To be Argued by:
SUSAN WINE
(Time Requested: 15 Minutes)

Case No. 507867

New York Supreme Court

Appellate Division—Third Department

In the Matter of the Application of
RIVENDELL WINERY, L.L.C. and SUSAN L. WINE,

Petitioners-Appellants,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

– against –

LINDA DONOVAN, GAIL CHRISTMAN, PATRICIA SCHWARTZ, JEFFREY CLOCK, and ROBERT HUGHES, Individually and as Members of the Zoning Board of Appeals of the Town of New Paltz, THE ZONING BOARD OF APPEALS OF THE TOWN OF NEW PALTZ and THOMAS WIACEK, Building Inspector, Town of New Paltz,

Respondents-Respondents,

– and –

KEVIN C. HARP and JOSEPH E. O'CONNOR,

Intervenors-Respondents.

BRIEF FOR PETITIONER-APPELLANT SUSAN WINE

SUSAN WINE
Petitioner-Appellant Pro se
507 Albany Post Road
New Paltz, New York 12561
(917) 626-5535

Ulster County Clerk's Index No. 08-275

I. TABLE OF CONTENTS

II. Table of Authorities……….…………………………………………………….……

III. Preliminary Statement . ……….…………………………………….…………..….1

IV. Questions Presented . . .………………………….……….……….…..……...… 1

V. Summary of Argument . . . ……………………………………….…….……….….2

VI. Facts . . . ………………………………..…………………………….…..……….2

VII. Argument:

Point 1: THE TOWN OF NEW PALTZ ZONING BOARD OF APPEALS HAD NO RATIONAL BASIS NOR ANY SUBSTANTIAL EVIDENCE UPON WHICH TO AFFIRM ITS BUILDING INSPECTOR'S DETERMINATION. THEREFORE, THE LOWER COURT ERRED BY NOT FINDING SUCH ZONING BOARD'S DECISION TO BE ARBITRARY AND CAPRICIOUS…………....………………………………....5

A. Arbitrary and Capricious Precedent……………………………………5

B. "Without Regard to the Facts"…………………………………………5

C. No Independent Analysis…………………………………..………10

D. Tenor of the Zoning Board and Its Public Hearings………………….11

E. Uncontroverted Expert Testimony and Generalized Community Opposition……………………….……………………………………14

F. Conflict with State and Federal Law………………………………....15

G. Total Exclusion of a Use……………………...……………………18

Point 2: THE LOWER COURT ERRED IN INTERPRETING THE DEFINITION OF AGRICULTURE FOR THE PURPOSE OF A PERMITTED USE WHEN IT REFUSED TO ACKNOWLEDGE THAT THE TOWN ZONING CODE'S DEFINITIONAL SCHEME IS AMBIGUOUS AND CONTRADICTORY..……………………………………19

A. Language of State Law Supports Winery as Agriculture…….………20

B. Conflict Between State and Local Law……………..…………………22

C. Definitional Scheme of Town's Own Code Is Inconsistent…………..24

D. Agriculture Should be Defined By Its Common Meaning………..….26

E. Legislative Intent…………………...………………………………27

Point 3: THE LOWER COURT ERRED BY NOT REVIEWING THE ZONING CODE DE NOVO AND NOT GIVING DEFERENCE TO THE PROPERTY OWNER………………...……………………………………….31

VIII. Conclusion……………….……………………………………..……………...33

II. TABLE OF AUTHORITIES

A. Cases

i. *V.R.Equities v New York City Conciliation and App. Bd.,* 118 AD2d 459 (1st Dep't, 1986)……………………………………………………………………5

ii. *Pell v Board of Educ*., 34 NY2d 222 (Ct App, 1974)……………………………………5

iii. *St. Agatha's Children's Home, Inc. v Webb*, 138 AD2d 715 (2d Dep't, 1988)……………………………………………………………………5

iv. *Diotte v Fahey*, 97 AD2d 653 (3d Dep't, 1983)……………………………………5

v. *Rolla v Barry*, 70 AD2d 717 (3d Dep't, 1979)……………………………………5

vi. *Halperin v City of New Rochelle*, 24 AD3d 768 (2d Dep't, 2005)…………………6

vii. *Sasso v Osgood*, 86 NY2d 374 (Ct App, 1995)……………………………………6

viii. *AT&T v State Tax Commission*, 61 NYS2d 393 (Ct App, 1984)…………………6

ix. *Sidnam v Town of Lewisboro*, 129 Misc 2d 622 (Sup Ct of Westchester County, 1985)…………………………………………8

x. *Concerned Citizens of Perinton, Inc. v Town of Perinton*, 261 AD2d 880 (4th Dep't, 1999)……………………………………………………………………10

xi. *Carcuro v Madigan,* 124 AD2d 294 (3d Dep't, 1986)……………………………10

xii. *Campo Grandchildren Trust v Marvin L. Colson*; 39 AD3d 746 (2d Dep't, 2007)……………………………………………………………………14

xiii. *McDonalds Corporation v Rose*, 111 AD2d 850 (2d Dep't, 1985)………………14

xiv. *450 Sunrise Highway LLC v Town of Oyster Bay*, 287 AD2d 714 (2d Dep't, 2001)……………………………………………………………………14

xv. *Goldsmith v Bishop et al*, 264 AD2d 775 (2d Dep't, 1999)…………………………14

xvi. *New York Botanical Garden v Bd. Of Standards and Appeals of the City of New York*, 91 NY2d 412 (Ct App, 1998)……………………………………14, 32

xvii. *Bongiorno v Planning Board of the Incorporated Village of Bellport*, 143 AD2d 967 (2d Dep't, 1988)………………………………………………14-15

xviii. *Twin County Recycling Corp. v Yevoli*, 90 NY2d 1000 (Ct App, 1997)…...…….15

xix. *Exxon Corp. v Restiano*, 237 AD2d 356 (2d Dep't, 1997)……...………..…..…..15

xx. *Southampton v Equus*, 201 AD2d 210 (2d Dep't, 1994)……………….…..……...15, 23

xxi. *Kinderhill v Walker*, 54 AD2d 811 (3d Dep't, 1976)………………….......…....15. 23

xxii. *St. Onge v Donovan*, 71 NY2d 507 (Ct App, 1988)…………....………………..…17

xxiii. *Holthaus v ZBA of Town of Kent*, 209 AD2d 698 (2d Dep't, 1994)….………..17, 18

