

Town of Danby Board of Zoning Appeals
Minutes of Hearing and Meeting
October 22, 2019

PRESENT:

Lew Billington
Gary Bortz
Toby Dean
Earl Hicks (Chair)

ABSENT:

Betsy Lamb

OTHER ATTENDEES:

Town Planner John Czamanske
Future Town Planner Jason Haremza
Town Supervisor Ric Dietrich
Town Councilperson Leslie Connors
Recording Secretary Alyssa de Villiers
Applicants David Jordan, Jed Jordan
Public: Andria Auerrell, Nate Clark, Ted Crane, Stu Fegely, Janet Gray, Bill Keokosky,
 Brian LaMorte, Dave McDermitt, Denise McDermitt, Sarah Schnabel, Linda Wyatt

1. CALL TO ORDER

The meeting was opened at 7:04pm.

2. APPROVAL OF MEETING MINUTES

MOTION: Approve minutes from the April 23th meeting

Moved by Dean, seconded by Bortz

The motion passed.

In favor: Billington, Bortz, Dean, Hicks

3. APPEAL OF ZONING OFFICER INTERPRETATION

Appeal by David Jordan, Owner, of a Zoning Officer determination and interpretation dated August 2, 2019 regarding the proposed use of 1582 Danby Road (Tax Parcel 7.1-1-11) for a farm cidery tasting room by Rogue Creek Cidery. The property is in the Low Density Residential Zone.

Chairman Hicks opened the meeting by reading the Jordans' interpretation appeal. He explained that this appeal is to find if the Zoning Officer's interpretation of the Zoning Ordinance was correct. He said that the Board of Zoning Appeals (BZA) also reviews appeals for area and use variances, wherein they are asked to grant a waiver to a requirement while looking at negative impact and unreasonable burden, but that their interpretation role is different. He asked that members hold emotional values and sensitivity to the situation back and focus on what the code says as they embark on a fact-finding mission. Bortz added that it was also an interpretation of the Department of Agriculture and Markets (Ag & Markets), Liquor Authority, and Department of Health requirements. Bortz said it was his first experience with an interpretation appeal and asked Planner Czamanske how the Board will reach a conclusion in the end, i.e. through individual statements, an agreement, or a vote. Czamanske answered that the BZA is a quasi-judicial body. They will gather facts through the hearing process to put together a record. Once they have a record, they can make a determination at this meeting or adjourn to read over the materials, consider the matter further, and deliberate at the next meeting. They can either reach a consensus or have a vote on whether the Zoning Officer's interpretation of the Zoning Ordinance was correct based on what he knew at the time.

Planner Czamanske had provided some documents to the Board and applicants through email, and he handed out a number of documents at the meeting, most of which are available on Laserfiche under "Board of Zoning Appeals Submittals," accessible through the Town's website. Among the documents he passed out were the NYS Agriculture and Markets Law (AML), Local Law No. 2 of 2009: "A Local Law Related to the Right to Engage in Agricultural Activity in the Town of Danby," the updated "Guidelines for Review of Local Laws Affecting Direct Farm Marketing Activities," the Planning Board minutes from the September 19th, 2019 meeting, and copies of communications with the Jordans' lawyer, Tracy Jong.

The Town's Code Officer, who has also been acting as the Zoning Officer, is John Norman. Planner Czamanske noted that Mr. Norman has submitted his notice and his last day will be at the end of October. Czamanske has been an interim planner; he began in March and will end when the newly hired planner, Jason Haremza, begins November 1st. Czamanske gave a timeline of the events relating to Rogue Creek Cidery since he has been in the position: He met with Mr. Jordan on March 19th to discuss issues Mr. Norman had raised of whether the use was allowed, which called into question the permit the Jordans had already been issued by the previous Code Officer in April 2018. Czamanske confirmed that the property was not in an agricultural district (ag district) and what the zoning was (Low Density Residential). There was then a meeting between Planner Czamanske, Town Supervisor Dietrich, Code Officer Norman, and Mr. Jordan, in which Mr. Norman said the tasting room use, as he understood the proposal, was not allowed. Mr. Norman renewed the building permit but only for residential use. On June 24th there was a communication from Mr. Jordan's lawyer, which Mr. Norman was privy to, and there was another communication from Attorney Jong on July 2nd. The Jordans and their lawyer asked the Town to reinterpret the Ordinance as they felt that a tasting room is allowed. The Town asked for more specifics on the proposal, and there was a July 14th correspondence. On August 2nd there was a letter from Mr. Norman to the applicants (which contains the interpretation being appealed). Czamanske noted that when Mr. Norman was making his interpretation, he had all of this information and also the State Liquor Authority (SLA) notice to the Town in 2018 for the Jordans' application for a cidery license and an application that went to the

Health Department. Czamanske and the Jordans then communicated prior to the September 19th Planning Board meeting, which the Jordans attended as a voluntary site plan review, and Czamanske sent out a memo to the Planning Board in advance of the meeting. Mr. David Jordan pointed out there was also a rebuttal presented to the Planning Board memo that should be included in the record.

