State certified agricultural district. The purpose of an agricultural district is to encourage the development and improvement of agricultural land and the use of agricultural land for the production of food and other agricultural products as recognized by the New York State Constitution, Article XIV, Section 4. Therefore, generally, agricultural uses and the construction of on-farm buildings as part of a farm operation should be allowed uses when the farm operation is located within an agricultural district.

Town Law §274-b, subdivision 1 allows a town board to authorize a planning board or other designated administrative body to grant special use permits as set forth in a zoning ordinance or local law. "Special use permit" is defined as "...an authorization of a particular land use which is permitted in a zoning ordinance or local law to assure that the proposed use is in harmony with such zoning ordinance or local law and will not adversely affect the neighborhood if such requirements are met." Agricultural uses in an agricultural district are not, however, "special uses." They are constitutionally recognized land uses which are protected by AML §305-a, subd.1. Further, agricultural districts are created

and reviewed locally through a process which includes public notice and hearing, much like zoning laws are adopted and amended. Therefore, absent any showing of an overriding local concern, generally, an exemption from special use permit requirements should be provided to farm operations located within an agricultural district.

The application of site plan and special permit requirements to farm operations can have significant adverse impacts on such operations. Site plan and special permit review, depending upon the specific requirements in a local law, can be expensive due to the need to retain professional assistance to certify plans or simply to prepare the type of detailed plans required by the law. The lengthy approval process in some local laws can be burdensome, especially considering a farm's need to undertake management and production practices in a timely and efficient manner. Site plan and special permit fees can be especially costly for start-up farm operations.

Generally, farmers should exhaust their local administrative remedies and seek, for example, permits, exemptions available under local law or area variances before the Department reviews the administration of a local law. However, an administrative requirement/process may, itself, be unreasonably restrictive. The Department evaluates the reasonableness of the specific requirement/process, as well as the substantive requirements imposed on the farm operation. The Department has found local laws which regulate the health and safety aspects of the construction of farm buildings through provisions to meet local building codes or the State Building Code (unless exempt from the State Building Code<sup>1</sup>) and Health Department requirements not to be unreasonably restrictive. Requirements for local building permits and certificates of occupancy to ensure that health and safety requirements are met are also generally not unreasonably restrictive.

#### **Site Plan Review for Farm Operations within an Agricultural District**

Many local governments share the Department's view that farm operations should not have to undergo site plan review and exempt farms from that requirement. However, the Department recognizes the desire of some local governments to have an opportunity to review farm operations and projects within their borders, as well as the need of farmers for an efficient, economical, and predictable process. In view of both interests, the Department developed a model streamlined site plan review process which attempts to respond to the farmers' concerns while ensuring the ability to have local land use issues examined. The process could be used to examine a parcel's current characteristics and its surroundings in relation to any proposed activities on the farm and their potential impact to neighboring properties and the community. For example, municipalities could specify that farm operations located within specific zoning districts must submit to site plan review. Municipalities may also elect to

---

<sup>1</sup> A discussion of the New York State Uniform Fire Prevention and Building Code follows below.

exempt farm operations, located within a county adopted, State certified agricultural district, from their site plan review process.

The authorizing statutes for requiring site plan review are quite broad and under "home rule" municipalities retain significant flexibility in crafting specialized procedures (e.g., the selection of a reviewing board; uses which trigger submission of site plans; whether to have a public hearing and the length of time to review an application). Town Law §274-a and Village Law §7-725-a define a site plan as "a rendering, drawing, or sketch prepared to specifications and containing necessary elements as set forth in the applicable zoning ordinance or local law which shows the arrangement, layout and design of the proposed use of a single parcel of land... ." These sections of law further outline a list of potential site plan elements including parking, means of access, screening, signs, landscaping, architectural features, location and dimensions of buildings, adjacent land uses and physical features meant to protect adjacent land uses as well as additional elements.

Many municipalities have also added optional phases to the site plan review. While a preliminary conference, preliminary site plan review and public hearings may assist the applicant earlier in the review process and provide the public an opportunity to respond to a project, they can result in a costly delay for the farmer.

For the sake of simplicity, the model site plan process and the following guidance presume that the planning board is the reviewing authority.

### **Site Plan Process**

The applicant for site plan review and approval shall submit the following:

- 1) Sketch of the parcel on a location map (e.g., tax map) showing boundaries and dimensions of the parcel of land involved and identifying contiguous properties and any known easements or rights-of-way and roadways.

Show the existing features of the site including land and water areas, water or sewer systems and the approximate location of all existing structures on or immediately adjacent to the site.

- 2) Show the proposed location and arrangement of buildings and uses on the site, including means of ingress and egress, parking and circulation of traffic.

Show the proposed location and arrangement of specific land uses, such as pasture, crop fields, woodland, livestock containment areas, or manure storage/manure composting sites.

- 3) Sketch of any proposed building, structure or sign, including exterior dimensions and elevations of front, side and rear views. Include copies of any available blueprints, plans or drawings.
- 4) Provide a description of the farm operation (existing and/or proposed) and a narrative of the intended use and/or location of proposed buildings, structures or signs, including any anticipated changes in the existing topography and natural features of the parcel to accommodate the changes. Include the name and address of the applicant and any professional advisors. If the applicant is not the owner of the property, provide authorization of the owner.
- 5) If any new structures are going to be located adjacent to a stream or wetland provide a copy of the floodplain map and wetland map that corresponds with the boundaries of the property.
- 6) Application form and fee (if required).

If the municipality issues a permit for the structure, the Code Enforcement Officer (CEO) determines if the structures are subject to and comply with the local building code or New York State Uniform Fire Prevention and Building Code prior to issuing the permit. Similarly, the Zoning Enforcement Officer (or the CEO in certain municipalities) would ensure compliance with applicable zoning provisions.