xxiv. *Gjerlow v Graap*, 43 AD3d 1165 (2d Dep't, 2007)….……………...…...………..17

xxv. *Frishman v Schmidt*, 61 NY2d 823 (Ct App, 1984)…….………………..……...…17-18

xxvi. *Arceri v Town of Islip Bd. of Appeals*, 16 AD3d 412 (2d Dep't, 2005)…........……18

xxvii. *Lufkin v Assessor of Town of Washington*, 185 Misc 2d 779
(Sup Ct of Dutchess County, 2000)…………...……………………...….…18, 23

xxviii. *Pursel v Zagata,* NY ENV LEXIS 31
(NY Freshwater Wetlands Appeals Board, 1998)……...…..…………...…..…...22

xxix. *Farmegg Products, Inc. v Humbolt County*, 190 NW2d 454
(Sup Ct of Iowa dissent, 1971)……...……………………………..…..…..……..22

xxx. *Blalock v Olney*, 17 AD3d 842 (3d Dep't, 2005)……………….……...………24, 32

xxxi. *Catlin v Sobol*, 77 NY2d 552 (Ct App, 1991)…………..……..……………....…24

xxxii. *People v Walker*, 81 NY2d 66 (Ct App, 1993)……....………..…….…..…..….…24

xxxiii. *Leisure Vue, Inc. v Commissioner of Taxation and Finance*,
172 AD2d 872 (3d Dep't, 1991)…………...……...………………….……….....…26

xxxiv. *Slocum v D's & Jayes Valley Restaurant & Café, Inc.*, 182 AD2d 981
(3d Dep't, 1992)………...………...…………………………...…………...….26

xxxv. *Caldwell v Alliance Consulting Group, Inc.*, 6 AD3d 761 (3d Dep't, 2004)…...…26

xxxvi. *Orens v Novello*, 99 NY2d 180 (Ct App, 2002)……………………………..…….26

xxxvii. *Rosner v Metropolitan Prop. & Liab. Ins. Co.*, 96 NY2d 475, 479 (2001)……...26

xxxviii. *Bonded Concrete v Zoning Bd. of Appeals of Town of Saugerties*, 268 AD2d 771 (3d Dep't, 2000)……………………………..…..…28, 32

xxxix. *Ellington Constr. Corp. v Zoning Bd. of Appeals*, 77 NY2d 114 (Ct App, 1990)………………………………………………..………..……..…..27

xl. *Pardi v Barone*, 257 AD2d 42, 46 (3d Dep't, 1999)……….…...………….……...…27

xli. *Raritan Dev. Corp. v Silva*, 91 NY2d 98 (2d Dep't, 2008)……………...……….....27

xlii. *Commerce Bank, N.B. v Planning Board of the Town of Bedford*, 47 AD3d 810 (2d Dep't, 2008)……..…………………………….……...……..29-30

xliii. *United University Professions v State of New York,* 36 AD3d 297 (3d Dep't, 2006)……………....…...………...……………….………………….……32

xliv. *Toys "R" Us v Silva*, 89 NY2d 411 (Ct App, 1996)………………….……..……32

xlv. *151 Route 17M Assoc. v Zoning Board of Appeals of the Town of Harriman*, 19 AD3d 422 (2d Dep't, 2005)……………………………...…………...…32

xlvi. *Allen v Adami*, 39 NY2d 275 (Ct App, 1976)……………..…..…………...….……32

xlvii. *DeTroia v Schweitzer*, 87 NY2d 338 (Ct App, 1996)….….……………...…....…....32

xlviii. *Capital City Rescue Mission v City of Albany Bd. of Zoning Appeals*, 235 AD2d 815 (3d Dep't, 1997)……………………..…………………...…...32

xlix. *Uciechowski v Ehrlich*, 221 AD2d 866 (3d Dep't, 1995)…………...…..…...….….32

l. *Hess Realty Corp. v Planning Commn.*, 198 AD2d 588 (3d Dep't, 1993)…….……....32

B. Statutes

New Paltz Town Zoning Code:

§ 140 (4)………………………………………………………………...….5

Word Usage and Definitions:

§ 140 (4) (A), Record on Appeal (ROA) at 70…….……………..………5, 24, 25, 26

§ 140 (4) (C), ROA at 70-76.…………..………………………………..…….3, 22

Permitted Uses:

§ 140 (8), ROA at 66-69……….….…………………..……......…………...……2

Article XIIIA--Clearing and Grading Control:
§ 140 (117.2), Findings, Puprose, Intent, ROA at 1052-1053….……….……......24

§ 140 (117.3), Definitions, ROA at 1053…………………….…4, 6, 9, 16, 23, 25, 31

§ 140 (117-5), Exempt Activities, ROA at 1056.……………..……………...…24

Article XV--Steep Slopes Protection:
§ 140 (133), Findings, ROA at 1063-1064………………………………………24

§ 140 (134), Definitions, ROA at 1064…………………….....4, 6, 9, 16, 23, 25, 31

§ 140 (135), Exempt Activities, ROA at 1066-1067………………………...…24

New Paltz Town Law, "Agriculture and Open Space Preservation and Acquisition":
§ 44……………………….…………………………………………………13-14, 29

§ 44 (2), Purpose……………….……………………….……..……………..….13, 29

§ 44 (3), Definitions………………………………..…………………...13, 29

McKinney's Consolidated Laws of New York Annotated, Book 1, Statutes, 1971:
§ 92, Legislative intent as primary consideration, at 176-185………..…………28

§ 95, Consideration of Mischief to be remedied, at 196 and 201……………..…28

§ 96, General purpose and spirit, at 202-211………………………....……....28

§ 111, Departure From Literal Construction--Generally, at 225-227………...27-28

§ 113, Illustration of principle, at 235-238………………………………...…24

§ 120, Extrinsic Aids to Interpretation—Generally, at 242……………...…….28

§ 143, Unreasonableness, at 286-290………………...………………...…...….....8

§ 145, Absurdity, at 294-297……...………………...………………….……...…8

§ 232, Words of ordinary import, at 392-396…………………...……….……..26

§ 311, Acts In Derogation Of Common Right—Generally, at 473-474.………...32

McKinney's Consolidated Laws of New York Annotated, Book 2B, Agriculture and Markets, 2008 (AML):