Chairman Hicks said the Board has 62 days from the conclusion of the hearing on the matter to render its decision, and that decision should be supported by findings that constitute substantial evidence; the period can be extended by mutual consent of the Board members and the applicant. He noted that the full Board is five members. Decisions are based on a majority of the full Board counting vacancies, absences, and abstentions, so three members would need to agree the Zoning Officer's interpretation was incorrect. One Board member, Betsy Lamb, was absent.

Board Member Bortz commented that in the July 14th letter from Attorney Jong, the Jordans lay out what they are planning to do, and he asked the applicants if anything has changed. The applicants' response was held until the public hearing.

Public Hearing

The public hearing was opened at 7:41pm. (Moved by Billington, seconded by Dean).

Hicks said the Board wants to be transparent and interactive and encourages people to share their thoughts and relevant information. The focus will be on the Jordans' request and the fact-finding mission.

David Jordan: Mr. Jordan noted that Mr. Norman's August 2nd letter approves some farm operations and denies others. He asked if he could read a summary of what they are asking for, passed out a handout for attendees, and read it aloud. In it, he explained that a tasting room and farm stand are currently going to be allowed at the site but not a small kitchen. He said that typical agricultural uses are allowed in the Low Density Residential (LDR) zone, and that their understanding is the Town would use Ag & Markets' definitions of what is an agricultural practice, even if the applicant is not in an ag district. He made the point that, "commercial agricultural use cannot be construed as simply a commercial use, which is not allowed in an LD zone." He discussed the interplay of local codes and zoning, Ag & Markets guidelines, and the State Liquor Authority. He stated that the neighbors are in "full support of our proposed activities," as evidenced by a petition. He said that a tasting room with de minimus food service is allowed but without a sanitary kitchen for food production, which he believes is unreasonably restrictive. Through their request they hope to have a kitchen approved for the dual purpose of food preparation for food to be paired with hard cider and the processing and packaging of apiary products, maple sap, jellies, pickles, and other farm-sourced produce.

Bill Keokosky: Mr. Keokosky said he had looked at some of the paperwork and concluded that this is only one code. There is, in his opinion, another code, and a higher code—a moral code. A permit had been issued by the Town and, after the Jordans put in thousands of dollars into their

project, the permit was denied. He has spoken to attorneys and past code officers and has thought about it himself and has come to the conclusion that to provide a permit one year and deny it the next is not right. He asked the members of the BZA to please make it right.

Ric Dietrich (Town Supervisor): Mr. Dietrich asked how the Board would feel about submitting the letter that Mr. Jordan just read to Mr. Norman for a response and the ability to provide a comment. Mr. Norman is not readily available but he thought a written response might be possible. Supervisor Dietrich thought that, from a code point of view, there is a different take than what Mr. Jordan said. He said it was unfortunate the Code Officer was not there to explain his reasoning and he does not want Mr. Jordan's letter to be a standalone opinion of the status quo. He also responded to Mr. Keokosky by saying that the original Code Officer's permit was given under the erroneous understanding that the property was in an ag district. Mr. Keokosky responded by asking him if he supports the opening of a cidery.

Chairman Hicks said he saw no problem with that and would think that interacting with Mr. Norman would be part of the process. He said he thought Mr. Norman should be part of the process if he is available. Bortz, however, thought that that may confuse the issue as whatever the Board decides may not agree with whatever rebuttal Mr. Norman puts in, and the Board is giving the final say. Hicks told Dietrich the point was taken, and they will try to get the letter in front of Mr. Norman before he leaves if possible.