The Department urges local governments to take into account the size and nature of the particular agricultural activity, including the construction of farm buildings/structures when setting and administering any site plan requirements for farm operations. The review process, as outlined above, should generally not require professional assistance (e.g., architects, engineers or surveyors) to complete or review and should be completed relatively quickly.<sup>2</sup> The Department understands, however, that in some cases, a public hearing and/or a more detailed review of the project which may include submission of a survey, architectural or engineering drawings or plans, etc., may be necessary. The degree of regulation that may be considered unreasonably restrictive depends on the nature of the proposed activities, the size and complexity of the proposed agricultural activity and/or the construction of buildings or structures and whether a State agricultural exemption applies.

#### **Time Frame for Review and Decision**

Town Law §274-a and Village Law §7-725-a require that a decision on a site plan application be made within a maximum of 62 days after receipt of the application or date of a public hearing, if one is required. Town and Village Law authorize town boards and village boards of trustees to adopt public hearing requirements and local laws often provide planning boards with the discretion

---

<sup>2</sup> Please see discussion of Agricultural Exemptions below.

whether to hold a public hearing. The Department recommends that if the municipality requires construction of farm buildings and structures within a state certified agricultural district to undergo site plan review, that the review and decision be expedited within 45 days, with no public hearing. The Department recognizes that the Town Law allows municipalities to determine which uses must undergo site plan review, the time frame for review (within the 62 day maximum), and whether to conduct a public hearing. A protracted review of most agricultural projects could, however, result in significant economic impacts to farmers.

The process outlined above affords the community an opportunity to examine a proposed agricultural project and to evaluate and mitigate potential impacts in light of public health, safety and welfare without unduly burdening farm operations. Of course, the "process" must also be administered in a manner that does not unreasonably restrict or regulate farm operations. For example, conditions placed upon an approval or the cost and time involved to complete the review process could be unreasonably restrictive.

### **Agricultural Exemptions**

**State Environmental Quality Review (SEQR)** - Agricultural farm management practices, including construction, maintenance and repair of farm buildings and structures, and land use changes consistent with "generally accepted principles of farming" are designated as Type II actions which do not require preparation of an Environmental Assessment Form (EAF) and are not subject to compliance with State Environmental Quality Review (SEQR). 6 NYCRR §617.5(a), (c)(3). [See *In the Matter of Pure Air and Water Inc. of Chemung County v. Davidsen*, 246 A.D.2d 786, 668 N.Y.S.2d 248 (3<sup>rd</sup> Dept. 1998), for application of the exemption to the manure management activities of a hog farm and *In the Matter of Humane Society of the United States v. Empire State Development Corporation*, 53 A.D. 3d 1013, 863 N.Y.S. 2d 107 (3<sup>rd</sup> Dept., 2008) where ESDC's classification of the issuance of a grant for the construction or renovation of on-farm buildings for treatment of manure and raising livestock as a Type II action was upheld.]

The SEQR regulations require localities to recognize the Type II actions contained in the statewide list.

**New York State Uniform Fire Prevention and Building Code** - While farmers must comply with local requirements which regulate health and safety aspects of the construction of farm buildings, many farm buildings are exempt from the State Uniform Fire Prevention and Building Code ("Uniform Code"). The Uniform Code recently underwent major revisions and now is comprised of seven sub-codes (the Building Code, Fire Code, Residential Code, Plumbing Code, Mechanical Code, Fuel Gas Code, and the Property Maintenance Code). The exemption for agricultural buildings has been incorporated in the following

portions of the revised Uniform Code and the Energy Conservation Construction Code, which became fully effective on January 1, 2003.

- Agricultural building is defined in §202 of the Building Code as "A structure designed and constructed to house farm implements, hay, grain, poultry, livestock, or other horticultural products. This structure shall not be a place of human habitation or a place of employment where agricultural products are processed, treated or packaged, nor shall it be a place used by the public."
- Building Code §101.2(2) provides an exemption from the Building Code for "[a]gricultural buildings used solely in the raising, growing or storage of agricultural products by a farmer engaged in a farming operation."
- Section 102.1(5) of the Fire Code of New York State provides that "[a]gricultural buildings used solely in the raising, growing or storage of agricultural products by a farmer engaged in a farming operation" are exempt from the provisions of the Fire Code pertaining to construction but are subject to applicable requirements of fire safety practice and methodology.
- Section 101.4.2.5 of the Energy Conservation Construction Code ("ECCC") exempts "nonresidential farm buildings, including barns, sheds, poultry houses and other buildings and equipment on the premises used directly and solely for agricultural purposes" from the provisions of the ECCC.

The above briefly highlights the agricultural buildings exemptions. Any specific questions regarding the interpretation and applicability of the revised State Uniform Fire Protection and Building Code should be directed to the Department of State's Codes Division at (518) 474-4073.

**Professionally Stamped Plans** - Education Law §7209(1) provides that no official of the State or any city, county, town or village charged with the enforcement of laws, ordinances or regulations may accept or approve any plans or specifications that are not stamped with the seal of an architect, or professional engineer, or land surveyor licensed or authorized to practice in the State. Thus, where local laws, ordinances or regulations require that plans and specifications for private construction be accepted or approved, they may not be accepted or approved without the required seal, subject to the exceptions set forth in the statute. 1981 Op Atty Gen April 27 (Informal).

However, the exceptions contained in Education Law §7209(7)(b) include "farm buildings, including barns, sheds, poultry houses and other buildings used directly and solely for agricultural purposes." As a result, plans and specifications for such buildings are not required to be stamped by an architect, professional engineer or land surveyor.<sup>3</sup>

<sup>3</sup> Similar requirements and exceptions are also provided in Education Law §7307(1) and (5).

Against this backdrop, specific guidelines for review of zoning and planning regulations by local governments and the Department can best be understood.

