

**TOWNSHIP OF MENDHAM
BOARD OF ADJUSTMENT
MINUTES
February 22, 2022
SPECIAL MEETING**

CALL TO ORDER

Ms. Foley called the meeting to order at 7:00 pm via zoom.

ADEQUATE NOTICE

“ADEQUATE NOTICE of this meeting of the Board of Adjustment of the Township of Mendham was given as required by the Open Public Meetings Act as follows: notice was given to the DAILY RECORD and the OBSERVER TRIBUNE, notice was posted on the bulletin board in Township Hall, and notice was filed with the Township Clerk on January 14, 2021.”

ROLL CALL

PRESENT Mr. Cadmus, Mr. Kapner, Mr. Lordi, Mr. Peruero, Mr. Witczak, Mr. Zairi, Chairman Roghanchi

ABSENT: Ms. Grant, Mr. Strafaci

OTHERS PRESENT: Mr. Anthony Sposaro, Board Attorney

SALUTE TO THE FLAG: Led by Ms. Foley

DESIGNATION OF VOTING MEMBERS WAS DETERMINED

NEW BUSINESS

CASE 4-21

APPLICANT: GEORGE & BERNADETTE KOENIG

KIMBERLY & ERIC HART

INTERPRETATION – ZONING ORDINANCE

Chairman Roghanchi explained how the evenings meeting would be conducted. He went on to say that any conflict-of-interest concerns regarding the Board's attorney, Mr. Anthony Sposaro, were addressed and resolved at the January 13, 2022 meeting and that this is not an application for relief from any of the ordinances but a request for an interpretation of a proposed use of Block 109, Lot 23 in the Township of Mendham. He explained that this Board does not hear matters related to noise violations or traffic ordinance violations nor does it create ordinances. Also, the various Board of Adjustment responsibilities are duplicated or superseded by the Planning Board in certain circumstances. However, the jurisdiction and authority of the Board of Adjustment to interpret the zoning ordinance of the Township of Mendham for allowed or disallowed uses is singular and absolute. He went on to say that there is potential for a County or State Board or Agency to render a decision in the future that might supersede the decision that this Board makes; however, this is immaterial to this Board's prerogative to hear and decide the matter before the Zoning Board of Adjustment this evening.

Ms. Susan Rubright, attorney for the applicants, confirmed that the request for the Interpretation was made on January 13, 2022 at the Board of Adjustment's Reorganization meeting. She discussed the conflict-of-interest concerns she has involving Mr. Anthony Sposaro, the Board of Adjustment attorney, and asked that the Board consider these concerns by allowing her to question Mr. Sposaro again with regards to some of his statements made at the January 13, 2022 meeting and whereby she was not allowed to continue her questioning at that time since the public portion of the meeting was closed. Chairman Roghanchi responded that the Board took Ms. Rubright's considerations under advisement at that meeting and that the matter has been resolved to the Board's satisfaction. He stated that Mr. Sposaro will be representing this Board with regards to the Interpretation request. Mr. Sposaro confirmed that he has not changed his position as far there being no basis for disqualification under the local government ethics law.

Ms. Rubright read her analysis and presentation (as outlined in her letter dated February 18, 2022) to the Board whereby under the Municipal Land Use Law the Zoning Board of Adjustment has the authority to interpret zoning ordinances and an interested party has the right to request an interpretation. She went on to say that BF Partners, LLC (Backer Farm) had an application pending before the Mendham Township Planning Board to use a portion of the property known as Block 109, Lot 23 on the Mendham Township Tax map and located at 32 Ironia Road for a brewery and a 78-seat "tasting room" and that the Planning Board application was withdrawn by BF Partners when BF Partners submitted an application with the Morris County Agriculture Development Board (CADB). That action does not moot this Interpretation application. Ms. Rubright stated that the BF Partners application, whether pending at the municipal level or the CADB level is required to comply with municipal regulations, including zoning ordinances. In support of its application before the Planning Board, BF Partners relied on Resolution 2020-02 issued by the CADB. That Resolution is a ruling as to whether the proposed Brewery application would violate the 2004 Deed of Easement on the Property. While the CADB's determination that the proposed Brewery use was in compliance with the Deed of Easement, the Resolution states that "the operation must comply with the Limited Brewery License and Craft Distillery License laws and any other applicable federal, state and local laws and regulations. However, Morris CADB approval does not preempt the jurisdiction and control of the Municipality and its Boards and Agencies nor the Morris County and State of New Jersey Boards and Agencies. The CADB defers to local municipalities to review and make a determination of the use under the municipality's own land use laws and other ordinances. The BOA should act and interpret its zoning ordinances and determine whether proposed and existing activities on the Property are permitted uses. She went on to say that Mendham Township's zoning ordinance permits agricultural and horticultural uses in residential zones under specific standards and as those terms are defined in the ordinance.

Ms. Rubright discussed the Mendham Township Right-To-Farm Ordinance 17-98, whereby developers of subdivisions advise new owners adjoining a farm through a notice and a deed restriction that notes the proximity to the farm and the noise, odors, dust and fumes associated with agricultural practices permitted under the Right-To-Farm section of the municipal ordinance. She opined that this ordinance and the resulting notice may need to be revised to address the expanded scope of a brewery as a permitted use.