Denise McDermitt: Ms. McDermitt said she is a lifetime resident of Danby. When she received the map in the mail was the first she had heard about the cidery. She takes exception with the Jordans' characterization of "unanimous" approval from all the neighbors, as she is the closest neighbor to the south; she also knew of others further up on 96B who had not been notified. She is pro business in Danby, and recognizes the Town is a fraction of the Town it once was but feels that this is trying to put a round peg in a square hole. She said she thought the Town would be in full support if the project was suggested on E. Miller Rd. Because the Danby Rd. site is in a LDR neighborhood, although she has a field between her house and the property, if she were closer, she would have concerns about hours of operation, potential noise, and cars parking. She knew the property under its previous owner, when it was very well maintained, and realizes that that has not been the case since his death. She asked the applicants what they were asking for in terms of parking, and a site plan was given to her showing 12–14 parking spots. She asked what would happen when they exceed the parking available as they are on the State highway. She said she would love this if it were on E. Miller Rd., and that in creating a business, you want it to be successful and grow. She asked about a document with preliminary menus attached. Reading through the paperwork, she was trying to understand what they plan to do. She had read something that talked about using the existing septic system, and she asked if they have been approved and whether it is a newer system. The McDermitts' system failed and they had trouble finding an area for the new system so she wondered what the Jordans would do in the event of needing a new leach field on this small property.

Mr. Jed Jordan responded and apologized that the McDermitts had not been approached. Mr. David Jordan also apologized and said he did not mean to speak for her; for those people who signed the petition, they were in favor of it. Jed Jordan said that, through the process of voluntary site plan review and speaking with Mr. Norman, they scaled down the parking so that it is enough spaces to serve the footprint of the building and the seating. He said they are not having any events that would draw a larger volume of people. The intention is to build the brand and promote products. Originally, they had been thinking of a farm stand. They have a pick-your-own berry farm, keep bees and make honey products, sometimes do maple syruping, grow garlic, make and sell pickles, and hope to add jellies. This is a small family business that they hope to grow over time. At the Danby Rd. site they hope to sell these items and promote people visiting the farm that is a mile away to pick berries and see the cidery; the apples are grown and cider is processed on farm at the E. Miller site. If they reach the point where the parking lot was full, that would be a success in itself, and would tell them that they should move it to the E. Miller site. They are restricted by the floor plan of the building at the Danby Rd. site. They have no intention of being a restaurant, and do not imagine sit-down visits. He noted that, along with all the paperwork Mr. Norman had, there were also phone conversations between the Town's lawyer and the Jordans' lawyer. In one of those phone conversations, it was suggested that the applicants do a survey of other tasting rooms in the area to answer the question of whether having food service at a tasting room was typical, as a lot of the language around what is allowed is based on what is "typical." It was clarified that Ms. McDermitt was talking about a different menu that has "burgers" crossed off. Jed Jordan said that the menu is not entirely up to them as Ag & Markets has guidelines as to what is allowed and how much needs to be farm-sourced; he gave an example of farm-sourced requirements for events. He then clarified he does not mean they will have events, that is just a category for which Ag & Markets gives very specific percentages. Hours would be seasonal. They plan to be open July to the end of December. They imagine being open 12–7pm, possibly closing earlier on weekdays. This has not been finalized, and Jed Jordan suggested that he sees this as an iterative process that happens with the Town and the neighbors. Regarding the septic system, they had to review the sanitary conditions and the water supply with the Department of Health, and they followed their guidelines.

Hicks asked Czamanske about the Town's "right to farm" law (Local Law No. 2 of 2009), and said that, similar to the rights of residential property owners, the right to farm law allows certain activities. What these activities/rights are is part of the reason for the meeting. He said there is a good reason Danby has been willing to embrace that law to encourage and support and maintain farming. Czamanske said that he is not an expert on this, but he spoke with somebody involved in the crafting of this local law who was familiar with the thinking behind it, which led to the idea that the intent was to extend the definitions of what farm operations are, as defined by the State, to other areas of the Town that are outside of ag districts. Hicks added that non-applicants have the right to file an appeal to permits.

Jed Jordan said that Hicks had begun the meeting emphasizing a focus on the code, and yet there was currently a public hearing, and he asked what Hicks understood the function of public comments not about code to be in terms of the decision-making process. He said he did want everyone to feel valued. Board Member Billington said that usually the Board meets for things like setbacks and input from neighbors about noise, traffic, and safety, which he thought had been addressed through the Planning Board. Now the Board is interested in code and its interpretation and changes like the 9/30/19 update to “Guidelines for Review of Local Laws Affecting Direct Farm Marketing Activities” which came after Mr. Norman’s letter. But it is important to get the feedback of everyone who chooses to speak, even if it is not necessarily germane to their decision. Bortz added that people want to know what’s going on.

