

Town of Clarence  
Zoning Board of Appeals Minutes  
Tuesday June 11, 2013  
7:00 p.m.

Chairman Daniel Michnik called the meeting to order at 7:10 p.m.

Zoning Board of Appeals members present:

Chairman Daniel Michnik	Vice-Chairman Ryan Mills
David D'Amato	Patricia Burkard
Jonathan Hickey	Gregory Thrun

Town Officials present:

Director of Community Development James Callahan  
Planner Michael Hutchinson  
Deputy Town Attorney Steven Bengart  
Councilman Bernie Kolber

Other interested parties present:

Michael Cummings	Norman Abraham
Anthony J. Picone	Michael Berger
Larry LaDuca	Adam Walters
Ron Sutton	David Winter
Tim Krantz	Henry Jurek
Patrick Spoth	Fred Cimato
Don Lavocat	Sean Hopkins
Bill Zittel	

Motion by David D'Amato, seconded by Ryan Mills, to **approve** the minutes of the meeting held on May 14, 2013, as written.

Jonathan Hickey	Aye	Patricia Burkard	Aye
David D'Amato	Aye	Ryan Mills	Aye
Daniel Michnik	Aye		

**MOTION CARRIED.**

Chairman Michnik explained that the Zoning Board of Appeals members have been requested to look at two (2) variance requests that were previously before the Board. The first is for an appeal from 2004 located at 10425 Keller Road, a vote needs to be taken to see if the Board wants to re-open the appeal, and the vote must be unanimous in order to re-open it. All members have visited the site and have read the minutes from the previous meeting(s). Mrs. Burkard said they want to put a driveway next to their present driveway, she said there was an indication that that may not be possible. Mr. Callahan explained that there must be a minimum of 100' separation between driveways; this is not shown on the plan.

**ACTION:**

Motion by Jonathan Hickey to re-open the hearing that was held in July and August of 2004 for a variance request located at 10425 Keller Road. There is no second.

MOTION FAILED.

Chairman Michnik explained the second variance in which the applicant is requesting a re-hearing. The request was originally heard in January 2013 for a side yard setback to build a garage addition at 5935 Strickler Road. The applicant is not present. Chairman Michnik said the applicant feels the variance that was granted is no longer viable for what he is looking for. A unanimous vote is required to re-open the case. Mrs. Burkard pointed out that the applicant is asking for more than he originally asked for; he asked for a 30' x 30' structure, he and the Board agreed to 30' x 24'. Now the applicant is looking for 30' x 34'.

There is no motion made to re-open the appeal.

**Old Business**

**Appeal No. 3**

Lynn Aronica  
Residential Single Family

Requests the Board of Appeals approve and grant a 500 square foot variance to allow for the construction of a 700 square foot pool house at 9042 Shannon Court.

Appeal No. 3 is in variance to § 229-55.

**DISCUSSION:**

Norman Abraham, designer on the project, is present and clarified that the enclosed space will be 430 square feet; there is a covered patio adjacent to the enclosed structure. Mr. Abraham said based on the last meeting the size of pool house has been reduced, the plumbing and the changing room have been eliminated. Michael Cummings, owner of the property, is present.

Two (2) neighbor notification forms are on file.

Mr. Abraham confirmed that stone or brick will be used for the pillars, the roof will be asphalt shingles and vinyl siding will be used; all these materials will match the existing house. Mr. Mills asked if the size of the structure could be pared down. Mr. Cummings said he could consider a smaller structure; he is looking for a functional pool house and something that allows them to store their outside items. Mr. Abraham said if the structure was smaller the windows and patio doors would have to be smaller too. He is concerned with racking and the special design considerations that would come about with changing the size. The primary residence is just less than 4,000 square feet.

There will be electric in the pool house; there is no plan to have plumbing installed in the future.

Mr. D'Amato asked if the applicant could come down 100 square feet in the request. Mr. Abraham said that is possible. Mr. D'Amato asked if the location of the proposed structure was chosen because of the plumbing. Mr. Cummings said it was based on being close to the patio, the direction of the sun and being close to the end of the pool that will be used by young children.

Chairman Michnik said he did not see any other structures that size in the surrounding neighborhood. Mr. Cummings said when he moved into the neighborhood it was supposed to have certain size houses but that has since changed, so his house is the largest on the cul-de-sac. On the other side of the neighborhood people have added two car garages to their homes. Chairman Michnik asked if there is a landscaping plan for the pool house. Mr. Cummings said yes there will be landscaping to along with existing landscaping and to cover the mechanism for the pool, however there isn't a plan drawn up yet. If this request is approved the applicant would like to start immediately.

**ACTION:**

Motion by Ryan Mills, seconded by Jonathan Hickey, to **approve** Appeal No. 3, under Old Business, with the following change: a **400** square foot variance for the construction of a **600** square foot pool house at 9042 Shannon Court.

**ON THE QUESTION:**

Chairman Michnik suggested adding a landscaping condition to the motion. There should be landscaping on the north and west side of the pool house. The landscaping should be at least 5' tall. Mr. Mills agreed to amend his motion to include the landscaping condition noting that the landscaping must be complete within one (1) year of the building permit issuance. Mr. Hickey also agreed to amend his motion to include the landscaping condition.