§ 2, Definitions at 5-6……22

§ 301, Definitions, at 84-91……13, 15

§ 301 (4) at 85 and pocket part at 14……4, 7

§ 301 (4) (c) (pocket part) at 14……8

§ 301 (4) (i) (pocket part) at 15……7

§ 301 (11) at 87 and pocket part at 17……4, 7, 13, 23

§ 301 (15) (pocket part) at 18……21

§ 308 (4) at 141 and pocket part at 42-43……9

McKinney's Consolidated Laws of New York Annotated, Book 3, Alcoholic Beverage Control, 2000:

§ 3 (12) (a), Definition of "Farm Winery" at 11……20

§ 76 (a), Farm Winery License, at 179-183……20

McKinney's Consolidated Laws of New York Annotated, Book 2, Constitution, 2006:

Article 1 § 11 beginning at 9……15

Article 14 § 4 at 371……31

McKinney's Consolidated Laws of New York Annotated, Book 61, Town, 2004:

§ 262 at 63-67……17

§ 263 at 68-91……17

§ 272 (a) (11) (a) at 424……30

Official Compilation Codes Rules and Regulations of the State of New York, Volume 9, Executive (A-2) (9NYCRR): § 194.1, Definitions, (n), (ag.) and (ah.) at 4508 and 4509……8

United States Code Annotated, 2003:

5th Amendment, Volume I, at 33……15-16

14th Amendment, Title 42, The Public Health and Welfare, § 1983, Civil Action for Deprivation of Rights……15-16

C. Treatises, Dictionary Definitions, other Commentary

Salkin, Patricia, New York Zoning Law and Practice (4th Ed.), § 13:14…………...……19

§ 4:03……………………………………………………………..…….……..29

Merriam-Webster Dictionary, 2009……………...……………………………..……..29

American Heritage Dictionary of the English Language, 4th Edition, 2009……………..29

Unfiltered, *Mouton-Rothschild Gets a Freudian Slip, plus Ushers wine bar succumbs to the recession, a New York winery succumbs to politics, and an Aussie wine's new Osama bin label*, http://*winespectator.com*/webfeature/show/id/[2/12/2009]………..….19

Andis Kaulins, Legal Commentary: LawPundit*, The World of New York Wines: Is Winemaking "Agriculture" as a Matter of Law? What is Legal Zoning with respect* to the Wine Industry? http://uslaw.com/library/legal_commentary/[5/26/2009]……..…19

III. PRELIMINARY STATEMENT

Petitioner-Appellant, Susan Wine (Wine), submits this Brief in opposition to the Order of the Supreme Court, Ulster County (Connolly, G.), granted November 25, 2008, that upheld the December 18, 2007 determination of Respondents Linda Donovan, Gail Christman, Patricia Schwartz, Jeffrey Clock, and Robert Hughes, members of the Zoning Board of Appeals of the Town of New Paltz (Zoning Board) affirming Respondent Thomas Wiacek, the Town of New Paltz's Building Inspector's (Inspector) July 26, 2007 rejection of Petitioner's-Appellant's March 30, 2007 site plan application, as amended, for a farm winery because it utilized the existing building on the subject property for processing and sales for such farm winery.

The Inspector determined that a building used for processing and sales on a farm is not an "agriculture use" under New Paltz Town (Town) zoning code and, therefore, Petitioners-Appellants do not have a permitted use in the A-1.5 zoning district of the Town.

IV. QUESTIONS PRESENTED

A. Did the lower court err when it upheld the Zoning Board's decision and did not find that the Zoning Board acted arbitrarily and capriciously?

B. Did the lower court err in interpreting the definition of agriculture for the purpose of a permitted use when it refused to acknowledge that the Town zoning code definitional scheme is ambiguous and contradictory?

C. Did the lower court err by not reviewing the zoning code de novo and giving deference to the property owner?

V. SUMMARY OF ARGUMENT

The lower court committed three errors. First, it erred by ignoring that the Zoning Board had no rational basis nor any substantial evidence upon which to affirm the Inspector's determination. It should have found that the Zoning Board's decision was arbitrary and capricious. Second, by refusing to acknowledge that the definitional scheme of the Town zoning code is ambiguous and contradictory, the lower court erred in interpreting such zoning code, specifically as it concerns the definition of agriculture for the purpose of a permitted use. Third, the lower court erred by not reviewing the zoning code de novo and awarding deference to the property owner.

VI. FACTS

On January 11, 2007, Wine bought the subject property, consisting of 2 contiguous parcels, each approximately 2 (two) acres, in order to move Rivendell, a farm winery, from its rented location, 3 miles away, in the adjoining township, to the more visible, accessible and agriculturally viable location. One parcel was improved with a newly constructed building that had never been occupied. Wine relied upon the fact that the subject property was in the A-1.5 (agricultural) zoning district and that since agriculture is a permitted use in such zoning district, (see Code § 140 [8] and ROA at 66-67,) a farm winery is also a permitted use. Rivendell leased the subject property from Wine. (See ROA at 56-64.)

On March 30, 2007, Wine filed an application for site plan review. (See ROA at 487-496.) Such application stated the existing building would be used as a farm winery. In addition to fermenting grapes into wine there, such wine would be bottled, labeled, stored and sold to the public there. Some of the subject property would be used for staff

and customer parking and customer amenities like picnic tables and the balance would be planted to vineyard.

The subject property abuts a 60-acre farm containing an owner-occupied home. Within a quarter mile is Brook Farm, home to a community supported agriculture project and many acres of cattle grazing land. Within 2/3 of a mile is Wallkill View Farm, one of Ulster County's largest farm markets as well as corn producer and exporter. Wallkill View has large, permanent buildings where sales and processing take place.

The subject property is bounded on one side by a major county highway and has a spectacular view of the area's natural wonder, the Shawangunk Mountain Ridge. It is en route to Minnewaska State Park and Mohonk Mountain House, an historic landmark and working resort, surrounded by seven thousand acres of land held in trust called the Mohonk Preserve.

Wine and Rivendell immediately embarked on adapting the subject property to its new use, with appropriate building permits and full knowledge and cooperation of the Town Building Department, in an effort to have the subject building and subject property ready as soon as the site plan was approved, which they hoped would be soon.