Bortz read the July 14th letter from Attorney Jong to the Town’s lawyer, Guy Krogh, to give insight to people in the audience and also as a starting point for the Board. The letter described the Jordans’ purpose and goal and asked what can be done under current zoning, what may need a special permit, and what might require a zoning change. It was confirmed that the information is still correct, except the parking has been reduced 12–14 spaces. Hicks said that a permit for residential use and a tasting room have already been authorized by the Code Officer, and the question is about the kitchen. Without limiting input, bigger issues with the tasting room would go through a different process. Bortz said that he read it because the meeting was still open to the public, and he wants to make sure the public still has input. He reviewed that, overall, the proposal is for a mixed-use property—part residential with an apartment to be rented, a canning/bottling/pickling operation, a cider tasting sales room with local, farm-based food menu in a café setting with no takeout service. Mr. David Jordan agreed with this, saying they want to prepare the food on site, consistent with Ag & Markets and NYS Liquor Authority guidance. Food processing is what they would like to do as part of a farm operation; the cider processing is done at the main facility.

Brian LaMorte: Mr. LaMorte said his property butts up against the back of the applicant’s property. He owns a small business with his partner. He expressed support for the project, and said that he thinks everyone should be doing what they can to support small agriculture. If there is any vagueness at all in the law, he said it should go in the Jordans favor rather than against them. They will not reduce the value or appeal of the neighborhood, and if anything will make it a lot cooler.

Ted Crane: Mr. Crane said that at other BZA meetings he has heard applicants given the opportunity to defer until all five members are present, giving them five chances to get three votes. He said he was part of the group involved in forming the right to farm law, mostly in a listening role. The understanding was it applied to those areas that were not State forest or in ag districts. The law was tied to definitions coming out of Ag & Markets. He feels that now Ag & Markets has expanded the definition of farming to the point that if you did not know it was agriculture, you would simply call it commercial operations. That law, like other things in Danby, is out of date and requires review, but it is the law. He said Mr. Jordan talked about local law, Ag & Markets Law, and NYS Liquor Authority law. His understanding is that the Liquor Authority does not override local law and Ag & Markets Law does not apply because this is not in an ag district. The relevant law then is the

Town's Local Law No. 2 of 2009. He thought Ag & Markets would aggressively defend the right of the farmer to do what it permits, whereas Danby simply permits it, and the right to farm law does not override Danby's zoning. The nub of the question is, is what is being proposed part of the Town's zoning or not? He noted that sometimes projects take on a life of their own and details are not cleared up ahead of time, including if zoning permits the use. The Town said the project was okay, and now feels that determination was wrong, so there may be an ethical issue, but the change of decision is not the argument being talked about here. He asked if the Board could write something about events and parking into their determination.

Hicks noted that the Board's duty is to figure out if the code says something or not, and they cannot impose conditions.

Stu Fegely: Mr. Fegely said he lives next door to the property, and much of what had been talked about clarified things for him. He was glad to hear the parking had been reduced. He signed the petition and does not object. He would rather have a business next to him than a dilapidated, falling-apart house. Ideally it would be residential, but it is not a perfect world. In the August 2nd letter from Mr. Norman, he agreed with "to minimize adverse impacts to nearby areas and residences, here mainly anticipated in respect to noise, traffic, traffic access, and circulation."

Dave McDermitt: Mr. McDermitt said he did not think Mr. Jordan had addressed the issue of the septic system leach field and asked about it again. Is there enough land to support a second leach field in the event of a failure? He also asked about water use for processing and bottling, and how this may or may not affect the water table level.

Regarding the leach field, Mr. David Jordan said they could extend it if they have to.

Andria Auerrell questioned this and said she had been told that, should their septic need major repair, they would have to upgrade to a current, coded septic system.

Denise McDermitt said that is what they had to do, and it was hard to site even with more land than at the proposed cidery. When they have to replace, what will they do since they plan to have a parking area and an orchard?

Board member Dean said this can come up with any property, and there are a lot of non-conforming lots in the Town.

Ms. McDermitt pointed out that not all properties are commercial with customers using bathrooms.

Hicks said that was one of Mr. Norman's interpretations—when does the tasting room become commercial.

Regarding water use, Mr. Jed Jordan said he needs a sanitary facility for honey production; he currently has to drive 25 minutes to use one. There is no water extraction for honey or maple syrup bottling. Mr. David Jordan said they have purchased a steam dish washer, which is approved by the Department of Health and is the same as a residential system.

