

Special Meeting of the Village of Pawling Zoning Board of Appeals Minutes

APPROVED

Meeting Date: May 11, 2022

Present: Michael Keupp, Chairman
Freddy DiVitto, Member
Ann Hardeman, Member
Nicholas Vorolieff, Member

Absent: Tom Zarecki, Member

Also Present: Dave Daniels, Village Counsel
Jeffrey Rothschild, Cappillino, Rothschild & Egan LLP (Heinchon Attorney)
Kenneth Stenger, Stenger, Diamond & Glass, LLP (Heinchon Attorney)
Kelly Libolt, KARC Planning Consultants, Inc.
Lauri Taylor, Mayor

On, **Wednesday, May 11th, 2022 at 7:00 PM**, the **Zoning Board of Appeals** met in the meeting room at the Village Hall on 9 Memorial Avenue, Pawling NY. The Meeting was called to order by Mike Keupp, Chairman and began with Roll Call as indicated above and The Pledge of Allegiance.

Applicant: Heinchon Dairy, Inc. & Eastern Hay Corporation
112 East Main Street (7056-05-210817, 219835, 226800)

Zoning Ordinance Appealed: Village of Pawling Code Sections: 98-10, 98-19, 98-45, 98-46, 98-59, and 98-65

Mr. Stenger represents Chris Johnson, the Applicant, on a newly purchased property located in the Town of Pawling. He explained that his client acquired this property in an effort to move his business operations, currently located in the Village of Pawling, to the new location in the Town of Pawling. Mr. Stenger explained that Mr. Johnson spent “a pile of money” to purchase the parcel for retail and storage. He explained, not as a permanent storage area but as an interim parking area for the trailer to come in take their loads and leave. Asserting that this is a permitted use under the zoning laws in the Town of Pawling. Mr. Stenger brought up a possible issue at the new site regarding an easement between the newly acquired parcel and the adjacent parcel which is owned by the Daniels Family Trust. His client is appearing before the Town of Pawling Planning Board for a Site Plan Amendment to begin this process on May 16th. He presented the Board with the Site Plan that shows the easement between the two parcels as well as a copy of the deed highlighting the two parties involved (Daniels Agency to Pawling ‘80s Associates) claiming that this presents a conflict of interest between Village Counsel, Dave Daniels and all parties concerned for two reasons. Because of Mr. Daniels involvement on both sides of the issue. One, as Counsel representing the Village of Pawling and two, as the Counsel representing the owner of the adjacent parcel. On the Site Plan, Mr. Stenger pointed out a green line that goes right through the easement between the two properties which is where the parking is proposed to take place. This includes a reservation in it for parking but it’s not clearly drafted and doesn’t say how many cars but it clearly says that in making this conveyance, the owner of this parcel reserves a right to park on this parcel and therefore cannot be obstructed. This is a problem because his client is proposing to construct vents which are required by the Town of Pawling on the location and could be construed as an obstruction. He further asserts

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that this is an arrangement that was made between the owners of the two parcels 40 years ago and made it clear that there's nothing wrong here. It's all fine and perfectly above board but the question is, does the Daniels Agency still want to assert its rights over the parking easement. It's my obligation is to bring the question to the Board for the Board to determine.

Board Member Nicholas Vorolieff commented that there may be some confusion with jurisdiction here stating that this isn't a Village matter. It's a Town Board matter and what we're here to discuss tonight is the use of a property here within the Village.