Jonathan Hickey	Aye	Patricia Burkard	Aye
David D'Amato	Aye	Ryan Mills	Aye
Daniel Michnik	Aye		

MOTION CARRIED.

**New Business**

**Appeal No. 1**

Picone Construction  
Traditional Neighborhood District

Requests the Board of Appeals approve and grant a 12 square foot variance to allow for a 32 square foot pole sign at 10995 Main Street.

Appeal No. 1 is in variance to § 181-3(D).

**DISCUSSION:**

Mr. Picone is present and explained that the sign actually consists of 2 posts and a panel between them.

Chairman Michnik noted that the Clarence Hollow Community Character Protection Board reviewed the proposed sign and it is acceptable to them.

Mr. Hickey reviewed the submission and asked the applicant if there are any other signs that were considered that are closer to being within variance. Mr. Picone said no, because of the size of the property the sign would be too small and not in keeping with other signs in the area. There are two (2) neighbor notification forms on file.

Mrs. Burkard asked if the signs in the photos that the applicant submitted were put up before the new Sign Law. Mr. Picone does not know that. Mr. Callahan confirmed that those signs went up prior to the new Sign Law. Mr. Picone said the Mobil sign just went up and that is huge. Mr. Callahan said that sign was a replacement and is grandfathered in. Mrs. Burkard wondered if the increased size is really necessary, there are no large signs in the immediate area of the applicant's business. Mr. Picone said this is an identification sign so when they get deliveries or perspective clients looking of their building they are able to find it without too much trouble. Mrs. Burkard said the Sign Law was revised to reduce the size of signs in the Town. Mr. Callahan noted that this property is the last property in Town along Main Street, it was zoned Commercial on the frontage, but the Town changed the zoning to Traditional Neighborhood District. So if it was still zoned Commercial, the code would allow a 32 square foot sign.

Mr. D'Amato asked if there will be lighting on the sign. Mr. Picone said there will be a ground light on either side of the sign and some low landscaping.

Mr. Picone confirmed that when he purchased the property it was zoned Commercial. Mr. Mills asked what material will be used for the posts. Mr. Picone said the posts are wood inside with a metal post over it.

**ACTION:**

Motion by Jonathan Hickey, seconded by Daniel Michnik, to **approve** Appeal No. 1, as written.

**ON THE QUESTION:**

Mr. Mills said one reason this property can be distinguished from others in the area with respect to signage is because it is the last parcel in that district, it was Commercial when the applicant purchased it, therefore more square footage can be afforded for this sign.

Jonathan Hickey	Aye	Patricia Burkard	Aye
David D'Amato	Aye	Ryan Mills	Aye
Daniel Michnik	Aye		

MOTION CARRIED.

**Appeal No. 2**

Niagara County Produce  
Major Arterial

Requests the Board of Appeals approve and grant:

- 1.) A 27 square foot variance to allow for an 87 square foot sign on a future RPZ building.
- 2.) A 24 square foot variance to allow for a 45 square foot LED sign.

Both requests apply to a proposed sign at 8555 Transit Road.

Appeal No. 2 is in variance to § 181-3.

**DISCUSSION:**

Michael Berger, architect with Sutton Architecture, is representing the applicant. He explained that they are proposing to provide a 21' x 11' structure that would be the housing for the RPZ equipment for the

building. In an effort to reduce the amount of things at the side of the road, he has combined the RPZ building with a sign. The maximum height of the building would be 20'. Due to the size of the requirement of the RPZ the building gets pretty large and in order to provide an appropriately looking proportional sign, the proposed sign exceeds the requirement of the 60 square foot maximum per side of the sign. They want to provide a clear identifier for the business because the building is set back 300' from the road. They analyzed a smaller sign to fit within the confines of the requirement but it just did not look size appropriate. There are two (2) parts to the sign. The top portion with the company logo in it would be affixed, halo lit, backlit type signage. The lower portion would be an LED reader board. The applicant would abide by the LED requirements. Mr. Berger explained that an RPZ building is for backflow prevention equipment which is part of the plumbing system. It comes off the main line and before it enters into the building it goes through a piece of equipment that reduces the pressure and also prevents a backflow into the main line. The materials for the RPZ structure will be the same as those used on the building itself which is brick, stone and a standing seam roof. All colors will match. There is no signage on the building itself. The sign would be on both sides of the RPZ structure.

There is one (1) neighbor notification form on file.

Mr. Mills likes the idea of utilizing the hotbox for signage better than having two separate structures at the road side. He asked if the actual signage can be cut down any more. Mr. Berger said the sign could be reduced a little but it would still be outside the confines of the requirement. Mr. Mills asked if he could reduce the LED portion of the sign. Mr. Berger said the company makes the LED signs in such a way that if the height of the sign is reduced, the width will be reduced as well in order to keep the letters proportionate, therefore, if the LED portion was reduced it would not look appealing on the building. Mr. Berger said he thinks the width of the sign could come down to 14' or 12' instead of the proposed 15', everything else would scale down proportionally.

This is the only signage the applicant is proposing for this property. The proposed structure is back far enough so that it will not block the line of sight when a vehicle is exiting the property.

Chairman Michnik asked if the height could be any less. Mr. Berger said the proposed height is 20' with a 6/12 pitch. He said he could probably bring it down to a 4/12 pitch and make it look appropriate. Chairman Michnik asked about the colors of the LED sign. Mr. Berger said it will be black with multi-color lettering.

