Town of Red Hook
Zoning Board of Appeals Special Meeting Minutes (Revised, Approved)

February 22, 2016

CALL TO ORDER

The meeting was called to order at 7:00 pm by Chairman Nick Annas

ROLL CALL

Members Present: Chairman Nick Annas, Tim Ross, Kris Munn, Jim Hegstetter, and Chris Klose.

Members Absent: Chris Carney and Doug Lee are absent.

Also Present: Victoria Polidoro, counsel for the Town of Red Hook ZBA.

Chairman Annas states that the matter before the Board is the question of whether rallycross on a farm, or farms, and having that several times a year, is a permitted use. He then asks Victoria Polidoro for comments. She reminds the Board that it is here to interpret the code as adopted, and whether, or not the Board members agree with [the Town Code] is a different matter. She further states that the Board is here to understand the intent of the legislature, when the [Town Board] adopted it, and to try and interpret [the Town Code] in accordance with that intent. Chairman Annas replies that it is sometimes difficult to read into the intent, that the reasoning behind a statement of intent is not generally clear in the statement [itself], and secondly, [it can also be hard to determine intent], when one goes back years later, to read [the statement of intent], and even the committee members, themselves, who drafted the statement may not agree on what the intent was, when the [statement of intent] was adopted. Victoria Polidoro replies that there are various ways to define intent. One can look at the purposes of that particular section of law, one can look at the context of a particular phrase, or whatever it is [that is being interpreted], by seeing what before [that phrase], and after it, and how they all fit together.

Chairman Annas states that the definition of *Accessory Use* [in the Code], states that it is secondary to the primary use, and that his question is when does a Secondary Use become so large, that it is the Primary Use. Victoria Polidoro replies that it is a matter of facts and circumstances. Chairman Annas asks Ms. Polidoro, if the Board is to consider Secondary Use as singular or plural; for example if he to were have a farm, with a modest amount of farming, and a whole host of other uses, there, [is that permitted in the Town Code]. Kris Munn replies that it is, that all of the permitted, Accessory Uses, are just that. [They are] permitted. Chairman Annas asks Victoria Polidoro what if the total income from the Accessory Uses exceeds the farming income, are they still Accessory Uses? He further asks Ms. Polidoro if the Board needs to look at the Accessory Uses together, or individually. She states that it is a hard question to answer, because there are Permitted Uses under the Code, and there are Accessory Uses, and so it really depends on the facts. She further states, that in this case, the Board is not looking at a

particular application, it is being asked in a vacuum – does the Permitted Accessory Use, in the Agricultural Business District (ABD), without respect to how [the applicant] is operating it, because it could be anywhere in the ABD. She states that the applicant's question was even more specific than that, as it came out during the public hearing. Ms. Polidoro states that [the applicant's] question was…Kris Munn interjects that if a farmer has an operation that is losing money, and has an Accessory Use, that earns, say, $50, it is still and Accessory Use. He futher states in particular if the farmer is farming all of his land, the question of profit and loss may be less salient, than the picture as a whole. Victoria Polidoro states that the way she heard the question, at the Public Hearing, and she believes the entire Board was in agreement, is as follows: "Is rallycross a Permitted Accessory Use under *Small Scale Entertainment*, which is [Section] 143-39.1.

Chris Klose asks how "Entertainment" to be understood [in the Town Code], [with regard to] the question posed by Mr. Greig. Victoria Polidoro replies that she has pulled together relevant parts of the [Town] Code, and broken them down, for the Board. She further asks the Board if it wants to go into attorney-client session. Chairman Annas asks how sensitive the information is. Ms. Polidoro replies that it is mostly just the Town Code. Chairman Annas states that the [Town Code] does not define entertainment. Chris Klose states that he is asking about entertainment due to the way in which the provision [in the Town Code] is worded, and due to the arguments that were set forth [at the 02.10.16 ZBA meeting] by Mr. Greig, and his supporters. Ms. Polidoro recommends starting with the bigger definition of "Small Scale Entertainment", which, she states, is one of thirteen examples of "Other Accessory, Agricultural, or Agritourism Uses" [in the Town Code]. She notes that the [Town] Code has a definition of "Agritourism", which is, she states, "activities conducted on a farm, or on land used for agricultural production, for the enjoyment, or education of the public, to primarily promote the production, sale, marketing, harvesting, promotion, or use of the products of the farm, and enhance the public's understanding, and awareness of farming and farm life". Ms. Polidoro further clarifies that everything [in the Town Code] that comes under "Other Accessory, Agricultural, or Agritourism [Uses]", are all supposed to be part of that idea of education, promoting the farm, and being open to the public.

