

Zoning Board of Appeals Minutes

Meeting Date: June 22, 2022

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

APPROVED BY
VILLAGE OF PAWLING
ZONING BOARD OF APPEALS

Also Present: Dave Daniels, Village Counsel
Curt Johnson (Representing Five Oak Street Reno)

On, *Wednesday, June 22th, 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.

Approval of Minutes

Chairman Keupp made a Motion to approve the minutes from May 11th, 2022. Member DiVitto seconded the Motion. All members were in favor. The Motion Carried.

Chairman Keupp made a Motion to approve the minutes from May 25th, 2022. Member Hardeman seconded the Motion. All members were in favor. The Motion Carried.

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

Chairman Keupp made a Motion to close the meeting to go into Executive Session for legal advice. Member Vorolieff seconded the Motion. All members were in favor. The Motion Carried.

Chairman Keupp made a Motion to re-open the meeting. Member Vorolieff seconded the Motion. All present members were in favor. The Motion Carried.

Chairman Keupp asserted that the Board did not pass any resolutions or make any decisions during Executive Session. He stated the Board has a draft decision. An informal decision was made at the May 25, 2022 ZBA meeting. The purpose of today's meeting is to finalize everything. He then referred to the Board for any questions or comments.

Member Vorolieff commented that he read through the draft resolution/decision stating that this is obviously Mr. Daniels legal interpretation of the ZBA discussion on May 25, 2022 about the issues that led the Board to certain decisions points. He pointed out the following: Agricultural products are not grown or produced on location; most of the products being sold are from third party vendors; the majority of the hay isn't grown on the land at the location or on land that is rented by the applicant. He further commented, additionally, according to the determination of New York State Agriculture and

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Markets, this operation does not qualify as a farm operation. After the Applicant appealed the decision, the NYS Department of Agriculture and Market denied the appeal again making the determination that the operation is non-agricultural.

Chairman Keupp commented that it's clear that this operation is not a farm operation. Pointing out, the land is not being used in agriculture production and to be considered by NYS Agriculture and Markets to be a farm operation, they need to have 7 acres, this location only has 5 acres. Even if there were agricultural production on site, they don't have enough acreage to qualify it.

Village Council asserted that it could qualify if it were a leased property. I don't think that alone would be a criteria you would want to apply.

Chairman Keupp further pointed out further that they're not growing anything there; there are no livestock, etc. It doesn't meet the generally accepted standards of what is considered "agricultural."

Member DiVitto again pointed out the NYS Agriculture and Markets rendered its decision as well.

Chairman Keupp concurred and pointed out the NYS Ag and Market rendered the same (not a farm operation) determination on appeal. He stated that the Board gave the Applicant time and opportunity to rectify this issue. The Village granted the Applicant the opportunity to appeal the State's decision, which they did. The Chair further pointed out that products for this operation are stored outside which goes against Village Code unless the operation qualifies as a farm operation which, in this case, it does not. They failed at holding up their end.

After more discussion and deliberation, Chairman Keupp Motioned to adopt the Resolution/Decision as drafted. The Motion was seconded by Member Vorolieff and passed by a roll call vote as follows:

	<u>Aye</u>	<u>Nay</u>	<u>Abstain</u>
<i>Chairman Michael Keupp</i>	<u>X</u>	<u></u>	<u></u>
<i>Ann Hardeman</i>	<u>X</u>	<u></u>	<u></u>
<i>Fred DiVitto</i>	<u>X</u>	<u></u>	<u></u>
<i>Nicholas Vorolieff</i>	<u>X</u>	<u></u>	<u></u>
<i>Thomas Zarecki</i>	<u></u>	<u></u>	<u>X</u>
TOTAL	<u>4</u>	<u>0</u>	<u>1</u>

Member Zarecki commented that he abstained from voting due to the fact that he was not in attendance during previous deliberations on May 11th and May 25th.

Member Vorolieff pointed out that the Village hires consultants who are certified by the State of NY to do inspections granting other Village employees, specifically the Clerk in this case, the authority to sign off on Notice of Violations. There should be no question moving forward that the Clerk of the Village of Pawling has the authority to sign formal notices based on the expertise and recommendations of the state certified consultants hired by the Village to do inspections. Village Council Daniels asserted the resolution must to be filed by the Village Clerk within five days.

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Five Oak Street Renovation Variances (6957-20-986028)

Urban Regulations: Parking Location

Bulk Regulations Schedule C: Lot Coverage

Urban Regulations: Required Minimum Setbacks on Front – Arch Street

Urban Regulations: Required Minimum Frontage Buildout – Oak Street

Urban Regulations: Required Minimum Frontage Buildout – Arch Street

Urban Regulations: Garden Wall

Mr. Johnson presented the Board with a summary of the proposed project and the Area Variances being sought as stated above.

Member Vorolieff commented that it seems that projects that are coming across the ZBA in the last number of months, there is often a request for increased lot coverage of impermeable surfaces and asked Mr. Johnson if he and the applicant have looked into alternatives to impermeable surfaces for the parking area.

Mr. Johnson replied that a lot of times those pervious surfaces for parking become problematic with maintenance because they tend to clog any of the porosity in those materials. Discussion ensued regarding the different options concluding that none would be appropriate based on the variations in climate and weather in this location.