Ms. Rubright went on to say that the Interpretation request is to ensure that the zoning in place is protected and that the integrity and transparency of the process is maintained, whereby the zoning ordinance, which was implemented to protect the health, safety and welfare of the residents and visitors to Mendham Township are taken into consideration. This includes issues such as safety on the roads, adequate septic, noise control, lighting etc. She asked that serious consideration be made in terms of the intent of the ordinance, whereby a commercial farm operator may seek to do something that is well beyond what was anticipated by the Township

Committee and Planning Board so as to allow a use that it is inconsistent with the zoning ordinances.

Ms. Rubright referred to the H2M Associates, Inc. report dated February 18, 2022 and stated that the H2M expert seems to argue that the CADB actions pre-empt the town from interpreting its own regulations. She went on to say that the only ruling the CADB has made in this case to date on breweries is the resolution interpreting the Backers Deed of Easement. In the resolution, the CADB does not interpret the Right-to-Farm Act or the municipal ordinances but simply interprets whether the Backer brewery proposal presented to the CADB two years ago is consistent with the terms of the Deed of Easement that was entered into with the Backers. She went on to say that H2M also makes the conclusion that the proposed brewery is an agricultural activity authorized by the CADB and subject to pre-emption. This is not supported by what the CADB has ruled to date and that the CADB has not even heard the SSAMP application. Therefore, this is something that is yet to be determined. It does not interfere with this Board's obligation under the BOA's Rules and Regulations and the Municipal Land Use Law to make the Interpretation.

Ms. Rubright went on to discuss the review standards and that unlike applications for variances that come before the BOA, this Interpretation is largely a legal determination. She also described the principles of Interpretation, which included some case studies and went on to say that the ordinances that are being considered are in Section 21-4, which she read to the Board. She went on to say that she has never seen the definition of Agriculture in the Right-to-Farm milieu but that there is a definition of Agriculture in the Mendham Township ordinance in Chapter XII.

Ms. Rubright stated that she is objecting to the report that was submitted by H2M based on the fact that the Planner is not an attorney and that she is opining on various legal issues. Mr. Sposaro responded that both Planners will be heard fairly with regards to the Interpretation.

Mr. Sposaro swore in Mr. Peter G. Steck, Planner for the application. As a voir dire for persons present, Mr. Steck offered his background and stated that he has a Bachelor's degree in civil engineering and a Master's degree in city and regional planning. He went on to say that he was licensed as a Planner in 1976 and that his license is up-to-date and in effect. Mr. Steck stated that he has been an associate planner for consulting firms and was the Planner for Montclair for ten years. He also has been practicing as a Planning consultant for the past 20 years and has appeared in approximately 250 municipalities as well as in Superior and Tax court. Mr. Steck was accepted as an expert witness for the applicant.

Mr. Steck stated that he was retained by his clients to examine the Interpretation request of the local ordinance under the MLUL and was also retained by them for the site plan application before the Planning Board last year (2021), which has since been withdrawn. Mr. Sposaro stated that any discussion with regards to the site plan application that came before the Planning Board should not be discussed or part of the record during the Interpretation hearing since the Board members have never seen the documents related to that site plan application.

Mr. Steck opined that a limited brewery would not be a permitted principle use nor a permitted accessory use in any of the residential zones in Mendham. He displayed six slides on zoom for the Board members, which are the focus of his testimony and explained the Interpretation process. Mr. Steck clarified that if breweries are ruled by the Board as automatically accepted as an accessory use to farms, then this would not just be confined to one property but all eligible properties in Mendham Township.

Mr. Steck referred to his second slide, which pertains to agricultural use as a permitted use in all of Mendham Township's residential zones and 95% of the acreage of the municipality - but with

limitations, which he discussed. He stated that agriculture as a permitted use does not have to be on a farmland assessed piece of property. Mr. Sposaro requested that the slides be marked and as such were marked as Exhibits P1 – P6. Mr. Steck referred to his third slide, Exhibit P-3, which relates to whether a brewery is a principle permitted use and described the definition of a brewery, which has a manufacturing component, a consumption component and a sale component. He emphasized that two questions remain – first, whether a brewery is a type of permitted use and secondly, whether it is a type of agricultural use and indicated on Exhibit P-3 the list of use standards for principle uses (a – e). Mr. Steck opined that a brewery, as a manufacturing use, retail use or a restaurant use, is not listed as a principle permitted use in any of the residential zones.

Mr. Steck referred to Exhibit P-4 and raised the question as to whether a brewery is a permitted principal use. He read the definition of Agriculture to the Board and stated that there is nothing in the definition that talks about consumption with limitations embedded in the definition. He added that there is no mention of breweries in the Standard Industrial Classification (SIC) Section 11, which is a nation-wide classification. Breweries are in a different section (2082), which is a section on manufacturing and that therefore a brewery is a manufacturing type of use and not an agricultural use. He went on to say that taverns or drinking places have a classification of 5813 under the heading of Retail Trade. As an observation, he opined that a brewery, whether viewing them as producing or consuming beer, is clearly not part of agriculture as defined by the ordinance. In summary, Mr. Steck opined that the ordinance cannot be interpreted to permit breweries as a principle use in all of the residential zones. He then proceeded to discuss whether a brewery can be permitted in the ordinance as an accessory use.

Mr. Steck went on to say that in Ordinance 17-98, Section 21-4.1, a – m is a listing of specifically named accessory uses and unlike principle uses, which he considers a close-end category, that accessory uses is an open-ended category as it reads. There might be other uses not listed, which could be considered by the Board to be permissible, accessory uses. He stated that it must be considered that the definition of agricultural use means that the products that are sold on the property are grown on the property. There was a discussion between Mr. Sposaro and Mr. Steck with regards to the a – m listing of specifically named accessory uses, in particularly item I, which discusses retail marketing of the agricultural output of the farm and how this affects a brewery as a permitted use. Mr. Sposaro read into the record the definition of a farm.

