

TOWN OF CLYMAN
BOARD OF APPEALS MEETING
September 23, 2008

Attendees: Nancy Schlender, Chris Spilker, Mary Kreuziger, Marylee Peterman, Marjorie Gahlman, Bob Tracy, Jr., Chuck Burkholz, Steve Hoffmann, Dave Blank, Jeff & Jeanne Kreuziger, Randy Wirtz, Jerry Foellmi, Pat Morrison, Caroline and Brad Bailey

Board members present: Chuck Joyce, Jerome Haase, Charlie Zimmerman, Leroy Schultz, Jeff Mameyak

Attorneys Present: Amy Tutwiler, Ray Roder, Andy Griggs

The meeting was called to order at 7:07 PM by Chairman Chuck Joyce with all board members present. The pledge of allegiance was said.

Minutes – Ray Roder noted corrections in two paragraphs of the previous minutes. The first correction is on page 1, the second paragraph under “Minutes,” with the sentence that ends with “the present time,” the words “unless requested by the Board of Appeals” should be added. On page 2, in the sentence that ends with “non-ag waste cannot be spread on ag land,” the words “without a permit” should be added. Motion by Leroy/Jerry to approve the minutes with corrections as noted. Motion carried.

Chuck indicated that the meeting was not for public input except as requested and hopefully they could come to a compromise on the CUP that was agreeable to both parties. Chuck asked Attorney Roder if there were any major conflicts with changes made by Attorney Tutwiler.

Attorney Roder explained that ULWR wants the town to abandon its enforcement by agreeing that if the DNR or state or federal court reaches a conclusion about compliance that that determination would bind the town. ULWR does not want to give the town automatically all documents filed with the DNR. It is unclear what permit terms and conditions the town would be able to enforce, among which would be hours of operation. He knows there is a dispute on hours as it affects municipal sewage sludge. There is a question about providing certain random sampling. There is also a question about the bond, should it be in some other form such as property valued at \$500,000. Those are the major disagreements.

Attorney Tutwiler stated that was a reasonable summary of where the parties differed. Paragraph 17 which seeks to set forth limits she feels is addressed in Jerry Foellmi's proposal.

Atty. Griggs asked about whether this involves other property or just the proposed lagoons. Leroy Schultz asked about what percentage of the waste is gotten from the township of Clyman. Attorney Tutwiler indicated that she does not have an answer to that and asked why it was material. Leroy said that he noticed that the DNR says this or the State says that, doesn't the town have any say as to what is put in their ground. She indicated that they have a different view of what the town's role is. Determination of non-compliance should be done by the state because decisions are made every day as to where they draw the line.

Attorney Roder indicated that ULWR needs to identify its non-compliance with the WPDES permit as part of the reporting process. The issue is who will enforce the non-compliance. Is the town willing to concede its enforcement to the DNR. The DNR does not act very quickly in their enforcement as seen by the odor problems in 2004. They basically did nothing until 2006.

Chuck indicated that the town needs something that is not a subjective form of control. ULWR is offering to be in compliance with the DNR however there is a question of whether the DNR will enforce their WPDES in a timely fashion. Chuck mentioned possible fines for violations of the CUP and WPDES. He wants to make sure that if the DNR doesn't act, that the town has the right to act on the CUP violations. Atty. Tutwiler indicated that the DNR has a stepped process for non-compliance. A letter is first, then further investigation, consultation and at that point the Department decides yes or no on whether to proceed to the next step which is a notice of violation. The challenge is at what point is there a non-compliance issue that has been confirmed. She indicated that there is a big trust issue and the factor that at what point in the process would the town get involved. Chuck indicated that the odor is of great concern to all but also the hazardousness to the well water. With respect to odor, Attorney Tutwiler indicated that there are measures in place and the odor complaints have gone way down. Hazardous waste involves the trust issue. ULWR has agreed to provide for periodic field sampling. Jerry Foellmi's proposal in his letter of 9/22/08 (Paragraph 60A) is acceptable. She indicated that ULWR does not accept hazardous waste. This plant is designed to address and reduce odor, but is not needed as a step in managing waste. She indicated that this would have a beneficial effect on the soil. If ULWR would take in waste that doesn't fit into their permit, this would raise not only a local concern but also a state concern.

Chuck indicated that if we find a violation has occurred, we want the ability to say we want something done and that we should not have to wait for the courts to

handle it. Chuck indicated that we are asking that if there is a violation as determined by the DNR, does the town have the ability to do something if the DNR does not do something. Atty. Tutwiler indicated that their goal is to be treated fairly and this should occur at the state level. Chuck asked about using a scent meter that could be set up on a calibration process. Engineer Randy Wirtz indicated that they don't use them currently so he is not sure if they are accurate. Chuck asked about the odor issue being reviewed on a yearly basis.