Kris Munn asks Victoria Polidoro for clarification of the uses listed in that section that do not, in the general layperson's understanding, qualify, or are even contrary, under the header of the definition. He states the example of "organizing meeting spaces for weddings, and corporate picnics". He further states that if such an event is to be included under the stated definition, then it must be broadened to include introducing people to the fact that a farm exists. Victoria Polidoro clarifies that in this case the farmer is inviting people to the farm, to enjoy the farm. Tim Ross states that the idea behind this list is that it not be limited to "Agritourism", but that the inclusion of an Accessory Use [in the ABD] is intended to generate extra income for the farmers, so that they can stay solvent. Kris Munn states that [Section] F states "Agricultural and Agritourism Uses", so that if [the Board] is to use this as a litmus test, for the [current] application, there are other specific examples [in the list, under "Other Accessory Uses"], such as "Music Concert" or "Car Show", that are not clearly comparable to events like a wagon pull or hayrides, a crop maze, a petting zoo, or even a Bed and Breakfast, or a bakery selling goods. Mr.

Munn further states that events such as weddings, car fairs, and art shows, are holding an event on a farm, but are not strictly farm-related.

Chairman Annas states that one of the arguments in favor of such events is to bring people out to the farm, but in this case [the applicant and his supporters] claim this is not a spectator event. Chris Klose states that this speaks to his concern regarding the definition of "Entertainment" [in the Town Code]. He further clarifies that this type of event is for the enjoyment for rally enthusiasts, but that entertainment is for the public, and that you would charge admission, and further, that there is no supporting evidence that this is an entertainment, [in the usual sense] it is more for private enthusiasts. If we grant this provision, it would have significant influence, as was pointed out by Amy Dubin, town-wide. Mr. Klose concludes that entertainment has a specific purpose, and [in comparison] that this type of event is private, and no one pays admission. Tim Ross notes that not all entertainment events charge admission, and that one of the [applicant's] neighbors did state that he attended one of the [rallycross] events. Victoria Polidoro notes [from the minutes] that on December 09th, Mark [Van DeCarr] stated that they did not advertise, and that spectators were not invited. Victoria Polidoro recommends that the Board, since this is an interpretation, see if the term "Entertainment" is used anywhere else in the [Town] Code, and how it is used, if the Board can't glean what is meant by that, then the Board may consult a dictionary. Tim Ross notes that the code does not state explicitly for whom the entertainments listed are intended, further that the rallycross is, [in fact] small scale entertainment for the participants, and those people pay to come race their cars around the track.

Chris Klose notes that the Board voiced concerns [at the Public Hearing, in January] on how the application [itself] was presented, that it was nearly illegible. He asks Victoria Polidoro how the Board is to consider what was presented, [since it is difficult to gain information from the application]. Victoria Polidoro clarifies that the Board also determined, with the applicant, during the course of the January meeting, what comprised the applicant's question, and to which section of the [Town] Code it was referencing, and that it is the applicant's burden of proof to demonstrate that the code enforcement officer was incorrect in his denial of the permit. Chairman Annas asks Victoria Polidoro if she feels the applicant has met this burden of proof. Ms. Polidoro replies that the applicant, in his discussion with the Board, did narrow the question.

Chris Klose asks Ms. Polidoro how to consider the [present] application for an interpretation, in terms of the public will. Ms. Polidoro replies that this is why the Board must interpret the [Town] Code as it is, and not how one would want it to be. Kris Munn notes that there is no balancing between benefit to the applicant versus a detriment to the community, that an interpretation is about the law. Ms. Polidoro notes that the relevant [Section of the Town Code] states purposes for this [legislation], in sections 1-10 [of Section 39.1 A 1], and that these are very specific purposes that might inform the Board's decision, as well. Chris Klose notes that all of these purposes are agriculturally related, and Ms. Polidoro concurs, and notes that this was put into the law so that when a matter arises, it can help the Board interpret the law. She references Section 39.1 A 1 "Protection of Agriculture", and states that these are some of the things that would color an interpretation.