Mr. Steck continued with his presentation and stated that the Mendham Township ordinance has a definition of an accessory use with fairly typical wording. He went on to say that the listing a – m offers the character and theme of uses the municipality considered as permissible accessory uses. This requires judgement to determine if a brewery is an accessory use. Mr. Steck read into the record some of the case law with regards to this issue, i.e., the Charlie Brown case, from the Cox Treatise (page 802). He questioned whether a brewery is a personal wish of the farmer or generically found, which is echoed in the case law he read. Mr. Steck suggested that most of the brew pubs that are popping up in New Jersey are not part of farms and in most cases are in downtown areas and that these brew pubs are clearly not commonly associated with farms. Ms. Rubright asked that Mr. Steck explain why Item I would not allow a brewery, and a conversation ensued between Mr. Steck and Mr. Sposaro with regards to the meaning of Item I and how it is interpreted. Ms. Rubright asked Mr. Steck to opine as to whether a brewery is an accessory use under the provision of wholesale and retail marketing. Mr. Steck explained that Item “a” addresses the intent, which reads that what is sold on the farm is produced on the farm. Item “I” addresses guidelines for marketing those products that are produced as part of the agricultural activity on the property. Mr. Sposaro argued that if a farm raises hops or barley that the product of hops or barley is beer and that if this is so, then hops and barley are used in a process to create beer. Also, the accessory uses contemplate the

processing and the sale of the agricultural output of the farm. There was further discussion and argument with regards to the interpretation of these items between Mr. Sposaro and Mr. Steck. Chairman Roghanchi raised the question as to what the difference is from growing pumpkins and then selling pumpkin pies and growing hops and barley and selling beer. Mr. Steck responded that a brewery is different in that it is a special type of use as opposed to just making and selling pumpkin pies and that SIC speaks to it as a type of manufacturing use. Chairman Roghanchi opined that Mr. Steck's testimony is that there is something specific related to the hops and barley that starts to become an issue relative to the ordinance. Mr. Steck explained that it needs to be determined whether a brewery is customarily incidental to Mendham Township and stated that this is not a common feature, which is one of the mandatory explorations that needs to be considered to judge whether it is an accessory use. Mr. Kapner sited other types of uses for discussion as examples – i.e., growing pumpkins and having a factory to make the pies on the farm - and whether those types of uses would be permitted. Mr. Steck opined that this would not be allowed because of the magnitude of it and whether it is incidental and of minor significance. A pie-making factory, for example, would probably produce more land use impacts than the farm itself. Similarly, as such an example would be the raising of chickens with eggs and whether a restaurant would be permitted to serve the eggs. Mr. Steck opined again that this would not be permitted since again it is not customary and would not be of minor significance compared with the parent use, which is a farm. Mr. Kapner sited another example of growing marijuana and then refined in order to set up a smoke shop, and Mr. Steck responded that this is a highly specialized activity, which is highly regulated by the State. This shows that there are different land use considerations, which is similar to a brewery because of the special licensing requirements in New Jersey that sets that use apart from other uses. Before 2012 there were no legal breweries on any farm since the State did not allow it. The State allows it now but it is a highly specialized use as is in the growing of cannabis. There was further discussion with regards to other uses and the permission of these uses in terms of the ordinance and government regulations. Mr. Steck explained the term "customarily" as is used in the ordinance and stated that he adopts the explanation of the term in the Cox Treatise of which he read to the Board. He went on to say that while there is a greater frequency of brew pubs in New Jersey, they tend to be in commercial zones and not on farms.

Mr. Steck summarized his testimony and stated that Mendham Township's definition of agriculture has automatic limitations built into it whereby what is processed on the property must be grown on the property. The agricultural definition references the SIC code, and there is no mention of a brewery under the agricultural section of the SIC code as well as no mention of a tavern or retail sales, which are in a different category. It is not listed as a principle permitted use in the Township's ordinance and is therefore automatically prohibited. Mr. Steck went on to say that the included but not limited language of the accessory uses must be considered, and he discussed this further as to its intent as far as the Master Plan and what the Governing Body intended when the ordinance was written. He referred to a letter dated July 6, 2021, which was issued by the interim administrator, Mr. Robert Casey, to the Morris County Department of Planning and Preservation, which was in response to a questionnaire regarding the Morris County Farmland Preservation Plan. It stated that the questionnaire was discussed by the Township Committee and summarized the Township Committee's response to the questionnaire. Mr. Steck read into the record the first item in the letter (which is part of the minutes) as part of the response. He went on to say that the real focus of this is whether or not a brewery can be classified as an as-of-right accessory use to an agricultural use and that this would apply to every property that is in a residential zone as well as the 144 farmland assessed properties in the municipality. Mr. Steck stated that in his opinion it simply is not customary. It acts independently of the farm and not seasonal with special licensing required from the State that is only recent.

Chairman Roghanchi opened up the discussion for Ms. Nicole Voight, who stated that if this meeting extends beyond one meeting that the applicant is required to pay for a stenographic record of the meetings and provide that.