Charlie indicated that what was being discussed was not the function of the Appeals Board. He indicated that the Appeal Board's function is to correct any errors and not to re-write the CUP so that it pleases the parties. Atty. Roder indicated that the Board can re-write conditions previously made to correct errors or rephrase the Board's work but not to undo its policy decisions. The purpose of the Appeals Board is to identify any inconsistencies and rewrite, not override, policy judgment to reach an accommodation. The real issue should be does the town have the power to enforce the CUP. Atty. Roder indicated that they have the right and the obligation to protect the town in their ground water and enforcement. Charlie felt that the town needs some authority to enforce this CUP. Atty. Roder indicated that it will take ULWR a certain number of months to get this up and operating. During this time they will have some upsets, but at the end they should be able to say that when they put stuff on the fields and there are odor complaints it is because the dissolved oxygen is "x". That tells what would be an enforceable number. Atty. Roder thinks the town should give them the chance to build this and operate it. He feels that the lagoons will go a long way in the odor issue. Charlie did not feel that the Appeal Board was the place for this compromising. Attorney Tutwiler indicated that if the CUP were issued as it was today, there would be litigation. Chuck indicated that we are trying to avoid litigation and keep the costs down for both parties. Charlie indicated that at the last meeting we went through the same thing and now we have to revise it again. Chuck indicated that we are trying to get beyond this and talk with both parties to resolve the issue.

ULWR is willing to consider options to address the town's concern about odor monitoring. Atty. Tutwiler indicated that she did not have a chance to fully review Jerry's letter and can only speak in concept. Jerry Foellmi indicated that there needs to be some way to establish an acceptable discharge limit. Once it gets to a stable state that would give parameters of establishing BOD to control odors. He indicated that that will take time but that is what the start up process is about. He thinks that if this thing goes through that it will satisfy the problems we presently have.

Chuck asked about how to get compromise compliance with violations and providing documentation. There is a concern with providing the town with the DNR documents. They want a written request but they want to have a discreet event to provide documents. Chuck indicated the problem with this is that we don't know when and what to ask for and that we are only asking for duplicate documentation. Attorney Tutwiler indicated that we could work something out about the town being noticed about non-compliance. Atty. Roder indicated that they should make up two envelopes, one to the DNR and one to the town. The fail safe way would be to submit whatever is submitted to the DNR to the town also. Atty. Tutwiler indicated that there is an element of reasonableness to this request. Chuck indicated that perhaps if this is complied with for a certain period of time then trust would be established. Atty. Tutwiler indicated that this would be ok for the town but not with ULWR. Chuck asked Bob Tracy, Jr. if this would cause a problem and he indicated that this was something that could be worked through. Jerry Foellmi asked if the reason they wouldn't provide this was because of privacy issues. Atty. Tutwiler indicated that documents submitted to the DNR do not contain client information. She would like a description of the documents they want to see. Jerry Foellmi felt that everything submitted to the DNR should also go to him on behalf of the town. He will go through to see what is appropriate and what is not and then take the step beyond that.

Steve Hoffmann asked if the forms received from the DNR would be acceptable to submit to the town. Jerry indicated that those would be acceptable along with any non-compliance notice. Atty. Roder indicated that the town took the language from the WPDES permit and paraphrased it regarding the information to be submitted to us. Jeff Mameyak asked about how many documents are filled out in a month's time. Steve indicated that there are about 20. Atty. Roder indicated that he felt that these reports only had to be submitted every other month. Atty. Griggs indicated that everything that goes to the DNR should come to the town. There will be a reasonable standard to this so that the trust element is addressed. Atty. Tutwiler indicated that Steve sends routine correspondence to the DNR and wants to make sure we are just talking about reports.

The creation of the lagoons and the BOD odor control would be something that would be developed as this progresses.

Hours of Operation - ULWR objects to the hours of operation. This is a business that receives waste primarily from the food industry. They have a need to receive waste to meet their client's needs. They need to be able to operate the facility on an as needed basis which could be 24 hours a day 7 days a week. The town's concern is accepting the waste with all the trucks coming in and involves the noise. Secondly, if the waste is discharged directly on the fields during the middle

of the night. Atty. Roder indicated that with the Wastewater Treatment Plant, there should be no need to do that. Bob Tracy, Jr. was asked how often they are asked to pick up in the middle of the night so as to avoid the noise. Bob said that the operation is 24-7. He indicated that this happens all the time, 30-40 percent is ongoing and 5-10 percent is on an emergency basis which provide effluents that have to be dispensed. They have certain clients where they pick up during the middle of the night because they operate around the clock. Discussion held as to when wastewater could be picked up and received. They agreed that they could restrict the field spreading to the hours as requested except for possibly sugar water and they would try to minimize the middle of the night receivings. Bob Tracy, Jr. indicated that they are just looking to do hydraulic loading during the middle of the night. Language could be developed to limit land spreading. Bob indicated that this hasn't happened in the last four years but that it could happen at any time. Leroy indicated that he felt the town was catering to the company but the company was not catering to the town. Atty. Tutwiler felt that they are going above and beyond to reach this compromise. They are agreeing to limit their land application activities with one exception that doesn't seem to be a big issue. Attorney Roder asked about possibly parking the trucks received in the middle of the night into the garages so as to minimize noise.