Chris Klose asks Ms. Polidoro if the specific issue that the Board is to interpret regards "Small Scale Entertainment". She replies that the question is as follows: "Was Steve Cole incorrect when he determined that rallycross is not a permitted use under "Small Scale Entertainment?" Mr. Klose asks the Board to confirm that the applicant understands that this is the question, which it does. Kris Munn asks Ms. Polidoro if there are any other places in the [Town] Code, in which rallycross, or competitive races is mentioned, and/or defined, and notes that if it were mentioned elsewhere, since if it is defined as being permitted elsewhere, then by definition, it is not permitted in the [ABD] .

Chairman Annas suggests that the Board review item six on the list [in Section 39.1 A 1], implying that there should be a separation between agriculture and [other uses]. He further notes, that "Small Scale Entertainment" contains examples, which are unrelated to agriculture, that the only thing [farm] related [in the use, presented in the application] is the fact that the applicant has a large enough open space in which to do it. Chairman Annas further notes that this type of event is not specifically identified in the example listed in the [relevant section] of the [Town Code]. He references "Music Concerts", as an example from the list of ["Other Permitted Accessory Uses"]. He also compares a rallycross event to a car show, and states that the rallycross event could be considered a dynamic car show, and states that a music concert is also dynamic. Ms. Polidoro references the minutes of the December 2015 meeting, in which Mark Van DeCarr stated that rallycross is not a car show, since the public is not invited, and no admission is charged. She further notes that events [such as car shows and music concerts] are advertised to bring attention to the event, and perhaps awareness to the farm. Kris Munn uses the example of a juried art show, in which only the artists are invited, and then go home, to raise the question of whether this would still be considered an art fair, [even if the public is not invited]. Ms. Polidoro states that the Board needs to interpret the question [raised by the applicant] under the heading of "Agriculture" or "Agritoursim", [as defined in the Town Code]. Tim Ross states that [rallycross, as presented by the applicant] is very similar to what is described in item 9, [on the list at Section 39.1 A 1], but asks Ms. Polidoro what is to stop someone from [hosting rallycross on a farm] or an art fair every weekend. Kris Munn responds that an applicant can go to the Planning Board to get authorization to do [such events] every weekend. Tim Ross then states that there is [in theory] no numerical limit. Mr. Munn replies that the limit on the number of events would be set by the Planning Board. Mr. Ross then asks what would happen if an applicant wanted to do 30 events, and Mr. Munn replies that, at that point, the Planning Board might determine that it is no longer an accessory use, but a primary use, and deny the application. He further notes that the Planning Board might determine that there is too much traffic, insufficient facilities, and public health and welfare issues, in regard to accessory uses. He states that there is nothing [in the Town Code] that states that one may not apply for a permit to hold a music concert every week, or even every day, but that the applicant still has to go to the Planning Board for approval, whether by minor site plan review, or public hearing.

Chairman Annas asks Kris Munn to clarify when [the Planning Board would determine that] an accessory use becomes a primary use. Kris Munn states that it can be subjective, and that it is a case of "knowing it when you see it". To which Chairman Annas asks what criteria are used,

since it was stated earlier that a financial criteria would not necessarily qualify. Ms. Polidoro states that the applicant is stating that [the rallycross events] host 35-40 cars, and Chairman Annas adds that the applicant has stated that about 80 people attend the event, which begins and ends on the same day. He further notes that the applicant has stated that these events take place 4 times a year. Kris Munn notes that if that was all the applicant ever did on [a given] parcel of land, it would be an example of a primary use. Mr. Munn notes that if the Planning Board approved permits for [an event similar to what the applicant is asking for] on agricultural land, and 6 months later the applicant came back to the Planning Board for additional permits, the Planning Board could determine that the use is no longer accessory, but is primary.

Tim Ross states that he and other Board members do not consider [the events, as described by the applicant] comprising 40 cars, 4 times a year, a big deal, but that an interpretation would have to restrict the [Permitted Accessory Use in the ABD] so much, that it could not be more than what is being asked for [by the applicant]. Ms. Polidoro states that the ZBA does not get to determine that, but that it could state that what is being asked of the Board comprises the question "Is rallycross of 45 cars, no more than 4 times a year, an 'accessory use' under this section [of the Town Code]?" She further states that the applicant never included information on setbacks in his question to the Board, so the Board cannot include that into the record.