Mr. Stenger said you're absolutely correct, this is a Town of Pawling Planning Board issue but here is the problem; this parking area now is controlled by Mrs. Daniels and her lawyers which are Daniels & Porco which are also your lawyers here tonight. If you have an interest on both sides of an issue, our rules say that's a conflict of interest. We want to move here as quickly as we can. If you're going to represent this interest in the Village, that can have an impact on our ability to move to the Town and get out of the Village. I can't emphasize enough this is history that has come home and this is not an indication that anyone did anything wrong or is going to do anything wrong. It's about appearances. I think the argument can be made that the involvement of a law firm creates the conflict now or the argument could be made to deal with whatever the issue might be with the easement. If Mr. Daniels says there no issue with the easement here, then the matter is resolved. I asked that question yesterday, I don't have an answer. I have an obligation to tell you and to create that record. I reiterate I think you should consider it. I just need you to know I want to repeat for the record one more time. I've had plenty of dealings with Mr. Daniels, it's all been good and all been professional. I have an obligation to present this to you for your consideration. This is not me saying that anything was done wrong here. What I am saying if you proceed without looking at this issue carefully, what you decide may be put into question unless you have properly addressed that issue.

Mr. Daniels stated the easement has been in place for many years. I didn't draft it, it's not the model of clarity but it is what it is and what ever rights you have, you have. My parents are 91 years old and they're not going to be going down to the Town. I'm not going to be going to the Town. There's a very competent Planning Board in the Town just as there is in the Village. I'm sure they'll do the right thing. My parents have no interest in getting involved in a squabble with the Johnson family who they've known for their whole lives. Right now they have no interest in the property because they've leased it. This is the first time I've seen the application. Whether they're going to like the application or not, I couldn't tell you. Maybe they'll like it. They grew up in the Village, both of them. They may be happy to see the trailers go, I don't know; it's not something they talk about. I wouldn't get involved in this even if it did happen. I have no inclination from anyone in my family that there would be any kind of dispute. Whatever that easement says, it says. There's no conflict here, none.

Mr. Vorolieff asked Mr. Daniels if he or his firm has anything to do with legal representation for the Town Boards.

Mr. Daniels replied, no.

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Mr. Vorolieff commented I just want to make sure that you would not be involved at all in advising the Town Boards because they're the ones who are going to make a decisions about this particular parcel which is in the Town Jurisdiction.

Mr. Daniels replied I'm not going to that meeting, my parents aren't going to that meeting and it will be what it will be. Whatever they decide to do with the parking, that easement is there. I mean you do with it what you will. I'm not obligated to tell what it is or isn't. You can figure that out by doing a title search.

The Chair asked Mr. Stenger and Mr. Rothschild how they would like to proceed. If they are satisfied?

Mr. Rothschild said the validity of Notice of Violation is the most important thing out of all of this. He asserts that the Notice of Violation was not signed by the Building Inspector and or Zoning Code enforcement Officer, it's signed by the Village Clerk. Unless there's something particular to the Village Code, which no one can see because it's not online or otherwise publically available, the Village Clerk does not have the authority to issue a Notice of Violation? How could the Village Clerk with her duties know what the Zoning Code says? I'm going to tell you with certainty that it's a fatal error. The Board can decide to throw this out or not, then we're going to end up in court. The Village Counsel at the time cited Section 98-59 of the Village Code which states "After the 5th following written notice served by mail or personal service by the Building Inspector or the Village Clerk..." This talks about serving the Notice this does not talk about issuing the violation. Section 98-59 which talks about penalties and offenses. That's what Mr. Bardavid was alluding to at the time. That indicates where the Village Clerk or the Building Inspector can serve the violation. Section 98-58 "Powers and Duties of the Building Inspector. It shall be the duty of the Building Inspector to enforce the provisions of this chapter of the zoning code." He asserts, not the Village Clerk. Going back to the Village Code, what role or what duties does the Village Clerk have? There's no mention. So then you go to the Village Law of the State of New York (see attached). Mr. Rothschild identified the duties of the Clerk and noted that not one of them discusses her ability to issue a Notice of Violation. It makes sense she can't issue a notice of violation because she doesn't know it. Now like I said, we deal with it tonight or throw it out or we go to court. I want to offer you an olive branch and my client has already shown good faith by removing the trailers. He's going to continue to remove the trailers until they're all gone. He's not bringing in anymore trailers; he's just getting rid of them as he can. He has also beautified the property. If you look in the front, he's taken it upon himself to put in some mulching and some bushes. It looks good. He doesn't have to do this. Finally he purchased another site to get out of the Village. Give him an opportunity. Give me 60 days. Ms. Libolt will explain to you where we are on the Town application. This is a neighbor who's been farmer his whole life. His family has been here for a hundred years farming. The Johnson family has been a farming family the whole life. What are we doing? You know, we're all neighbor's here. I work here; I've been here since 1989. I'm sitting here going this is just is wasteful and if we're going to litigate this, I would want the tax payers to understand what's being litigated because their money is being wasted. So again, I come and I say, it's up to you we can do this the hard way, it will be painful for the Village because you're going to waste a lot of time and you can mark my words because when we're back here a year from now. I don't care if Mr. Daniels is the one advising the Board; It doesn't matter to me. It's up to the Board if we can resolve this by giving the Applicant some time to get out, we're willing to do that. We're willing to not raise this issue but if you're pushing us, I'm raising it. I want to make sure this is being taped and I reserve the right to get that recording because this is why you better have independent Counsel. So what I want to do to show further good faith, I just want Ms. Libolt explain the details of the application