Review and deliberation of Variance #1: Urban Regulations: Parking Location

Member Vorolieff commented that it is an unusual property pointing out that there are some definite constraints in developing this project. He explained there are two frontages, one on Oak Street and one on Arch Street stating that he sees the point about the garden wall being an obstruction to the parking spaces and adding that layout would be an improvement. He then asked Mr. Johnson if there is a possibility of permit parking for the residences.

Mr. Johnson confirmed that there is no permit parking and explained that there are five parking spaces, one parking space for each residential unit designated for residents only between the hours of 5pm to 8am. During the day time the parking is shared with patrons of the commercial space. The owner and employees of the commercial space would have to utilize Merchant Parking. There is also on street parking and Lou Musella who's on the Planning Board and is also the traffic enforcer said there is very rarely full parking on Arch Street. He then pointed out that there will be signs indicating the parking restrictions and stated that this would be enforced by the owner of the building.

Member DiVitto ask how the Applicant came to the decision to build five one bedroom units opposed to two bedroom units so in order to use two of the parking spaces for the commercial use.

Mr. Johnson replied that the commercial use isn't an issue because there is ample parking in the area and there is Merchant Parking offsite.

Member Vorolieff pointed out that most of the parking in that area has a 3 hour time limit. Chairman Keupp asked if there is any interest in the commercial space. Mr. Johnson replied, not yet.

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Member Zarecki asked can that commercial space at any point in time be changed to multiple commercial spaces.

Mr. Johnson replied that it isn't large enough to break it down into multiple spaces.

Village Council Dave Daniels asserted that this space has been designated and a retail space, changing it to another type of use would require a Special Use Permit.

With no other comments or questions, Chairman Keupp made a Motion to grant the variance for Urban Regulations: Parking Location. Member Vorolieff seconded the Motion. All Members were in favor. The Motion Carried.

Review and deliberation of Variance #2: Bulk Regulations Schedule C: Lot Coverage (maximum lot coverage is 75%, applicant is seeking a 10% increase for lot coverage to 85%)

Member Vorolieff asked Mr. Johnson if the strips of land surrounding parking area are going to remain permeable landscaping, grass and dirt surfaces.

Mr. Johnson replied, yes, on all three sides except for the footprint of the building and the five parking spaces adding that there is also a planting area in the front. He pointed out that the hard part is to adhere to the strict application of the Urban Regulations where you're required to have building frontage of 90% and you have to build on the property line. It kind of leads you into covering the entire site in the downtown by a building.

Member Vorolieff added then you'd lose all of those parking spaces. He then stated that he is ok to make a motion to grant the variance, he just wants to make sure that the remaining areas remain as landscaped and completely permeable.

With no other comments or questions, Member Vorolieff made a Motion to grant the variance for Bulk Regulations Schedule C: Lot Coverage of 10% increase to 85%. Member Zarecki seconded the Motion. All Members were in favor. The Motion carried.

Review and deliberation of Variance #3: Urban Regulations: Required Minimum Setbacks on Front – Arch Street (Building Setbacks are not permitted in the front yard).

Chairman Keupp commented that the current building is old and rundown. The proposed changes will definitely be an improvement. In this case, it would be difficult to make an improvements to the site and abide by a strict following of the Code. Some alterations have to be made in this case.

Member Vorolieff commented if we were to adhere to the building setbacks part of the Code, we'd lose all of those five parking spaces. So I think that this design use of the property is probably the best application for what's wanted and how it's going work with the parking needs.

With no other comments or questions, Chairman Keupp made a Motion to grant the variance for Urban Regulations: Required Minimum Setbacks on Front – Arch Street. Member Vorolieff seconded the Motion. All Members were in favor. The Motion Carried.

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Review and deliberation of Variance #4: Urban Regulations: Required Minimum Frontage Buildout – Oak Street (A minimum of 90% frontage buildout is required, the applicant is providing 52%)

Member Vorolieff commented that it seems like there's two things kind of working together in tandem at the front here. The setback has to do with how far back the building is. The frontage is how wide the building is across that frontage.

Mr. Johnson described where both, the Oak Street frontage and Arch Street frontage is per discussions with the Planning Board. Pointing out that some of the green space would be lost and the parking spaces would be lost on arch Street. So we're bringing the building closer to the property line without interfering with the greenspace.

With no other comments or questions, Member Vorolieff made a Motion to grant the variance for Urban Regulations: Required Minimum Frontage Buildout – Oak Street. Member DiVitto seconded the Motion. All Members were in favor. The Motion Carried.

Review and deliberation of Variance #5: Urban Regulations: Required Minimum Frontage Buildout – Arch Street (A minimum of 90% frontage buildout is required, the applicant proposes 0%).

With no other comments or questions, Member Zarecki made a Motion to grant the variance for Required Minimum Frontage Buildout – Arch Street. Member Hardeman seconded the Motion. All Members were in favor. The Motion Carried.

Prior to moving on to the next variance, Member Zarecki asked Mr. Johnson what kind of lighting is currently in place on the site.

Mr. Johnson replied that lighting will be provided in the overhangs, below the second floor. There's no pole lighting and there is existing street lighting.

Member Zarecki commented that that corridor gets very dark at night. That will help as that section of the Village continues to be developed.

Review and deliberation of Variance #6: Urban Regulations: Garden Wall (Garden wall shall be built on frontage property lines in the absence of building walls. The Applicant proposes no garden wall on Arch Street).

