

City of Auburn, Maine

"Maine's City of Opportunity"

Office of Planning & Development

Zoning Board of Appeals

To: Zoning Board of Appeals

From: Eric J. Cousens, Deputy Director of Planning and Development

Date: August 7, 2014

Re: Administrative Appeal of Daniel and Marie Herrick (the Petitioner) to appeal the denial of a building permit to construct a single family home in the Agriculture and Resource Protection District at 240 Hatch Road / PID # 213-006 pursuant to Chapter 60, Article XV, Division 4, Section 60-1186.

I. AUTHORITY/JURISDICTION

The Board has jurisdiction to hear Administrative Appeals under Section 60-1186. Administrative appeals, Of the City of Auburn Ordinances. The section reads as follows:

(a) The board of appeals may hear appeals in the administration of the zoning chapter in order to determine if the building inspector or code enforcement officer erred in granting or denying a permit. An applicant who is given no decision on a permit request, or who is denied a permit may appeal.

(b) If the board of appeals finds that the building inspector or code enforcement officer acted in error, it should order the error to be corrected.

In this case the Petitioner will present the reasons that they believe that the permit should have been granted and City Staff will present the Ordinance and the reasons that the permit was denied. The Board will need to decide if building inspector or code enforcement officer acted in error. If the Board finds that City staff did not act in error, the appeal should be denied and the decision of the building inspector or code enforcement officer should be upheld. If the Board finds that City Staff did act in error then the appeal should be granted and the decision of the building inspector or code enforcement officer should be ordered by the Board to be corrected.

II. PROPOSAL

The City of Auburn received an appeal from Daniel and Marie Herrick to appeal the denial of a building permit to construct a single family home in the Agriculture and Resource Protection District at 240 Hatch Road / PID # 213-006 pursuant to Chapter 60, Article XV, Division 4,

Section 60-1186. Staff has provided a number of documents from the file and included them with this report. The documents are combined into a page numbered pdf file and this report references the page number at the bottom left corner of the pages.

Property History Summary:

1. On 12/16/1991 John J. Lander applied for a building permit to construct an agriculture and equipment building at 240 Hatch Road and the permit was approved. Copy attached on Page 17-19. Attached to the application (page 20) was a letter from John Lander that states the following, "The building will be used to store agr. products and equipment, lime, fertilizers, also for drying of herbs".
2. On 5/6/1992 John J. Lander applied for a plumbing permit to install a subsurface wastewater disposal system for an "AGRICULTURAL BLDG." and the permit was approved. Copy attached on page 13-15.
3. On 11/24/1992 John J. Lander applied for a building permit for an addition to the agriculture and equipment building and the permit was approved.
4. On April 26, 1993 John J. Lander requested an amendment to the 11/24/1992 permit that indicated that he would change the structure to include a bedroom, living area and kitchen and the request was denied on April 29, 1993 (see attached letter on page 12).
5. In March of 2014 I received a phone call from a local realtor asking about the legal status of the home prior to listing it for sale. The inquiry prompted a review of the property file and it was clear that the building was converted to a home illegally after the denial of the April 26, 1993 request to amend the earlier permit for an agriculture and equipment building.
6. Later in March I received a phone call from Daniel Herrick asking about the legal status of the property at 240 Hatch Road as he believed "it was built without permits". Staff confirmed that the home was illegal and that the City could require that it be removed or the violation be corrected in some other way. Mr. Herrick informed me that he was considering purchasing the property because he raises both pigs and turkeys and the USDA requires separation between the two types of animals for disease related concerns. Mr. Herrick explained that the location was close to his home, could easily be converted into a turkey coop and asked if that would resolve the zoning violation. After agreeing that it would resolve the violation the conversation was ended and Mr. Herrick indicated that he may purchase the property.
7. On April 1, 2014 I sent a letter to the owner of Record, John Lander Jr. (now deceased), to remind him of the violation and recorded an affidavit and a copy of the letter and attachments in Book 8887, Page 272-Page 277 of the Androscoggin County Registry of Deeds to ensure that a buyer of the parcel would be aware of the violations. A copy is attached on page 10-16.
8. On April 19, 2014 Mr. and Mrs. Herrick purchased the property at 240 Hatch Road for \$9500.00 and on April 22, 2014 the deed and affidavit related to that purchase was recorded at the Androscoggin County Registry of Deeds in Book 8898, Pages 266-267. A copy of the deeds are attached on pages 28-29.

