

# TOWN OF NORTH EAST ZONING BOARD OF APPEALS MINUTES

January 29, 2015

A meeting of the Town of North East Zoning Board of Appeals (“ZBA”) took place on Thursday January 29, 2015 at 7:30 PM in the Town Hall, Millerton, NY. Board members present were Co-Chair Edith Greenwood, Jon Arnason, Patti Lynch and Carl Stahovec. Julie Schroeder recused herself from the scheduled matter but attended in the audience. Also present were: Lynn Mordas, the appellant with respect to the matter described below; Warren Replansky, attorney for the Town of North East; Robert Stevens, Highway Superintendent of the Town of North East; Kenneth McLaughlin, Code Enforcement Officer for the Town of North East; and members of the general public.

Co-Chair Greenwood opened the meeting. She then asked the secretary to read the Public Notice of the Appeal of Lynn Mordas which is entitled as follows:

**Lynn Mordas**  
**157 Indian Lake Road**  
**Review of Documentation for an Interpretation of §98-48.14(C)**  
**Tax Parcel #: 7269-00-187847**

Greenwood explained that Mordas had appealed from the following notices of violation and related correspondence from the Town of North East:

- a. McLaughlin to Mordas July 22, 2014 RE: Storage of Manure
- b. McLaughlin to Mordas August 5, 2014 Amended Order to Remedy Violation
- c. McLaughlin to Mordas September 9, 2014 Order To Remedy Violation
- d. McLaughlin to Mordas November 18, 2014 Amended Order to Remedy Violation

All of these notices relate to the same issue, which is the claim by the Town that Mordas has a manure pile stored closer than 100 feet to the center line of a public road in violation of Section 98-48.14 (C) of the Town Code entitled “Storage of Manure”. This section provides, in relevant part, “Manure shall not be stored for composting or staging for subsequent removal or crop field application or for any other purpose within 100 feet of the center line of any public road or highway”. According to the Order to Remedy Violation issued to Mordas dated September 9, 2014, manure is being stored within 50 feet of the centerline of a public road fronting her property.

Arnason made a motion to open the Public Hearing which was seconded by Lynch and passed unanimously.

Arnason asked for clarification on the several notices of violation that have been issued to Mordas. Replansky acknowledged there have been several notices but that notice before the ZBA was that which had been issued on 9/9/14.

Lynn Mordas

The meeting commenced with a presentation by Mordas.

Mordas reviewed a letter she submitted to the ZBA dated August 20, 2014 which summarizes her claims. First, she does not have a manure pile on her land, but rather a compost pile composed of less than 10% manure, together with bedding and other plant material. The manure rapidly degrades into the biomass of the pile. Thus, the law regarding storage of manure does not apply to her activities. Second, she has been composting in this area since 1993, and thus her activity – even if found to be storage of manure -- is a prior non-conforming use exempt from the application of the statute.

Mordas stated that the size of the pile varies widely over the course of the year. The material degrades rapidly and thus the pile shrinks in size. Further, since she sells the compost sometimes there is no pile at all. She noted that she too was confused by all the notices she had received and had had a similar experience when the Town had sued her previously. She states the previous charges were dismissed.

Mordas then described her property. She has a historic barn complex that she rehabilitated in 2005 through a grant given by the State of New York. The barn is in the Land Conservation district (LC) and is in a flood plain. On the other side of Indian Lake Road is her house. A well is located south of the house which services both the house and the farm operation. The septic system was built in 2000 and is north of the house on both sides of the driveway.

Mordas was concerned about the best way to keep her water source safe, and applied to the Dutchess County Soil and Water Conservation District (DCS&W) for a conservation plan. She stated that the first two phases of the resulting plan have been put in place. In evaluating her property, she stated the DCS&W confirmed that the current location of her compost pile was the perfect location on her property, given the contour of the land as it relates to her water supply. The DCS&W did make the recommendation that a berm be put between the pile and the roadway to prevent encroachment from water from either direction. There is a slope behind the compost pile but the material in the pile is very dry so absorbs the runoff from the slope behind. There is a berm between the pile and the road that has been in place for a long time. It has not been breached during heavy rain.

According to Mordas, the intersection of Mill Rd. and Indian Lake Rd. has experienced frequent flooding for years, especially since road work was done at the intersection in 2012. Mordas introduced into the record pictures from October 1998 through September 2014 showing wet areas along the side of the road at the intersection of Indian Lake Rd. and Mill Rd. and looking from Mill Rd looking into the compost pile.