Member Vorolieff commented that there have been some instances in the past where projects are granted variances with the ZBA that then change and take on an entirely different look that doesn't quite fit in quite well with the community. He said some of the materials being considered for this project include dark asphalt shingles, grey siding, white vinyl trim and half red brick walls look like it will fit in with the character of the area and suggested to the Board that all variances granted tonight are based upon these materials as presented to the Board both during discussions and on images including the Site Plan. All decisions on these variances are based on this whole proposal including how this is going to fit in with the neighborhood.

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Mr. Johnson replied that the applicant is that same person who developed the property next door (7 Oak Street). The intent is to have the same finishes of that one so it will feel like a larger building.

Member Vorolieff said ok. So I just want to make sure that we understand that there's a condition that these variances that we're approving tonight are based on this designs that you have provided to the Board.

Village Council Daniels asked if the materials that were discussed are part of the architectural guidelines.

Mr. Johnson said, yes, and they were also submitted them to the Planning Board and discussed at the last meeting also.

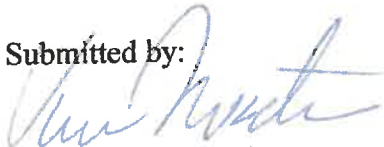
With no other comments or questions, Member Zarecki made a Motion to grant the variance for Urban Regulations: Garden Wall. Member Vorolieff seconded the Motion to grant the Variance with the conditions that we are expecting the building to look as presented during deliberations and as demonstrated on the site plan. All Members were in favor. The Motion Carried.

All submission documents and consultant reports can be found on file at the Village Hall.

Adjournment

Chairman Keupp made a Motion to adjourn until the June 22nd, 2022 ZBA meeting. The Motion was seconded by Member Vorolieff. All Members were in Favor. The Motion Carried.

Submitted by:



Vivian Nikolatos, Secretary

At a Meeting of the Village of Pawling Zoning Board
of Appeal held at 9 Memorial Avenue, Pawling, New
York, on the 22th day of June 2022, at 7:00 PM

**RESOLUTION OF THE ZONING BOARD OF APPEALS OF THE VILLAGE OF
PAWLING**

Identifier: Heinchon Dairy, Inc. and Eastern Hay Corporation Request for Interpretation

The meeting was called to order by Chairman Michael Keupp and the following were:

P R E S E N T:

☒ Chairman Michael Keupp
☒ Ann Hardeman
☒ Nicholas Vorolieff
☒ Thomas Zarecki
☒ Fred Devitto

FILED WITH
JUN 22 2022
VILLAGE CLERK

The following Resolution was proposed by Michael Keupp, who moved its adoption, and
seconded by Nicholas Vorolieff.

WHEREAS, on or about April 7, 2022 Heinchon Dairy, Inc. and Eastern Hay Corporation (the "Appellants") submitted an appeal to the Village of Pawling Zoning Board of Appeals ("the "ZBA") requesting an interpretation and appealing a determination issued by the Village Clerk on June 17, 2021 (the "Violation") asserting that the Applicants are in violation of sections 98-10, 98-19, 98-45, 98-46 and 98-65 of Chapter 98 Zoning of the Code of the Village of Pawling ("Code");

WHEREAS, pursuant to New York Village Law Section 7-712-A and Section 98-67 of the Code the ZBA has jurisdiction to hear and decide appeals from and review any order, requirement, decision, interpretation, or determination made by the administrative official charged with the enforcement of the zoning code of the Village of Pawling;

WHEREAS, on May 11, 2022 a duly noticed Public Hearing was held and the Appellants and members of the public were provided with an opportunity to be heard;

WHEREAS, the Public Hearing was left open until May 25, 2022 for the additional submission of documents by the Applicants and the ZBA's Attorney;

WHEREAS, at its meeting on May 25, 2022, the ZBA passed a resolution denying the Applicant's requested interpretation that it be deemed a farm operation and/or an agriculture use and a further resolution denying the Applicant's request that the notice of violation issued by the Village Clerk be dismissed;

NOW THEREFORE BE IT RESOLVED THAT with respect to the Applicant's request for interpretation and appeal, the ZBA issues the decision annexed hereto and made a part hereof as Exhibit "A".

The question of the foregoing Resolution was duly put to a vote, the Zoning Board of Appeals voting as follows:

	<u>Aye</u>	<u>Nay</u>	<u>Abstain</u>
Chairman Michael Keupp	<u>X</u>	—	—
Ann Hardeman	<u>X</u>	—	—
Fred Devitto	<u>X</u>	—	—
Nicholas Vorolieff	<u>X</u>	—	—
Thomas Zarecki	—	—	<u>X</u>
TOTAL	<u>4</u>	—	<u>1</u>

I hereby certify that the above is a true and correct copy of the Resolution passed by the Village of Pawling Zoning Board at a meeting held on June 22, 2022

Date: June 22, 2022


Zoning Board of Appeals Secretary

**VILLAGE OF PAWLING
ZONING BOARD OF APPEALS**

X

**HEINCHON DAIRY, INC. and
EASTERN HAY CORPORATION,**

Applicants.

