

**STATE OF NEW YORK
DEPARTMENT OF AGRICULTURE AND MARKETS**

In the Matter of Compelling Compliance with the provisions of Agriculture and Markets Law §305-a, subdivision 1 by

**The Town of Fenton and The Town of Fenton Zoning Board of Appeals
44 Park Street
Port Crane, New York 13833**

**DETERMINATION
AND
ORDER**

PRELIMINARY STATEMENT

Upon receiving a complaint concerning the administration of the Town of Fenton's Zoning Code and a determination by the Town of Fenton Zoning Board of Appeals (ZBA) that the Weiss farm operation is considered "outdoor recreation" and not an agricultural use in Broome County Agricultural District #4, the Department of Agriculture and Markets investigated to determine whether the ZBA had administered its Land Use Regulations in a manner consistent with the provisions of §305-a, subd.1 of the Agriculture and Markets Law (AML). Subdivision 1 prohibits local governments from enacting or administering local laws that would unreasonably restrict farm operations located within an agricultural district unless it can be shown that the public health or safety is threatened.

The Department interviewed the farm owner, conducted a site visit, reviewed the ZBA's decision and the relevant portions of the Zoning Code, participated in a conference call with Town officials, and reviewed correspondence from the Town's Attorney. Based upon the relevant facts and information gathered, I hereby make the following findings and conclusions which support both a Determination that the Town of Fenton and the Town of Fenton ZBA have violated AML §305-a, subd.1 and an Order compelling compliance with such law.

FINDINGS

1. On June 21, 2002 the Department received a request from Raymond Weiss concerning an action by the Town of Fenton and the Town of Fenton ZBA with regard to the conduct of a livestock and horse boarding operation on a 170 acre parcel of land located on New York State Route 369 in the Town of Fenton. Mr.

Weiss and his wife, Jane Weiss, own a farm consisting of over 170 acres of land located within Broome County Agricultural District No. 4. Mr. Weiss states that his daughter, Traci Harrington, manages the farm. Mr. Weiss and his daughter breed, sell, board and train horses on the farm, which includes an outdoor riding arena/exercise area. Mr. Weiss reports that the farm receives an agricultural assessment. Mr. Weiss indicated that the Town classified the farm as "outdoor recreation" under the Zoning Code, subject to special use permit and site plan review requirements. Mr. Weiss appealed the Town's decision to the ZBA and requested an interpretation of the Zoning Code. He submitted a copy of the ZBA's June 3, 2002 decision, which upholds the Town's position that the farm constitutes "outdoor recreation."

2. On June 21, 2002, Kim Blot, the Director of the Division of Agricultural Protection and Development Services, sent a letter to the Town Supervisor, Edward Banks, and the Chairman of the ZBA, Dale Gregory, informing them of Mr. Weiss' request to conduct a review of the Town of Fenton's Zoning Code and its administration for compliance with AML §305-a.
3. Albert Millus, Attorney for the Town of Fenton, responded to Mr. Blot's June 21, 2002 letter by letter dated July 31, 2002. Mr. Millus stated that the Town had concluded, and the ZBA affirmed, that Mr. Weiss's operation constitutes an "Outdoor Recreational Use" within the meaning of the Town's Zoning Law. Mr. Millus argued that the Town's site plan requirement is not an unreasonable restriction which is inconsistent with AML §305-a. Mr. Millus contended that the Weiss Farm is not engaged in "farming" based upon his understanding that Mr. Weiss boards horses and operates a riding academy. Mr. Millus also provided background on a dispute between the farm and one of its neighbors. He did not contend that the public health or safety is threatened by the farm operation.
4. On August 20, 2002, Dr. Robert Somers, Chief of the Department's Agricultural Protection Unit, conducted a field review of the Weiss Farm. Dr. Somers observed that the farm is a working horse farm, which specializes in painted horses, and consists of over 50 horses owned by the Weiss's; 14 horses owned by others boarded at the farm; and several other livestock (approximately 12 hogs, 3 fallow deer, 3 goats, one donkey, 20+ domestic turkeys, and chickens with a rooster). Dr. Somers reported that the barn is an old dairy barn with two silos, which has been refitted to horse stalls. Other outbuildings include a maintenance garage and several small sheds which are used for the housing of turkeys and chickens. Fenced corrals and pasture exist along with a fenced-in training/riding area. The hogs have been bred and are sold by the farm. In addition to the land owned by Mr. and Mrs. Weiss, the farm rents land for the production of hay which is also sold. The fenced in training/riding area is used by boarders and to show horses to prospective buyers. Boarders ride and exercise their horses on the property. A letter submitted by Mr. Weiss's attorney to the ZBA in May 2002 states that "...Mr. Weiss does not offer trail rides or riding lessons, does not sell any tack or other

accessories and does not advertise for any of these services." The Weiss' indicate that the public is allowed to visit the farm as potential boarders or purchasers of livestock, but not to rent and/or ride the horses. Dr. Somers walked that portion of the property where the livestock is predominantly kept and examined the buildings. He concluded that the activity on the property was agricultural, not recreational, and did not observe any outdoor recreation associated with the farm.