In response to a question from Stahovec as to how Local Law # 1 of 2014 came about, Mordas recalled the events that took place after she made a formal complaint to the Town dated July 30, 2012 about the road flooding. The Town responded by issuing a series of violation notices. That led to criminal charges being brought against Mordas regarding her manure pile. (Mordas asked that all the court papers, including her responses relating to the charges be made part of this Public Hearing record.) Mordas believes that the real reason the Town took her to court was that they feel she is responsible for the water puddle on the road.

Mordas stated there were some procedural issues but ultimately the case was dismissed by Judge Crodelle. Mordas said she then went to great expense to reorient her property to take care of the damage done by the road flooding and prevent it from happening again.

Mordas went on to explain that the poultry manure generated in the barn complex is taken away and sold directly to a local CSA. Her compost pile consists of sheep manure, bedding and other vegetable matter such as leaves. The compost pile is turned regularly, now by Mordas since she purchased a tractor, and previously by local farmers who she hired for that job.

Mordas entered into the record various guidance documents concerning how Municipalities enforce laws relating to agricultural activities. Lastly, Ms. Mordas entered into the record various newspaper and public alerts describing the flooding on Mill Rd.

This concluded Mordas' initial presentation.

Arnason asked for clarity as to what the ZBA was to opine on in this matter. Is the issue to be decided simply whether the storage of manure was too close to the road? Replansky interjected that Arnason's summation was exactly correct.

### Town of North East

#### Introduction by Warren Replansky

Warren Replansky, attorney for the Town of North East, then began the presentation of the Town's case. Since Replansky usually represents the ZBA as well as the Town in various matters, he began by making it clear that he is before the Board as the attorney for the Town and is not representing the ZBA in this matter. He told the ZBA he would provide them with a memorandum of the Town's position in this case.

Replansky stated that the two issues in the matter are:

- 1) Does the Town have the right to enact a local law to regulate composting or the storage of manure adjacent to a public highway; and
- 2) Does a local law apply to a pre-existing non-conforming use?

Replansky began by introducing into the record a report from the Town Engineer, Morris Associates, dated August 13, 2012. The report concludes that the cause of the road flooding at

the intersection of Mill Road and Indian Lake Road is the result of the compaction of years of compost on the same spot on the Mordas property, thereby disrupting the natural flow of water which would not normally flow onto the highway.

Replansky went on to say he plans to introduce evidence from the NYS Ag and Markets and from DCS&W that Mordas does not follow sound agricultural practices and that both agencies have recommended she store the manure and compost at other locations on her property. He explained that the Town has tried on numerous occasions to talk Mordas into moving the pile, as recommended by agricultural experts, to a different part of her property.

Replansky went on to say that not all non-conforming uses established before an applicable zoning law was enacted are protected from the application of the law. Protected non-conforming uses have to be a substantial in relation to the property. In this case storage of manure is considered an accessory activity to an agricultural operation and thus is not substantial. Replansky will provide the ZBA with case law to show that municipalities in the State of New York have the right to regulate uses such as the storage of manure. Replansky argued that the Town has adopted a proper law which applies in the circumstances of this case.

#### Robert Stevens

Following Replansky's introduction, the Town called Robert Stevens, Highway Department Superintendent for the Town of North East since January 1, 2008, to testify.

Stevens stated that the manure pile became an issue in 2008. He confirmed that the pile has been in the same location during his tenure but that it changes in size and on occasion has extended all the way out to the edge of the pavement of the road. Certain photographs from 2008 were introduced into record. Stevens said that at one point he had sent a wheel loader to push back the pile as he determined the pile was disrupting the flow of water resulting in flooding on the west side of Mill Rd.

Stevens confirmed that the Town received a letter from Mordas on July 30, 2012 regarding flooding issues on Mill Rd. He said that some of the pictures submitted by Ms. Mordas today were the same as the pictures which were submitted with her July 30, 2012 letter.

Subsequent to receiving Ms. Mordas's letter, Stevens asked Morris Associates to review the situation with respect to the compost pile and its location in relation to Mill Road. Replansky then read into the record a letter from Morris Associates dated August 31, 2012.