Ms. Voight questioned Mr. Steck as to whether it is his position that the only permitted agriculture in Mendham Township must be in accordance with these SIC codes. Mr. Steck responded that it must be in the first category of SIC codes, Section 11. Ms. Voight also asked Mr. Steck if it is his position that there is absolutely no consumption permitted on site, and Mr. Steck responded that it is a matter of the scale of it. He went on to say that consumption is not mentioned in the Township ordinance and certainly not permitted as a principle use and that at some point it is no longer a minor significance requiring a judgement relating to the scale as an accessory use. Ms. Voight stated that she disagrees with characterizing the brewery as an accessory use and opined that Mr. Steck is reading into one paragraph of the Mendham Township ordinance, which contains a lot of subjective wording. This is not referenced anywhere in the SIC code but that the code does refer to agricultural management practices developed by the State Agricultural Development Committee, which does have clear standards. Ms. Voight discussed the definition of agriculture and emphasized the first line that she had Mr. Steck read in the definition, which is "production principally for the sale to others." Mr. Steck stated that while there is a focus on the Backer Farm that the discussion is generic as far whether it is a permitted use anywhere in residential zones. Ms. Voight stated that she happens to be most familiar with Backer Farm by way of examples of limited breweries on farms aside from the precedent of the prior SADC decisions permitting this. This is really the reason why the applicant has filed this application. Ms. Rubright clarified that an Interpretation was filed that is being heard tonight, which is an interpretation of the zoning ordinance and that the Chairman was very specific in stating that this does not pertain to Backer Farm. Chairman Roghanchi corrected Ms. Rubright and said that he specifically mentioned Block 109, Lot 23, which is Backer Farm and listed as such on the application. Ms. Voight stated that she will refer to the Interpretation of the ordinance in generic terms as opposed to referring it to Backer Farm specifically.

Ms. Voight stated that there are other definitions in the right-to-farm ordinance, which includes a definition of an acceptable agricultural management practice and asked Mr. Steck whether the inherent limitations in the definition of agriculture are much easier to understand when the rest of the right-to-farm ordinance is incorporated. For example, a permitted use is any agricultural management practice adopted by the SADC. She asked Mr. Steck whether he agreed if a principal use includes any of these AMP's. Mr. Steck responded that it may; however, the Agricultural Development Board does not ignore the local ordinances, which have some bearing on what would be an acceptable management practice. He went on to say that he is unaware of any global ruling that breweries are an acceptable agricultural management practice. Ms. Voight quoted a decision regarding this - State Agricultural Development Committee Resolution FY2019 R28 – Request for Division of Premises in which it had to be determined whether the Division would result in an agricultural use. The Division was for the purpose of a limited brewery and that the State Agricultural Development Committee in that case specifically found that because 51 percent of the ingredients of the beer was grown on the farm management unit that the processing and sale onsite to the public is a permitted agricultural use protected by Right-To-Farm. Mr. Steck responded that this case is not customary as opposed to pumpkin farms, whereby pumpkin picking is a more customary, habitual practice. Mr. Sposaro questioned the term "customarily incidental" and whether it is being taken out of context. It talks in terms of what is customarily incidental to the agricultural use and not what is customarily incidental to what is happening in Mendham Township. The discussion regarding the fact that there are no breweries in Mendham Township and therefore not customarily incidental is taken out of context. There was further discussion and argument regarding the topic of "customarily incidental." Ms. Voight raised the question as to how a brewery is different from a winery, and Mr. Steck stated that this is not the subject for this Board. He added that there are different

licensing considerations, different acreage considerations in order to grow it and that his analysis has to do with a brewery, which is not listed as a permitted use. Ms. Voight stated that she disagrees with the fundamental premise that a brewery is an accessory use and that a brewery is a primary use. The Deed of Easement restricts the house. Mr. Sposaro clarified for Chairman Roghanchi that 21-4.1 a – m are accessory uses, which are part of the principle use part of the code. The principle permitted uses are horticultural or agriculture as a livelihood and that the relative incidental use is “a” – the storage, processing and sale of farm products where produced. The second accessory use is “l” – provisions for the wholesale and retail marketing of the agricultural output of the farm including the building of temporary and permanent structures etc. Ms. Voight stated her position that a brewery is a permitted principle use in the Township under 21-4.1 e, which she read to the Board and justifies the use of a brewery in Mendham Township as a principal use. It does not consider SIC codes, incidentals, scale standards etc. She went on to say that Ordinance 17-98 taken as a whole incorporates all of the SADC’s agricultural management practices as acceptable primary uses.

Ms. Voight continued to say that if commercial agriculture was an accessory use, it would then result in a farmer never being able to live on a commercial farm. Mr. Steck responded that it is quite customary for a farm to have a single-family dwelling on it and that the ordinance is structured whereby specific principal uses are listed and any principal use not listed is automatically prohibited. Agriculture is a principal use provided the products are grown on the property and that this is a closed category with principal uses and whereby breweries are not mentioned. He went on to say that there is an open category with accessory uses, which list items that offers character of what the Governing Body was considering. He opined that it would not be proper to say that breweries are a principle permitted use since it is not listed. However, it can be considered as an accessory use but that it must follow rules of eligibility for an accessory use and that in his opinion, a brewery cannot comply with those standards. Ms. Voight stated that a principle use in Mendham Township’s residential zones includes any activity conducted in accordance with a farm conservation plan or SADC agricultural management practice. Mr. Steck opined that this is not how the ordinance reads and that section 21-4.1 e is more of performance standard. There was further discussion and argument between Ms. Voight and Mr. Steck with regards to 21-4.1 e.