Random Field testing – ULWR will agree to language that random testing can be performed with no further consent needed. Jerry Foellmi indicated that he will be using the samplings as outlined in the WPDES permit. ULWR is acceptable to the cost and they have to maintain the sample.

Bond – Atty. Roder polled people in his firm that do a fair amount of bonding. He indicated that the bond cost of \$30,000 is in the correct range. Bob Jr. indicated that he talked to a bond company and they would request 4.5% for the bond. He also checked with the bank and both request a term bond. These companies could not assess it because it wasn't a term bond. Chuck advised him to investigate additional companies. Chuck asked about a potential combination of the two. Question raised about what it would cost to clean up the site. Atty. Roder indicated that Jerry Foellmi and Sauer independently came up with the \$1,500,000 figure. Bob Jr. was questioned about insurance for rebuilding for failure of a lagoon wall which would only cover the cost of the building itself. The town would not be able to access this. Jerry was asked how he came up with this figure. He indicated it was based on rebuilding, repair, and clean up. Atty. Tutwiler indicated that ULWR does not really believe a bond would not be needed but they are willing to look at one for purposes of settlement. Jerry Foellmi will try to get some figures on this issue. Bob, Jr. will provide Jerry Foellmi with names of competitors to check with. Atty. Tutwiler recommended that some discretion be used. There is a need to identify potential costs for abandonment which may or may not affect

the total bond issue. In conjunction with the bond guarantee, Bob, Jr. asked if ULWR could give land they own to spread on within a 5 miles radius if they walked away over and above the other land they are offering. The land cannot be sold off.

Atty. Griggs brought up about reimbursement of attorneys fees and costs. He felt this has been completely avoided. He feels that otherwise this cost will fall on the citizens of the Town. Atty. Tutwiler indicated that they do not agree with the costs because ULWR complied with the costs required at the time of filing the CUP. She feels that the town is asking ULWR for a blank check. Atty. Roder indicated that based on experience under the negotiation processes he was previously involved in, this is not beyond the town's power. Atty. Tutwiler stated that there was no ordinance in place at the time ULWR filed their application. Atty. Roder indicated that the fees do not have to be specified in an ordinance. Discussion held on Section 13 of the Zoning Ordinance. Chuck asked about breaking the problem down. Atty. Tutwiler feels that it is a big issue. She does not feel that ULWR should be paying for on-going inspection costs. She feels this is the role of the state, not the town. If ULWR would consider paying past costs, they would have to go through the items and weed out the negative meetings involved. Chuck asked if any numbers have been discussed. The Town would have to go through and identify what could be worked with. Atty. Tutwiler indicated she needs to discuss this in private with her clients. Chuck requested that she get back to Attorneys Roder and Griggs on this matter. Jerry Foellmi should also put together some figures as to his cost figures.

The permit must run with the land. ULWR will agree to limit the hours of direct spreading but have not discussed anything on other spreading. Leroy indicated that he has run off on his land from ULWR spreading on adjacent land. Atty. Roder indicated that this is to be addressed by the WPDES permit. He suggested that Ken Denow of the DNR be notified. Based on the documentation that has been received some fields have been grandfathered, but many more are not and no CUP has been granted. Atty. Roder thinks that it should be folded into this permit. He informed ULWR that only those fields spread before March 20, 2000, are grandfathered. After that, until May 10, 2004, they are in violation because those fields are not grandfathered. Their position is that the town does not have authority on land regulation at this time. Discussion held on this issue. ULWR is fighting this because of the restrictions being placed on them for land spreading. Under the CUP, the same time they submit items to the DNR they need only submit them to the town. ULWR would provide documentation that they obtained state approval of the site and identification of those lands that are spread on prior to March 19, 2000. Getting required approval from the land owners is not required by the state. Under the CUP, they must alert the land owner that they are going to use their land and they must be in compliance with the WPDES

permit. Atty. Roder thought there has to be evidence of the land owner approval. ULWR has a concern about harassment from citizens.

Discussion held on there being consistency within the town if this matter comes before the board again. Mention was made about possibly adding these restrictions to the ordinances. Discussion held on other competitor's complying with the spreading restrictions.

Atty. Tutwiler indicated that they would like to review Jerry Foellmi's report. Atty. Roder inquired if the attorneys could sit down together and come up with a draft to present to the Appeal Board. If there are points of disagreement, highlight them. Jeff Mameyak asked if this could be presented the night of the meeting instead of prior to the meeting because of the document being passed around to other people before the meeting. The board was cautioned not to share information received from counsel before the meeting with anyone else.

Atty. Tutwiler indicated the cost issue and cost of clean up would be the sticking issues.

The next meeting date will be October 28 at 7:00 PM.

Motion by Leroy/Jerry Haase to adjourn. Motion carried. Meeting adjourned at 9:55 PM.

Respectfully submitted:

Kris Kohlhoff, Clerk