Bernie Kolber said there are hotboxes in every subdivision and at all the major buildings; usually they are metal structures by the road frontage. There is something similar to this proposal at Doodlebugs on Sheridan Drive.

#### **ACTION:**

Motion by David D'Amato, seconded by Daniel Michnik, to **approve** Appeal No. 2, as written with the following changes:

- 1.) The width of the sign is changed to 14'.
- 2.) The pitch of the roof is changed to 4/12.
- 3.) The height of the structure will be 18'6", the width will be 20'.

**ON THE QUESTION:**

Mr. Hickey thinks a variance request like this is distinguishable because of the size of the building that is required for the RPZ equipment which creates unique circumstances. It is the second last building in the Town going north.

Jonathan Hickey	Aye	Patricia Burkard	Aye
David D'Amato	Aye	Ryan Mills	Aye
Daniel Michnik	Aye		

MOTION CARRIED.

**Appeal No. 3**

Natale Builders/Larry LaDuca  
Traditional Neighborhood District

Requests the Board of Appeals approve and grant a 3' variance to allow for a 22' front yard setback for the construction of a new home at 6826 Rivera Way. The property is located in the Rivera Greens Subdivision and requires a 25' front yard setback.

Appeal No. 3 is in variance to Map Cover #3494.

**DISCUSSION:**

Two (2) neighbor notification forms are on file.

Larry LaDuca was present and explained that there were some tree stumps buried at the project site from a Town project that cleared the trees 10-20 years ago. He did not want to put a foundation over a tree stump so he cleared the property behind that and put a pump station in, so they had to move the foundation 3' to stay clear of the pump and the organic material.

Mrs. Burkard asked why the applicant didn't come before the board prior to putting the foundation in. Mr. LaDuca said when a bore hole is done to test what is under there, the bore hole could slip through; you don't pick up everything that is around it at the time. The home planned for that site is a 1950 square foot ranch style house.

The applicant was before the Board for a variance on 6829 Rivera Way, at that time the applicant said there would be one more variance request. Mr. LaDuca is hopeful that this will be the last variance request they need. There are eight (8) lots left that aren't spoken for.

Mr. Mills asked if there is any other reasonable solution to this issue that would not require a variance. Mr. LaDuca cannot think of any other solution short of extracting the foundation wall which is already there, but that would cost another \$30,000-\$40,000.

**ACTION:**

Motion by Ryan Mills, seconded by Patricia Burkard, to **approve** Appeal No. 3 as written.

**ON THE QUESTION:**

The builder has encountered some situations they were not expecting and that were not self-created. This is a unique situation. Building on organic material can be unsafe, creating unstable houses.

Jonathan Hickey	Aye	Patricia Burkard	Aye
David D'Amato	Aye	Ryan Mills	Aye
Daniel Michnik	Aye		

MOTION CARRIED.

Motion by Daniel Michnik, seconded by David D'Amato, to **move** the Zoning Board of Appeals meeting from the Kathleen Hallock Conference Room to the Town Hall Auditorium.

Jonathan Hickey	Aye	Patricia Burkard	Aye
David D'Amato	Aye	Ryan Mills	Aye
Daniel Michnik	Aye		

MOTION CARRIED.

**Appeal No. 4**

Jennifer Dougherty/Phillips Lytle, LLP  
Agricultural Rural Residential

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.

Appeal No. 4 is in variance to § 229-37.

**DISCUSSION:**

Chairman Michnik reads a memo from James B. Callahan, Director of Community Development, dated June 5, 2013, regarding Appeal-8441 County Road into the record:

"I prepared this Memo for the consideration of the Zoning Board of Appeals in connection with the pending appeal filed by Lisa Smith and John Zugarek regarding the proposed use of the property at 8441 County Road. The pending appeal seeks to reverse my previous administrative decision that the proposed greenhouse is an expressly permitted use on the property which is zoned Agricultural Rural Residential ("A-RR") zoning district pursuant to the Town of Clarence Zoning Map.

229-37 of the Zoning Code sets forth a list of expressly permitted uses in the A-RR zoning district and the list of expressly permitted uses is as follows:

1. Single-Family Homes
2. Modular Homes
3. Home Occupations
4. Customary Agricultural Operations

5. Golf Courses
6. Churches (under 10,000 sq. ft.)
7. Parks
8. Playgrounds
9. Schools
10. Riding Academies
11. Cemeteries
12. Greenhouses or nurseries

I determined that the proposed greenhouse is an expressly permitted use since it falls into two categories of expressly permitted uses listed in Section 229-37 of the Zoning Code. The reasoning utilized in support of my determination is provided below.

The proposed greenhouse clearly qualifies as a “Customary Agricultural Operation.” Article 17 of the Zoning Code is titled Definitions and Section 229-168 defines “Agriculture Operation (Customary)” as follows: “The raising or production for compensation, of crops, livestock, poultry, dairy products, fish or other wildlife, trees and other similar pursuits. Tree growing and harvesting, animal husbandry, horticulture operations, forestry operations; and the sale, at wholesale or retail, of farm products upon the premises where the same are grown or produced shall be considered agriculture operations.” The proposed greenhouse will be utilized to grow annuals, perennials and nursery stock for sale and such activities clearly fall within the broad definition of expressly permitted agricultural operations in the A-RR zoning district. The above definition states that the sale of farm products at both wholesale or retail is allowed.