Kris Munn notes that an applicant [for such events, or even a concert] would still have to go to the Planning Board, and if [this person] wanted to host the event adjacent to the road, the Planning Board would have something to say about that, and also health safety and welfare issues. He further notes that this is part of the review process that any of the ["Other Accessory Uses" in the ABD] would have to undergo, and that this review includes a minor site plan review, or a public hearing. Mr. Munn futher explains that the applicant would come to the Planning Board, for a minimum $150 fee, and the Planning Board would allow a given number of events per year. Ms. Polidoro also clarifies that [minor site plan review] is per lot, so that the applicant would have to obtain approval for each lot he intends to hold the rallycross. She notes that in the ABD, [an interpretation in favor of the applicant] would [mean that rallycross is permitted] on every lot, that has adequate acreage. Kris Munn notes that this also holds for all of the "Other Permitted Accessory Uses". Chairman Annas notes that the rallycross events could traverse more than one parcel. Tim Ross notes that the applicant has stated his events require 8 acres.

Ms. Polidoro asks the Board if it considers this type of use as detrimental to agriculture, and therefore not consistent with agricultural uses, or agritourism. Tim Ross responds, the way [it has been presented to the Board], he does not consider it a detriment, in particular because the applicant rotates the event among his fields. He posits a scenario, in which the applicant would always use the same field, and states this could be a detriment. Ms. Polidoro asks if this would be due to [soil] compaction. Mr. Ross responds that light cars do less damage than a tractor, but if they are always run in the same location, it would, in time, compact the soil. Chris Klose notes that the Board was told that the cars use aggressive tires, and travel at 35-40mph. He further states that this will tear up a field in no time. Tim Ross responds that tearing up a fallow field does not hurt it for the next year. Chairman Annas notes that if a farmer has plowed his field, he

has torn it up, and that the applicant will have a rallycross on a field one year, and have it planted the next year. Ms. Polidoro asks the Board if rallycross is always on dirt. The Board replies that the events are mostly on dirt, and occasionally on gravel lots. Ms. Polidoro then asks the Board if the applicant's question only pertains to a dirt [surface]. Chairman Annas asks Ms. Polidoro if the Board were to interpret in favor of the applicant, can it stipulate that there would be no permanent changes [to the land]. Ms. Polidoro repeats that she is asking the Board if the applicant's question is only related to dirt. Mr. Ross states that the way he would phrase the interpretation, would be to state that "The way it was presented to the Board, no more than 4 events per year, on fallow fields, that could be returned to agricultural use" and [the applicant] did say [he was] never closer than 500 or 1000 feet to a neighbor, and that it was noted that noise ordinances are never exceeded.

Mr. Ross asks a neighbor, who is present, Mrs. Linda Keeling, if she has ever heard the cars. She states that she has watched, but does not hear it from her home. Chairman Annas states that he is concerned that if the Board allows this [accessory use], the next applicant will come along and want to do motorcycle races on his property, so that the standard would come closer and closer to what the next applicant wants. Victoria Polidoro replies that any applicant would have to go to the code enforcement officer first, and that he might look at the opinion [the Board would render], and decide that motorcycle racing is permitted, or he might say it is not, and then the applicant would come before the Board. Kris Munn notes that the Board's decision will have the effect of broadening, or narrowing the parameters the code enforcement officer would use to approve or deny a permit. Chris Klose asks what would prohibit an applicant from hosting an event with much larger vehicles. Tim Ross states that the Board would review such an application.