### **Generic Review Guidelines**

Generic reviews are those of entire zoning regulations or sections of zoning regulations that impact the municipality's farm community as a class or several farm operations in the same way. Examples of actions which might result in a generic review include the adoption or administration of an entirely new or substantially amended zoning regulation that results in a material change in the use and area standards applied to farm operations in a State certified agricultural district. In such cases, the Department recommends that the municipality ask itself the following questions:

- Do the regulations materially limit the definition of farm operation, farm or agriculture in a way that conflicts with the definition of "farm operation" in AML §301, subd.11?
- Do the regulations relegate any farm operations in agricultural districts to "non-conforming" status?
- Is the production, preparation and marketing of any crop, livestock or livestock product as a commercial enterprise materially limited, restricted or prohibited?
- Are certain classes of agriculture subject to more intensive reviews or permitting requirements than others? For example, is "animal agriculture" treated differently than crop production without demonstrated links to a specific and meaningful public health or safety standard designed to address a real and tangible threat?
- Are any classes of agricultural activities meeting the definition of "farm operation" subject to special permit, site plan review or other original jurisdiction review standard over and above ministerial review?
- Are "farm operations" subject to more intensive reviews than non-farm uses in the same zoning district?
- Are "farm operations" treated as integrated and interdependent uses, or collections of independent and competing uses on the same property?
- Is the regulation in accordance with a comprehensive plan and is such a plan crafted consistent with AML Article 25-AA as required by law?

If the answer to any of the first six questions is "yes," or if the answer to either of the last two is "no," the zoning regulations under review are likely to be problematic and may be in violation of AML §305-a, subd.1. Certainly such regulations would appear to be on their "face" inconsistent with the statutory requirement that *"Local governments ...shall exercise these powers in such manner as may realize the policy and goals set forth in this article [Article 25AA-Agricultural Districts]."*

## **Guidelines for Site Specific Reviews**

AML §305-a zoning case reviews often involve application of zoning regulations to a specific farm operation. Such cases typically result from applying the site plan, special use permit, use or non-conforming use sections, yard requirements, or lot density sections of the municipal zoning device to an existing farm operation.

These cases often evolve because although the zoning regulation may appear to be consistent with the agricultural districts law, its application to a specific issue or set of facts is not. In such cases, the Department recommends that the municipality ask itself the following questions:

- Is the zoning regulation or restriction being applied to a use normally and customarily associated with a "farm operation" as defined in AML Article 25-AA?
- Does the regulation or restriction materially limit the expansion or improvement of the operation without offering some compelling public benefit?
- Is the regulation or restriction applicable to the specific farm operation in question or, under the same circumstances, would it apply to other farm operations in the community?
- Does the zoning regulation impose greater regulation or restriction on a use or farming activity than may already be imposed by State or federal statute, rule or regulation?
- Is the regulation or restriction the result of legislative action that rendered the farm operation a "non-conforming use"?

If the answer to any of these questions is yes, then the zoning regulation or restriction under review is likely to be problematic and may be in violation of the statutory prohibitions against unreasonably restrictive regulation of farm operations in an agricultural district, unless a threat to the public health or safety is demonstrated.

## **Guidance on Specific Zoning Issues**

The following are some specific factors that the Department considers when reviewing local zoning laws<sup>4</sup>:

### **A. Minimum and Maximum Dimensions**

Generally the Department will consider whether minimum and maximum dimensions imposed by a local law can accommodate existing and/or future farm

<sup>4</sup> Please see other Department guidance documents for further information on issues related to specific types of farm buildings and practices.

needs. For example, many roadside stands are located within existing garages, barns, and outbuildings that may have dimensions greater than those set by a local ordinance. Also, buildings specifically designed and constructed to accommodate farm activities may not meet the local size requirements (e.g., silos and barns which may exceed maximum height limitations). The size and scope of the farm operation should also be considered. Larger farms, for example, cannot effectively market their produce through a traditional roadside stand and may require larger farm markets with utilities, parking, sanitary facilities, etc.

#### B. Lot Size

Establishing a minimum lot size for farm operations within a zoning district that includes land within a State certified agricultural district might be unreasonably restrictive. The definition of "farm operation" in AML §301(11) does not include an acreage threshold. Therefore, the Department has not set a minimum acreage necessary for protection under AML §305-a and conducts reviews on a case-by-case basis. For example, a nursery/greenhouse operation conducted on less than 5 or 10 acres may be protected as a "farm operation" under §305-a if the operation is a "commercial enterprise" as determined by the Department.

For agricultural assessment purposes, however, AML §301(4) states that a farm must have "land used in agricultural production" to qualify (either seven or more acres and gross sales of an average of \$10,000 or more in the preceding two years or have less than seven acres and average gross sales of more than \$50,000 in the preceding two years). AML §301(4) also provides for an agricultural assessment on seven or more acres which has an *annual* gross sales of \$10,000 or more "...when such land is owned or rented by a newly established farm operation in the first year of operation." AML §301(4)(h).

Local requirements for minimum lot sizes for farm buildings raise concerns similar to those involving minimum and maximum building dimensions. A farmer may be unable to meet a minimum lot size due to the configuration of the land used for production or lying fallow as part of a conservation reserve program. The need to be proximate to existing farm roads, a water supply, sewage disposal and other utilities is also essential. Farm buildings are usually located on the same property that supports other farm structures. Presumably, minimum lot size requirements are adopted to prevent over concentration of buildings and to assure an adequate area to install any necessary utilities. Farm buildings should be allowed to be sited on the same lot as other agricultural use structures subject to the provision of adequate water and sewage disposal facilities and meeting minimum setbacks between structures.

### C. Setbacks

Minimum setbacks from front, back and side yards for farm buildings have not been viewed as unreasonably restrictive unless a setback distance is unusually long. Setbacks that coincide with those required for other similar structures have, in general, been viewed as reasonable.

