

TOWN OF NEW SCOTLAND PLANNING/ZONING BOARDS
COUNTY OF ALBANY

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IN RE APPLICATION OF CATHERINE DONATO

CATHERINE DONATO,

Petitioner.

**ATTORNEY
AFFIRMATION OF
JEREMIAH F.
MANNING, II**

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STATE OF NEW YORK)
SS)
COUNTY OF ALBANY)

I, JEREMIAH F. MANNING, II, an attorney admitted to practice law before the courts of the State of New York, and not a party to the instant matter, affirm the following to be true under the penalty of perjury pursuant to CPLR Section 2106:

1. I am an attorney with offices at 49 Oldox Road, Delmar, NY 12054. I have represented members of the Donato family for over 50 years.

2. This affirmation is intended to be a factual affidavit with two exceptions: (1) reference to Article 25AA Section 301(2) of the New York State Agriculture and Markets Law; (2) reference to non-conforming and accessory uses of agriculture property.

3. This application concerns the property at 64-1198 Normanskill Road, Voorheesville, NY 12186. The Prospective of this matter is understood easily because the use of the subject property is a non-conforming use. The other issues are important, but secondary.

4. The Furman farm is at the corner of Font Grove Road and Krumkill Road. It was a fully functional farm until approximately 1985, growing, harvesting and selling chickens, eggs, pigs, cows, and in my youth, farm horses, and a wide variety of agricultural products. As Mr.

Furman aged, the land was used to cultivate, harvest and sell hay. During this time, the Donato family were contiguous neighbors to Mr. Furman, and also operated fully functional farms on their lands which included the subject property. The farm was Mr. Furman's sole business, and he went to Albany near what is now the Times Union Center to sell his produce daily.

5. The Donatos always had farm stands on their properties; most had other crafts as well, e.g. Mr. Louis Donato was known as the best welder in the area.

6. I worked on the Furman farm beginning in 1945. The entire area, including the subject property, the Furman farm, and Font Grove Road to Normanskill Road and Johnston Road, was all farmland. The farmers were all land rich, none made much income, and their agricultural uses included accessory uses in order to stay solvent.

7. In addition to providing this historical context, I can also testify to two other relevant factual matters.

8. First, the subject properties have been farmland for at least 70 years, and parts of the original Donato farmland was subdivided for use by the sons and other family. It continued to be farmland thereafter. The subject property has also been subdivided for a residence and the main parcel was used for farming.

9. Second, the Donato family supplied wood to Mr. Furman on an annual and continuous basis until at least 1995 for his kitchen wood stove. His other stove was coal and that was how he heated his farmhouse. I note that this was typical of farmhouses on farms in this community and others, and additionally that Mr. Furman's residence had no running water and used well-water and an outhouse. The elder Donato grandparents' residence on the original, undivided Donato parcel were similarly fashioned.

10. From my direct personal knowledge of the use of the land in the area over many,

many years, I am surprised at the zeal of Town of New Scotland Planning Board in attempting to eliminate the use of the subject property for agricultural purposes, including the sale of produce and wood at a farm stand. The proximity of this farm to the residential homes is certainly helpful to provide fresh produce. My question is whether the Town has considered a “Residential & Agricultural District”? This could be of enormous benefit to the community and its farmers.

11. With regard to the legal issues, Article 25AA Section 301(2) includes “woody biomass” also known as wood/firewood, in the definition of “crops, livestock and livestock” products. This term applies to wood harvested on the property and wood bought and sold to support agricultural uses such as cultivating mushrooms, purifying maple syrup, and other uses including heat for the farm workers/operators.

12. Where the land is used as a farm for agricultural purposes, accessory uses and/or companion uses are permitted. Farm stands, sawmills, and other farm-related activities that produce income streams are permitted. This is black letter law. The issues concerning accessory uses are directed to the level of flexibility and the required relationship between the farming operation and the other enterprises. There is little doubt that these factors are satisfied here. *See, e.g.,* Chapter 10, Sections 14:02(d) in *New York Zoning Law & Practice*, 4th Edition, Patricia E. Salkin (2004). The sale of the wood is an accessory use, producing a small income, and helps to maintain the farm’s solvency. It is also used for cultivation of farm products.

13. A non-conforming use is a “vested right to its user.” *Best & Co. v. Incorporated Village of Garden City*, 247 A.D. 893, aff’d 273 N.Y. 564 (1937). The instant farm is the Petitioner’s and her family’s livelihood. Eliminating a non-conforming use (sale woody biomass/firewood) on this farm would render valueless a vital source of income, and therefore should ^{not} be permitted. *People v. Miller*, 304 N.Y. 105 (1952). The use is also not unlawful or

prohibitive such as raising pigs.

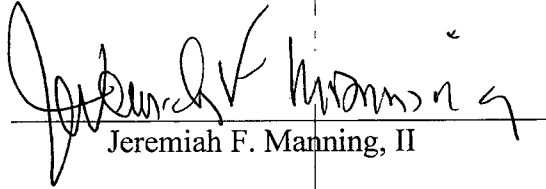
14. It is correct that in New York, a zoning statute can contain provision(s) so that a Town can terminate non-conforming uses, but dispositively for this case, such provisions cannot be applied to agricultural uses. Chapter 39 at 39-34 in *New York Zoning Law & Practice*, 4th Edition, Patricia E. Salkin (2004). This is also black letter law. Thus, arguments, concerns or standards regarding the depreciation of value of proximate properties or impairment of use of such properties, do not apply where the non-conforming use is agricultural. *Id.*

15. Reviewing the evidence submitted in support of this application, including the affidavits of Mr. Neander, the Donatos and Mr. Wilson, and including the Manning Affirmations, the non-conforming use of the subject real estate for the sale of firewood/woody biomass/wood for cultivation occurred for many years continuously prior to the promulgation of the Town of New Scotland zoning statutes and regulations. In law, this evidence sustains the non-conforming use and at minimum, it is *prima facie* proof of the fact of non-conforming use. In such a case, the burden of proof switches to the Town of New Scotland. It appears the Town would have difficulty sustaining its denial of Petitioner's application should the matter reach that stage. 1 Anderson, *New York Zoning Law & Practice* §§6.01, 6.02 (2d Ed) (substantial user has vested rights to continue its use).

16. The instant farm, as with most small farms, does not create a great income stream. This application and situation concerns a family trying to financially survive, while also giving back to the community, including church and veteran organizations. Again your affiant questions the intense approach that attempts to eliminate sources of income for a farm family. And this, at a time when the COVID-19 pandemic is affecting broad swaths of this state and nation both physically and financially.

17. On behalf of Catherine Donato and her family, farmers all, I request that the Board certify and approve the present use of the subject property and its accessory uses as a non-conforming use, and/or with a legally-issued variance.

Dated: July 8, 2020



Jeremiah F. Manning, II