(Stevens confirmed that Mill Rd. had been repaved with chip and seal surface treatment in 2012 but maintained the resurfacing was routine maintenance that in no way changed the drainage of the road.)

Arnason asked if the issue here was that the compost pile had changed the natural drainage pattern of the land and that previous to its establishment, the water naturally drained into Mordas' land. Replansky replied that the natural drainage was along the road and water

drains off all highways onto adjacent land. He concluded that the creation of the pile had changed the natural drainage pattern. Arnason asked if the nature of the existing pile was relevant or if any material stored in this location would create the same problem. Replansky said the storage of other materials such as cement or dirt would probably create the same drainage problem but the problem here is the storage of manure. Replansky went on to say that the problem is not that Mordas is responsible for the drainage problem but that there was a rationale to specifically target the storage of manure in this local law.

Stevens then testified that in an effort to convince Mordas of the need to move the manure pile, a meeting had been held in the Salisbury Bank Community Room to discuss the problem with Mordas. In addition to Stevens, others at that meeting included representatives from DCS&W, Town elected officials and representatives from Dutchess County Department of Public Works to discuss various options available. The DCS&W recommended that the pile be moved to another location on the property at the north end of the barn.

Following that meeting, Stevens, having concluded that the pile at its current location was creating a hazardous condition, approached the Town Board for help in remedying this problem. This request resulted in the enactment of Local Law #1 of 2014.

Arnason asked Stevens if he had confirmed that the pile was 10% or less manure, as stated by Mordas. Stevens stated he did not know if that was correct. Replansky asked if Stevens had observed anyone working or turning the compost pile. Stevens said he has never seen any active composting activity at the location. He went on to say that Mordas had told him she buried her dead animals in that pile. In addition, Stevens said that he had observed large limbs of trees had been added to the pile and that trees were not conducive to composting.

#### Kenneth McLaughlin

The Town then called Code Enforcement Officer Kenneth McLaughlin to testify. McLaughlin stated that he has been with the Town since 2000 and has approximately 30 years of experience with building, zoning and enforcement.

McLaughlin said that he had been familiar with the situation with the compost pile and its location prior to issuing a notice of violation. He said that Michael Segelken, the Town's Field Building Inspector and Code Enforcement Officer had taken measurements and determined that the compost pile was located less than 100 feet from the centerline of Mill Road, although McLaughlin did not know precisely what the measurements were.

McLaughlin said he had been aware there was an issue with the property for several years and knew Town officials had been working to correct it. McLaughlin said he had not been directly involved but knew there had been meetings and that Stevens had become extremely frustrated with the situation. McLaughlin said there were several meetings that had taken place at the site. He mentioned that Ed Hoxie from DCS&W and Cornell Cooperative experts attended. He stated that the experts clearly said that what Mordas has claimed is a compost pile was not, but rather a manure pile which had gone "septic".

McLaughlin said the experts had examined the site. They had said they would try to find a reasonable solution to the problem of the location of the compost pile and even try to secure funding for a solution. He also said that the experts made it clear that if the compost pile was in violation of any law they would not be able to provide help in securing funding.

McLaughlin went on to state that he is looking to achieve compliance not litigation. He further stated that DCS&W had proposed as a temporary solution relocating the compost pile to an area adjacent to the barn until they could find a more permanent solution. He said that such a solution was being explored by Cornell Cooperative. Replansky asked if McLaughlin felt Mordas intended to comply with these recommendations. He stated that she was defiant and that all who attend the meeting felt she was not going to cooperate in any capacity.

Replansky then asked McLaughlin to identify a series of letters from his office that were entered into the record.

1. The first was dated March 5, 2013 relating to the reestablishment of the pile. Replansky asked if the pile had ever been removed. McLaughlin said another farmer, whose name he could not remember, had removed the manure pile completely. McLaughlin reiterated that the pile was manure not compost as determined by the expert from Cornell Cooperative.
2. McLaughlin sent a letter dated May 1, 2013 asking Mordas for a plan to correct the violation. Mordas had told McLaughlin that she had hired a landscaper who had not performed all the work she had requested. Through verbal conversations, he thought the landscaper was Mr. Lopane and that job was to put the area back to its more natural state.
3. The next letter dated June 4, 2013 stated that a plan to resolve the problem with the location of the compost pile was to be put in place by June 30, 2013.