9. In June of 2014 the Petitioner applied for a building permit for a new single-family home at 240 Hatch Road and the permit was denied because single family homes are not permitted in the Agriculture and Resource Protection Zoning District.

The Agriculture and Resource Protection Zoning District (AG/RP) covers approximately 40% of the City and serves the following purpose:

Sec. 60-144. Purpose.

The purposes of this district are to allow for conservation of natural resources and open space land, and to encourage agricultural, forestry, and certain types of recreational uses. It is declared to be in the public interest that these areas should be protected and conserved because of their natural, aesthetic and scenic value, the need to retain and preserve open space lands, their economic contribution to the city, and primarily because these areas are so remote from existing centers of development that any added uncontrolled growth could result in an economic burden on the city and its inhabitants. This section shall be construed so as to effectuate the purposes outline here and to prevent any attempt to establish uses which are inconsistent with these purposes or any attempt to evade the provisions of this division.

As is the case with each City zoning district, the AG/RP zoning district has a list of Permitted uses and a list of Special Exception Uses. Permitted Uses can be approved at a staff level and Special Exception uses require a higher standard of review and, with few exceptions, can only be approved after a public hearing and vote of the Planning Board. Uses that are not listed in a particular district are not allowed. The AG/RP zoning district has directed growth to the central area of the City where services can be provided efficiently and has discouraged growth in the rural areas since the 1960's. The AG/RP zoning district was a very forward thinking growth control that came from the 1958 City Plan before urban sprawl was a popular planning term and has served as a model for other communities and current use tax programs. Below is an excerpt from Section 60-145 Use Regulation that limits dwellings to situations where they are accessory to a farming operation. Dwellings as a primary use of property and that are not accessory to farming are not permitted. The following sections also prescribe what *accessory* means and establish the 50% income requirement that has been in place for decades.

Sec. 60-145. Use regulations.

- (a) *Permitted uses. The following uses are permitted:*
 - (1) *One-family detached dwellings, including manufactured housing subject to all the design standards, except the siting requirements of section 60-173, as set forth in article XII of this chapter, accessory to farming operations subject to the following restrictions:*
 - a. *No certificate of occupancy shall be issued for any such farm residence until the barns, livestock pens, silos, or other such buildings or*

structures which are to be erected in connection with the proposed agricultural use as shown on the plans and specifications presented to the municipal officer charged with enforcement are substantially completed.

- b. In no case shall any farm residence constructed under the provisions of this section after the effective date of the amended ordinance from which this section is derived continue to be occupied as a residence if the principal agricultural use has been abandoned or reduced in scope below the minimum requirements as shown on the plans and specifications presented to the municipal officer charged with enforcement.*
- c. Any residence constructed under this article shall not be converted to nonfarm residential use except by permission of the planning board based upon a finding that the abandonment or reduction in such use resulted from causes beyond the control of the applicant and not from any intention to circumvent the requirements of this article.*

The terms Accessory and Farm are clearly defined in Section 60-2 of the Ordinance as follows:

Accessory use means a subordinate use of land or building which is customarily incidental and subordinate to the principal building or to the principal use of the land and which is located on the same lot with the principal building or use.

Farm means any parcel of land containing more than ten acres which is used in the raising of agricultural products, livestock or poultry, or for dairying. The term "farm," under the Agricultural and Resource Protection District, shall be further defined as meeting the following criteria:

(1) At least 50 percent of the total annual income of the farm occupant and his spouse living in the farm residence will be derived from such uses; and

(2) At least ten acres of the farm will be devoted to the production by the occupant of field crops or to the grazing of the occupant's livestock. For purposes of this definition, the term "poultry" means no fewer than 100 fowl and the term "livestock" means no fewer than 20 cattle or other animals being raised for commercial purposes.