When Wine first spoke to the Inspector, he said a winery was "just like a restaurant and restaurants aren't permitted in the A-1.5 zoning district except with a special use permit". Subsequently, he told her the subject property couldn't be considered a "farm" unless it was one parcel of at least 10 acres. (See § 140 [4] [C] [Farm] and ROA at 72). Wine made arrangements for Rivendell to lease 10 acres of adjoining land owned by Harry C. Tabak (ROA at 65) and pointed out to the Inspector that to be a "farm" under AML, there could be multiple parcels, "contiguous or non contiguous, owned or

rented, ” so long as they were part of “single operation”, (see AML § 301 [11] at 87 and ROA at 736, “farm operation”) and that, in contrast to the Town zoning code, AML requires only 7 acres, (see AML § 301 [4] at 85 and ROA at 735). He agreed.

On May 1, 2007, in a memo to the Town Planning Board, the Inspector presented his concerns about the site plan, but did not include the definition of “agriculture” as one of these. On the contrary, he stated in that memo, “Winery is not specifically mentioned in our zoning but I do agree it is agricultural which is allowed in A-1.5.” (See ROA at 77.) Note he used the term “winery” (a building) as opposed to “vineyard” (farmland planted to grape vines).

On July 26, 2007, the Inspector mailed his decision letter, the essence of this appeal, to Petitioners-Appellants. At its heart, the letter stated: “Winery as a retail business or service” would not be permitted within the A-1.5 zoning district. “[F]or the use to be classified as agricultural, it would need to meet the definition of same in the Town zoning code at § 140 (117.3) (Article XIIIA: Clearing and Grading Control) and § 140 (134) (Article XV: Steep Slopes Protection).” (See ROA at 79-81.)

On September 7, 2007, Petitioners-Appellants appealed the Inspector’s decision to the Zoning Board. Public hearings were held on October 16 and November 13, 2007, (see ROA at 755-1016,) and on December 18, 2007, the Zoning Board voted to affirm the Inspector’s decision. (See ROA at 105-116 and 352-353.)

On January 18, 2008, Petitioners-Appellants commenced their Article 78 in the lower court. (See ROA at 17-118.) On November 25, 2008, the decision and order of the lower court was served. (See ROA at 5-16.)

VII. ARGUMENT

Point 1: THE ZONING BOARD HAD NO RATIONAL BASIS NOR ANY SUBSTANTIAL EVIDENCE UPON WHICH TO AFFIRM THE INSPECTOR'S DETERMINATION. THEREFORE, THE LOWER COURT ERRED BY NOT FINDING SUCH ZONING BOARD'S DECISION TO BE ARBITRARY AND CAPRICIOUS.

A. The "Arbitrary And Capricious" Precedent

A determination is arbitrary and capricious "when it is without sound basis and reason and is generally taken without regard to the facts." (See *V.R.Equities v New York City Conciliation and App. Bd.*, 118 AD2d 459, 461 [1st Dep't, 1986] quoting *Pell v Board of Educ*., 34 NY2d 222, 231 [Ct of App, 1974].)

In determining whether administrative decision-making is arbitrary and capricious, a court "is to exercise a genuine judicial function and not confirm a determination simply because it was made by such an agency." (See *St. Agatha's Children's Home, Inc. v Webb*, 138 AD2d 715, 716 [3d Dep't, 1988] citing *Diotte v Fahey*, 97 AD2d 653 [3d Dep't, 1983].) (See also *Rolla v Barry*, 70 AD2d 717 [3d Dep't, 1979].)

B. "Without Regard To The Facts"

Chapter 140 of the Town Law is the zoning code. § 140 (4), entitled "word usage and definition," contains definitions, but no definition of "agriculture" and § 140 (4) (A) reads:

> "If a term is not listed below, but is defined in Article 16 of the New York State Town Law or Chapter 140 of the Town Code, then for the purpose of these regulations the meaning of that term shall be defined therein. Otherwise, words not specifically listed in this section assume the definition employed in common usage."

The Town contains some 80 farms, many of which have buildings on them used

for processing and/or sales, but no farm had been previously challenged as to "permitted use" based on the definitions in § 140 (117.3) and § 140 (134), nor has any since. Nevertheless, in order to prevent the subject property from being used as a farm winery, Respondent Inspector utilized the definition of "agriculture" in § 140 (117.3) (Article XIIIA--Clearing and Grading Control) and § 140 (134) (Article XV-- Steep Slopes) of the zoning code, which are identical, as the definition of agriculture for the purpose of defining a permitted use for the subject property and the subject site plan application and consequently not allowing it. Such definition reads:

> "Agriculture-all agricultural operations and activities related to the growing or raising of crops, livestock or livestock products, and agricultural products, as such terms are defined in or governed by Agricultural and Markets Law of the State of New York *on lands qualified under Ulster County and NYS law for an agricultural exemption by the Assessor of the Town*." (Emphasis added.)

However, even if such definition of "agriculture" as set forth in §§ 140 (117.3) and 140 (134) prevails for the purpose of defining a permitted use, and Petitioners-Appellants do not concede this, the proposed farm winery still constitutes an agricultural permitted use as defined in those sections because the subject property, including the tax parcel with the subject building, would qualify for agricultural assessment/exemption. The Inspector chose to ignore this and the Zoning Board was required to have an "objective factual basis" for affirming the Inspector's decision, (*Halperin v City of New Rochelle*, 24 AD3d 768, 772 [2d Dep't, 2005]; citing *Sasso v Osgood*, 86 NY2d 374, 384 [Ct App, 1995]. See also *AT&T v State TaxCommission*, 61 NYS2d 393, 400[Ct App, 1984],) but it did not.

According to the Inspector's interpretation, to be a "permitted use", the agricultural operations must be conducted on lands that qualify for (not that have)

an agricultural assessment/exemption as defined by AML. As the lower court related in its decision, Petitioners-Appellants do not dispute that AML excludes from assessment/exemption land or portions thereof used for processing or retail merchandising of crops for the purposes of calculating acreage for an assessment/exemption …(McKinney's AML § 301 [4]). However, even though a portion of the parcel owned by Wine that is currently improved with a building proposed to be used for processing and retail merchandising of the subject winery's grapes and wine such that the acreage beneath it cannot be counted toward an assessment/exemption, this does not preclude the remainder of the parcel from being eligible for assessment/exemption.

Since AML allows for any number of contiguous and non contiguous, rented and/or owned parcels to comprise a single farm operation, being adamant only that it be *a single* operation, as Rivendell was, the isolation of one specific tax parcel, (particularly since it is only one part of one tax parcel being questioned,) for the purpose of calling it non-agricultural as to use, does not comport with public policy or the law. (See AML § 301 [11], *supra*.)