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currently in from of the Town of Pawling Planning Board. Also, please remember when Kelly is presenting, the Applicant didn't buy this property until April. He was trying to get it as quick as he could and what should be impressed upon, is the amount work that he's done to move this operation out of the Village site onto the Town site.

Mr. Daniels commented the issue of the Village Clerk, whether you're aware of it or not, under the State Building Code a contract Building Inspector cannot issue a Notice of Violation. It can only be done by a Village Official and there's ample authority for that here.

Mr. Rothschild commented that it could be done by a Village Official. I know it can't be done by the Village Clerk.

Mr. Daniels explained that the Clerk has the authority to do so at the recommendations of the Building Inspector. That's where you're falling short on your analysis. If you want to brief the issue, I'll brief the issue and we'll provide it to the ZBA. It's an important issue. He asserted that the function of the Board here is to interpret a Zoning violation and they're throwing all of these collateral issues up that have nothing to do with the merits of this which is that the Village gave Mr. Johnson a stay to allow him to go to NY State Department of Agriculture and Markets. This took place last year. We knew that took place but what we didn't know is that in October they turned him down. We didn't know this until January or February and the only reason we did know is because we sent in for a foil request and then it started again. The Applicant then wanted to apply for a reconsideration with NY State Ag and Markets and wanted to be in abeyance. The Village denied the Applicant's request for the second abeyance citing the Applicant didn't do what was expected by not informing the Village of the State's findings. The

Applicant then resubmitted the application to the State and the State came back with the same finding which is that it is not a farm operation, it's a mercantile operation. NY State Department of Agriculture and Markets doesn't normally side with anybody other than the farmer. The Village was willing to listen and abide by a finding in favor of the Applicant but that's not how that played out. The application to the State was turned down twice and the Applicant made arguments about properties offsite that they claimed were exclusive providers and Ag and Markets saw through that and said no that's a purchase agreement. You don't lease a de-facto lease because you're buying stuff from 50 different farms across the country. I mean that they advertised all kinds of different grains and produce. It's clearly deemed to be a commercial operation. It's not entitled to the protection of the NY State Department of Agriculture and Markets law so therefore the Village Zoning Laws apply to this operation.

Mr. Rothschild replied that the Notice of Violation is not collateral. That is the complaint, that's why we're here and I'm going to tell you now, it's up to the Board to decide but we will go to court on this. That is a defective notice and Mr. Bardavid's language is clear. He didn't say the Village Clerk, he said a Village Officer can issue it and there's a good reason because the Village Clerk doesn't have that power and it makes sense. The Village Code talks about the Building Inspector having the right to enforce the Zoning Code. That's not the role to argue against us, the role is to advise the Board on legal issues. This is not the way you treat a neighbor who is trying to do the right thing. Mr. Rothschild asserted that the Applicant did not inform the Village of the States' denial to afford the Applicant the protection of the Right to Farm Laws was because he was advised not to do so

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by his lawyers. The State didn't inform the Village, they made you foil it. Now he's listening to Counsel, I'm sure, and everything he's done besides that is not even an issue. That you can't hold that against somebody who's being prosecuted at the time.