The Petitioner has not provided any written information regarding farm income and has verbally admitted that he will not earn 50% of his household income from farming. Please refer to the opinion from the City Attorneys, Dan Stockford and Anne Torregrossa dated June 19, 2014 for additional advice (page 28). The property file is clear and Mr. John Landers letter (page 20) confirms that City Staff and the property owner were fully aware that a home could not be permitted on this property.

It is City Staff and the City Attorney's opinion that issuing the permit would violate the City Ordinance and the permit had to be denied.

The Petitioner will likely argue that because the previous owner violated the Ordinance that they too should be allowed to violate the ordinance again to build a new home on the property. The fact that someone gets away with a violation of zoning or other legal requirements once does not give them permanent exception to that requirement. Any argument that the petitioner should be able to construct a building for a use that is not permitted in the zoning district must be denied.

The Board should also be aware that the decision on this case could have far reaching implications for the City and the integrity of the AG/RP zoning district. If the Board finds that the appeal should be granted and the permit issued, there could be people illegally converting agricultural buildings to residential uses throughout the AG/RP zoning district and when they are caught, instead of being required to comply with the ordinance, they could simply apply for a permit and use or replace the illegal structure with a home.

III. RECOMMENDATION.

Staff recommends that the Board consider the following findings:

1. The parcel at 240 Hatch Road is owned by Daniel and Marie Herrick and we have a copy of the deed from the Androscoggin County Registry of Deeds Book 8898, Page 266 as evidence of that fact.
2. The parcel at 240 Hatch Road (City PID # 213-006) is located in the Agriculture and Resource Protection Zoning District as shown on the City of Auburn Zoning Map.
3. The City Zoning Ordinance, Chapter 60, Section 60-173(1) requires a minimum of 10 acres of land for a building to be erected on lots in the AG/RP zoning district.
4. The City Zoning Ordinance, Chapter 60, Section 60-2 Defines Farm as any parcel of land containing more than ten acres which is used in the raising of agricultural products, livestock or poultry, or for dairying. The term "farm," under the Agricultural and Resource Protection District, shall be further defined as meeting the following criteria:
 - (1) At least 50 percent of the total annual income of the farm occupant and his spouse living in the farm residence will be derived from such uses; and
 - (2) At least ten acres of the farm will be devoted to the production by the occupant of field crops or to the grazing of the occupant's livestock. For purposes of this definition, the term "poultry" means no fewer than 100 fowl and the term "livestock" means no fewer than 20 cattle or other animals being raised for commercial purposes.
5. The parcel at 240 Hatch Road is approximately 5.45 acres in size based on City tax records and does not meet minimum lot size requirements of the zoning district.
6. The Petitioner has not demonstrated that he/she intends to meet the income requirements of the Ordinance or the requirement to devote at least 10 acres to the production of field crops or the grazing of livestock.

7. City of Auburn Ordinances, Chapter 60-Section 145. AG/RP District Use Regulations lists One-Family Detached Dwellings as a permitted use if they are accessory to a farming operation subject to some restrictions.
8. City of Auburn Ordinances, Chapter 60-Section 145. AG/RP District Use Regulations does not list One-Family Detached Dwellings as a permitted use by itself as a principal use and allowing the use would be in conflict with the purpose of the zoning district.
9. Issuance of a permit by Staff for uses that are not permitted in a zoning district would violate City Ordinances.
10. A violation of a City Ordinance does not give the property owner the ability to repeatedly violate City Ordinances.

Based on the above findings, the Board concludes that the Petitioner did not demonstrate that the permit was denied in error. City Staff followed the requirements of the ordinance and correctly denied the permit for a new single-family home that was not accessory to a farming operation and the decision of the building inspector and code enforcement officer is upheld.

Eric J. Cousens
Deputy Director of Planning and Development