Chairman Annas states that way in which the law is written is not clear, and that it needs further review. He notes that the paragraph is outside the first couple of pages of intent. He asks Ms. Polidoro if the Board is to consider the preamble, or number 9[Small Scale Entertainment]. She states that they must be interpreted together. Tim Ross responds that this is possible, and that it is crafted in such a way that a farmer can utilize a fallow field. He notes, however, that [the accessory use] has to be small scale, and that this is a gray area within [the Town Code]. Chris Klose expresses concern regarding case law and the public will [with regard to rallycross events in the ABD]. Tim Ross and Jim Hegstetter respond that there was only one, anonymous complaint, that they were not even aware that these events were going on. Ms. Keeling states that she is aware of these events, but that as long as they are far enough away, she is not bothered by them. She notes that there are other neighbors who would be closer to the event. Chris Klose agrees with Chairman Annas that the law is unclear, and that it needs revision. He also expresses concern that allowing uses in a piecemeal fashion, could have a deleterious effect on the community. Kris Munn states that were the Town Board to clarify section 9, the Board's decision would be null and void. Ms. Polidoro clarifies that the lots in which this was already practiced would be grandfathered in. Tim Ross states that the applicant would have to conduct the events at least every 18 months. Kris Munn states that minor site plan review by the Planning Board is generally only for one year, unless the Planning Board issued an open ended permit.

Chairman Annas notes that the language for the "Other Permitted Accessory Uses" is all farming related, until section 9 "Small Scale Entertainments", at which point, he states, it is unhelpfully vague. Tim Ross notes that [the drafting of the language, regarding the ABD,] took a long time, and that the farmers had to give up something for [the district] to be created. He further states that [the uses related to "Small Scale Entertainment"] was a way of giving something back to the farmers. Kris Munn notes that the provisions 1-10, back in section A, for the creation of the [ABD], such as to conserve a critical mass of farmland, and to facilitate active and economically viable agricultural use of the land, for now, and in the future, are compatible with the section on "Other Permitted Accessory Uses", as sources of additional income for the farmers. He notes that the Board's decision comes down to whether or not the accessory use, described by the applicant, could be permitted in the entire ABD, without destroying the farm, and thereby violating the intent of the the law that created the district. Mr. Munn concludes that he cannot see a substantive difference between the listed permitted accessory uses, under small entertainment in the ABD, such as music concert, car shows, and art fairs, and rallycross, as it has been presented by the applicant, when it considering their relationship to agricultural or agritourism uses. He states that none of them are particularly related to agriculture, in a strict sense, but they do bring people to the farm, and contribute to the overall solvency of the farm.

Jim Hegstetter asks if the Town could prohibit a rallycross event, if the property owner were not getting paid for it. Kris Munn states that if a property owner invites people/strangers onto his land, he would still need a permit. Jim Hegstetter then asks what if the people invited were friends, and notes that the applicant has been hosting these events 8 years, with no complaints, other than an anonymous letter. He further states that if the Board is in a position where it wants to deny, or approve [the permit], it must be based on serious consideration, and grounds, for example, if it were to be considered not safe, or due to adverse effects to the [farm] and to the public. Mr. Hegstetter notes that no one spoke out against this type of event during the public hearing, [at the January meeting], and that the person who wrote the anonymous letter was not present. Both Tim Ross and Jim Hegstetter characterize the statement made by Amy Dubin, [at the public hearing], that motor sport is a slippery slope, and both agree with this. Jim Hegstetter states that it is the Board that will keep rallycross from becoming a slippery slope, and further states that he is in favor of including language that will limit the interpretation to respond to the question asked by the applicant, exactly as the applicant described the event.

Victoria Polidoro reiterates that the Board is finding that this particular use is consistent with the district, because it is bringing money to the farm, and it is allowing use of a fallow field, and which does not otherwise harm the field, that it is consistent with the intent, and fits in with "Other Accessory Uses". Tim Ross interjects, that this is correct as long as this position is referring to an event, as it was described by the applicant, that it be extremely limited. Kris Munn notes that it is not clear that there is a full consensus, in consideration that two [Board] members are not present, whose opinions may differ from those expressed. Ms. Polidoro states that she will draft a resolution for the Board. Kris Munn requests that two resolutions be drafted - one in favor, and one opposing the applicant's request. Tim Ross asks Ms. Polidoro if, according to the open meetings law, each Board member may communicate with her via email. Ms. Polidoro responds that each member may respond individually, but may not copy the other

Board members on their comments. She further states that any comments must be sent to her, on an individual basis, so that she may draft a resolution. The Board briefly discusses the level of disturbance caused by a music concert with 500 to 1000 people, and compares it to a rallycross event. Tim Ross asks Victoria Polidoro to draft a resolution, and send it to the Board members, using attorney client privilege, and ask for comments from each Board member.