After the plan was only partially implemented, McLaughlin issued a Notice of Violation that was served on July 3, 2013 and then led to the justice court proceedings described above.

After Mordas was issued an appearance ticket by the court, McLaughlin confirmed that she removed the pile of manure. He then confirmed that he and Replansky appeared before the judge and withdrew the complaint and as a result, the complaint was dismissed and there was no ruling by the judge on any of the violations of the property maintenance code.

McLaughlin stated that after the complaint was dismissed, the manure pile was reestablished in the same approximate location.

4. Replansky asked about a letter from McLaughlin to Mordas dated August 1, 2013 outlining his recollection of a meeting held on Tuesday July 22, 2013. The letter was read into the record. The letter required that Mordas implement the temporary plan developed by DCS&W by September 15, 2013.
5. Replansky showed McLaughlin a document from DCS&W dated August 14, 2013 who confirmed it was the temporary plan prepared by DCS&W regarding the moving of the

compost pile across the street adjacent to the barn. McLaughlin did not think Mordas ever complied with the proposed plan.

6. Replansky then submitted another letter from DCS&W dated Oct 3, 2012 which was a summary and field evaluation

As a result of Mordas' refusal to move the pile, McLaughlin stated he recommended to the Town Board that an appropriate way to handle the matter would be to draft a specific law to address the issue more directly. Following these discussions, Local Law #1 of 2014 was passed.

7. In a letter dated July 22, 2014, McLaughlin sent a copy of the new Local Law #1 of 2014 to Mordas asking her to remove the manure pile from its current location. He stated that Ms. Mordas did not remove the pile.
8. On August 5, 2014 McLaughlin sent a similar letter to Mordas asking her to remove the manure pile from the site by August 20, 2014.
9. An Order to Remedy Violation was issued on September 9, 2014 signed by both K. McLaughlin and M. Segelken as M. Segelken made the physical inspection before the order was sent.

Replansky asked McLaughlin if he had had a chance to verify that the property in question was located in the A5A district of North East. He replied that he had spoken to Janet Tissiere of the Dutchess County Department of Planning today and was told that she believes that there is an error in the Dutchess County parcel access data. In reviewing the old maps, it has come to light that the parcel on the west side of Indian Lake Rd is in the LC district. McLaughlin said there are several different maps to consult but the Dutchess County Planning Department believes all the land east of the rail bed is in the LC district. Replansky stated that a farm is permitted in both the A5A and LC districts. However, if an operation does not qualify as a farm, there may be an issue of whether Mordas can conduct animal husbandry in the LC district. Replansky asked McLaughlin if animal husbandry was permitted in the LC zone. McLaughlin replied he has not had a chance to research that question.

Arnason asked McLaughlin about his comment that the experts from Cornell Cooperative referred to the pile as having gone septic and asked him to clarify the term. McLaughlin said the term septic was used in the sewage treatment world that when something goes septic it is becoming toxic. The comment was made on a field visit done in 2013. Arnason asked if what was happening on the site today was consistent with condition at the time of the field visit in 2013. K. McLaughlin thought so and he said the experts also brought up the point that because of the dense shade, the current location of the pile is completely inappropriate for composting. He went on to say that there was a consensus among the experts that this was clearly not an appropriate location for making compost.

Replansky then entered two additional documents into the record. The first was an email from Brian Scoralich, the Acting Executive Director of DCS&W, summarizing his department's history with Ms. Mordas.

Replansky then read an email from Bob Somers, the Manager of the Agricultural Protection Unit of the Department of Agriculture and Markets dated March 13, 2014.

Replansky testified in his capacity as attorney for the Town that Mordas' statements regarding the court proceeding referred to above, were absolutely untrue. There was no trial and there was no determination by the judge as the case was simply withdrawn. It is not true that she was vindicated by the court in that action.

Subsequently, given Mordas' refusal to comply by moving the compost pile, the Town had no recourse other than to enact a local law that was clear, unequivocal, specific and straight to the point about the storage of manure in close proximity to the highway. Replansky went on to draft the law. In doing so he consulted with Ag and Markets and was provided with information he utilized in preparing Local Law #1 of 2014. The draft law was sent to Ag and Markets to confirm it was not in any way in violation of state farm laws or created an unreasonable restriction on farming activities. They signed off on the draft law and provided some even more stringent language about separation from wells that the Town Board decided not to include as they felt the points were covered by the Department of Health code. Replansky read part of the Local Law #1 of 2014. He reiterated that great care had been taken not to interfere with a farmer's ability to store manure appropriately.

