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r July 28, 2020

BY EMAIL AND FIRST-CLASS MAIL

Ms. Crystal Peck, Town Planning Attorney
Mr. Jeremy Cramer, Building Inspector
Town of New Scotland
2029 New Scotland Road
Slingerlands, NY 12159

Re: Donato/Neander Intention to Appeal at Meeting Tonight

Dear Crystal and Jeremy,

In accord with my email correspondence last week and over the weekend with Crystal, please be advised that my client will appeal the denial by Jeremy of my client's non-conforming use that my client has raised in her submissions. To wit, we are invoking and relying on Section 190-50 of Article IV of the Town of New Scotland Zoning Law, which states:

> "Exceptions. The requirements for a special use permit do not apply to any use lawfully existing as of the effective date thereof."

We specifically raise and refer to this provision in our submission, and it is black letter law that a variance is an exception to zoning, whereas a nonconforming use (also known as a grandfather clause) arises under New York common law (and Section 190-50) when there is a change to the zoning, but an existing use is still permitted to continue. A town building inspector's failure to consider, mention or apply this crucial distinction is *prima facie* arbitrary and capricious.

By attempting to sidestep the actual basis for our application, you are acting to deprive my client of the recognition that she has an existing non-conforming use to sell woody biomass, produce, and flowers, and maintain chickens and sell eggs, as allowed by the grandfather provision in Section 190-50. This is not a case such as in MTR Off Shore Restaurant Corp. v. Linden, 30 N.Y.2d 160 (1972), where that local zoning ordinance did not contain such an exception. Where a zoning ordinance contains such a grandfather clause, a petitioner is permitted to introduce evidence to meet his/her burden of proving continuous use, and a building inspector must present affirmative evidence

demonstrating lack of continuous use to issue a denial. Matter of 278, LLC v. Town of East Hampton Zoning Appeals Board, 2018 NY Slip OP at *3 ("a denial of a special use permit must be supported by evidence in the record..."; see also Matter of Smyles v Board of Trustees of Inc. Vil. of Mineola, 120 AD3d 822, 823; Matter of Green 2009, Inc. v Weiss, 114 AD3d 788, 789; Matter of White Castle Sys., Inc. v Board of Zoning Appeals of Town of Hempstead, 93 AD3d 731, 732. We have presented substantial evidence of continuous use, while you have not presented any evidence whatsoever of a lack of continuous use and cannot, because there is no such evidence. You have therefore failed in to meet your burden as a matter of law.

For these reasons, we will appeal Jeremy's denial, which has no evidentiary basis. In contrast, as you know we have submitted the following documents, and will additionally submit hundreds of petitions later today that have been signed by community members evidencing the benefits and longevity of my client's long-standing farming activities:

- Affirmation of Jeremiah F. Manning III, Esq. dated July 9, 2020
- Affirmation of Jeremiah F. Manning II, Esq. dated July 8, 2020
- Affidavit of Joseph Donato dated July 8, 2020
- Affidavit of Phil Donato dated July 8, 2020
- Affidavit of Randy Wilson dated July 8, 2020
- Affidavit of Arthur Neander, Jr. dated July 8, 2020

Please contact me by email at jmanning_us@yahoo.com or by phone at 518-334-2652 if you have any questions or require additional information. Thank you for your consideration.

Very Truly Yours,

Jeremy F. Manning

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