A farm operation's barns, storage buildings and other facilities may already be located within a required setback, or the farm operation may need to locate new facilities within the setback to meet the farm operation's needs. Also, adjoining land may consist of vacant land, woodland or farmland. The establishment of unreasonable setback distances increases the cost of doing business for farmers because the infrastructure needed to support the operation (e.g., water supply, utilities and farm roads) is often already located within, and adjacent to, the farmstead area or existing farm structures. Setbacks can also increase the cost of, or make it impracticable to construct new structures for the farm operation.

### D. Sign Limitations:

Whether or not a limitation on the size and/or number of signs that may be used to advertise a farm operation is unreasonably restrictive of a farm operation depends upon the location of the farm and the type of operation. A farmer who is located on a principally traveled road probably will not need as many signs as one who is located on a less traveled road and who may need directional signs to direct the public to the farm. The size of a sign needed may depend on whether the sign is used to advertise the farm's produce or services (e.g., for a commercial horse boarding operation) as part of the farm's direct marketing, or just for directional purposes.

### E. Maximum Lot Coverage

Establishing a maximum lot coverage that may be occupied by structures may be unreasonably restrictive. For example, it may be difficult for horticultural operations to recoup their investment in the purchase of land if they are not allowed to more fully utilize a lot/acreage for greenhouses. Farm operations within an agricultural district should be allowed the maximum use of available land, consistent with the need to protect the public health or safety. Generally, if setbacks between buildings are met and adequate space is available for interior roads, parking areas (where required), and safe operation of vehicles and equipment, health and safety concerns are minimized.

### F. Screening and Buffers

Some municipalities impose buffer requirements, including setbacks where vegetation, landscaping, a wall or fencing is required to partially or completely screen adjacent land uses. Often, the buffer area cannot be used or encroached

upon by any activities on the lot. Requirements for buffers or setbacks to graze animals, construct fences and otherwise use land for agricultural purposes are generally unreasonably restrictive.

Buffers and associated setbacks may require farmers to remove land from production or otherwise remove land from use for the farm operation. The impact on nursery/greenhouse operations is especially significant since they are often conducted on smaller parcels of land. Maintenance of the buffer also creates a hardship to the landowner. If a setback is required for fencing, the farmer may have to incur the expense of double fencing the perimeter of the property, or portion thereof, to prevent encroachment by neighboring property owners.

A requirement to screen a farm operation or agricultural structures such as farm labor housing or greenhouses from view has been found by the Department to be unreasonably restrictive. Screening requirements suggest that farm operations and associated structures are, in some way, objectionable or different from other forms of land use that do not have to be screened. Farmers should not be required to bear the extra costs to provide screening unless such requirements are otherwise warranted by special local conditions or necessary to address a threat to the public health or safety. While aesthetics are an appropriate and important consideration under zoning and planning laws, the purpose of the Agricultural Districts Law is to conserve and protect agricultural lands by promoting the retention of farmland in active agricultural use.

# **Exhibit G**

## Town of Lysander v. Hafner

~~Court of Appeals of New York~~  
September 6, 2001, Argued; October 18, 2001, Decided  
No. 126

Reporter: 96 N.Y.2d 558; 759 N.E.2d 356; 733 N.Y.S.2d 358; 2001 N.Y. LEXIS 3269

Town of Lysander, Respondent, v. Paul Hafner, Jr., et al., Appellants.

**Prior History:** Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court *in* the Fourth Judicial Department, entered November 13, 2000, which affirmed an order and judgment of the Supreme Court (Robert J. Nicholson, J.), entered *in* Onondaga County, granting a motion by defendant to renew, and, upon renewal, reaffirming a prior decision and order which granted a motion by plaintiff for a preliminary injunction, denying a motion by defendant for summary judgment, granting summary judgment to plaintiff, permanently enjoining defendants from placing or erecting any house trailers, mobile homes, or other structures without a permit from plaintiff, and from utilizing as farm worker housing any house trailer, mobile home or other structure without a certificate of occupancy from plaintiff and a permit from the county health department, and ordering defendants to remove any such structures located on their property.

*Town of Lysander v Hafner*, 277 AD2d 1055, reversed.

**Disposition:** The appellate order was reversed, defendants' motion for summary judgment was granted and the case was remitted to the trial court.

### Core Terms

mobile home, farm, farm operation, summary judgment, local government, ordinance, agricultural district, agricultural, on-farm, building permit, zoning

### Case Summary

#### Procedural Posture

Defendant farmers appealed an order dismissing their motion for summary judgment by the Supreme Court, Onondaga County (New York), *in* plaintiff town's action to prohibit the farmers' use of undersized mobile homes to house migrant workers. The New York Court of Appeals granted leave to appeal.

#### Overview

The farmers owned and operated a commercial farm. They attempted to install several single-wide mobile homes for housing migrant workers on their farm. The mobile homes did not comply with a local zoning ordinance requiring a minimum living area. The town commenced an injunctive action to preclude the use of the mobile homes. Both parties moved for summary judgment. The trial court held for the town. The appellate court reviewed the statutory history of N.Y. Agric. & Mkts. Law § 301(11) and determined that all buildings located on the farm could be considered part of the farm operation. Thus, the mobile homes did not have to comply with the local zoning ordinance.

#### Outcome

The order was reversed; the farmers' motion for summary judgment was granted and case was remitted for further proceedings.

### LexisNexis® Headnotes

Real Property Law > Zoning > Comprehensive Plans  
Real Property Law > Zoning > Regional & State Planning

**HN1** See N.Y. Agric. & Mkts. Law § 305-a(1)(a).

Governments > Agriculture & Food > General Overview  
Governments > Agriculture & Food > Product Promotions

**HN2** See N.Y. Agric. & Mkts. Law § 301(11).

Governments > Agriculture & Food > General Overview  
Real Property Law > Zoning > General Overview

**HN3** Lands falling within certain agricultural districts in New York may be entitled to various statutory protections and benefits. N.Y. Agric. & Mkts. Law § 305-a(1)(a) mandates that, when exercising their powers to regulate land use activities, local governments must do so *in* a manner consistent with the policy objectives of N.Y. Agric. & Mkts. Law art. 25-AA.