Replansky told the ZBA that he would prepare a memorandum citing case law that show municipalities have the right to regulate non-conforming uses. Regulations need to be reasonable and done to protect the health and safety of the community. A public hearing was held regarding the law, it was sent to all affected agencies. None of these agencies had any problem with the law as written. The public hearing was closed and the law was enacted. Local Law #1 of 2014 is now the law and needs to be abided by everyone, including Ms. Mordas.

Replansky went on to state that he disagrees this property is a farm. He reviewed a number of definitions in the Ag and Markets law relating to farms and feels the only pertinent section in this case is the ability to show \$50,000 of gross income. To date, Mordas has not chosen to prove this point and her property does not benefit from an agricultural exemption at this time. He states that the town will concede that under the Town code, Mordas's operation would qualify as animal husbandry, a permitted use in the A5A district but not a permitted use in the LC zone.

Arnason requested that evidence be provided as to which zone the property in question is located. Evidence will be provided if it is determined to be relevant to this review.

Replansky's last point relates to Mordas's claim that the use was legally instituted. The Town does not believe this to be true and that the installation of the composting pile in its current location is in violation of the property maintenance code. Non-conforming use status is only afforded to uses that are legal. He then referred to the vehicle and traffic laws prohibiting throwing refuse onto public roads. The position of the town is that they want the violation remedied. Replansky ended by saying the Town is not looking to punish anybody.

Arnason stated there is a factual issue. What exactly is Mordas doing on her property? He is troubled by the title of this law "Storage of Manure" and the application of the law if she is composting. He asked Replansky to address this point in his memorandum.

Greenwood then summarized an email from David Head and Brooke Schooley, neighbors to the south of Mordas's property. They state that they have no aesthetic, health or safety concerns regarding the current location of the pile. They often walk on Mill Rd and have never noticed any odor or run-off associated with the compost pile. They have noticed water accumulation at the triangle since the resurfacing of Mill Rd but state they do not think this is caused by the pile which consists primarily of bedding and leaves. They do not feel the pile needs to be moved. The email is part of the public record.

Mordas asked if prior proceedings will have any bearing on the decision the ZBA will make. Greenwood said that the ZBA's responsibility was to address the Notice to Remedy Violation and not to determine if her property was deemed a farm. Greenwood then stated the ZBA may take prior proceedings into account in making their decision.

Mordas asked if Stevens had documentation of her property ever receiving water from the road. Stevens responded he did not although he has been observing the site for the past 20 years. Mordas stated that she had lived at her property since 1993 and has never seen water flowing from her land onto the road. She went on to question Stevens' comment that he has never observed composting activity on her property. Stevens stated that he checks Mill Rd five days a week as part of his responsibility to check beaver activity and resulting flooding on Mill Rd.

Mordas asked McLaughlin when, where and who made the comment that her pile was turning septic and was not a compost pile. He responded the comment was from Cornell Cooperative along with Ed Hoxie in a site visit meeting where John Merwin, Chip Barrett and others were in attendance. McLaughlin could not remember if Mordas was present at this meeting.

Delora Brooks made the following comments. She stated she was distressed that there was a lot of information given tonight and there were gaps in what was presented. She questioned if the ZBA had heard everything that was presented. She also felt the information provided was slightly selective. Brooks then asked if every Board member had made individual site visits to the property. She concluded that she felt the process was quite odd and not completely fair.

Mordas asked the ZBA to review the definitions of agricultural activities and non-conforming uses as outlined in the Town Code. She concludes that Local Law #1 of 2014 needs to be taken quite literally and should mean 100% manure as there is no definition of manure in the Town Code.

Greenwood requested a motion to recess the Public Hearing until the next regularly scheduled meeting of the ZBA on Thursday February 19, 2015 at 7:30 pm.

A motion to recess the Public Hearing until February 19, 2015 at 7:30 pm was made by Arnason, seconded by Lynch and passed unanimously.

Arnason volunteered to write the decision in the Lynn Mordas matter.

The meeting ended at 10:10 pm.

Respectfully submitted,

Edith Greenwood  
Co-Chair of the Zoning Board of Appeals