X

DECISION

On April 7, 2022, Heinchon Dairy, Inc., and Eastern Hay Corporation (the "Applicants") filed an application ("Application") with the Village of Pawling Zoning Board of Appeals ("ZBA" or "Board") seeking a requested interpretation of §§ 98-10, 98-19, 98-45, 98-46 and 98-65 of the Village of Pawling Zoning Law ("Village Zoning Law") and appealing a determination by the Village Clerk dated June 17, 2021 that the Applicants' use and occupancy of the property at 112 East Main Street, Pawling, New York (the "Property") violates §§ 98-10, 98-19, 98-45, 98-46 and 98-65 of the Village Zoning Law.

In the Application, the Applicants request that the ZBA render a determination that the Applicants' use of the Property is agricultural and therefore: (i) § 98-19 does not apply and (ii) the Property is exempt from Village Zoning Law §§ 98-10, 98-19, 98-45, 98-46 and 98-65.

For the reasons set forth above, we find that Village Zoning Law § 98-19 does apply to the Applicants' use of the Property and that the Applicants' use of the Property is not exempt from Village Zoning Laws §§ 98-10, 98-19, 98-45, 98-46 and 98-65.¹

¹ The provisions cited in the notice of violation were: §98-19 that all uses of property in the B-2 zone be carried out in buildings fully enclosed on all sides, §98-45 it is unlawful, without a certificate of occupancy, to occupy or use any land or building, §98-46 a special permit must be issued by the Planning Board prior to issuing a certificate of occupancy for any use of land or building requiring same and §98-65 requiring site plan approval in the B-2 District for any principal uses (other than single family dwelling), accessory uses and special permit uses except for certain interior alterations.

The Applicants expressly acknowledge that "§98-10 requires the requisite approvals from the local jurisdiction" (see Ebinder, Application at 9). Village Zoning Law § 98-10 provides in part as follows:

"no building shall be erected and no existing building shall be moved, altered, rebuilt, added to or enlarged, nor shall any land or building be used, designed or arranged to be used for any purpose or in any manner except in conformity with all applicable regulations, requirements and restrictions specified in this chapter for the district in which such building or land is located."

Based on this acknowledgement, it appears that the Applicants acknowledge that Village Zoning Law § 98-10 requires the requisite approvals from the local jurisdiction and thus do not dispute the general applicability of the Village Zoning Law to the Property (see Ebinder, Application at 9). However, the Applicants contend that §§ 98-45, 98-46 and 98-65 of the Village Zoning Law, which pertain to certificates of occupancy, special permits and site plan approvals, are not applicable to the Property because the Property is located in a B-2 district in which agriculture is a permitted use and because the use of the Property constitutes a farm operation affording the Applicants' protection under §§ 305-a and 308 of the New York Agriculture and Markets Law ("AML").²

Contrary to Applicants' contention above, the Board finds that the Property is not a farm operation under the AML and thus has no protection from the Village Zoning Law under AML 305-a.³ "Farm operation" is defined in AML § 301(11), in pertinent part, "as land and on-farm

² The provisions cited in the notice of violation were: Village Zoning Law § 98-19: that all uses of property in the B-2 zone be carried out in buildings fully enclosed on all sides, Village Zoning Law § 98-45: it is unlawful, without a certificate of occupancy, to occupy or use any land or building, Village Zoning Law § 98-46: a special permit must be issued by the Planning Board prior to issuing a certificate of occupancy for any use of land or building requiring same, and Village Zoning Law § 98-65: requiring site plan approval in the B-2 District for any principal uses (other than single family dwelling), accessory uses and special permit uses except for certain interior alterations.

³ AML § 305-a requires that the Village, in administering its zoning law, must exercise its powers so it does 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".

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, ... 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 Village Clerk, based upon a recommendation of Edward Larkin⁴, determined that the current use of the Property is not a farm operation. A similar finding was made by the NY Department of Agriculture and Markets ("A&M"). Specifically in its letter to the Applicants dated October 15, 2021, A&M found that the Applicants were not a farm operation eligible for protection under AML § 305-a protection because, inter alia Eastern Hay sells hay purchased from third parties and sells additional products not grown by the Applicants (see Ebinder, Exhibit 3 at 92). This initial finding was ratified by A&M in its letter dated April 12, 2022 (see Ebinder, Exhibit 6 at 102).

The recommendation of Mr. Larkin indicates that it was based on his extensive review of relevant public information, including review of historical aerial imagery of the site showing an increase over time in the number of trailers and packaged material located on the site, visual observation of the site from the street, a review of Eastern Hay's website advertising various commercial products for sale and consultation with A&M (see Ebinder, Exhibit 25 at 232). A&M's findings in October of 2021 and April of 2022 were made after A&M received various submissions

⁴ §98-59A of the Village Zoning Law expressly authorized the Village Clerk to issue this notice of violation. Further, at the time of issuance of the notice of violation, Edward Larkin was employed by Chazen Engineering, the firm engaged by the Village to perform the services required of a building inspector, other than those required to be exercised by a Village official. The notice of violation was issued by the Village Clerk upon the recommendation of Edward Larkin dated June 3, 2021 (see Ebinder, Exhibit 25 at 234). This process was authorized by the Village consistent with 19 NYCRR § 1203. 2(3)(1) which provides (i) that when a municipality such as the Village uses a contract service for the principal part of its program to enforce the uniform code, a Village official, and not the contractor must execute documents related to such program and such execution must be supported by a recommendation from a person meeting the qualifications to act as a building inspector and (ii) that when a public official such as the Village clerk executes a document upon the recommendation of a person qualified to act as building inspector, such execution is a "ministerial act".