Ric Dietrich (Town Supervisor): Mr. Dietrich reiterated that the Board has not heard from the Code Officer. There are land use issues and setback issues, but the real point of contention is the code. He believes there are some code problems; Mr. Norman is needed to weigh in on what exactly is in violation of code and to respond in a current fashion about where the situation sits right now.

Dean read aloud the problem the Code Officer described in his August 2nd letter—
“...the property is not permitted to be used as an assembly space for live music, food service, food production, large assembly events, or other activities which are not covered under the definition of an AML tasting room.” As far as he can see, that is the only problem Mr. Norman has with the proposal.

Andria Auerrell: Ms. Auerrell said she lives directly across the street. She signed the petition, although she saw it more as a non-objection rather than active support. She thinks Danby could use more life like this project. She asked if this is a variance for the zoning, which Hicks clarified it is not—it is an interpretation of the zoning. She wanted to know if this has any effect on the interpretation of zoning for the rest of residents’ properties; if one goes commercial, do other properties then have the potential to be developed commercially, and would this be the beginning of a snowball effect. She asked if this decision will update or change the code.

Hicks said that their duty is to interpret code, and this would involve looking at past decisions, so in that sense this decision will create a precedent. Code tries to be concise but there is obviously interpretation. No new code will be made; they are only interpreting existing code with more minds than just the Code Officer’s.

Planner Czamanske said that it takes an action by the Town Board to amend the Zoning Ordinance. The BZA cannot change the code, but precedent would lead the Zoning Officer in the future to likely interpret the Ordinance the same way to allow a similar use. He noted that the word “code” has been used a lot, but with many meanings depending on who is using it. There is the international building code that NY has adopted and there is the Town’s zoning. Currently there is no active building permit for a tasting room. The permit extended in April 2019 was for the residential portion. Presently the Jordans can seek a new permit for a tasting room according to the interpretation by Mr. Norman, and that is when issues related to the building code would come to fore and the Code Enforcement Officer would deal with those things. The interpretation in the August 2nd letter was a zoning interpretation. Currently Mr. Norman is the Code Officer, Code Enforcement Officer, and Zoning Officer; he made the decision with his “Zoning Officer hat” on. His “Code Officer hat” he wears when looking at building permit applications; there is not currently an application for the tasting room in front of the Code Officer. The Jordans will have to go through the building permit review process when they apply. In response to a comment from Hicks he noted that this process is not public, but, yes, once a permit is granted, it could be appealed.

Bill Keokosky: Mr. Keokosky said he disagrees with everything that has been said about code. In his

opinion, having looked at other towns in NY, code is not an irrevocable, biblical admonition like the Ten Commandments. It is modified by precedent. If the Board is flexible about something for the Jordans, they are in that process of making code applicable to a present situation or a changing situation. The Ithaca Journal recently had an article on cideries. It deals with the Fingerlakes area, encouraging the idea that in this area, particularly in Tompkins County, this is an excellent investment in rural communities like Danby.

Jed Jordan: Mr. Jordan read from Local Law No. 2: "It is the general purpose and intent of this Local Law to help maintain and preserve the rural tradition and character of the Town of Danby, to protect the existence and operation of farms, and to encourage the initiation and expansion of farms and agricultural uses, where such farms and agricultural uses employ sound agricultural practices." He said that, in relation to Ms. Auerrell's comment about it being commercial and attracting more commercial, they are bound by "sound agricultural practices." If there are objections to the farm operation proposed, one would really need to explain how it is not a sound agricultural practice to bottle honey and have a cider tasting room and to be serving the products of one's farm. The Law is from 2009, and there may be discomfort about how agricultural uses have expanded, and this is a great time for the Town to consider what aspects of the local laws can be clarified, but he would hope that here we are looking at the intent to protect the existence and expansion of these uses.

Hicks said that one task is to figure out if the branch appendage from the main farm is encumbered in the laws that Mr. Jordan cited.

Mr. Jordan said it is and that there is specific language in Ag & Markets that says the branch is part of the farm operation, with no threshold of size.

Ms. McDermitt said she did not want them to have the impression that they are not in support of expanding farms, having a business, or making money. She thinks it is amazing for Danby, and their only concern is the chosen location. She said the branch property did not use to be a farm, and Mr. Jordan responded that it was, before the previous owner. She said the property the Jordans bought was not a farm at the time, and that might be what some people are struggling with. Mr. Jordan said that is what the Town is struggling with—development and the loss of its agricultural heritage—that is what is at stake here.