Additionally, Section 229-168 of the Zoning Code contains a definition of “Agricultural Support Structure” as follows: “Shall include, but not be limited to, barns, silos, sheds, coops, shops, commodity buildings, machine or equipment storage buildings, greenhouses, stables, riding rings or arenas, exercise tracks, runs, dry lots, stalls, paddocks, pens, corrals or fences, windmills, water supply ponds, farm stands, manure storage facilities, wineries or vineyards, maple sugaring facilities or other storage buildings, out buildings or enclosures.” The above definition of Agricultural Support Structures includes greenhouses and this supports my determination that the proposed greenhouse is an expressly permitted use in the A-RR zoning district.

The proposed greenhouse also falls within the category of “greenhouses or nurseries” as included in the list of expressly permitted uses in the A-RR zoning district per 229-37 of the Zoning Code. The letter submitted by Jennifer Dougherty, Esq. of Phillip Lytle LLP with the pending appeal dated May 10, 2013 states a retail greenhouse is not permitted in the A-RR zoning district since the list of permitted uses in the Commercial (“C”) zoning district pursuant to Section 229-84A of the Zoning Code includes “retail nursery or greenhouse.” It was my determination that the distinction made between the A-RR and C zoning districts is between retail nurseries and nurseries and this is supported by the use of the word “or” in Section 229-84A of the Zoning Code. While not relevant with respect to the pending appeal, a “retail nursery” appears to be permitted in the A-RR zoning district since it falls within the definition of an “Agriculture Operation (Customary)” as discussed above.

My previous determination that the proposed greenhouse is an expressly permitted use within the A-RR zoning district is consistent with past determinations made for other existing greenhouses involving the retail sale of farm products. For example, on October 16, 2012, a determination was made that the greenhouse at 8850 Clarence Center Road is an expressly permitted as an “Agriculture Operation (Customary)” use. The property at 8850 Clarence Center Road is zoned Residential Single-Family (“R-SF”) and the list of expressly permitted uses in Section 229-47A of the Zoning Code includes “customary agricultural uses” so long as the property is over five acres in size and agricultural use of the property was established prior to March 9, 2005.

In conclusion, my previous decision that the proposed greenhouse that will be utilized for the retail sale of farm products is consistent with applicable sections of the Zoning Code as cited above and past determinations with respect to greenhouses.”

A copy of the memo is on file.

Deputy Town Attorney Steve Bengart said he spoke with both counsel. While the Town clearly stands by the memo read into the record and kept on file, the Town does concede the fact that a site plan is required under law.

Adam Walters, attorney at Phillips Lytle LLP, is present. He is representing Lisa Smith and John Zugarek who reside at 6675 Westminster Drive. Mr. Walters submitted a copy of a document depicting an aerial view of the properties in question. Mr. Walters said the Lavocat Nursery has proposed a nursery and commercial garden center. A Concept Plan that was reviewed by the Planning Board details the front end use. The plan is for a large parking lot on County Road for 48 cars, a 19,000 square foot of retail greenhouse operations. Hours of operation are 8:00am to 8:00pm Monday through Saturday and 8:00am to 5:00pm on Sunday. Mr. Walters said the minutes from previous meetings regarding this Appeal are listed under Exhibits A and B in their submittal. According to these minutes the operation will sell plants, trees and shrubs grown on site and plants, trees and shrubs grown elsewhere. They will also sell gardening supplies and equipment, other landscaping supplies and equipment, and other garden center related products. Mr. Walters referred to Mr. Callahan’s memo and said they respectfully disagree with the analysis within the memo. A nursery is clearly permitted in the A-RR district, but what is proposed is not a straight nursery; it is a garden center, it is a commercial development, a design capitalized on proximity to Transit Road and improve customer flow for the Lavocat’s. The current operation is on Goodrich Road, off the beaten path, this will clearly be a better retail operation for them. Mr. Walters said the project seemed to fly through the approval process, despite issues being raised for the Town Board and the Planning Board. He said the applicant’s attorney clearly told the Town Board and the Planning Board that there were no permissive approvals required, that State Law pre-empts the ability of the Town to regulate this type of use and that they had no choice but to approve it. Mr. Walters said they felt they had no options other than to appeal to this body. One issue has already been resolved in that the applicant has conceded that a Site Plan Approval will be required. Mr. Walters encouraged the Zoning Board of Appeals members to read all the minutes pertaining to this proposal before rendering a decision because in light of the concession, it changes the analysis. Mr. Walters thinks another issue is off the table because Mr. Hopkins provided a copy of his submittal to Mr. Walters and in it he concedes that the NYS Agricultural and Markets Law (Ag and Mkts Law) has no relevance to the Lavocat’s proposal. The project is not in an Ag district, the Ag and Mkts Law is irrelevant. So the issue before the Board tonight is an interpretation of whether or not the proposed use is a permitted/authorized use under the Zoning Code. In Mr. Walters submittal it is detailed why they think the Lavocat’s use is not permitted in the A-RR District. Mr. Walter’s referred to the Town Code §229-37 Permitted Uses and stated a greenhouse or