Real Property Law > Zoning > Regional & State Planning

**HN4** See N.Y. Agric. & Mkts. Law § 305-a(1)(a).

Real Property Law > Zoning > General Overview

**HN5** N.Y. Agric. & Mkts. Law § 301(11) makes it plain that all buildings located "on-farm" may be considered part of a "farm operation" if they otherwise satisfy the requirements of the statute. N.Y. Agric. & Mkts. Laws § 301(11).

Governments > Agriculture & Food > General Overview

**HN6** See 1997 N.Y. Laws ch. 357, § 2.

Real Property Law > Financing > Federal Programs > Rural Housing  
 Real Property Law > Mobilehomes & Mobilehome Parks > General Overview  
 Real Property Law > Mobilehomes & Mobilehome Parks > Maintenance & Use Issues  
 Real Property Law > Zoning > Regional & State Planning

**HN7** Frequently, farmers rely on mobile home housing for their farm laborers to accommodate the long work day, seasonal housing needs and to address the real shortage of rental housing in rural areas. Local government prohibitions or restrictions on the use of mobile homes can significantly impair the viability of farm operations.

Governments > Legislation > Interpretation  
 Real Property Law > Financing > Federal Programs > Rural Housing  
 Real Property Law > Mobilehomes & Mobilehome Parks > General Overview  
 Real Property Law > Mobilehomes & Mobilehome Parks > Maintenance & Use Issues

**HN8** Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, courts regularly defer to the governmental agency charged with the responsibility for administration of the statute.

#### Headnotes/Syllabus

#### Headnotes

Agriculture - Agricultural Districts - Migrant Worker Housing - Applicability of Local Zoning Laws

1. A zoning ordinance which requires all single family dwellings to be a minimum size is superseded by Agriculture and Markets Law § 305-a (1) (a), which provides that local governments shall not unreasonably restrict or regulate farm operations unless the public health or safety is threatened. The ordinance may not be used to prevent the erection of mobile housing for migrant workers in an agricultural district established pursuant to article 25-AA of the Agriculture and Markets Law. Lands falling within such districts may be entitled to various statutory protections and benefits, and the Commissioner of Agriculture and Markets has concluded that mobile homes used for farm worker residences are protected "on-farm buildings" within the meaning of

Agriculture and Markets Law § 301(11). The Legislature's amendment of section 301 to delete specific reference to "farm residential buildings" did not limit the definition of "farm operation" to non-residential buildings. The literal language of the amended statute does not exclude residential buildings. The intent of the amendment was to correct technical errors and strengthen, not limit, the protections against unreasonably restrictive local ordinances.

Agriculture - Agricultural Districts - Migrant Worker Housing - Applicability of Local Zoning Laws - Interpretation of Commissioner of Agriculture and Markets Entitled to Deference

2. In construing Agriculture and Markets Law § 305-a (1) (a), which provides that local governments shall not unreasonably restrict or regulate farm operations unless the public health or safety is threatened, the interpretation of the Commissioner of Agriculture and Markets that a town's enforcement of a zoning ordinance to prohibit the siting of mobile homes having an area of less than 1,100 square feet for farm labor housing on farm operations unreasonably restricts such farm operations is entitled to deference. The interpretation or application of the statute involves knowledge and understanding of underlying operational practices and entails an evaluation of factual data and inferences to be drawn therefrom. Moreover, the town failed to make any evidentiary showing that the statutory exception to the ban on unreasonable regulations of farm operations applied--i.e., that an absolute ban on single-wide mobile homes was needed because the public health or safety was threatened.

**Counsel:** *Scott F. Chatfield, Tully, for appellants. I. The legislative intent of Agriculture and Markets Law article 25-AA, as well as the 1997 revisions to Agriculture and Markets Law § 301(11) do not support the lower court's conclusions. II. The lower court exceeded its authority when engaging in statutory construction of Agriculture and Markets Law § 301(11). (Schrader v Carney, 180 AD2d 200; Segal v State of New York, 60 NY2d 183, rearg denied sub nom. Cutway v State of New York, 61 NY2d 670; Riegert Apts. Corp. v Planning Bd., 57 NY2d 206; People v Graham, 55 NY2d 144; New Amsterdam Cas. Co. v Stecker, 3 NY2d 1.) III. Local government's power to regulate farm operations within a county approved, state certified agricultural district has been limited by the Legislature.*

*Coulter, Ventre, McCarthy & Twichell, L. L. P., Syracuse (P. David Twichell of counsel), for respondent. I. Appellants' acknowledged violation of the Lysander Zoning Law requires that the injunction be affirmed, whether or not Agriculture and Markets Law § 305-a (1) (a) applies. (Matter of Town of Butternuts v Davidsen, 259 AD2d 886.) II. The courts below were correct in concluding that the term "farm operations" in Agriculture and Markets Law § 301(11) no longer includes farm residen-*