and communications from the Applicants. Based on our review of Edward Larkin's and A&M's respective findings as well as information submitted by the Applicants to A&M, the Board finds that:

- (i) No agricultural products are grown or produced on the Property;
- (ii) Eastern Hay uses the Property to sell grain, animal bedding, and other feed products to its customers. These products are purchased from third party vendors and are not grown on land owned or leased by Applicants;
- (iii) Eastern Hay uses the Property to sell hay to its customers. The majority of this hay is purchased by Eastern Hay pursuant to purchase agreements with third parties and is not grown on land owned or rented by Applicants.
- (iv) Sales of off farm produced products constitute a majority of Eastern Hay's sales.
- (v) The Applicants' parking of trailers on the Property increased over time as described by Mr. Larkin (see Ebinder, Exhibit 25 at 232). ⁵

(See Ebinder, Exhibit 3 at 92 and Exhibit 6 at 102).

Based on the foregoing findings, we reject Applicants' contention that the Applicants are using the Property for a farm operation and find that Applicants are not entitled to protection under AML § 305-a. Accordingly, Applicants are required to comply with the provisions of the Zoning Law cited in the notice of violation.

We also reject Applicants' claim that the Property is not subject to the Village Zoning Law based on the fact that agricultural uses are permitted in the B-2 zone. In order to be protected under AML § 305-a, a property must qualify as a farm operation. Accordingly, an agricultural use would not be entitled to protection under AML § 305-a if it falls within the meaning of agricultural

⁵ During the course of this appeal, the number of trailers located on the Property has dwindled.

use, but not within the meaning of a farm operation.

Therefore, based on our finding that the Property does not qualify as a farm operation, any agricultural or other use of the Property will not be protected under AML § 305-a, and any use of the Property, including the Applicants' current use, must meet all applicable requirements of the Village Zoning Law, including any applicable requirements for site plans approval, special use permits, building permits and certificates of occupancy.

We also find that the current uses of the Property are the retail sale of goods and the operation of a commercial parking and/or storage lot. "Agricultural use" is not specifically defined in the Village Zoning Law. However, "agriculture" is a word of ordinary import and the Board will apply what it understands to be its usual and commonly understood meaning. Merriam Webster Dictionary defines "agriculture" as the science, art, or practice of cultivating the soil, producing crops, and raising livestock and in varying degrees the preparation and marketing of the resulting products.⁶ As with the definition of farm operation in the AML, this dictionary definition clearly contemplates that marketing of products will only be deemed agricultural if those products are grown or cultivated by the farmer. Applying this definition to the Applicants' use of the Property, the Board finds that Applicants are not engaged in an agricultural use of the Property because the predominate use of the Property is the sale of products purchased from third party vendors. In reaching this conclusion we also consider as relevant the following definition of "land used in agricultural production", in AML §301(4):

not less than seven acres of land used as a single operation in the preceding two years for the production for sale of crops, livestock or livestock products of an average gross sales value of ten thousand dollars or more; or, not less than seven

⁶ <https://www.merriam-webster.com/dictionary/agriculture#:~:text=Definition%20of%20agriculture,to%20use%20it%20for%20agriculture.>

acres of land used in the preceding two years to support a commercial horse boarding operation or a commercial equine operation with annual gross receipts of ten thousand dollars or more. Land used in agricultural production shall not include land or portions thereof used for processing or retail merchandising of such crops, livestock or livestock products. Land used in agricultural production shall also include:.. a. Rented land which otherwise satisfies the requirements for eligibility for an agricultural assessment." (emphasis added).

This definition is similar to the definition of "farm operation" in that it excludes property used for the sale of products not grown on the subject property or on other land owned or leased by the owner or tenant. Accordingly, for the same reason that the Property does not qualify as a farm operation under AML § 301(11), it also does not qualify as land used in agricultural production under AML § 301(4).

We also find that, even if the current use of the Property did somehow qualify as an agricultural use under the Village Zoning Law, it would not be exempt from having to comply with the same requirements as would apply to other permitted uses in the B-2 zone, including applicable requirements for site plan approval, building permits and certificates of occupancy. See Village Zoning Law § 98-65 (site plan approval required for principal uses in the B-2 zone).

Based on our finding that the use of the Property is not agricultural, we also find that the Property is subject to Village Zoning Law § 98-19, requiring that all uses of property in the B-2 districts and all storage accessory thereto be carried out in buildings fully enclosed on all sides by a building.⁷

The Applicants also claim that the Village Zoning Law provisions cited in the notice of violation do not apply to the Property because the Village has reviewed the subject property in the past and "has issued various correspondence, SEQRA decisions, resolutions of approval and

⁷ We note that this prohibition in §98-19 would not apply if the Applicants were to obtain a special permit to operate a commercial parking lot. We find that the other exceptions to this requirement set forth in §98-19 are not applicable.