Ms. Rubright stated that she has no further testimony or argument and that Mr. Steck has articulated the applicant’s position as to why this is not a permitted principle or accessory use. Also, for the record she indicated that her client is not waiving any rights to object to Mr. Sposaro presiding over this Interpretation in connection with his explanation of why there is no conflict of interest.

Chairman Roghanchi opened the meeting to the public for any questions they may have for Mr. Steck.

Ms. Terrill Doyle inquired about the winery issue that was raised and stated that there is an AMP for wineries and that there is no AMPs for breweries. She asked Mr. Steck if provisions a – m under 21-4.1 e is customarily incidental, and Mr. Steck stated that he would agree with that interpretation by the structure of the ordinance.

Ms. Maria Moore of 26 Ironia Road asked Mr. Steck if a brewery will create a nuisance for adjacent properties when it wasn’t planned at the time when a person bought a house next to a farm. Mr. Steck responded that it could produce noise and activity, which would not be typically expected from a farm; however, this is not the current issue. The discussion before the Board is the permitted use of a brewery.

Mr. Moretti of Ironia Road asked Mr. Steck whether he would agree that brewing is actually a chemical process as opposed to just making products from pumpkins. Mr. Steck responded

that both have a certain level of chemical processes; however, it should be considered what is customary and opined that he clearly finds a brewery not customary.

Chairman Roghanchi asked Ms. Voight to summarize her presentation, and Ms. Voight stated that the Backer Farm is in the R-10 zone but that the use would apply to the other residential zones in Mendham Township. The argument by the applicant has entirely disregarded a section of the code, which incorporates the State's agricultural management practices, which includes standards for all of the farms. She went on to say that this was avoided for the purpose of trying to limit what can happen on farms. A permitted use is any farming in compliance with an agricultural management practice with the State Agricultural Development Committee and that this includes the on-farm marketing agricultural management practice. This is used by wineries and that there is not separate AMPs for wineries contrary to an inaccurate statement expressed by a member of the public. The concept of farm-to-glass beer or the productions in the farm management units whereby the product is processed onsite and sold to customers onsite subject to all of the restrictions of the limited brewery license of the 51% standard for production of the site capacity is a limited concept for a limited brewery unlike other breweries that are not on farms. This all falls under the agricultural management practice, which is a permitted use, and she continued to say that this is why the Morris County Development Committee certified this farm as a commercial farm and the application as the subject matter of an agricultural management practice. The code needs to be read in a whole and not ignore parts of certain definitions. Ms. Voight stated that she reviewed the Planner's report dated February 28, 2022 and that she agrees with Ms. Chavan's assessment of the code and the permitted uses entirely. She discussed some aspects of the report further. Ms. Voight went on to say that any decision made at the BOA level can be pre-empted by the primary jurisdiction of the CADB. She opined that this Interpretation is a bizarre use of municipal resources to try and find a way to limit one farm at the expense of 95% of the properties in the municipalities. Ms. Voight also discussed a questionnaire that the Mendham Township administrator responded to from the Morris County Department of Planning with respect to farmland preservation. She went on to say that the Right-To-Farm ordinance that Mendham Township passed is connected to the funding that is received by the County and that if the Right-To-Farm ordinance is limited, then this would need to be approved by the Morris County Planning Board and further posing a potential problem for the funding of preserved farmland. The Right-To-Farm ordinance is tied to the funding that is received, and Ms. Voight went on to say that Mendham Township's Right-To-Farm ordinance is written well and incorporates the SADC's AMPs as permitted uses.

Mr. Lordi asked Ms. Voight about her interpretation of the Governing Body's thought process in developing the use part of the ordinance. Ms. Voight responded that it would be bold for her to opine what the people who passed the ordinance were thinking at the time. However, she stated that she reads Interpretations all the time and that interpreting one section of a definition in a limited way leads to confusion and does make sense. She clarified that this is simple and that there is a Right-To-Farm ordinance that was intended to protect farmers and that the ordinance resulted in amendments to different parts of the code, including adding Section e to 21.4.1 permitted uses. That includes agricultural uses and incorporates any agricultural management practice. The Right-To-Farm does not list certain limited agricultural management practices but states "any agricultural management practice" that is developed by the SADC. She stated that the on-farm direct marketing AMP was passed in 2014 and has been heavily relied upon. The SADC has already permitted a brewery under the AMP standards.

Mr. Kapner inquired whether the SADC and CADB are in total control and whereby Mendham Township has no ability to interpret Mendham's own zoning ordinances and its intent as written. Ms. Voight responded that this is not her position and that the Board has the absolute right to interpret its ordinance. Mr. Sposaro clarified that the Board needs to look at the four corners of the ordinance and that what the present Township Committee may or may not have conveyed through the administrator in a survey is irrelevant. A decision needs to be made based on the

language of the ordinance and the intent of the ordinance as a totality. Mr. Kapner inquired whether the intent of the Master Plan as it was written can be considered as well, and Mr. Sposaro opined that the Master Plan should not be considered in the Interpretation. The Master Plan gives guidance to the Governing Body as to adoption of ordinances and that the Governing Body can adopt an ordinance that is not consistent with the Master Plan. The ordinance is what controls here and that the Board is limited to interpreting the zoning ordinance.

Chairman Roghanchi opened the meeting to the public.