tial buildings. (*Riley v County of Broome*, 95 NY2d 455; *New York State Bankers Assn. v Albright*, 38 NY2d 430; *Matter of Stein*, 131 AD2d 68; *Town of Beekman v Sherman*, 213 AD2d 627; *Matter of Dworman v New York State Div. of Hous. & Community Renewal*, 94 NY2d 359; *Matter of Killian [General Motors Corp., Delco Chassis Div.—Sweeney]*, 89 NY2d 748; *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451.) III. Alternatively, even if *Agriculture and Markets Law* § 305-a (1) (a) applies, appellants have *not* shown that the Lysander Zoning Law unreasonably restricts or unreasonably regulates farm operations. (*Zuckerman v City of New York*, 49 NY2d 557.) IV. Alternatively, even if *Agriculture and Markets Law* § 305-a (1) (a) applies, the minimum floor area requirement is a valid exercise of the Town's zoning authority which is *not* precluded by *Agriculture and Markets Law* § 305-a (1) (a). (*Village of Euclid v Ambler Realty Co.*, 272 US 365; *Matter of Diocese of Rochester v Planning Bd.*, 1 NY2d 508; *Town of Pompey v Parker*, 53 AD2d 125; *Matter of Village Bd. of Trustees v Zoning Bd. of Appeals*, 164 AD2d 24; *Matter of Stevens v Smolka*, 11 AD2d 896; *Osetek v Barone*, 60 Misc 2d 980; *Corning v Town of Ontario*, 204 Misc 38; *Matter of Town of Bedford v Village of Mount Kisco*, 33 NY2d 178; *Shepard v Village of Skaneateles*, 300 NY 115.) V. Alternatively, there are potential public health, safety and other factors precluding a grant of summary judgment to appellants. VI. The record and law show that public health and safety is threatened. (*Corning v Town of Ontario*, 204 Misc 38.)

Joan A. Kehoe, Albany, John F. Rusnica and Larry A. Swartz for Commissioner of Agriculture and Markets, *amicus curiae*. I. The protections afforded by *Agriculture and Markets Law* § 305-a to farm workers housing were *not* removed nor diminished by the 1997 amendment of the definition of "farm operation" in *Agriculture and Markets Law* § 301 (11). (*Matter of Albano v Kirby*, 36 NY2d 526; *Matter of Erie County Agric. Socy. v Cluchey*, 40 NY2d 194; *Finger Lakes Racing Assn. v New York State Racing & Wagering Bd.*, 45 NY2d 471; *Town of Beekman v Sherman*, 213 AD2d 627; *Matter of Alfie's Fish & Chips v Zoning Bd. of Appeals*, 36 AD2d 664; *Matter of Grand Jury Subpoena Ducès Tecum [Museum of Modern Art]*, 93 NY2d 729; *Matter of Howard v Wyman*, 28 NY2d 434; *Matter of Eastern Milk Producers Coop. Assn. v State of New York Dept. of Agric. & Mkts.*, 58 NY2d 1097.) II. Evidence in the record of the Commissioner's conclusion that the Town's prohibition of the use of mobile homes for farm labor housing unreasonably restricted the Hafners' farm operation, with no evidence to the contrary, precluded the grant of summary judgment *in* favor of the Town pursuant to CPLR 3212 (b). (*Zuckerman v City of New York*, 49 NY2d 557.)

Elizabeth Corron Dribusch, Glenmont, for New York Farm Bureau, Inc., *amicus curiae*. The term "farm operation" as defined *in* section 301 (11) of the *Agricultural*

*Districts Law* should be construed to include mobile homes for farm labor housing because the plain language of the statute and the legislative intent underlying the enactment of the *Agricultural Districts Law* clearly support such an interpretation. (*Doctors Council v New York City Employees' Retirement Sys.*, 71 NY2d 669; *Matter of Washington Post Co. v New York State Ins. Dept.*, 61 NY2d 557; *Metropolitan Life Ins. Co. v Durkin*, 276 App. Div. 394, 301 NY 376; *Patrolmen's Benevolent Assn. v City of New York*, 41 NY2d 205; *Rankin v Shanker*, 23 NY2d 111.)

Judges: Opinion by Judge Levine; Chief Judge Kaye and Judges Smith, Ciparick, Wesley, Rosenblatt and Graffeo concur.

Opinion by: LEVINE

#### Opinion

[\*561] [\*\*\*359] [\*\*357] Levine, J.

Defendants own and operate a commercial farm *in* the Town of Lysander, *in* an *agricultural district* created pursuant to *Agriculture and Markets Law* § 303. This case arises from defendants' attempt *in* 1999 to install several single-wide mobile homes for housing migrant workers on the farm. The mobile homes do *not* comply with a Town zoning ordinance that "all one-story single family dwellings" have a minimum living area of 1,100 square feet (Town Zoning Code § 139-56 [A]).

The central issue before us is whether the zoning ordinance, as applied to defendants' installation of mobile homes to house migrant farm workers, is superseded by *Agriculture and Markets Law* § 305-a (1) (a). That statute provides:

*H1N1* "I. Policy of local governments. a. Local governments; when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules or regulations, shall exercise these powers *in* such manner as may realize the policy [\*562] and goals set forth *in* this article, and shall *not* unreasonably restrict or regulate farm operations within *agricultural districts in* contravention of the purposes of this article unless it can be shown that the public health or safety is threatened" (emphasis supplied). *H1N2*

The statute defines "farm operation[s]" as "the land and on-farm buildings, equipment and practices which contribute to the production, preparation and marketing of crops, livestock and livestock products as a commercial enterprise" (*Agriculture and Markets Law* § 301 [11]).

*In* 1998, the Town initially granted defendants a temporary building permit for two mobile homes, but refused to extend the permit *in* 1999 and disapproved defendants' permit application to site additional mobile homes on the farm, relying solely on Town Zoning

Code § 139-56(A). The Town then commenced this action for an injunction precluding defendants from using the mobile homes to house migrant workers and directing removal of the structures unless defendants obtained the necessary building permits.

Defendants alleged, as an affirmative defense, that the zoning ordinance unreasonably restricted farm operations within the meaning of *Agriculture and Markets Law* § 305-a (1) (a) and that the Town failed to show that its restriction on mobile homes was necessary to protect the public health or safety. They also sought, *in* a counterclaim, an order directing the Town to issue building permits and certificates of occupancy for the mobile homes. Thereafter, defendants moved for summary judgment dismissing the complaint. *In* support of their motion, they submitted a letter addressed to the Town from the Department of Agriculture and Markets, which stated that the "Department has consistently viewed mobile homes used for farmworker residences as protected 'on-farm buildings'" and that it viewed application of the Town's zoning code *in* defendants' case as an unreasonable restriction on farm operations.