nursery is clearly permitted in the A-RR District. There is no question that if the Lavocat's want to do a greenhouse or nursery on site, no retail operation, that is permitted under the zoning code. The operation that is proposed is clearly a retail operation; there is a 50 car parking lot so the Lavocat's are hoping for 50 customers at peak hours of operation. Mr. Walters referred to the Town Code §229-84 Commercial and said a permitted use listed is a retail nursery or greenhouse, this is a clear distinction. Mr. Walters referred to Mr. Callahan's memo which noted the use of the word "or". Mr. Walters does not understand that. He thinks the clear intent of the code is to create two types of uses: a nursery garden center, which is appropriate in the Rural Ag District. To have a retail operation or garden center is clearly not what is intended when we talk about a greenhouse or a nursery. Mr. Walters referred to the definition of Customary Agricultural Operations: "The raising or production for compensation of crops, livestock, poultry, dairy products, fish or other wildlife, trees or other similar pursuits. Tree growing and harvesting, animal husbandry, horticulture operations, forestry operations; and the sale, at wholesale or retail, of farm products upon the premises where the same are grown or produced shall be considered agriculture operations." Mr. Walters said this definition does not say the wholesale or retail of all the listed products, just farm products. Nor does it authorize a retail operation or a retail garden center, only products grown on site can be sold on site. Mr. Walters said the only way this proposal could be considered a permitted use is if the list of permitted uses in the Commercial Zone is ignored. He goes on to say that when the code was drafted a retail nursery and greenhouse operations specifically listed as a more intensive use destined for a more intensive district. The Lavocat's will have other options via the Zoning Board of Appeals or a rezoning request at the Town Board level.

Sean Hopkins, of the law firm of Hopkins and Sorgi, is present on behalf of the Lavocat family. Mr. Hopkins noted that the Lavocat's purchased the property in question in February 2013. There were four (4) issues that were presented to the ZBA per the letter from Jennifer Dougherty dated May 10, 2013. At this point the focus is on issue #3 of that letter, which is whether or not it is a permitted use. With regards to the requirement for a Site Plan, Mr. Hopkins said he thinks they could make a strong argument that Site Plan Approval is not required, and such a position would be consistent with previous determinations by the Town, but for several reasons they chose not to. The first reason is because there is pending litigation that has been commenced by the petitioners, so any decision will be reviewable by a court. The second reason is the clients have nothing to hide; they have been in front of the Planning Board and have already incorporated their input into the proposed plan. Finally, they think it is in everyone's best interest to save money in terms of litigation fees. The property is not located in the County Agricultural District, however the applicant will be making a request that it be added; the County does that once a year in November. Mr. Hopkins referred to the Town of Clarence Zoning Map adopted in 2005 and pointed out that the subject property is located in the Agricultural Rural Residential Zoning District. Mr. Walter's clients live on Westminster Drive in the Residential Single Family Zoning District. Mr. Hopkins said that since the first day the Town adopted the Zoning Code in 1945 the property at 8441 County Road has been zoned for agricultural purposes. The Westminster subdivision was also zoned for agricultural purposes until the late 1990's when the developer requested a rezoning in connection with the Westminster subdivision. For fifty years these parcels shared the same zoning. The petitioner's purchased their home in 2004 for \$665,000, when they bought the house they knew what zoning was close by. The NYS and Town Laws allow the grief party to challenge the determination by Mr. Callahan. In order to be a grief there has to be proof that there is some injury that will be sustained as a result of the project, given that Mr. Walters' clients live approximately 500' away, that's questionable. Mr. Walters' clients have an issue with the use of the property but their frustration is directed at the wrong party, which are Mr. Hopkins' clients and the Town of Clarence. This property is a portion of property that was under contract by six (6) or (7) property owners nearby on Westminster who wanted to expand their backyards by a buffer. They purchased that property and told Mr. Hopkins' client that they want a buffer but they don't need the