Hicks noted that every year there is the opportunity to petition to be included in an ag district, and the Jordans have an application in to have the branch property included.

Czamanske said that NYS's agricultural districting program is tied to Article 25AA of the Ag & Markets Law. If a County creates an ag district, then that ag district operates under the set of laws in Article 25AA. The branch operation discussion applies inside the ag district, which currently this property is not. The Town's zoning law allows customary agricultural uses as a permitted right in every zone in Town—the question is, what is a "customary agricultural use." That is where the Town's right to farm law and how that is read comes into play, which brings in the AML definitions because some have said that was the intent. The review of an ag district happens every eight years, and the Town can add or remove parcels at this time.

Now there is an annual enrollment process, but only at the eight-year review can you take them out. Currently Ag District #1 is undergoing review.

The public hearing was closed at 9:23pm. (Moved by Dean, seconded by Billington).

Board Discussion

Bortz asked about the grounds for denial for ag district applications. Czamanske said it is the County Legislature's prerogative to create and review districts. There is a process, including a public hearing, and the towns in which landowners have requested to be added to the district are notified. The Town has the opportunity to respond, but it is the County Legislature that makes the determination, and ultimately the Commissioner of Ag & Markets who certifies the review, and they are not required to agree with the Town.

Bortz also asked what would happen if this property was in an ag district. Czamanske said that the issues would still be there in terms of what is allowed in the use envelope under the Ag Districts Law, and how that relates to the Town's zoning law. The Ag Districts Law (Article 25AA) alone gives a quasi-preemption of zoning. This is what says municipalities shall not unreasonably regulate farm operations. Unreasonability is a determination that is made by the Commissioner of Ag & Markets. If a farmer believes they are being regulated unreasonably (e.g. site plan review of corn fields), they could take a complaint to the Commissioner and a determination would be given, similar to a determination of what is a "sound agricultural practice." Dean asked whether a property is removed from the Low Density Residential zone if it is put into an ag district. Czamanske said, no, the underlying zoning is still there, and municipalities can regulate farms reasonably. He has recommended basic site plan review for large operations that would bring the public onto the farm to ensure safe ingress and egress, parking, lighting, and signage; presently the Town does not have this requirement. He showed a map of where the Town's ag districts are located; Mr. David Jordan said their farm on E. Miller Rd. is in Ag District #2, and their application for the branch site could be added to Ag District #1 or #2. Why there are two districts was briefly discussed.

A five minute break was taken.

Dean asked if South Hill Cider on Sand Bank Rd. is in the Low Density Residential zone, to which Czamanske answered, "yes." Dean noted that it has a kitchen and is following AML measures in terms of food products. He is not sure how it affects this situation other than perhaps an issue of precedent. Bortz pointed out that that property is in an ag district. Dean said part of his question is how the ag district affects that.

Bortz asked the applicants about the food products they would be serving and whether the bottling, canning, and pickling operation would be of on-farm products, and strictly their own product. They answered yes, that is the intent. It was agreed there are guidelines around that. Bortz then asked about the food source for the cidery café. Again, there should be a clear connection to the farm-produced crops, and Jed Jordan answered that each item on the menu would be centered on one of their farm products. David Jordan explained the goal is to promote the value-added product. For example, they do not make bread,

but what goes in the sandwich should be what they have on the farm. Some products like cheese and crackers or a charcuterie plate might be accepted because it pairs well with the beverages offered. Hicks noted that what is allowed is defined by Ag & Markets, and that is utensil-less meals. He thinks that part of that is to define what is not a restaurant.

Hicks read from Code Officer Norman's August 2nd letter, "...as long as the use is agricultural within the constraints and thresholds set forth in the AML...this property may be used as a tasting room as defined by, and within the scope of, such defined use as set forth in the AML..." and then read the next paragraph, which says that for uses outside of a tasting room, the Town Ordinance defines what is an allowed use. Hicks says this is what they are fundamentally trying to figure out---is there a definition of a tasting room and what is it. Mr. David Jordan said he thought Mr. Norman made an error in that section of the letter. Ag & Markets defines farm operations and farm operations permits those activities he is denying now, specifically food processing; he does not believe there is an actual definition of a tasting room as implied by Mr. Norman, rather it is in the scope of farm operations.