Chairman Annas notes that the [Town Code] does not address motor sports, and Victoria Polidoro notes that this would be an argument for an interpretation [opposing the applicant's request]. Chairman Annas further notes that the Code Enforcement Officer ruled, that in cases like this, that if it is not specifically permitted, then it is not a permitted use. Ms. Polidoro concurs that this is a true tenet of statutory interpretation, but she further notes that the problem with the matter at hand is that the provision is open ended, that in stating the permitted accessory uses, [the provision] states "for example", which also means "not limited to". Chairman Annas states that he does not see motor sports falling into the "small entertainment" category, in which "car shows" are listed. Kris Munn states he believes, in terms of intensity of use, that rallycross, [as described by the applicant], is small in scale, but that it remains to be seen whether it is compatible with agriculture. The Board briefly discusses the difference between rallycross and car racing. It specifies that rallycross is generally one, and not more than two, cars at a time, racing against the clock, and not each other. Chairman Annas notes that this is also true for drag racing, and that some very powerful cars could end up racing on farms. Kris Munn states that it would probably not get approval from the Planning Board.

Chris Klose notes that he will not be present at the [ZBA] meeting on [March] 10. Tim Ross asks Victoria Polidoro if an interpretation has to go [Dutchess] County Planning for review. She states that it does not. Tim Ross also notes that the Board will have an attorney-client session, during the regular meeting. Victoria Polidoro states that she will begin drafting findings based on this meeting, and will draft findings, in favor of, and opposing [the applicant's question], just in case. Tim Ross asks for a preamble stating the nature of the Board's concerns, and also stating the ambiguous nature of the provision. Ms. Polidoro notes that there is another tenet of statutory interpretation, that states "if something is truly ambiguous, and the [Board] cannot figure out the context by looking at everything around it, it must rule in favor of the landowner." The Board briefly discusses the limitations that can be put into the interpretation. Jim Hegstetter states that his main concern that this type of event be kept to a reasonable size. Tim Ross states that this event, as described by the applicant, seems reasonable, but reminds the Board that this [accessory use] will be permitted in the entire ABD. The Board briefly discusses the location of other farms in the ABD, and their proximity to residential neighborhoods.

Kris Munn asks Victoria Polidoro if the Board were to rule in favor of the applicant, would that prevent the code enforcement officer from permitting 5 such events per year, or if it the Board's decision would merely serve as guidance. Victoria Polidoro states that it would not prevent it, and that the Board's decision would state that the rallycross event, as described by the applicant, is an accessory use, but it would not say what is not an accessory use. Kris Munn notes that whatever the code enforcement officer approves, it still has to go to the Planning Board. Tm Ross states that the Board could also state, in the interpretation, that the events must be as

described by the applicant, and that anything above this description, in terms of frequency, numbers of cars, and numbers of drivers and attendees, would have to be reviewed by the Board. Victoria Polidoro responds that the Board is interpreting the applicant's question, and that the Board could try this. Kris Munn asks if the Board has deliberated long enough to determine what numbers would correspond to an accessory use. Victoria Polidoro recommends interpreting the question, as asked by the applicant. Chairman Annas asks Victoria Polidoro for clarification, when the Board is talking about 4 events per year, does this mean per parcel? She responds that it does. Chairman Annas notes that the application to the ZBA involves 7 parcels, and so this could be up to 28 events per year. Kris Munn reminds the Board that the Planning Board would still have to approve it, and that the minimum review by that Board is minor site plan review. Tim Ross suggests including a provision that the event not be held on land currently under agricultural use. Victoria Polidoro responds that she has this in her notes, that the events would take place on fallow fields. Chairman Annas states that this would also imply that the land would be used again, in the short term, for agriculture. Kris Munn states asks why it would be a problem if a landowner had 30 acres, and used 26 for crops, and 4 for racing, and did not rotate them. He further states that he does not think this Board is qualified to address every caveat, and nuance, to rewrite legislation, that this is not the Board's job. He states that the Board needs to rule on the specific question before it, and allow any additional applicants the possibility of applying for a permit, and if they get it, they go before the Planning Board, and if not, they come before the ZBA. Ms. Polidoro states that the Board cannot come up with an arbitrary number [of events per year].

At 8:16 pmTim Ross moves to adjourn the meeting. Chris Klose seconds, and all are in favor.