Mr. Daniels replied that this is just about adhering to the Zoning Laws. The Village Board passed a Resolution authorizing the Village Clerk to sign notices of violations upon the recommendation of the Contract Building Inspector. That's consistent the NYS Law that allows for Village Clerks to sign Notices of Violations upon the recommendation of a Contract Building Inspector. Again, it's not the role of the ZBA to be making a deal with the Applicant. It's just a matter of complying with the law. The trailers have been building up over the years up to where they were 50 of them, I believe, so that's been going on for years. I think the Village was quite patient and even when the violation was issued, the Village the Applicant the opportunity to see what Ag and Markets would say and they said, NO.

Kelly Libolt presented the Board with the details of the current status of the application before the Town of Pawling Planning Board. She explained that the Applicant, Eastern Hay, has purchased property in the Town of Pawling. As I'm sure you all know buying property in NY isn't done overnight and so that process started in the fall of 2021. It was a long process, they closed on the property in April of this year. He tried to submit an application to the Town of Pawling Planning Department during the closing process to advance the application in February but the sellers didn't allow it and required that we withdraw our application. They wouldn't allow us to submit as contract vendees so we're encumbered to wait to go before the Planning Board until we actually closed on the property which occurred on April 6th. At that point the Applicant promptly submitted a new application to the Town. We've had several pre-application meetings that did not include the Town's consultants and as Mr. Stenger had indicated, we're before the Town Planning Board on Monday, the 16th of May. It sounds like the Town of Pawling is very happy to have the Applicant and is willing to work with him in advancing the application. As soon as we're able to secure the final permits at the current location then, obviously, the business and the trailers will be relocated to the Town site.

Chairman Keupp asked what is happening to the trailers that have already left. Where are they going?

Ms. Libolt replied that most of the trailers have been sold.

Mr. Daniels asked if any operations on the Village property will continue.

Mr. Rothschild asked Mr. Daniels to clarify in what capacity will there be operations. He commented that the Applicant will continue to sell hay, absolutely. To be clear then, if there is any hay selling activity going on, it will certainly be within the parameters of the Right to Farm Laws. We won't do anything that's going to extend beyond the Right to Farm protections.

To clarify, Mr. Daniels asked if there is going to be any grain sales.

Mr. Rothschild replied, I can't say because you're allowed to do a 60/40 mix. It doesn't have to be all grown on site. There's a 60/40 ratio that the Ag and Markets uses. So as long as you're selling 60% of your farm products

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grown on a proprietary property, you're within the Right to Farm protections and so I'm not going to say that but what I will say is we'll make sure we comply with the Right to Farm Laws.

Mr. Daniels asked will you get a sign off from Ag and Markets because you don't have it right now.

Mr. Rothschild said, yes, absolutely. I mean that's the whole idea.

Member Vorolieff asked Mr. Rothschild if at this point is there any hay of any kind grown on the property here in the Village for sale.

Mr. Rothschild said I can't speak, I don't know.

Mr. Daniels asserted that the law states that you can sell hay if it's produced on the property or another property that you lease.

Mr. Rothschild said understand, they receive an agricultural exemption. It is a farm. There's an agricultural use going on that property. The assessor for the Town of Pawling who covers the Village has granted for years and just recently recertified him and he's in an Agriculture District on top of it so there's no question it's an agricultural use.

Mr. Daniels said I'm not sure that's correct. He was turned down in April by the New York State Agriculture and Markets and the rules for the agricultural exemption standards are the same.

Mr. Rothschild said that's looking for things.