Certificate of Occupancy Permits for the site and at no time did the Village of Pawling indicate that the site was non-compliant nor provided any indication that the use of the site did not meet the Village Code” (see Ebinder, Application at 9). The Applicants specifically refer to a site plan and special permit application approved by the Village of Pawling Planning Board on June 13, 2017 relating to a proposed use of the Property for intermittent overflow parking from concerts at Daryl’s House (see Ebinder, Application Exhibits G, H, I at 43 – 53). This application states that the site has been granted Agricultural status by the A&M and that “[it] is proposed that the existing uses remain on the property”.⁸ The gist of Applicants’ contention related to this expired zoning approval appears to be that because the Village did not require the Property to comply with the Village Zoning Law in the past, it was not permitted to do so in June of 2021 when it issued the notice of violation. The Applicants’ position is not supported by the record. Edward Larkin’s June 3, 2021 letter recommending issuance of the notice of violation makes clear that it was not until shortly before the notice of violation was issued in June of 2021 that the Village became aware that the Applicants were not eligible for protection as a farm operation under AML § 305-a (see Ebinder, Exhibit 25 at 231). This letter states in substance that based on Mr. Larkin’s extensive research and after consulting with A&M, he found “probable cause to believe that the operation of the site/business has changed over time to include general mercantile and commercial business uses that no longer meets the definition of an agricultural use” (see Ebinder, Exhibit 25 at 233) and that he therefore recommends issuance of a notice of violation. Further, the Village held the notice of violation in abeyance for approximately nine (9) months while the Applicants sought a

⁸ This site plan application was accompanied by a request from 13th Step LLC, dba Daryl’s House for special permit to use of the property for temporary and periodic parking from Daryl’s House, a local music venue. This proposed use was limited to specific hours and days of the week and required that the Daryl’s House meet a number of conditions. Although the special permit was issued, the Applicants do not contend that it was ever activated. Thus, the issuance of this site plan and special use permit does not support the Applicants’ claim that they are not required to comply with the Village Zoning Law.

determination from A&M that they were a farm operation (see Ebinder, Application Exhibit B at 31, Application Exhibit C at 33, Exhibit 1 at 89, Exhibit 3 at 92 and Exhibit 6 at 102). It is clear from Mr. Larkin's letter that his recommendation was based on the Applicants' current use of the Property, not their past use. Any determinations by the Village with respect to the Property prior to issuance of the notice of violation were premised on the Village's understanding and belief that the Property was agricultural. Accordingly, neither the Applicants' past use of the Property nor any actions taken or reviews conducted by the Village in connection with such past use support that Applicants' contention that it is not subject to Village Zoning Law.

As a final matter, for the reasons set forth in the letter from the Board's attorney David E. Daniels to Applicants' attorney Ken Stenger dated May 24, 2022 (see Ebinder, Exhibit 26 at 250) the Board finds that (i) the Applicants' appeal based on alleged defects in the notice of violation is time barred because it was not included in the Application; and (ii) even if such appeal is not time barred, such appeal is denied based on fact that the Village Clerk was clearly authorized to issue such notice of violation under Village Zoning Law § 98-59A and pursuant to the resolution of the Village Board dated February 3, 2022.

VILLAGE OF PAWLING

Zoning Board of Appeals

Wednesday, June 22, 2022 @ 7:00 P. M.
Village Hall on 9 Memorial Avenue

AGENDA

- 1. Opening of Meeting, Roll Call and Pledge of Allegiance**
- 2. Approval of Minutes**
- 3. Consider Issuance of Formal Decision on Eastern Hay/Heinchon Dairy Appeal and Request for Interpretation**
- 4. Five Oak Street**
- 5. Adjournment**

**VILLAGE OF PAWLING
ZONING BOARD OF APPEALS**

X

**HEINCHON DAIRY, INC. and
EASTERN HAY CORPORATION,**

DECISION

Applicants.

X

On April 7, 2022, Heinchon Dairy, Inc., and Eastern Hay Corporation (the “Applicants”) filed an application (“Application”) with the Village of Pawling Zoning Board of Appeals (“ZBA” or “Board”) seeking a requested interpretation of §§ 98-10, 98-19, 98-45, 98-46 and 98-65 of the Village of Pawling Zoning Law (“Village Zoning Law”) and appealing a determination by the Village Clerk dated June 17, 2021 that the Applicants’ use and occupancy of the property at 112 East Main Street, Pawling, New York (the “Property”) violates §§ 98-10, 98-19, 98-45, 98-46 and 98-65 of the Village Zoning Law.

In the Application, the Applicants request that the ZBA render a determination that the Applicants’ use of the Property is agricultural and therefore: (i) § 98-19 does not apply and (ii) the Property is exempt from Village Zoning Law §§ 98-10, 98-19, 98-45, 98-46 and 98-65.

For the reasons set forth above, we find that Village Zoning Law § 98-19 does apply to the Applicants’ use of the Property and that the Applicants’ use of the Property is not exempt from Village Zoning Laws §§ 98-10, 98-19, 98-45, 98-46 and 98-65.¹

¹ The provisions cited in the notice of violation were: §98-19 that all uses of property in the B-2 zone be carried out in buildings fully enclosed on all sides, §98-45 it is unlawful, without a certificate of occupancy, to occupy or use any land or building, §98-46 a special permit must be issued by the Planning Board prior to issuing a certificate of occupancy for any use of land or building requiring same and §98-65 requiring site plan approval in the B-2 District for any principal uses (other than single family dwelling), accessory uses and special permit uses except for certain interior alterations.