5. The Department has consistently viewed the raising, breeding, boarding and sale of horses as a "farm operation." Riding and training activities which are directly related to and incidental to the boarding and raising of horses are also considered by the Department to be part of the "production, preparation and marketing" of such livestock. Under AML §301, subd. 11, "farm operation" means "...the land and on-farm buildings, equipment, manure processing and handling facilities, and practices which contribute to the production, preparation and marketing of crops, livestock and livestock products as a commercial enterprise, including a 'commercial horse boarding operation' as defined in subdivision thirteen of this section. 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." AML §301, subd. 13 defines the term "commercial horse boarding operation" as "...an agricultural enterprise, consisting of at least seven acres and boarding at least ten horses, regardless of ownership, that receives ten thousand dollars or more in gross receipts annually from fees generated either through the boarding of horses or through the production for sale of crops, livestock, and livestock products, or through both such boarding and such production..." The Department determined that the Weiss Farm is a farm operation for purposes of §305-a, subd.1 due to its horse breeding, sales, boarding and training activities. The raising and sale of other livestock, including turkeys, chickens and deer, and the keeping of goats and donkeys for sale, sale of their by-products, or use as on-farm guard animals, is also part of the farm operation.
6. By letter dated September 23, 2002, Mr. Blot informed Supervisor Banks and ZBA Chairman Gregory of the Weiss Farm field review conducted by Dr. Somers and the Department's conclusion that the farm is a "farm operation" under AML §305-a. Mr. Blot explained that Mr. Weiss indicated that his farm is located in the Town's Agricultural-Residential District, in which "Agriculture" is a permitted use. The Town Code does not define "agriculture," "farm," "farm structures and/or practices," or any other descriptive word or phrase used to define an agricultural enterprise or agriculture in general. The Town ZBA concluded by its June 3, 2002 decision that the Weiss' use of their land is an "Outdoor Recreational Use" according to §150-17-A(4) and therefore is subject to the provisions of §150-47(C). "Outdoor recreation," like "agriculture," is permitted within the Town's Agricultural-Residential District, but, unlike "agriculture" it is subject to the provisions of §150-47 and §150-47(C) of the Code, which require site plan review by the Town's Planning Board as well as additional conditions.

7. Mr. Blot explained that generally the construction of on-farm buildings and the use of land for agricultural purposes should be allowed in all areas located within a county adopted, State certified agricultural district. Mr. Blot noted that the purpose of an agricultural district is to encourage the development and improvement of agricultural land and that site plan and special permit reviews could impose expensive and burdensome requirements on farm operations. Mr. Blot stated that the classification of the Weiss farm operation as a "commercial outdoor recreational use," and not an agricultural use, subject to site plan and special approval requirements appeared to unreasonably restrict the Weiss farm operation in possible violation of AML §305-a, subd. 1. Mr. Blot requested that the Town and the ZBA contact the Department concerning the issues raised and that if they believed the public health or safety was threatened by the farm operation, to submit any documentation and other evidence they have to that effect.
8. Thereafter, Town Attorney Albert Millus and Department Associate Attorney John Rusnica had telephone discussions and corresponded by e-mail concerning the matter. Mr. Rusnica sent Mr. Millus an e-mail on September 27, 2002 expressing the Department's view that the key point in the case is that the ZBA has classified the Weiss Farm as a "commercial outdoor recreational use," which is subject to site plan and special approval requirements, while "agriculture," which is not defined in the Zoning Code, is a permitted use. Mr. Rusnica further noted that, as discussed in Mr. Blot's September 23rd letter, the Weiss Farm is engaged in "agriculture" and, therefore, based on the provisions of the Town's own Zoning Code should not be subject to the additional requirements.
9. Mr. Millus replied to Mr. Rusnica by e-mail dated September 27, 2002 and indicated that the Town is entitled to interpret its Zoning Law, that the ZBA had upheld the determination that the operation is an "outdoor recreational use" and challenged the Department's authority to question such action. Mr. Millus did not provide any documentation or other evidence of a health or safety threat.
10. Thereafter, Mr. Rusnica sent an e-mail, dated October 29, 2002, to Mr. Millus, wherein he inquired whether the Town intended to make any other written response to the Department's September 23rd letter and reiterated Mr. Blot's request that the Town provide the Department with any documentation and other evidence the Town may have that the public health or safety is threatened by the Weiss farm operation.
11. On November 8, 2002, the Department and Town officials, including Supervisor Banks and Town Attorney Millus, had a conference call to discuss the matter. The Town reiterated its position that the farm is an "outdoor recreational use" which is subject to site plan review and discussed generally the various issues arising from the dispute between the neighbors, including claims of a barking dog, dust from the dragging of the horse arena, music and lights used for the arena, a manure pile, and obstruction of access to a spring on the Weiss Farm. Based upon later

communications it appears that the Town viewed these claims as posing a health and safety concern.