remainder of the property; they asked the Lavocat's if they would be interested in purchasing it. Those neighbors, who are the closest to the property, knew exactly what the Lavocat's plan was; the Lavocat's agreed to some restrictions in terms of what they could do at the back of the property. The Lavocat's purchased the property with the consent of the closest 6 or 7 property owners. Those property owners negotiated conditions that they thought would protect the high value of their homes. In terms of whether or not this is a permitted use, Mr. Walters indicated that in instance of ambiguity it is up to this Board to make that determination. Mr. Hopkins thinks the language is clear and unambiguous, as a result a certain level of deference should be shown to Mr. Callahan's determination, he has been reviewing the Zoning Code, played a significant part in offering the Zoning Code and has been issuing interpretations since before Mr. Hopkins started doing this type of work, which was in 1998. If anyone is in the best position to make a determination as to whether or not this is a permitted use or if some other type of use is a permitted use, that falls clearly within Mr. Callahan's jurisdiction. If there is a consideration to invalidate his decision, Mr. Hopkins asked the Board to specify very clearly the reason why on record. Mr. Hopkins referred to the Zoning Code and noted that the property in question is zoned Agricultural Rural Residential. He then referred to §229-37 Permitted Uses and said the proposed use falls into two categories listed. The first is item #4 Customary Agricultural Operations, he said Mr. Walters said that greenhouses don't fall within that definition, Mr. Hopkins thinks that is incorrect and read from §229-168 Definitions: Agriculture Operation (customary)-the raising or production for compensation, of crops, livestock, poultry, dairy products, fish or other wildlife, trees and other similar pursuits. Tree growing and harvesting, animal husbandry, horticulture operations, forestry operations and the sale, at wholesale or retail, of farm products upon the premises where the same are grown or produced shall be considered agriculture operations. Mr. Hopkins referenced Mr. Walters' characterization of the proposed use as a nursery/garden center. The term "garden center" is not found in the Zoning Code. The common sense definition of a garden center is retailers such as Lowes or Home Depot or Wal-Mart; these are retailers that don't grow anything. They bring plant material on site and they sell it to their customers. Conversely, the Lavocat's have been growers in this Town for more than 30 years. Attached to the letter that Mr. Hopkins submitted is Exhibit J-which are invoices for materials, soils, etc., that conclusively demonstrate that Lavocat's are growers. They intend to sell products that they grow on site; they currently sell over 800 different types of plant materials including perennials and annuals. There will be retail customers on site. The Zoning Code states, "...and the sale, at wholesale or retail, of farm products upon the premises where the same are grown or produced..." This is a farm product. Farm products are not limited to eggs or a certain type of plant or tomatoes. Farm products include perennials, annuals, shrubs, etc. Mr. Hopkins referred to another definition in §229-168 of the Code: Agricultural Support Structures (which are permitted in the existing zoning classification of the subject property) and noted that greenhouses are expressly called out as a permitted use pursuant to that definition. He referred to Exhibit G-I of his submittal which is the Use Controls Schedule taken from the Zoning Code. One of the permitted uses listed under Agricultural Rural Residential is greenhouses. The Zoning Code does not make a distinction between a wholesale greenhouse or retail greenhouse or a garden center. The Lavocat's will sell for wholesale as well as retail. This proposed use also falls within the greenhouses or nurseries category listed in §229-37. Mr. Hopkins referred to the Commercial section of the Zoning Code which states retail nurseries or greenhouses are permitted. Mr. Hopkins said "or" means "or". That section of the code does not say retail nurseries or **retail** greenhouses.

The Lavocat's have received support letters from nearby property owners. Mr. Mills read the following letters into the record:

-Letter dated June 11, 2013: Donnie, I just wanted to drop you a line showing my support behind your proposed nursery project on County Rd. I have known you and your family as hard working, honest and

reputable family business. I am sure that your plans would only add value to the property. Good luck with this project. Manny Gambacorta.

-Letter dated June 10, 2013: Chris Lavocat, Sorry I cannot make the meeting Tuesday night. I wanted to drop a quick note regarding the property you own on County Road. I own the property directly behind your property-I have more linear feet of overlap than anyone else. At the last Town Board meeting I asked two questions: one regarding lights facing on my property-you said there would not be any lights facing backwards from your property that would be a problem for me-and the other regarding the amount of distance from the back of the greenhouse to my property line-you said a few hundred feet. Both of these answers are acceptable to me and I have no other concerns. I look forward to having you as a neighbor and will be a customer of your business-long term; home grown businesses are an important source of employment for our Town. Michael Colson 6651 Westminster.

-Letter dated June 10, 2013: Chris Lavocat, I wanted to take a moment and write you a note in regards to the property you own at 8441 County Road. I own property directly south of your property. The fact that our property is adjacent to one another I felt I should let you know that as long as you follow the plan you have presented to the Town, I have no issue with this and welcome you to the neighborhood. I believe that Clarence needs to continue to attract entrepreneurs such as yourself to broaden our tax base. Steve Jacobs.

The letters are on file.

Ron Sutton lived on Heroy Road for 35 years, near the Lavocat's. The people they have working for them are very professional. He lives within 500' of their current operation and it is operating full force right now and Mr. Sutton has no problems with them. He wishes the Lavocat's good luck.

David Winter and his wife Mary currently operate an 85 acre vegetable farm in Orchard Park; they have been friends with the Lavocat's for 25 years. They are friendly competitors at the market they both go to and run a reputable business. Farming is a great thing in this country and it still is in Clarence. The Lavocat's greenhouse proposed for this property will make the neighborhood look wonderful. This is an allowable use in this zoning and agriculture is here to stay.

Tim Krantz, of Lapp Road, has known the Lavocat's for a number of decades, they are a quality family and he welcomes them to the neighborhood. Mr. Krantz said the neighbors who have concerns should know that there could be something there that is a lot worse than someone growing trees and shrubs, the alternatives might be something they won't be happy with in the future. He would not have a problem if the Lavocat's were to move next to his property.

Henry Jurek, of Jurek Builders, owns property at 8272 County Road. He was one of the developers that helped put Westminster Drive in and when they put the street in they removed about four (4) greenhouse foundations that were there from the early 1900's. He loves the Lavocat's as a neighbor and he looks forward to them operating out of the County Road site.

Bill Zittel owns a 350 acre farm with fresh market produce and 4 acres of greenhouses in which they grow spring plants. He confirmed that the Lavocat's have been wonderful local people who buy from his farm. He looks forward to them having a new operation and continuing to buy good local farm products.