Ms. Terrill Doyle stated that she was not incorrect about the winery AMPs. Wine tasting is referenced in one of the AMPs and breweries are not referenced in any of the AMPs. Secondly, she spoke with Ms. Foley who told her that this Interpretation was not about the Backer application. As a result, she would like to know why Ms. Voight is able to make a presentation and question experts. Chairman Roghanchi responded that members of the public can question the experts and that any other attorney is welcome to ask questions as well. It was asked at the beginning of the meeting if any other attorneys were present. The application from Ms. Rubright referenced Backer Farm specifically by name and by a Block and Lot number so it is reasonable that someone representing the owner of that Block and Lot would have something to say at the meeting.

Ms. Doyle opined that "e" is clearly customarily incidental and that a customarily incidental action cannot be used to shoehorn in a manufacturing plant (brewery) and that Mr. Steck did a good job of showing why a brewery is not customary and incidental in New Jersey. She went on to say that she agreed with Mr. Steck's point whereby if the Board decides that the ordinance authorizes breweries that this sets a precedent. Ms. Doyle went on to say that the Board should be very careful as to how it considers this since it could fundamentally change the nature of Mendham. Mendham is unique in that it allows agricultural uses in virtually everyone's yard; however, she objects to a neighbor having a concert because it is an ancillary use on their agricultural property because they happen to sell firewood. She discussed this further and opined that this would be a fundamental change. Ms. Doyle opined that Ms. Voight is essentially saying that the Board has no say in this change, which is her basic argument.

Mr. Peter Banos of Ironia Road commended Mr. Steck and his interpretations. He agreed with Ms. Rubright that Mr. Sposaro should have recused himself from this meeting since there is in his opinion a conflict of interest. He inquired as to why the application was withdrawn from the Planning Board, and Chairman Roghanchi responded that this is not an issue before this Board. Mr. Banos opined that a brewery would change the depth and breadth of the neighborhood and expressed his dissent with regards to allowing this as an appropriate use of the Backer Farm.

Ms. Maria Moore expressed her dissent and frustration with regards to the brewery and that it is a dangerous and unsafe idea.

Ms. Deborah Indella opined that the brewery is not a permitted use and that the Board should not consider this a permitted use for one brewery and ruin the town.

Mr. Dave Rainas opined that it is not the intention of the town to allow a process that would be required to turn anything grown on a farm into saleable goods. He expressed his dissent with regards to having a brewery on a farm in Mendham Township.

Ms. Melissa Rainas opined that she finds it very difficult to claim that a brewery would be customary to Mendham Township and expressed her dissent for allowing such a brewery along with Ms. Voight's presentation and the time she was allowed to speak. She opined also that Mr. Sposaro should not be allowed to represent the Board since he is clearly bias and on the side of the farm.

Mr. Roghanchi closed the public portion of the meeting and asked Ms. Rubright to summarize her presentation.

Ms. Rubright stated that Mr. Steck very clearly and concisely explained why this is not a permitted, principle or accessory use since anything that is not permitted is prohibited. She went on to say that certain things were taken out of context. The Planning Board did not take action on this and had only one hearing on the matter before it was ultimately withdrawn after this Interpretation application was filed to the Board of Adjustment. Additionally, there was some confusion with regards to the reference of the AMPs in the ordinances and that this reference is that if the farm activity complies with AMP, then it is determined that it is not a nuisance. The farm management unit and the AMP's that were raised by Ms. Voight are not part of the ordinance and not what this Board is suppose to be considering.

Ms. Rubright referred to the Planner's Report dated February 18, 2022 and stated that the Planner discusses in most of her report the Agricultural Board. This is not what is before this Board for the Interpretation. Ms. Rubright went on to say that the Agricultural Board can certainly make their own findings; however, the Planner's report should not come into consideration because it is not trying to interpret what the ordinance says. She discussed further her dissatisfaction with the Planner's report since many of the conclusions she opined are of a legal nature and again not addressing the interpretation of the ordinance. Ms. Rubright cautioned the Board to be careful in their decision in considering the brewery as an accepted permitted use and to not act favorably in accepting it as a permitted use.

Ms. San Chavan, Planner for the Board of Adjustment, made an appearance before the Board and explained that the reason why she wrote the report as she did was because she reviewed the correspondence that was submitted to the Zoning Board and the prior review of one her team members who no longer is with H2M. The application that went to the Planning Board is now before the County Agriculture Board and that the County Agriculture Board has statutory authority. Ms. Rubright stated that Ms. Chavan has not been sworn in as a witness, and Mr. Sposaro swore in Ms. San Chavan. Ms. Chavan continued to say that the Right-To-Farm act and the CABD's determination preempts the local ordinance in certain cases. Should the CABD determination be contrary to the local ordinance, the local ordinance is superseded. The CABD determines whether any supporting activities on a commercial farm are compliant pursuant to code, and she emphasized that the local ordinance should be considered in its entirety.