12. On November 22, 2002, Mr. Blot wrote Supervisor Banks and ZBA Chair Gregory stating that the Department had completed its review concerning the Town of Fenton's Zoning Code and the determination by the Zoning Board of Appeals that the Weiss farm operation is considered an "outdoor recreation use" and not an agricultural use. The Department concluded that the ZBA's classification of the Weiss farm operation as an outdoor recreational use rather than an agricultural use, which requires that it be operated pursuant to a site plan and special approval requirements, unreasonably restricts the Weiss farm operation within Broome County Agricultural District Number 4, in violation of AML §305-a, subd. 1. The Department further concluded that the Town and the ZBA had not demonstrated that the public health or safety is threatened by the Weiss farm operation. The Department offered that the Town and the ZBA could comply with AML §305-a, subd. 1, by not applying §§150-17-A(4), 150-47 and 150-47(C) of the Town Code to the Weiss farm operation. The Department requested that the Town and the ZBA confirm within 15 days that §§150-17-A (4), 150-47 and 150-47(C) of the Zoning Code would not be applied to the Weiss farm operation within a county adopted, State certified agricultural district.
13. On December 4, 2002, Mr. Millus wrote Mr. Blot a letter in response to Mr. Blot's November 22, 2002 letter. Mr. Millus expressed the Town's belief that the Weiss operation, to the extent that horses are boarded and ridden on the farm, is subject to the Town's site plan approval processes. Mr. Millus contended that the Town may restrict and regulate the farm operation as long as it does so in a reasonable fashion. Mr. Millus states that the Town's previously expressed concerns about dust, noise, hours of operation, night lighting and possible well pollution due to manure placement are matters that affect the health, welfare and safety of neighbors in the vicinity of the Weiss property. While informing the Department of those concerns, the Town did not demonstrate that the public health or safety is threatened by the Weiss farm operation.
14. Since "Agriculture" is a permitted use under the terms of the Town's own Zoning Code, site plan review and special approval is not a proper means to address the Town's concerns. The Department informed the Town that "commercial horse boarding" is part of a farm operation and distinguished riding academies, which are not agricultural uses of land and are not part of a farm operation. The Department's site investigation confirmed that the farm is a "commercial horse boarding" operation and is raising horses and other livestock as a commercial enterprise.

CONCLUSION

Based upon the above findings, I conclude the following:

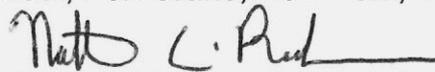
1. The Town of Fenton's administration of its Zoning Code and the interpretation by the Town of Fenton Zoning Board of Appeals that the Weiss farm constitutes an "outdoor recreational use" rather than an agricultural use, which requires it to operate pursuant to a site plan and special approval requirements, unreasonably restricts the Weiss farm operation in Broome County Agricultural District #4.
2. The Weiss operation is a "farm operation" within the meaning of AML §301, subd. 11 and the activities described as part of the farm operation constitute an agricultural use and not a recreational use. The Town's Zoning Code clearly provides that "agriculture" is a permitted use in the zoning district where the Weiss Farm is located, which is not subject to site plan review or special approval requirements.
3. While expressing health and safety concerns, the Town has not shown that the Weiss farm operation presents a threat to the public health or safety.

DETERMINATION AND ORDER

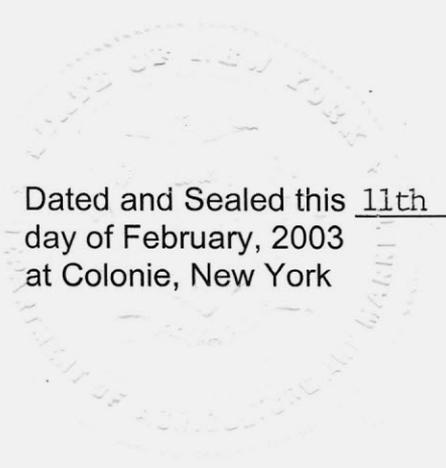
Now, therefore, in consideration of the above-stated findings and conclusions, it is hereby determined that the Town of Fenton and the Town of Fenton Zoning Board of Appeals have violated AML §305-a, subd. 1, and it is hereby

ORDERED, pursuant to the provisions of AML §36, that the Town of Fenton and the Town of Fenton Zoning Board of Appeals comply with the provisions of AML §305-a, subd. 1 by not applying §§150-17-A(4), 150-47 and 150-47(C) of the Town Zoning Code, which pertain to "Outdoor Recreational Use," to the Weiss farm operation located in Broome County Agricultural District #4.

This Order shall take effect immediately upon service of a certified copy thereof on the Town of Fenton and the Town of Fenton Zoning Board of Appeals, by mail to Edward Banks, Supervisor, Town of Fenton and Dale Gregory, Chair of the Town of Fenton Zoning Board of Appeals, at 44 Park Street, Port Crane, New York, 13833.



Nathan L. Rudgers
Commissioner of
Agriculture and Markets



Dated and Sealed this 11th
day of February, 2003
at Colonie, New York