Patrick Spoth is a life-long Clarence resident and owns Kelkenberg farms on Wolcott Road in Clarence. He has known the Lavocat's for quite some time. Mr. Spoth said you have to look at this as a common sense thing. This is a family that has been in this Town for over 30 years doing a great job growing a business. They take seeds, put them in the ground, grow a product and sell it locally. What could be better than that? This is the type of business investment you want to embrace in this Town, not turn them away. Mr. Spoth said the last thing the Lavocat's want to do is have their place look like a garden center. If you go to their existing business it's like shopping with their family, they are not going to try and create a business that looks like Lowes. The way they will compete is by people knowing they are a local family business providing excellent service to their customers and a healthy locally grown product. We need to give them full support.

Fred Cimato was a previous owner of the subject property. He brought this to the Board approximately 7 years ago; it was not brought to the Board formally. He talked to the Chairman and said they want to put up greenhouses and the Town said it was fine but they did not want to see retail or wholesale customers coming onto the property. The Town wanted Mr. Cimato to grow it, pick it up and take it somewhere. He has no problem with the greenhouses but there is plenty of industrial and commercial land on County Road for sale out by him, he owns Cimato Topsoil and there is 15 acres for sale next to him; there is a 26 acre Industrial Park across the street. He does not feel this is the right place for the proposal.

Clayt Ertel is the real estate broker that sold the property. He referenced Mr. Walters' implication that the proposal would impose an undue hardship to some degree to the neighboring properties. Mr. Ertel said at the time of property sale negotiations he was dealing with five (5) neighbors. In order to protect their property it was negotiated in the contract that the Lavocat's would build a berm that adjoins that property and plant mature 5'-6' Blue Spruce trees. This would make it almost impossible to see the Lavocat's operation unless you are traveling down County Road. So the visual concerns of the adjoining property owners have been addressed. It was also noted that the lighting would be directed towards the road. Mr. Ertel said the project is not imposing any visual impacts at all to the adjoining properties.

Mr. Walters said this is about residential versus retail use. There are specific districts in the Town designated for retail, they think there are specific reasons why that is appropriate and should be maintained. Mr. Walters pointed out that the buffer that Mr. Ertel mentioned does not run the entire length of the property. The proposed parking lot is immediately adjacent to the property to the west. His client, Lisa Smith, looked at the list of permitted uses in the A-RR district before she purchased her property and found that a retail garden center is not on the list. He referred to a letter dated March 7, 2013 printed on Lavocat letterhead that explained to neighbors what they were proposing. He read from the letter, "...we are planning on constructing a high-end grower greenhouse and garden center on the property." The letter is on file. Mr. Walters said the retail component is the issue that is objectionable, if something is not a permitted use, it is prohibited. It is clear, under the Agricultural Operations definition that you can't do retail that is for off-site sales of materials that were not grown on the property. How do you sell a product that is not grown on site? The other issue is the use of the word "or" in retail nursery or greenhouse under permitted uses for the Commercial Zone. This means a greenhouse is a permitted use in a Commercial District not a retail greenhouse. If the word "retail" needs to be in front of both, that is simply a list of permitted uses for Commercial; so arguably under Mr. Hopkins and Mr. Callahan's interpretation you could not do a retail greenhouse in a Commercial District yet we are arguing that it can be done in an Agricultural Rural Residential District.

The Board referred to Exhibit B of Mr. Hopkins submission in order to locate Lisa Smith's residence in relation to the project site. Mr. Mills noted that Lisa Smith's property does not border the project site but it is within 500' of it. Mr. Walters said she currently hears noise from clearing activity at the project site.

Mr. Hickey asked Mr. Walters for details on why it is so important for the Board to compare the definition found in the Commercial Zone Code, which is retail nursery or greenhouse, versus §229-37 which doesn't have the word retail in it. Why can't the focus be on §229-37 Agricultural Rural Residential and interpret solely on that? Mr. Walters said there is a fundamental rule of statutory interpretation for zoning codes in particular because zoning codes are in derogation of common law property rights so they need to be strictly construed against the municipality. They also need to be read and effective so each provision has meaning. Mr. Walters' argument would be that because there is a secondary listed permitted use, at the time the code was drafted, there was a need to distinguish between retail greenhouse/nursery and regular greenhouse/nursery. Mr. Walters said it is the retail use that is not authorized for this project.

Mr. D'Amato asked if Lisa Smith was one of the five or seven property owners who were approached initially. Mr. Walter's said no.

Mr. Hopkins said his clients are growers and are proposing a use that clearly falls within the definition of Customary Agricultural Operations. The proposal is clearly for a greenhouse, not a garden center. They will be selling products that they grow on site. If this property gets added to a County Agricultural District it will give the Lavocat's some additional flexibility in terms of the sale of products. Mr. Hopkins stated for the record that the Lavocat's will only be selling products that they grow; they have been doing so for 32+ years. He noted that Mr. Callahan's interpretation is consistent with past precedent with similar projects in the Town of Clarence. A letter from the Assistant Director of Community Development noting the most recent example is on file. That example is a greenhouse project at 8850 Clarence Center Road, this property was not located in a County Agricultural District at the time and was zoned Residential Single Family. The letter stated that it is an expressly permitted use and that no approvals were required in terms of a site plan. If Mr. Callahan's determination on the Lavocat's proposal is wrong than it would also be wrong for the existing greenhouse at 8850 Clarence Center Road which would make it illegal, it would also render several other greenhouses in Clarence illegal such as Szuli's at 7300 Goodrich Road which is zoned Agricultural Rural Residential and Weeks Greenhouses at 5955 Shimerville Road which is zoned Residential Single Family. The Zoning Code allows greenhouse in Residential Single Family if it is a parcel more than five (5) acres in size and if it was agricultural use in 2005 when the Zoning Code changed. But in order to do so you have to rely on the Agricultural Operations definition. Mr. Hopkins asked the Board to consider the previous determinations when making their decision. If the Board overturns the determination made by Mr. Callahan, then all of the existing greenhouses automatically become illegal. If there is ambiguity in the Zoning Code, such ambiguity is construed against the Town and in favor of the property owner, the Lavocat family. Mr. Hopkins said the language in the code is not ambiguous. The proposal is clearly permitted pursuant to two (2) categories in the Agricultural Rural Residential. If ambiguity is found, Mr. Callahan's determination still has to be upheld because any ambiguity gets interpreted in favor of the property owner rather than the municipality.