Mr. Stenger commented that we're not in a court of law, no one is being prosecuted here. The Board has a lot of discretion. It's ultimately in the Board's hands to come to a finding tonight. The Board can conclude that everything before the Board is wrong or the Board can conclude that the Board will need further review or the Board can make a finding that it's wrong but we'll give them 60 days to get out. Here I leave it to your discretion. I just wanted to say to you that you have that power and when you talk about what to do next that you consider it as part of your deliberations.

Chairman Keupp commented that Jeff Rothschild highlighted some dire consequences if the Board finds contrary to what he's advising. He suggested hearing Mr. Larkin, the Village of Pawling Building Inspector, before making any decisions.

Member Vorolieff agreed he would like to hear Mr. Larkin's perspective before having a discussion amongst the Board.

Mr. Larkin of LaBella Associates and contract Village of Pawling Building Inspector begin with the legality of the way Building Department enforces the Village Code. According to Part 1-203 of Title 19, New York State Code of Rules, Regulations and Compliance how Building Departments operate at the local municipal level, the Village

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can contract with a consulting firm provided the firm meet the same qualifications. He explained that he is a New York State Certified Code Enforcement Official which does meet the Village qualifications. The way it's written is that I am not authorized execute any formal document which includes a Building Permit, Notice of Violation and Certificate of Occupancy. Issuance of those documents has to be done by a Public Officer. The terminology is "Public Officer." In the Village of Pawling, as you know a small community, you're Public Officers are not always readily available. Your Clerk, who is a Public Officer, is the most available individual which is why she was appointed to execute documents after written recommendation has been provided by the Building Inspector. That is the procedure. It's defensible at the state level so please take solace that we did set this up correctly and we are following State requirements. With regards to the process of how we got here, again as our role as your Building Official involved investigations of violations or investigations of complaints. This started as a complaint associated with the number of trailers which has already been brought up a lot tonight. This resulted in my visiting the property on March 16th and to clarify we were not invited on the property so we did our assessment from the public area around the property. From what we could see from the public way including the number of trailers; the presence of products both brought on site purchased and packaged; there were some products there that were delivered commercialized. In trying to assess the property to complete our investigation of the compliance of the site, the property maintenance became apparent which is also enforceable. There is one chapter of the Fire Code that is enforceable. As it pertains to the site, that's typically regulated by a site plan approval process. So things like transportation vehicles, curb cuts and that would be regulated under your site plan approval process. When I tried to pull those documents in order to see if there was any enforceable action on the property owner, I realized that this property from the site plan and building permit approval process had been except under the agricultural law. That was our starting point. We subsequently set up a meeting with NY State Agriculture and Markets because that's their jurisdiction. As was stated tonight, this property has functioned with Agricultural District protections both with tax and other agricultural exemptions since it was constructed back in the early 2000's. I didn't want to make any determinations without talking to everyone. NY State Agriculture and Markets informed me that they could not make a formal determination unless we issued a violation and which would send the applicant to NY State Ag and Markets. So the violation that was issued was a pre-requisite to the applicant being able to go to NY State Ag and Markets, state their position and have Ag and Markets who is the Authority in this case make their determination. That is what we did and the rejection letter came in October 15th. We referred to the Applicant to Ag and Markets through the violation process which is what we were instructed to do and that started the process down this road. In summary this all commenced in research of due diligence of a complaint. The violation was issued as a requirement to start a process which involved NY State Agriculture and Market who is ultimately the authority and who has now two times denied the application. In letters dated October 15th and April 12th it states that their current operation does not meet agricultural exemptions and, as it stands, you have a building which is occupied by the public in the Village of Pawling that has not gone through the appropriate Site Plan Approval and Building Permit Process and that needs to take place in order to ensure that building is safe for occupancy. This is what we're focused on, making sure the building itself is safe at this stage, we're not talking about trailers. We're talking about ensuring you have a safe building in your Village. That's where we are.

Mr. Daniels said if I could just add so I don't forget, the documents that were emailed to you, I would like to make sure are entered into the record. I did provide a copy to Mr. Rothschild as well. I would suggest that

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Given the dichotomy between what Mr. Rothschild said and what Ed Larkin and I are saying that you may want to get something in writing so that it's not just hyperbole.