[\*\*360] [\*\*358] Supreme Court denied defendants' motion for summary judgment and granted summary judgment to the Town, permanently enjoining defendants from using mobile homes without building permits and certificates of occupancy. The court reasoned that *Agriculture and Markets Law* § 305-a (1) (a) did *not* "create an exemption from local zoning authorities or ordinances for all 'farm operations'" and, specifically, that the statute did *not* provide any protection to "farm residential buildings," [\*563] including mobile homes. The Appellate Division affirmed for "reasons stated" at *Supreme Court* (277 AD2d 1055). We granted leave to appeal and now reverse.

The Legislature enacted article 25-AA of the Agriculture and Markets Law *in* 1971 for the stated purposes of protecting, conserving and encouraging "the development and improvement of [this State's] *agricultural lands*" (L 1971, ch 479, § 1). At that time and again *in* 1987 (L 1987, ch 774, § 1), the Legislature specifically found that "many of the *agricultural lands in* New York state are *in* jeopardy of being lost for any *agricultural purposes*" due to local land use regulations inhibiting farming, as well as various other deleterious side effects resulting from the extension of nonagricultural development into farm areas (*Agriculture and Markets Law* § 300).

To foster the socio-economic vitality of agriculture, *in* New York, the Legislature gave county legislative bodies the power to create "*agricultural districts*," (*see, id.*, § 303). *HN3* Lands falling within those "*agricultural districts*" may be entitled to various statutory protections and benefits. As is relevant here, *Agriculture and Markets Law* § 305-a (1) (a) mandates that, when exercising their powers to regulate land use activities, local governments must do so *in* a manner consistent with the

policy objectives of article 25-AA. Thus, *HN4* the statute directs that local governments shall *not* unreasonably restrict or regulate farm operations within *agricultural districts in* contravention of the purposes of this article unless it can be shown that the public health or safety is threatened" (*id.*, § 305-a [1] [a]).

*In* this case, as previously noted, the Commissioner of Agriculture and Markets, who appears *amicus curiae* on defendants' behalf, has concluded that "mobile homes used for farmworker residences [are] protected 'on-farm buildings.'" Rejecting the Commissioner's position, the courts below concluded that use of mobile homes to house migrant farm workers does *not* fall within the definition of "farm operation." Initially, the Legislature defined the phrase "farm operation" as "the land used *in agricultural* production, farm buildings, equipment and *farm residential buildings*" (L 1992, ch 534, § 1 [emphasis supplied]; *see also*, L 1995, ch 235, § 1). *In* 1997, the Legislature amended the definition to mean "the land and *on-farm buildings*, equipment, and practices which contribute to the production, preparation and marketing of crops, livestock and livestock products as a commercial enterprise" (L 1997, ch 357, § 2 [emphasis supplied]). The courts below reasoned that, by deleting the phrase "farm residential buildings," the [\*564] Legislature intended to limit the definition of "farm operation" to non-residential buildings, thereby divesting those buildings of the protections of *Agriculture and Markets Law* § 305-a (1) (a). We disagree.

As urged by defendants and the Commissioner, the literal language of the definition does *not* exclude "farm residential buildings" from the protective reach of the statute. To the contrary, *HN5 Agriculture and Markets Law* § 301 (1) makes plain that *all* buildings located "on-farm" may be considered part of a "farm operation" if they otherwise satisfy the requirements of the statute (*see, id.*, § 301 [1]). Moreover, [\*\*\*361] [\*\*\*359] the legislative history supports the Commissioner's view by explaining that the statute was amended *in* 1997 to correct technical errors and to *strengthen—not* limit—the protections against unreasonably restrictive local laws and ordinances (*see*, Senate Mem *in* Support, Bill Jacket, L 1997, ch 357, at 3, reprinted *in* 1997 McKinney's Session Laws of NY, at 2345 [amendments were needed "to correct technical errors and improve the Department's ability to effectively administer the law"]; Senate Sponsor John R. Kuhl, Jr., Letter *in* Support, Bill Jacket, L 1997, ch 357 [HN6 the bill "incorporates several technical changes" proposed by the Department (of Agriculture and Markets) and is intended "to further improve and strengthen the law"]; Assembly Sponsor William L. Parment Letter *in* Support, Bill Jacket, L 1997, ch 357 ["This legislation will improve the administration of the *Agricultural Districts* Program by strengthening the ... unreasonably restrictive local ordinance provisions ... and making various technical corrections"]).

The Commissioner also concluded that "the Town of

96 N.Y.2d 558, \*564; 759 N.E.2d 356, \*\*359; 733 N.Y.S.2d 358, \*\*\*361

Lysander's Zoning Code, insofar as it prohibits the siting of mobile homes having an area of less than 1,100 square feet for farm labor housing on farm operations ... unreasonably restricts such farm operations, including Paul Hafner Farms." According to the Commissioner, HN7

HN8 "Frequently, farmers rely on mobile home housing for their farm laborers to accommodate the long work day, seasonal housing needs and to address the real shortage of rental housing in rural areas. Local government prohibitions or restrictions on the use of mobile homes can significantly impair the viability of farm operations."

The Commissioner's view in this regard is entitled to deference. [\*565] Where, as here, the "interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute" (Kurcsics v Merchants Mut. Ins. Co., 49 NY2d 451, 459 [emphasis supplied]; see also, Matter of Jennings v New York State Off. of Mental Health, 90 NY2d 227, 239).

Finally, the Town failed to make any evidentiary showing that the statutory exception to the ban on unreason-

able regulations of farm operations applied--i.e., that an absolute ban on single-wide mobile homes was needed because "the public health or safety [was] threatened" (Agriculture and Markets Law § 305-a [1] [a]). Therefore, we agree with defendants and the Commissioner that defendants were entitled to summary judgment dismissing the Town's complaint. The Town's remaining arguments are without merit.