Mr. Sposaro addressed the claims that he is biased or disinterested and that he meant no disrespect to Mr. Steck in light of his vigorous cross examination. He went on to say that when the totality of the ordinances is studied with regards to agriculture and what uses are permitted it should be determined whether a brewery is a permitted use in the R-10 zone district. The identification of the uses that are permitted in the R-10 must be considered. Mr. Sposaro said that Mr. Steck's conclusion that if a brewery is not specifically identified, then it must not be a permitted use, and Mr. Sposaro argued that the analysis is not as simplistic as that because agriculture is defined in the ordinance as well. He read the definition of Agriculture to the Board from the ordinance. He continued by methodically breaking down the phrases in the ordinance by citing examples. Mr. Sposaro brought up the term "customarily incidental" and opined that this does not refer to what is customarily seen in Mendham or in other municipalities but rather what is customarily incidental to the particular agricultural use in question. With regards to a brewery the question becomes whether the growing of hops and barley is allowed to be grown on a farm in Mendham Township and stated that the undeniable answer to this question is that barley and hops can be grown. He stated that it must then be methodically considered with the question becoming what can be done under the ordinance with those crops and that accessory uses are the storage and processing and sale of those farm products along with providing for the wholesale and retail marketing of the agricultural output of the farm. He discussed Section

21-4.1 b further and read the definition of “farm” and stated that the Governing Body recognized that a farm can consist of non-contiguous parcels that are either owned, leased or occupied by an individual or organization that collectively operates one farm management unit. He opined that to interpret the ordinance so narrowly whereby one can only sell what is raised on a particular finite parcel is too restrictive and stated that he did agree with Ms. Rubright with regards to agricultural management practices in that the ordinance does not necessarily say that if the State permits the use, then the ordinance permits the use. However, AMP is mentioned in the ordinance and as such the Governing Body took AMPs into consideration and what they indicate and that it is fair to say that the Governing Body looked to the SADC for direction on what uses are permitted and not permitted.

Mr. Sposaro continued with how the SADC addressed breweries and stated that he contacted SADC to inquire whether they adopted an AMP for breweries. He stated that he was told that they had not adopted an AMP for breweries and that although they had not adopted an AMP for breweries that the SADC has determined that a brewery is an acceptable AMP in applications that have come before the SADC, provided that the output of the brewery shall contain a minimum of 51% of the ingredients raised on its farm management units. Mr. Sposaro read what the SADC outlined in order to give the public and Boards guidance on what activities are permitted in the eyes of the SADC with regards to both wineries and breweries.

Mr. Sposaro opined that as the attorney for the Zoning Board of Adjustment and in reading the ordinance in its totality that agriculture is a permitted use in the R-10 zone district, which includes the growing of barley and wheat etc. for beer. Once this is permitted, then under the ordinance it is allowed to store, process and sell these products and sell them from a farm, which is a farm management unit. In summary, Mr. Sposaro went on to say that given the SADC findings that breweries are a permitted use on preserved farms provided 51% of the contents, excluding water, are grown on the farm. In light of the fact that the ordinance seems to be very supportive of the SADC's interpretation of what uses are permitted with an acceptable AMP, he opined that a brewery is a permitted use in the R-10 zone district. This is the key issue before this Board.

Chairman Roghanchi asked if any members of the Board had any further questions for Mr. Sposaro. He stated that the Board will only decide whether a brewery is an accepted use or not an accepted use and that this decision will have no impact on enforcement of other ordinances the Township may contemplate with regards to noise, traffic etc. Mr. Sposaro stated that the ordinance appears to permit the sale of what is grown on the premises, which addressed Mr. Zairi's questions with regards to the sale of food at a brewery. It does not appear to explicitly authorize the sale of complementary products.

Mr. Cadmus inquired whether there could be a brewery without a pub-like setting. Mr. Sposaro responded that this could certainly be done and stated that the ordinance is what should only be considered, which he read again. He opined that the beer can be manufactured and brewed and that under the ordinance, it can also be sold. Whether other products beyond beer can be sold is subject to debate. The question becomes whether it can be just packaged goods or pour beer out of a keg and sell it for consumption on the property. Mr. Sposaro stated that the ordinance is silent on this; however, it would be too narrowly interpreted to say that packaged goods could only be sold but that beer cannot be offered for consumption in a tasting room.

Mr. Cadmus also expressed his concerns with the potential precedent that could be set with regards to other farms in Mendham Township wishing to open brew pubs. Mr. Sposaro responded that there are many factors involved with other farms opening a brew pub – for example, whether they are farmland assessed and have the capacity to raise the crops necessary so that 51% of the ingredients other than water are grown on their farm. In theory, this can happen; however, Mr. Sposaro stated that he does not have an opinion in the reality of

this scenario. He went on to say that in this situation the Board must interpret the ordinance as it exists, which does not just apply to Backer Farm but applies to all farms in Mendham Township. He also clarified that the Governing Body is free to amend the ordinance and how that would affect a use that was deemed permitted is beyond the scope of what is before the Board at this time for an interpretation.

Mr. Cadmus went on to say that he finds it concerning that Mendham Township would be one of the few in the State of New Jersey that would have a brewery (potentially the third in the State). Mr. Sposaro responded that if 51% of the ingredients is grown on the farm, the question remains whether it can be marketed, processed and consumed on the farm. The State seems to allow for this and whether this is considered to be in the best interest of Mendham Township is not the issue before this Board. That is for the Governing Body to decide. Mr. Sposaro stated that this is really an academic exercise since there is no application before the Board and is not binding on anyone.

Mr. Cadmus inquired about the appeal process with regards to a decision by the County Agricultural Development Board. Mr. Sposaro responded that an appeal from a decision from the CADB goes to the State Agricultural Development Committee. If it is appealed at that level, then it goes to the Appellate Division of the Superior Court and then ultimately to the New Jersey Supreme Court.