Mr. Rothschild said I wanted to just gloss over it but I'm going to read you the statute so that you understand exactly what a Village Clerk can do (see attached statute) He read the entire section and emphasizing the last sentence which states, "I- Shall also perform such other duties not in consistent with this office as shall be determined by resolution by the Board of Trustees. So unless you fit this or there's a resolution, the Clerk does not have authorization.

Mr. Daniels stated that there is a resolution.

Mr. Rothschild said I want to see it. What Mr. Stenger received from Mr. Bardavid was a recitation of the Village Code that said she can serve it. He never mentioned a resolution. If he had it he should have given it to Mr. Stenger.

Mr. Daniels states, I'm here now and I'm telling you there is a Resolution. You just made our case with the last sentence. I'm glad you were honest about that.

Member Vorolieff made a motion to open the Public Comment. Member Hardeman seconded the motion. All present members were in favor.

Mr. Andy Durkin said I have a green and white house immediately north of the Heinchon property. I'm very fond of Mr. Johnson and his parents for 40 years. Got along great with them, never had a problem but all of a sudden he acquired a house, tore it down, made it a compost pile and it is unsightly. I don't live there but I have people living there and they want me to get involved with the attorney and they say they're getting black mold. They're afraid to go outside because it smells. It's not part of the Agricultural District it was a private residence. They tore it down and they're starting this big compost pile on it. I wouldn't be in favor of them expanding this if that's what it's going to be.

Mr. Stenger replied that he is leaving the site completely. The trailers are leaving as soon as we get permission from the Town of Pawling. He went out and spent 2.7 million to buy that property so they could move this out of the Village. I hear you very clearly what you're saying to me. The bottom line is, the sooner that everybody gets out, the sooner the problem is solved. Half of the trailers are out now. As soon as the Town approves that parcel. He has to go through the Planning Board first but the Zoning administrator said the proposed use at that location in the Town is acceptable in the Town's Code. I don't know anything about a compost but I can tell you right now it needs to come out.

Mr. Durkin said go out on East Main Street and take a look at Heinchon. It's not on the original farm property. He tore house down in a residential zone.

Mr. Stenger said if you give me your name and number. I'll speak to Mr. Johnson tomorrow and I'll call you.

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Chairman Keupp commented he noticed the pile that Mr. Durkin is referring. In some places it's up to five feet high as you go down Heinchon Lane on the left. There's a small three family apartment house down on the back. The people who live there have to drive by that to get to their house. It looks like someone is cleaning out horse barns. There's horse manure and straw and it smells and, again, it's not in the agricultural area.

Discussion ensued regarding the hay piles. Mr. Stenger agreed to look into it and report back.

Chairman Keupp suggested holding a decision until we can do further research.

Member Hardeman agreed.

Mr. Daniels reiterated that the decision is whether the Notice of Violation should be invalidated based on improper interpretation of the zoning. They've asked for a determination that the zoning law did not apply and it was based on farm operation, I believe, it really hasn't been talked about a lot. They have raised the technical issue which is certainly their right and that's something that I think the attorney should submit in writing so there's no misunderstanding about what's being presented and what's being said instead of this back and forth which probably wasn't really helpful.

Member Vorolieff asked Mr. Daniels if this is there is another issue other than whether the interpretation about whether the Clerk is authorized to sign paperwork under the advisement of a certified inspector by the State? Is there also the issue of interpreting whether or not we accept the NYS Department of Agriculture and Markets findings? So there are two interpretations before the Board.

Mr. Daniels replied that he would like to make sure there's a full record of the issues that were discussed tonight that I, frankly, thought of been resolved.

All submission documents are on file at the Village Hall

Adjournment

Member Hardeman made a motion to adjourn until the May 25th ZBA meeting. The motion was seconded by Member DiVitto. All Members were in Favor.

Submitted by:

Vivian Nikolatos, Secretary