We note that, as a result of our reversal, defendants' counterclaim for an order directing the Town to issue building permits and certificates of occupancy--which had been rendered academic by the rulings below--apparently now remains pending.

Accordingly, the order of the Appellate Division should be reversed, with costs, defendants' motion for summary judgment granted and the case remitted to Supreme Court for further proceedings in accordance with this opinion.

Chief Judge Kaye and Judges Smith, Ciparick, Wesley, Rosenblatt and Graffeo concur.

Order reversed, etc.

## Matter of Deerpark Farms, LLC v Agricultural & Farmland Protection Bd. of Orange County

Supreme Court of New York, Appellate Division, Second Department  
February 23, 2010, Decided  
2009-04137

Reporter: 70 A.D.3d 1037; 896 N.Y.S.2d 126; 2010 N.Y. App. Div. LEXIS 1614; 2010 NY Slip Op 1647

In the Matter of Deerpark Farms, LLC, Appellant, v Agricultural and Farmland Protection Board of Orange County et al., Respondents, and Orange County Legislature, Respondent. (Index No. 12083/08).

### Core Terms

arbitrary and capricious, rational basis, administrative determination, real property, confirmed

### Headnotes/Syllabus

### Headnotes

Agriculture—Agricultural Districts.—Administrative determination made by Legislature in adopting resolution denying petitioner's application for inclusion of its property in agricultural district was rational, and not arbitrary and capricious—rational, expressed concerns of Legislature regarding adverse impacts on Town and upon parcels of real property neighboring real property owned by petitioner if application were approved were not sufficiently addressed or refuted by petitioner; moreover, there was rational basis to concern expressed by Legislature that, by including petitioner's property in district, petitioner's projected increase in number of hogs kept on subject property would contravene local zoning law and create potential health hazard.

Counsel: [\*\*\*1] David B. Gilbert, Middletown, N.Y., for appellant.

David L. Darwin, County Attorney, Goshen, N.Y. (Michael Rabiet of counsel), for respondents, Agricultural and Farmland Protection Board of Orange County and Wayne A. Decker, as Legislator for the 13th District of Orange County, and respondent-respondent, Orange County Legislature.

Drake, Loeb, Heller, Kennedy, Gogerty, Gaba & Rodd, PLLC, New Windsor, N.Y. (Adam L. Rodd and Jennifer

E. Wright of counsel), for respondents, Gary W. Flieger, as Supervisor of Town of Deerpark, and Town of Deerpark.

Judges: STEVEN W. FISHER, J.P., ANITA R. FLORIO, ARIEL E. BELEN, L. PRISCILLA HALL, JJ. FISHER, J.P., FLORIO, BELEN and HALL, JJ., concur.

### Opinion

[\*1037] [\*\*127] In a proceeding pursuant to CPLR article 78, inter alia, to review a determination of the Orange County Legislature dated August 7, 2008, which adopted a resolution denying the petitioner's application to have certain property that it owned in the Town of Deerpark included in Agricultural District No. 2 in the County of Orange, the petitioner appeals, as limited by its brief, from so much of an order and judgment (one paper) of the Supreme Court, Orange County (McGuirk, J.), dated March 4, 2009, as confirmed [\*\*\*2] the determination, denied the petition [\*1038] insofar as asserted against the Orange County Legislature, and dismissed the proceeding insofar as asserted against the Orange County Legislature.

Ordered that the order and judgment is affirmed insofar as appealed from, with costs to the respondent-respondent.

In reviewing an administrative determination, a court must ascertain whether there is a rational basis for the action in question, or whether it is arbitrary and capricious (see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231, 313 NE2d 321, 356 NYS2d 833 [1974]; see also Matter of Pechham v Calogero, 12 NY3d 424, 431, 911 NE2d 813, 883 NYS2d 751 [2009]). An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts (see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d at 231). Thus, "[i]f the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have

70 A.D.3d 1037, \*1038; 896 N.Y.S.2d 126, \*\*127; 2010 N.Y. App. Div. LEXIS 1614, \*\*\*2

reached a different result than the one reached by the agency" (Matter of [\*\*128] Peckham v Calogero, 12 NY3d at 431; [\*\*\*3] see Kurcsics v Merchants Mut. Ins. Co., 49 NY2d 451, 459, 403 NE2d 159, 426 NYS2d 454 [1980]). Consequently, "courts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise" (Matter of Peckham v Calogero, 12 NY3d at 431).

Here, the petitioner failed to meet its burden of demonstrating that the administrative determination made by the Orange County Legislature (hereinafter the Legislature) in adopting a resolution denying its application for the inclusion of its property in Agricultural District No. 2 in the County of Orange (hereinafter the district) lacked a rational basis or was arbitrary and capricious (see generally Matter of Stanton v Town of Islip Dept. of Planning & Dev., 37 AD3d 473, 829 NYS2d 596 [2007]).

The rational, expressed concerns of the Legislature regarding the adverse impacts on the Town of Deerpark and

upon the parcels of real property neighboring the real property owned by the petitioner if the application were approved were not sufficiently addressed or refuted by the petitioner. Moreover, there was a rational basis to the concern expressed by the Legislature that, by including the petitioner's property in the district, the petitioner's projected increase in the [\*\*\*4] number of hogs kept on the subject property would contravene the local zoning law and create a potential health hazard. Therefore, contrary to the petitioner's contention, the Legislature's determination was rational, and not arbitrary and capricious (see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of [\*\*1039] Scarsdale & Mamaroneck, Westchester County, 34 NY2d at 230-231).

Accordingly, the Supreme Court properly confirmed the determination, denied the petition insofar as asserted against the Legislature, and dismissed the proceeding insofar as asserted against the Legislature. Fisher, J.P., Florio, Belen and Hall, JJ., concur.