The lower court hinges its decision against Petitioners-Appellants on the word "solely" in AML § 301 (4) (i), which defines "land used in agricultural production", in pertinent part, as:

> "land of not less than 7 acres used as a single operation for the production for sale of orchard or vineyard crops when such land is used *solely* for the purpose of planting a new orchard or vineyard and when such land is also owned or rented by a newly established farm operation in its first, second, third or fourth year of agricultural production" (emphasis added).

However, the concept of "support land" was devised for the exact situation at hand and

can be relied upon:

> "Land used in support of a farm operation or land used in agricultural production, constituting a portion of a parcel qualified for an agricultural assessment" (McKinney's AML § 301 [4] [c)] at pocket part p. 14).
>
> "support land means land constituting a portion of a parcel, as identified on an assessment roll, which also contains land qualified for an agricultural assessment, where such land is not actually being used to produce crops…but is being used in support of a farm operation or in support of land used in agricultural production (examples include…land under farm buildings…) (9 NYCRR § 194.1 [ag]; also [n] which defines "Land used in agricultural production" and includes "support land" and [ah] which defines "vineyard").

"Support land" clearly defines the land on which the subject building sits, envisioning such land as that which supports the storage, processing and marketing of the crop being grown on the same farm's properties. If it did not, then an entire farm operation could be deemed to not qualify for agricultural assessment/exemption merely because a portion of its land contained a building or equipment used for the processing and/or retail merchandising of its crops. It is possible that no farm in the Town that processes or sells its crops at the same location as it has its plantings, (with the exception of seasonal roadside stands that are specifically allowed for in the zoning code,) would consequently qualify for an agricultural assessment/exemption and this would be an unreasonable or absurd result (McKinney's Statutes § 143 at 286-290 and § 145 at 294-297).

The Town's Tax Assessor fully supported Petitioners-Appellants' position in his memorandum, dated November 13, 2007 (ROA at 117-118), wherein he clarified that if Petitioners-Appellants were to utilize a portion of the "house parcel" for planting grapes, such parcel would be eligible for an agricultural tax exemption. (See *Sidnam v Town of Lewisboro*, 129 Misc 2d 622 [Sup Ct of Westchester County, 1985]). Robert Ransom,

husband of Wine and a principal of Rivendell, stated in his Sur-Reply Affidavit, sworn to on May 8, 2008, that he had planted grapes on both parcels owned by Wine (ROA at 369-372). Therefore, according to the Town Assessor's evaluation, the improved parcel would qualify for an agricultural assessment/exemption, thereby satisfying the definition of "agriculture" as set forth in § 140 (117.3) and § 140 (134).

The Zoning Board asked the Ulster County Planning Board (UCPB) for its expert recommendation. In that recommendation, which was uncontroverted, the UCPB wholeheartedly supported Petitioners-Appellants' position on all subjects, including this one. It said:

> "We will address the issue 'qualify for an agricultural exemption' first.
>
> The pertinent qualifications for an agricultural exemption from the AML are:
>
> - 7 acres or more in agricultural production
> - Land of not less than seven acres used as a single operation for the production for sales of orchard or vineyard crops when such land is used solely for the purpose of planting a new orchard or vineyard and when such land is also owned or rented by a newly established farm operation in its first, second, third or fourth year of agricultural production.
>
> Rivendell indicated in its response that it leased lands for vineyard purposes totaling more than 7 acres. It would appear that the lands involved, when planted, would meet the provision to qualify for an agricultural exemption (note: the definition does not require that an exemption be in existence)." (See ROA at 428-429.)

Patrick Hooker, the Commissioner of the New York State Department of Agriculture and Markets, was asked by the Building Inspector for his expert opinion on this subject. He gave it, pursuant to the "Right to Farm" law (AML § 308 [4] at 141), by phone before the Inspector made his determination and subsequently in writing on

August 6, 2007, (see ROA at 90-91):

> "…the processing and fermentation activity and the on farm buildings and equipment which are needed to store and ferment the grapes which are processed on the farm are part of the farm operation. The on-farm marketing of the wine under these circumstances is also part of the farm operation…It is my opinion that the use of the land in question for the production of grapes, the fermentation of such grapes to produce wine and the retail sale of the wine, is agricultural in nature" (ROA at 91).

C. No Independent Analysis

It is the responsibility of an appellate zoning board to independently analyze an interpretation of a building inspector, as well as the documentary evidence and testimony submitted to it and, thereafter, set forth its rationale, articulating the reasons as to why it would or would not uphold the interpretation of the building inspector. (See *Concerned Citizens of Perinton, Inc. v Town of Perinton*, 261 AD2d 880 [4th Dep't, 1999] and *Carcuro v Madigan,* 124 AD2d 294, 296 [3d Dep't, 1986].) The Zoning Board failed to set forth any rationale for upholding the determination of the Inspector in its December 18, 2007 decision. It articulated no reasons, and, with the exception of the UCPB recommendation that it requested and then ignored, it never called any other witnesses to testify as to statutory construction, legislative intent, or history.

Although the Zoning Board determination is 12 pages in length, 11 of the 12 pages do nothing more than set forth the history of the proceeding and contain quotations from certain laws and documents submitted, most from witnesses for the Petitioners-Appellants (ROA at 105-116). The final page, entitled "Decision", is without any rationale or analysis whatsoever. In it, the Zoning Board says nothing more than that it has determined that the Inspector's interpretation "was correct", that the Inspector "properly applied the definition of agriculture found in the zoning code in reaching his

determination" and that the Inspector properly determined that Petitioners-Appellants' "intended use of the building is not considered an agriculture use…" (ROA at 116).

D. Tenor Of the Zoning Board And Its Public Hearings

The question of bad faith arises when one reads the public hearing transcript and places it in context.