Mrs. Burkard asked what she will see when she walks into the Lavocat's new greenhouse; will it be the plants that they have grown on site? Don Lavocat said she will see 1,000 different varieties and colors. His son researches the latest varieties in shrubs, annuals, perennials, etc., so they can have them available through their nursery. There will be no wheel barrows or lawnmowers for sale, it's all plant material.

Mr. Hickey asked Mr. Lavocat if what he is selling is the product that is grown on site. Mr. Lavocat said yes. Mr. Hopkins said the definition of farm includes non-contiguous sites so technically they could grow products at their Heroy Road site and bring them to the County Road site to sell them. Mr. Lavocat noted that he received a letter in support of his proposal from Robert Somers of the NYS Department of Agriculture and Markets dated May 31, 2013. A copy of the letter is on file.

Mr. Hopkins said his clients will go before the Planning Board for site plan review.

There is an existing rental house on the County Road property. The tenant will be moving out in September 2013. Mr. Lavocat's son has shown interest in renovating the house and living there.

Mrs. Burkard asked for confirmation that the neighbor to the west will not have a view of the parking lot because of the proposed berm. Mr. Hopkins confirmed that there will be landscaping along the front portion of the western parking area. The Planning Board said it will be important to provide screening for the parking area itself. There is a condition in connection with the purchase from the contiguous property owners that there be some landscaping along the back. It is wooded between the residents on Westminster and the proposed location of the greenhouse. Mr. Hopkins said there are more intense permitted uses that could go on this property that might include heavy machinery or animals.

Mr. Walters said if the Board made its determination that this is a permitted use as an agricultural operation, he would specifically ask the Board include a finding that is contingent upon the products being grown on site. Mr. Walters said the code says the products must be grown on site, so there should be no product brought over from the Heroy Road site.

Mr. D'Amato asked Mr. Walters if there is a specific product(s) that his clients are afraid of. Mr. Walters said there was discussion in the testimony that included wheel barrows, mulch, typical garden products and Christmas trees. Mr. Walters confirmed that that is where the term he has been referring to as "garden center" came from. Mr. D'Amato asked Mr. Walters what his and his client's position is if the Lavocat's stick to selling only what they grow on site. The parking lot would not be an issue then. Mr. Walters said he and his client would not have an objection under the Zoning Code.

Don Lavocat said he will 100% agree to sell on County Road, only what they grow on County Road. He also noted that if anyone is interested in seeing video of the Heroy location, they can watch the 11:00pm news on Channel 7 this evening; he was interviewed at that location today.

#### **ACTION:**

Motion by Ryan Mills, seconded by David D'Amato, that the Zoning Board of Appeals make a determination that the proposed use is a **permitted use** in the Agricultural Rural Residential District under §229-37 of the Town Code, subsection 4-Customary Agricultural Operations. The definition of Agricultural Operations (customary) can be found under §229-168 and specifically references the language: "The raising or production for compensation of crops, livestock, poultry, dairy products, fish or other wildlife, trees and other similar pursuits. Tree growing and harvesting, animal husbandry, horticulture operations, forestry operations; and the sale, at wholesale or retail, of farm products upon the premises where the same are grown or produced shall be considered agriculture operations."

**ON THE QUESTION:**

It is clarified that the Zoning Board of Appeals is making a determination as to whether Mr. Callahan was correct.

Mr. Hickey said he did not listen to irrelevant information such as the cost of the Smith's home, what this determination would mean to earlier determinations, what did or didn't happen on the site seven (7) years ago, he gave no credence to any of that information. He listened only to what the Lavocat's said they were intending to do with this property and applied it to what he thinks is a clear definition. He heard them represent that they are only going to sell farm products grown on site; that falls clearly within permissible use as outlined in the motion under Customary Agricultural Operations. Mr. Hickey made his decision based on these facts that were represented this evening, and nothing else.

Mr. Mills said the Board as a whole looked at §229-37 of the Zoning Code, the Definition section §229-168, the definitions under §229-84(A) of the Zoning Code, Mr. Callahan's memo put in the record earlier this evening and dated June 5, 2013, the submission by Phillips Lytle LLP/Jennifer Dougherty and the memo submitted to the Board by Mr. Hopkins dated June 10, 2013.

Jonathan Hickey	Aye	Patricia Burkard	Aye
David D'Amato	Aye	Ryan Mills	Aye
Daniel Michnik	Aye		

MOTION CARRIED.

Meeting adjourned at 9:45pm.

Carolyn Delgato  
Senior Clerk Typist