Dean said the AML says pretty clearly that an area to prepare farm products and finger foods would be part of a tasting room, and you see that all over the Fingerlakes region. The zoning code says restaurants are only allowed in the Commercial zone, but he does not see this as a restaurant in the sense of a large commercial operation that would be suitable for Commercial C. Hicks questioned if the kitchen is lending itself to being a restaurant or not. Dean pointed out that on page three, section D of the "Guidelines for Review of Local Laws Affecting Direct Farm Marketing Activities" (updated 9/30/19), it says, "Some larger farm markets may have facilities for the on-site preparation of processed foods (e.g. a kitchen, bakeshop, etc.), as well as facilities for the consumption of foods (e.g. a café)." They mention the word kitchen/café and also mention the de minimus percentage. Dean said generally a restaurant would have longer hours, a larger menu, and people would expect to sit for a full meal. David Jordan added that Ag & Markets inspects farm operations and the Department of Health inspects restaurants. For restaurants, the split of food to beverage might be 70:30, and the predominant revenue source is the food, whereas for a tasting room, the predominant source of income is the beverage. He added that Ag & Markets is looking for you to promote the agriculturally sourced product as the predominant element and revenue stream; in this context, this answers the question of what is a restaurant and what is a tasting room by who does the inspections.

Bortz asked about if a special permit would be applicable in this case. Czamanske said that this is not a special permit use, and it is not totally clear how the special permits part of the Ordinance operates in terms of how much latitude the Planning Board has to take up those questions. Customary agricultural use is a permitted use in LDR; restaurants are not. The definition of customary agricultural use in the zoning was written many years ago, Local Law No. 2 of 2009 was written ten years ago, and what Dean read was written a month ago. There is an evolving definition of things that the Town needs to wrestle with in terms of the Zoning Ordinance and ag districts and modernizing the language and understandings in the zoning. Bortz pointed out the "other uses" section of special permits, but Czamanske thought this did not fit because it is not similar to the other uses listed, and from his understanding the Planning Board does not really have jurisdiction to consider a special permit for this. He said the Zoning Ordinance is, of course, part

of the record in this case. It says that in LDR the principally permitted uses are customary agricultural use, residential, and public utilities. There are no site plan uses and then there are special permit uses, including "other uses." Regarding the question of whether somebody can go straight to the Planning Board or whether it needs to start with the Zoning Officer, his understanding is that it is more with the Zoning Officer. David Jordan read from "Guidelines for Review of Local Zoning and Planning Laws," which says, "agricultural uses in an agricultural district are not, however, 'special uses.' They are constitutionally recognized land uses that are protected by AML," although it was pointed out that that is in ag districts. Czamanske said if one reads the zoning and right to farm law alone, it does not seem as expansive as if you read the Ag Districts Law and what has evolved through Ag & Markets. The understanding of the intent of the right to farm law is what led to the interpretation. The question is how much comes out of the Ag District Law, does the BZA agree that is the intent of the right to farm law, and how does it operate in the context of the zoning.

Dean suggested saying they disagree with Mr. Norman's decision but make the provision it be added to the ag district. Bortz asked what would happen if it was refused. Hicks noted that if they disagree with the interpretation, they have to specifically identify what section of code was misinterpreted or illustrate a piece of code that was not considered.

Czamanske noted that the Planning Board did not have any authority to make a decision in their September 19th meeting because customary agricultural use does not require site plan review; the applicants underwent an optional site plan review. Billington asked if the Planning Board will be considering addressing any zoning changes at its next meeting. Czamanske said the Board does have the discussion of zoning changes on its next agenda, although not specific to this type of use. It also has the review of Ag District #1 on its agenda, and whether there are properties that should be added or removed, in large part because of the evolving definitions of farming and how the Town should consider that in relation to its land use laws.

Dean read from Mr. Norman's August 2nd letter, "Thus, bistro or short-order restaurant services, catering operations, events hosting, a live music venue with late night hours, and commercial food production operations exceed these parameters..." He checked with the Jordans that they had ruled out all but the food production operation and said, to him, that seemed allowed within the AML as farm operations. So the last part of the sentence is where he has a problem with Mr. Norman's conclusions. Jed Jordan said that is it, the whole thing—is food processing in a sanitary space part of a farm operation. Hicks said that is why Supervisor Dietrich wished Mr. Norman was there to explain what that was based on. The idea of commercial activity is woven through the issue, and what piece of code is that based on. Dean said he thinks this is the crux of the matter. He wished the house had more acreage and that it was just up the road in the Commercial zone, which is very close, but that is not the case. It does seem unfair that someone else got to have a tasting room and sell cider in the Town (in LDR), but the Jordans were turned down, although that may not be germane.