First, the Zoning Board is comprised of individuals possessing a bias against any development and that bias was evident in the conduct of its public hearing. The most blatant example is Respondent-Respondent Robert Hughes. Mr. Hughes, a nurse, has his bias as his central, and only, credential for his placement on the Zoning Board and on the Planning Board before that. A decade ago, Mr. Hughes started an organization called "Save our Wetlands and Watercourses" in order to stop development of a senior citizen cluster housing project. After that project was allowed to move forward as a result of the mediation by a county legislator in 2001, and even though Mr. Hughes was quoted in a local paper as still being dead-set against the senior citizen project, he was rewarded with an appointment to the Town Planning Board and later to the Zoning Board. As head of "Save our Wetlands and Watercourses", Respondent-Respondent Hughes met and worked closely with another local environmental zealot, David Porter, head of another local anti-development organization, the Association for Intelligent Rural Management (AFFIRM). In the instant case, Mr. Porter, a neighbor of the subject winery property, is an active objector.

Second, although the Zoning Board Chair, Respondent-Respondent Linda Donovan said, "We're just debating right now whether or not the building inspector's decision to deny this as an agricultural use is appropriate or not, that's all." (See ROA at

995.) She chose not to speak those words until close to the end of the public hearings. Those words of hers are recorded on page 114 of the 135 pages recorded the second night of public hearings. At the same time, in response to a question from a member of the audience, she said, “Those are not issues that are relevant to the zoning board of appeals.” But the hearing stenographic records of October 16, 2007 and November 13, 2007 show that Respondent-Respondent Hughes, in particular, and other Board members, were persistent in taking the hearings off subject from their inception. Issues of planting and growing, traffic, crop spraying, and the “view shed”, all matters more appropriately aired before the Planning Board, were constantly raised. (See ROA 756-1016.) Wine and her husband/business partner patiently addressed all those issues, even though they knew it was an inappropriate forum.

At these hearings, the Respondents-Intervenors put their efforts into twisting facts in order to convince the Zoning Board that the winery project was commercial to the detriment of being considered agricultural. (See ROA 911-1001.) Principal Respondent-Intervenor, Kevin Harp is an Ulster County Assistant District Attorney. His father, grandfather, and great uncle were all New Paltz attorneys. He inherited vacant, rural property near the subject property and has been developing it with large homes. He hired an Albany law firm to represent him and financially supported its efforts to get community opposition to turn out and get names on a petition full of false, misleading and incendiary statements**.** The petition reads:

> “A major liquor retail and “special event” business at this dangerous intersection will pose a traffic threat to public health and safety. It will also be a visual threat (through congestion and a potential stoplight) to this top-of-the-ridge scenic gateway to the community’s treasured mountain vista. Intersection and roadway congestion, visual blight and “special event”-related loud noise will negatively affect the community character

> of this residential neighborhood. These various negative impacts also violate the Town Comprehensive Plan." (See ROA at 634-646.)

But the most egregious and seemingly conspiratorial effort put forth concerns a new chapter of the Town Law, #44, entitled "Agriculture and Open Space Preservation and Acquisition", that was enacted on August 23, 2007, during the process of Planning Board and Zoning Board reviews, a time when everyone associated with Town government in any hired, elected, or appointed capacity was aware of the winery issue. The legislative purposes of the new chapter are set forth in § 44 (2), and one of those is "to provide mechanisms to protect the assets of the Town" which include "farm and forestry industries that are strong and sustainable".

§ 44 (3), entitled "Definitions", contains the specific definition "Agricultural Use and Production":

> "The use and production for commercial purposes of all those items and products as defined in *NYS Agriculture and Markets Law § 301*, including but not limited to plants and animals useful to man, including fruits, *viniculture*, nuts, vegetables, greenhouse plants, tree nurseries, Christmas trees, forages, sod crops, grains, feed crops, dairy, processing of farm-produced dairy products, all domestic livestock for breeding and grazing and the equine industry, aquaculture, hydroponics, woody biomass, horticulture, maple sap, and other similar uses and activities" (emphasis added).

§ 44 (3) specifically refers to AML § 301 and is identical to the definition of "farm operation" at § 301 (11):

> "Farm operation" means the land and on-farm building, equipment, manure processing and handling facilities, and practices which contribute to the production, preparation and marketing of crops, livestock and livestock products as a commercial enterprise….Such farm operation may consist of one or more parcels of owned or rented land which parcels may be contiguous or noncontiguous to each other."

For some unexplicable reason, Chapter #44 was not made publicly accessible on

the Town's website while the Planning Board, Zoning Board, and lower court were hearing the instant case. This was intentional and bad faith. The UCPB researched the Town law, the Comprehensive Plan and the Open Space Plan before it made its recommendation. (ROA at 425-431). It was thorough. If Chapter #44 had been available to the public, the UCPB would have known and referenced it. The Town attorneys and their clients made a concerted effort to keep Petitioners-Appellants and its attorneys from knowing about and therefore utilizing the Chapter #44 in making their case.

E. Uncontroverted Expert Testimony and Generalized Community Opposition

The Zoning Board and lower court ignored all expert uncontroverted testimony in spite of the fact that precedent requires that expert testimony before an administrative board, with no record to the contrary cannot be ignored. (See *Campo Grandchildren Trust v Marvin L. Colson*, 39 AD3d 746, 748 [2d Dep't, 2007]; *McDonalds Corporation v Rose*, 111 AD2d 850 [2d Dep't, 1985]; and *450 Sunrise Highway LLC v Town of Oyster Bay*, 287 AD2d 714 [2d Dep't, 2001], "generalized complaints of residents and the findings of the ZBA were uncorroborated by any empirical data or expert testimony and were therefore, insufficient to counter the expert testimony presented….") (See also *Goldsmith v Bishop et al*, 264 AD2d 775 [2d Dep't, 1999].) The fact that the administrative board in the instant case is comprised of laymen makes this point even stronger. (See *New York Botanical Garden v Bd. of Standards and Appeals of the City of New York*, 91 NY2d 413, 419 [Ct App, 1998].)

The Zoning Board's determination was based on local public opposition, an improper ground for a local authority to rely on in refusing to grant an application for site plan approval. (See *Bongiorno v Planning Board of the Incorporated Village of Bellport*,

143 AD2d 967, 968 [2d Dep't, 1988].) This principal of law applies in many situations, including when a board is making a determination regarding whether to grant or deny certain applications. (See *Twin County Recycling Corp. v Yevoli*, 90 NY2d 1000, 1002 [Ct App, 1997], "the board may not base its decision on generalized community objections," and *Exxon Corp. v Restiano*, 237 AD2d 356 [2d Dep't, 1997], "the determination by the City Council was impermissibly based on generalized objections and concerns expressed by members of the community.")