The Applicants expressly acknowledge that “§98-10 requires the requisite approvals from the local jurisdiction” (see Ebinder, Application at 9). Village Zoning Law § 98-10 provides in part as follows:

“no building shall be erected and no existing building shall be moved, altered, rebuilt, added to or enlarged, nor shall any land or building be used, designed or arranged to be used for any purpose or in any manner except in conformity with all applicable regulations, requirements and restrictions specified in this chapter for the district in which such building or land is located.”

Based on this acknowledgement, it appears that the Applicants acknowledge that Village Zoning Law § 98-10 requires the requisite approvals from the local jurisdiction and thus do not dispute the general applicability of the Village Zoning Law to the Property (see Ebinder, Application at 9). However, the Applicants contend that §§ 98-45, 98-46 and 98-65 of the Village Zoning Law, which pertain to certificates of occupancy, special permits and site plan approvals, are not applicable to the Property because the Property is located in a B-2 district in which agriculture is a permitted use and because the use of the Property constitutes a farm operation affording the Applicants’ protection under §§ 305-a and 308 of the New York Agriculture and Markets Law (“AML”).²

Contrary to Applicants’ contention above, the Board finds that the Property is not a farm operation under the AML and thus has no protection from the Village Zoning Law under AML 305-a.³ “Farm operation” is defined in AML § 301(11), in pertinent part, “as land and on-farm

² The provisions cited in the notice of violation were: Village Zoning Law § 98-19: that all uses of property in the B-2 zone be carried out in buildings fully enclosed on all sides, Village Zoning Law § 98-45: it is unlawful, without a certificate of occupancy, to occupy or use any land or building, Village Zoning Law §98-46: a special permit must be issued by the Planning Board prior to issuing a certificate of occupancy for any use of land or building requiring same, and Village Zoning Law § 98-65: requiring site plan approval in the B-2 District for any principal uses (other than single family dwelling), accessory uses and special permit uses except for certain interior alterations.

³ AML § 305-a requires that the Village, in administering its zoning law, must exercise its powers so it does 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”.

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, ... 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 Village Clerk, based upon a recommendation of Edward Larkin⁴, determined that the current use of the Property is not a farm operation. A similar finding was made by the NY Department of Agriculture and Markets (“A&M”). Specifically in its letter to the Applicants dated October 15, 2021, A&M found that the Applicants were not a farm operation eligible for protection under AML § 305-a protection because, inter alia Eastern Hay sells hay purchased from third parties and sells additional products not grown by the Applicants (see Ebinder, Exhibit 3 at 92). This initial finding was ratified by A&M in its letter dated April 12, 2022 (see Ebinder, Exhibit 6 at 102).

The recommendation of Mr. Larkin indicates that it was based on his extensive review of relevant public information, including review of historical aerial imagery of the site showing an increase over time in the number of trailers and packaged material located on the site, visual observation of the site from the street, a review of Eastern Hay’s website advertising various commercial products for sale and consultation with A&M (see Ebinder, Exhibit 25 at 232). A&M’s findings in October of 2021 and April of 2022 were made after A&M received various submissions

⁴ §98-59A of the Village Zoning Law expressly authorized the Village Clerk to issue this notice of violation. Further, at the time of issuance of the notice of violation, Edward Larkin was employed by Chazen Engineering, the firm engaged by the Village to perform the services required of a building inspector, other than those required to be exercised by a Village official. The notice of violation was issued by the Village Clerk upon the recommendation of Edward Larkin dated June 3, 2021 (see Ebinder, Exhibit 25 at 234). This process was authorized by the Village consistent with 19 NYCRR § 1203. 2(3)(1) which provides (i) that when a municipality such as the Village uses a contract service for the principal part of its program to enforce the uniform code, a Village official, and not the contractor must execute documents related to such program and such execution must be supported by a recommendation from a person meeting the qualifications to act as a building inspector and (ii) that when a public official such as the Village clerk executes a document upon the recommendation of a person qualified to act as building inspector, such execution is a “ministerial act”.

and communications from the Applicants. Based on our review of Edward Larkin's and A&M's respective findings as well as information submitted by the Applicants to A&M, the Board finds that:

- (i) No agricultural products are grown or produced on the Property;
- (ii) Eastern Hay uses the Property to sell grain, animal bedding, and other feed products to its customers. These products are purchased from third party vendors and are not grown on land owned or leased by Applicants;
- (iii) Eastern Hay uses the Property to sell hay to its customers. The majority of this hay is purchased by Eastern Hay pursuant to purchase agreements with third parties and is not grown on land owned or rented by Applicants.
- (iv) Sales of off farm produced products constitute a majority of Eastern Hay's sales.
- (v) The Applicants' parking of trailers on the Property increased over time as described by Mr. Larkin (see Ebinder, Exhibit 25 at 232). ⁵

(See Ebinder, Exhibit 3 at 92 and Exhibit 6 at 102).

Based on the foregoing findings, we reject Applicants' contention that the Applicants are using the Property for a farm operation and find that Applicants are not entitled to protection under AML § 305-a. Accordingly, Applicants are required to comply with the provisions of the Zoning Law cited in the notice of violation.

We also reject Applicants' claim that the Property is not subject to the Village Zoning Law based on the fact that agricultural uses are permitted in the B-2 zone. In order to be protected under AML § 305-a, a property must qualify as a farm operation. Accordingly, an agricultural use would not be entitled to protection under AML § 305-a if it falls within the meaning of agricultural

⁵ During the course of this appeal, the number of trailers located on the Property has dwindled.

use, but not within the meaning of a farm operation.