Hicks also read from the August 2nd letter, "Thus, proposed uses or on-site business or related activities that fall outside of the respective AML and SLA standards are indicators of commercial activity, which are not allowed uses in this zone, not protected by the AML." This is the key, what is AML's definition of what a tasting room operation might entail. Mr. David Jordan said if they are going along with the modern definitions of what Ag & Markets defines to be a farm operation, they explicitly say that a farm operation is commercial. It is not commercial in the sense of the broader definition as it is applied to zoning; it is not all commercial activity that is allowed, only a farm. In response to a statement by Hicks, Czamanske said the Ag District Law is the only place with a quasi-preemption of local land use control in that it says municipalities cannot unreasonably regulate farming, not the Liquor Authority or the ABC Law. Getting a license from the Liquor Authority does not mean you do not have to comply with the zoning. Mr. David Jordan discussed his application with the State Liquor Authority and the permitting process.

Billington asked about a use variance, as mentioned in the August 2nd letter. Czamanske said the Town Attorney might be needed for that question. He introduced the new Town Planner, Jason Haremza; his first day is November 1st. The Planner will now be the Zoning Officer also rather than the Code Officer taking on this role. The Code Officer will still be the Zoning Enforcement Officer. The BZA could ask if Mr. Norman and/or the Town Attorney could be present at the next meeting. Hicks pointed out the Board can adjourn and set a date to continue. He asked if denial of a special use permit would prompt a use variance appeal. Haremza answered that there are permitted uses, specially permitted uses, and prohibited uses. If the Planning Board denies a special use permit, the appeal is an Article 78 proceeding in the State Supreme Court, it does not go to the BZA. If a use is prohibited, then an applicant could ask for a use variance. Permitted uses you can just do with a building permit, specially permitted means the use is okay but you need an extra level of review, and prohibited uses are unwanted. You have to build a very strong case to get a special waiver from your zoning code to allow a use that is not permitted. Put simply, special permits start at "yes," variances start at "no."

Bortz asked if they were going to write a resolution or make an interpretation ruling. Czamanske said to look at Mr. Norman's letter and, if they disagree with what was written, say what should have been written. Dean suggested that he disagrees with the refusal of the "commercial food production operation" in the final paragraph and that the kitchen they are requesting falls within accepted farm/commercial operations for a tasting room. The other objections Mr. Norman mentioned the Jordans have taken out of their proposal so they do not have to be considered. He also mentioned referring to section D of the updated "Guidelines for Review of Local Laws Affecting Direct Farm Marketing Activities." Billington confirmed with Czamanske that the Board cannot apply any conditions. Czamanske recommended developing some findings as they move towards a decision to explain what it was that led them to whatever their ultimate decision is, and that they exercise due diligence and care in picking the words. Bortz suggested sleeping on it and meeting again.

Regarding the deliberation process, Czamanske said that there would not be another hearing, but it is a public meeting so people could attend and observe. Haremza said that it seems unorthodox to have the Board asking the applicants questions during deliberations. Once the testimony is closed, it is just the Board talking. Czamanske said if they find they need more information, they could seek it, and the

appellants would have the opportunity to rebut it. The Board members research and consideration will be done independently at home, and then they will come together at the meeting for discussion and to reach a conclusion. Interaction with the Town Attorney at the meeting would be public. Czamanske's time is now extremely limited, but he will return for Haremza's first day and will post the documents that are now part of the record. Haremza thought the Board member who could not attend, Betsy Lamb, could be involved if the meeting recording was made available.

It was agreed to hold another meeting on November 12th, 2019 at 7:00 p.m. Mr. David Jordan and Chairman Hicks discussed the legal time periods given for appeals and the time until a decision is made.

4. CONSIDER APPEAL SUBMITTAL DEADLINES AND OTHER PROCEDURES

Hicks brought up creating a timeline of when applicants must submit appeals. Right now he needs to do phone tag with the Planner to find out whether something is pending. His goal is to come up with a clearly defined process to get a hearing onto the schedule. Czamanske suggested Haremza can help to develop operating procedures and forms.

5. ADJOURNMENT

The meeting was adjourned at 10:56pm. (Moved by Dean, seconded Billington).

Alyssa de Villiers – Recording Secretary