In *Southampton v Equus* (201 AD2d 210, 215 [1994]), the Second Department overturned the lower court's decision that affirmed a zoning board of appeals, stating "…it is clear that the local opposition…was largely the result of unwarranted warnings by certain groups…" and that the "proposed use of the property…constitutes 'agricultural production' within the meaning of AML § 301 and is consistent with the objectives of the Town's Farmland Preservation Program…."

Southampton v Equus, supra, cites *Kinderhill v Walker* (54 AD2d 811), a 1976 case in this court concerning a thoroughbred horse farm attempting to get a license for a mobile home to be used by its employee and the Town of Chatham's denial of that license purportedly on the grounds that the subject operation was not a farm as defined in the Chatham zoning ordinance. This court reversed Columbia County's Supreme Court, awarded costs to the petitioner-appellant, and found the Town of Chatham's view "plainly erroneous and lack[ing] a rational basis".

<u>F. Conflict with State And Federal Law</u>

The Town and Respondents paid no attention to the doctrine of Equal Protection in both New York State and Federal Law. (McKinney's Const. Article 1, Section 11**;**

U.S.C.A., Amendments 5 and 14¨42 U.S.C. § 1983).

The Town and Respondents never had the slightest intention of utilizing §§ 140 (117.3) and/or 140 (134) of their Code to create a new and standard interpretation for defining agriculture for the purpose of a permitted use either when they were made law or when they applied them to the instant case. Respondents were simply trying to prevent the subject winery from operating at the subject property. If they had meant to create a new standard, they would have applied the law equally and consistently to all farms.

After the Zoning Board decision and with the UCPB uncontroverted expert opinion in mind, Wine wrote the Town Building Department, asking it to notify all farms in the Town of the new interpretation of the definition of "agriculture use" and its impending impact on them as "non conforming uses" concerning their buildings used for sales, processing, and owner housing, also excluded for counting acreage toward assessment/exemption in the real estate tax law (ROA at 303).

On February 25, 2008, she received the following response, from the Town Building Department, signed by Rodney Watrous, Code Enforcement Officer:

> "Our office is in receipt of the decision of the Zoning Board of Appeals with respect to the appeal by Rivendell Winery of the Building Inspector's July 26, 2007 letter regarding the application of Rivendell Winery and Ms. Wine.
>
> We have carefully reviewed that decision and will continue to act in a manner consistent with that decision, as well the decision of the Building Inspector that gave rise to the appeal.
>
> With respect to the various issues raised in your letter, *the determination of the Building Inspector was made with respect to the facts represented in the Rivendell Winery/Wine application, and is limited to those facts. This office is not aware of any facts that demonstrate the applicability of that determination to the other circumstances described in your letter*" (emphasis added, ROA at 304).

The UCPB's uncontroverted expert recommendation makes the point that many farms in the Town would not pass this test. In such recommendation, requested by and given to the Zoning Board, it said:

> "Taken further, the BI's determination would affect the agricultural use classification under the Town statute of barns, farm stands, and farm worker housing since the lands they sit on also do not qualify for an exemption…."
>
> "Finally, as it relates to the importance of this and its application to others, we note that current land use in the community shows many residences on the same parcel as the agricultural use. Of the 67 parcels in the Town in State Certified Agricultural Districts, more than half (36) contains a residence. The BI determination would imply that these residences are non-conforming. It would also mean that absent the creation of a separate lot, new residences would not be permitted on farms which would clearly violate AML regarding the issue of housing" (ROA at 429-430).

Town Law §§ 262 and 263 (McKinney's at 63-67 and 68-91) authorizes a town board to create zoning districts subject to these conditions:

> "All such regulations (within a district) shall be uniform for each class or kind of buildings, throughout such district, and shall be made in accordance with a comprehensive plan."

Use goes to the property, not the property owner. Argument by the opposition that "the determination of the [Inspector] was made with respect to the facts represented in the Rivendell Winery/Wine application and is limited to those facts," (*supra*, and ROA at 304,) does not comport with this law. "[T]he fundamental rule [is] that zoning deals basically with land use and not with the person who owns or occupies it." (See *St. Onge v Donovan*, 71 NY2d 507, 511[Ct Appeals, 1988].) (See also *Holthaus v Zoning Bd. of Appeals of Town of Kent*, 209 AD2d 698, 699 [2d Dep't, 1994] and *Gjerlow v. Graap*, 43 AD3d 1165 [2d Dep't, 2007].)

Although *Frishman v Schmidt* (61 NY2d 823, 825 [Ct App, 1984) found for the

appellate board, it made the point that “a reasonable amount of discretion in the interpretation of the legislative direction may be delegated to an administrative body or official…*where it is difficult or impractical for a legislative body to lay down a rule which is both definitive and all-encompassing*” (emphasis added). Such restriction on appellate zoning board’s authority is clear. If a town wants to impose additional limitations, those limitations must be practical and universal, and they must be legislated. (See *Arceri v Town of Islip Bd. of Appeals*, 16 AD3d at 412 [2d Dep’t, 2005].)

In *Holthaus v ZBA of Town of Kent* (1994, *supra*), the Second Department reversed the lower court, finding the appellate zoning board decision arbitrary and capricious because it initiated rules that should have been legislated and did not enforce them uniformly.

In *Lufkin v Assessor of Town of Washington* (185 Misc 2d 779, 784, 785 [Sup Ct of Dutchess County, 2000]), the denial of the agriculture assessment/exemption was found to be illegal, arbitrary and capricious because the assessor added requirements not found in the exemption law itself and the court said “the interpretation of an exemption statute should not be so narrow and literal as to defeat its settled purpose”, e.g. pursuant to AML, “the policy of the State is to encourage and foster the preservation of agricultural lands and open spaces.”

<u>G. Total Exclusion Of A Use</u>

If farms are not permitted to “process” in the Town’s A-1.5 zoning district, where are the cows to be milked, the cheeses to be made, the cider to be pressed?

If winemaking is to be considered commercial to the detriment of being considered agricultural, while at the same time New York State law requires that farm

wineries be on farms, what are the implications? (See ROA at 98.)