Therefore, based on our finding that the Property does not qualify as a farm operation, any agricultural or other use of the Property will not be protected under AML § 305-a, and any use of the Property, including the Applicants' current use, must meet all applicable requirements of the Village Zoning Law, including any applicable requirements for site plans approval, special use permits, building permits and certificates of occupancy.

We also find that the current uses of the Property are the retail sale of goods and the operation of a commercial parking and/or storage lot. "Agricultural use" is not specifically defined in the Village Zoning Law. However, "agriculture" is a word of ordinary import and the Board will apply what it understands to be its usual and commonly understood meaning. Merriam Webster Dictionary defines "agriculture" as the science, art, or practice of cultivating the soil, producing crops, and raising livestock and in varying degrees the preparation and marketing of the resulting products.⁶ As with the definition of farm operation in the AML, this dictionary definition clearly contemplates that marketing of products will only be deemed agricultural if those products are grown or cultivated by the farmer. Applying this definition to the Applicants' use of the Property, the Board finds that Applicants are not engaged in an agricultural use of the Property because the predominate use of the Property is the sale of products purchased from third party vendors. In reaching this conclusion we also consider as relevant the following definition of "land used in agricultural production", in AML §301(4):

not less than seven acres of land used as a single operation in the preceding two years for the production for sale of crops, livestock or livestock products of an average gross sales value of ten thousand dollars or more; or, not less than seven

⁶ <https://www.merriam-webster.com/dictionary/agriculture#:~:text=Definition%20of%20agriculture,to%20use%20it%20for%20agriculture.>

acres of land used in the preceding two years to support a commercial horse boarding operation or a commercial equine operation with annual gross receipts of ten thousand dollars or more. **Land used in agricultural production shall not include land or portions thereof used for processing or retail merchandising of such crops, livestock or livestock products.** Land used in agricultural production shall also include:.. a. **Rented land which otherwise satisfies the requirements for eligibility for an agricultural assessment.**" (emphasis added).

This definition is similar to the definition of "farm operation" in that it excludes property used for the sale of products not grown on the subject property or on other land owned or leased by the owner or tenant. Accordingly, for the same reason that the Property does not qualify as a farm operation under AML § 301(11), it also does not qualify as land used in agricultural production under AML § 301(4).

We also find that, even if the current use of the Property did somehow qualify as an agricultural use under the Village Zoning Law, it would not be exempt from having to comply with the same requirements as would apply to other permitted uses in the B-2 zone, including applicable requirements for site plan approval, building permits and certificates of occupancy. See Village Zoning Law § 98-65 (site plan approval required for principal uses in the B-2 zone).

Based on our finding that the use of the Property is not agricultural, we also find that the Property is subject to Village Zoning Law § 98-19, requiring that all uses of property in the B-2 districts and all storage accessory thereto be carried out in buildings fully enclosed on all sides by a building.⁷

The Applicants also claim that the Village Zoning Law provisions cited in the notice of violation do not apply to the Property because the Village has reviewed the subject property in the past and "has issued various correspondence, SEQRA decisions, resolutions of approval and

⁷ We note that this prohibition in §98-19 would not apply if the Applicants were to obtain a special permit to operate a commercial parking lot. We find that the other exceptions to this requirement set forth in §98-19 are not applicable.

Certificate of Occupancy Permits for the site and at no time did the Village of Pawling indicate that the site was non-compliant nor provided any indication that the use of the site did not meet the Village Code” (see Ebinder, Application at 9). The Applicants specifically refer to a site plan and special permit application approved by the Village of Pawling Planning Board on June 13, 2017 relating to a proposed use of the Property for intermittent overflow parking from concerts at Daryl’s House (see Ebinder, Application Exhibits G, H, I at 43 – 53). This application states that the site has been granted Agricultural status by the A&M and that “[it] is proposed that the existing uses remain on the property”.⁸ The gist of Applicants’ contention related to this expired zoning approval appears to be that because the Village did not require the Property to comply with the Village Zoning Law in the past, it was not permitted to do so in June of 2021 when it issued the notice of violation. The Applicants’ position is not supported by the record. Edward Larkin’s June 3, 2021 letter recommending issuance of the notice of violation makes clear that it was not until shortly before the notice of violation was issued in June of 2021 that the Village became aware that the Applicants were not eligible for protection as a farm operation under AML § 305-a (see Ebinder, Exhibit 25 at 231). This letter states in substance that based on Mr. Larkin’s extensive research and after consulting with A&M, he found “probable cause to believe that the operation of the site/business has changed over time to include general mercantile and commercial business uses that no longer meets the definition of an agricultural use” (see Ebinder, Exhibit 25 at 233) and that he therefore recommends issuance of a notice of violation. Further, the Village held the notice of violation in abeyance for approximately nine (9) months while the Applicants sought a

⁸ This site plan application was accompanied by a request from 13th Step LLC, dba Daryl’s House for special permit to use of the property for temporary and periodic parking from Daryl’s House, a local music venue. This proposed use was limited to specific hours and days of the week and required that the Daryl’s House meet a number of conditions. Although the special permit was issued, the Applicants do not contend that it was ever activated. Thus, the issuance of this site plan and special use permit does not support the Applicants’ claim that they are not required to comply with the Village Zoning Law.

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