Mr. Sposaro responded to Mr. Lordi's questions regarding this Board's decision and how it is affected by a decision of the CADB with regards to an application and whether a CADB decision overrides this Board's decision. He explained the Right-to-Farm Act and that if all the criteria are satisfied in the Right-to-Farm Act, then farmers can exercise these rights notwithstanding any municipal ordinance to the contrary. This is what state law provides. There was some further discussion with regards to the Right-to-Farm Act and the regulations that have been adopted consistent with it. Mr. Sposaro went on to say that it is his understanding that the MCDB has certified Backer as a commercial farm and that the Backers will be pursuing a site-specific application to them, which is their right to do and bypass conventional site plan review by Mendham Township. Mr. Sposaro opined that he suspects that the request for the Interpretation was made in that if the decision was made that this is not a permitted use through the Board's interpretation that those opposing Backer Farm would argue that Mendham Township does not recognize this as a permitted use and communicate to the CADB that this should be considered in their deliberation of the application.

Mr. Kapner expressed his concerns with interpreting a brewery as a permitted use and stated that it could set a precedent for other unforeseen scenarios. He opined that the ordinance was written at a time when this type of use was not considered and that it must now be interpreted. He further opined that the ordinance is not clear as it is written.

Mr. Cadmus expressed his concerns as well with regards to the ordinance being vague and that it was drafted at a time when brew pubs were not even considered at the time. He again opined that a precedent could be set with an impact on other farms in the community. Mr. Cadmus went on to say that a lot of thought must be given to how to vote on the Interpretation of the ordinance.

Mr. Zairi added that the ordinance states that a farm is permitted to store, process and sell but that it is not written that consumption is allowed. However, it is not written that consumption is not allowed either. He opined about the concerns expressed of the use setting a precedent and explained the reasons why this is not a concern for him.

Mr. Lordi added that the Board needs to consider the Right-to-Farm Act and not let emotion take precedent in the Interpretation decision. He has listened to both sides and has read the

significant amount of documentation that was disseminated and that the Board must look at the ordinance and the basis for making a decision, which is the Right-to-Farm Act. Also, he stated that the CADB can overrule any decision made by this Board.

Mr. Witczak echoed the same sentiments as Mr. Zairi and that this must be considered for what is being asked, which is strictly an Interpretation of the Zoning ordinance only. He stated that this is a very important decision but that it is the people in Mendham that make the community great and a special place.

Chairman Roghanchi summarized that a significant amount of documentation has been disseminated and reviewed by the Board members from various entities. This is a complex subject and that the Board does rely on the professionals' expertise in the matter. It is a benefit to the Board to have Mr. Sposaro present to help explain these complex laws. He went on to say that it is difficult to determine where a line should be drawn relative to farming and selling items that are farmed and that the ordinance takes this into account in anticipated uses i.e., growing pumpkins for pumpkin pies, chickens for eggs, apples for apple pie etc. He opined that it is hard to believe that this wouldn't extend to growing wheat and barley to produce beer. Chairman Roghanchi went on to say that this decision has nothing to do with a 78-seat tasting room, concerts, parking etc. which would need to be addressed by one of the Boards, the Governing Body, or the CADB another time. He opined that this is pretty straightforward in that the Township has an ordinance whereby people are allowed to raise crops and sell the product from those crops. Any decision rendered tonight does not give credence to allow for a tasting room, concerts, other events etc.

Mr. Pereyuro stated that this is an important decision and that the Board must interpret the ordinance as written. While he does have concerns with regards to traffic, environmental concerns, neighbors' concerns etc., he opined that the use is permitted under the ordinance.

Chairman Roghanchi inquired whether the Board can restrict their decision specifically to the issue of a brewery and the selling of packaged goods as opposed to allowing other uses such as concerts, events, parking allowances etc. Mr. Sposaro responded that he thinks the question is whether a brewery is a permitted use in the agricultural zone. He read the definition of a brewery, which is a place where beer is made commercially and went on to consider the question as to whether a farmer that grows the components of beer is allowed to brew the beer and operate a brewery. He opined that consumption does not need to be considered and that the ordinance is silent on this issue. The ordinance permits the storage, processing and sale of beer that is brewed from those component parts, which again is grown on the farm. Mr. Sposaro also stated that it is not necessary to specify what types of crops are being grown and that it is sufficient to say that 51% of the ingredients that are grown are used to produce the beer without identifying the particular crops.

Mr. Cadmus inquired as to how the 51% of the ingredients required to be able to process and sell the beer is policed or monitored and the procedures followed if this ratio is not satisfied. Chairman Roghanchi responded that this Board does not have the power to enforce and monitor the requirement and that the Governing Body must address this matter. Mr. Sposaro added that this is not an application where the concern would be of somebody deviating from conditions that were determined but simply the Board's opinion of what the standard is. How it's enforced is not before this Board and that the sole issue is whether the Board is satisfied that a brewery with a minimum of 51% of the ingredients raised on the farm is a permitted use in Mendham Township pursuant to the ordinances. Also, the Board would only consider the processing and selling of what is produced with no opinion regarding consumption onsite.

Mr. Lordi made a motion to allow the production and selling of beer as a permitted use whereby a minimum of 51% of the ingredients, excluding water, are from crops grown on the farm management unit. Mr. Kapner seconded the motion. Upon roll call:

AYES: Mr. Lordi, Mr. Peruyero, Mr. Witczak, Mr. Zairi, Chairman Roghanchi

NAYES: Mr. Cadmus, Mr. Kapner

Mr. Sposaro stated that he will prepare a resolution for adoption at its next meeting.

READING AND GENERAL CORRESPONDENCE

None

Chairman Roghanchi entertained a motion to adjourn. A motion was made, and it was seconded. All agreed.

The meeting was duly adjourned at 11:21 pm.

Respectfully submitted,

Beth Foley
Board Secretary