As "Unfiltered" at Wine Spectator.com said in an article on February 12, 2009, "how [would] the negociants and cooperatives of Burgundy feel about this[?]"And, as Andis Kaulins said in his "Legal Commentary: LawPundit," a blog of USLaw.com., May 26, 2009, "Given the judicial opinion of Gerald W. Connolly in the Rivendell case, it would, by the logic of the reasoning in that case, be nearly impossible to put up a winery anywhere [in New Paltz], because you can't farm grapes on…[commercially] zoned property, and you can't process them on agricultural land. The New Paltz zoning interpretation essentially makes it impossible to have a winery in their jurisdiction and that cannot be the law now can it?"

Patricia E. Salkin, in her treatise, New York Zoning Law and Practice (2009, § 13:14) addresses regulations which exclude junkyards. She writes:

> "Although junkyards serve a useful function, most communities prefer that the function be carried out somewhere else. Some have sought to accomplish this by excluding such uses from all the territory of the municipality. *Such total exclusion of a use, which is useful and not unlawful, is of doubtful validity***.** The power to zone generally is considered to be the power to separate incompatible uses by assigning them to different districts, not by prohibiting them. (Emphasis added.)

In light of the substantial evidence confirming that a winery is an agricultural use under the zoning code, and the obvious lack thereof to the contrary, the Zoning Board had no rational basis for its decision and such decision was, therefore, arbitrary and capricious.

Point 2: THE LOWER COURT ERRED IN INTERPRETING THE DEFINITION OF AGRICULTURE FOR THE PURPOSE OF A PERMITTED USE WHEN IT REFUSED TO ACKNOWLEDGE THAT THE ZONING CODE'S DEFINITIONAL SCHEME IS AMBIGUOUS AND CONTRADICTORY.

A. Language of State Law Supports Winery as Agriculture

New York State Law clearly includes all winery activities, regardless of how "commercial", under its definitions of "agriculture" and "farming".

Dean Charles Crampton of Cornell University Law School, an acknowledged expert in the Alcohol and Beveral Control Law, gave his uncontroverted, expert opinion to the Town:

> "Rivendell is licensed as a farm winery under Section 76-a of the Alcoholic Beverage Control Law of the State of New York (NY CLS Al Bev § 76 [a]) (copy attached). Pursuant to the ABC Law, "farm winery" means and includes any place or premises, located on a farm in New York State, in which wine is manufactured and sold. Thus, to be a farm winery in New York the licensed premises i) must be on a farm, and ii) wine must be manufactured. Rivendell meets both of these requirements. Furthermore, farm wineries are by definition agricultural (a point acknowledged by the building inspector) and must produce their wine solely from grapes grown in New York State (though not necessarily grown on the farm winery's property) and may only sell New York State wines….
>
> The only time when local zoning becomes an issue for farm wineries is when the licensee wishes to operate its business in a non-agricultural zone that does not permit such use (such as in an area zoned purely residential). If the farm winery is located in an area zoned as agricultural, then it has the right to conduct its business there consistent with its rights under the ABC Law.
>
> These rights do have limits; however, and farm wineries, as other land owners, are subject to applicable health and safety requirements in the building codes, and reasonable restrictions such as applicable set-backs, signage and the like included in the local zoning ordinances. Rivendell is not contesting any of the Town's requirements in this regard" (See ROA at 96-102, particularly 96-97 and McKinney's Alcoholic Beverage Control § 3 [12] [a], definition of "Farm Winery" at 11 and § 76 [a], Farm Winery License, at 179-183).

Several sections of New York State Agriculture and Markets Law attest to the latitude the State wants given to the definition of "agricultural". The

following are examples:

1. AML § 301 (15):

> "'Agricultural tourism' means activities conducted by a farmer on-farm for the enjoyment or education of the public, which primarily promote the sale, marketing, production, harvesting or use of the products of the farm and enhance the public's understanding and awareness of farming and farm life."

2. AML § 2 (3):

> "The terms 'food' and food 'products,' shall include all articles of food, drink, confectionery or condiment, whether simple, mixed or compound, used or intended for use by man or animals, and all also include all substances or ingredients to be added to food for any purpose"

3. AML § 2 (4):

> "The *production* of foods means the producing of food upon the farm or elsewhere by the tillage of the soil, the commercial raising, shearing, feeding and management of animals or other agricultural, horticultural, ranching or dairying processes and shall also *include the manufacture of foods*"(emphasis added).

4. AML § 2 (5):

> "'Farm product' means any agricultural, dairy or horticultural product, or any product designed for food manufactured or prepared principally from an agricultural, dairy or horticultural product and the commercial raising, shearing, feeding and management of animals on a ranch".

Patrick Hooker, NYS Commissioner of Agriculture and Markets, gave his uncontroverted expert opinion to the Town on this subject:

> **"**It is my opinion that the use of the land in question for the production of grapes, the fermentation of such grapes to produce wine and the retail sale of the wine, is agricultural in nature" (ROA at 91).

The UCPB, in its uncontroverted expert recommendation, requested by and given to the Zoning Board, said:

> “ It is important to note that agritourism is governed by AML and would be within the definition of agriculture in the Town’s statute” (ROA at 428).

In *Pursel v Zagata (*NY ENV LEXIS 31, 8 [NY Freshwater Wetlands Appeals Board, 1998]), where the subject of the litigation was the definition of “agriculture” as it applied to a barn used to house female heifers to be sold as dairy replacement cows, the Town of Caledonia Zoning Board of Appeals determined that such use was “not…an agricultural activity or function but instead…more akin to a commercial use”. The State of New York Freshwater Wetlands Appeals Board reversed, finding that where “an exemption is provided for one type of agricultural activity, [it] does not mean that other types of agricultural activities do not exist. *Nor does it make industrial or commercial, other activities where the land’s use is not primary to an agricultural activity*” (emphasis added).

In that 1998 opinion, the Wetlands Appeals Board cited the dissent in a 1971 Iowa decision, *Farmegg Products, Inc. v Humbolt County*, 190 NW2d 454, 462, which stated, “*today’s agriculture…is commercial*. Today’s farmer is essentially a businessman, often a very substantial one, engaged in a commercial enterprise. Animal husbandry practices with cattle, hogs, and poultry are strikingly different from those of a generation ago. But changes in practices do not mean that the new animal husbandry is not agriculture” (emphasis added).

B. Conflict between State and Local Law

The zoning code’s definition of “Farm” at § 140 (4) (C) speaks to the code’s conflict with State law and to the instant case:

> “Any parcel of land containing at least 10 acres which is used *for*

> *gain in raising of agricultural products*, livestock, poultry and dairy products. *It includes necessary farm structures within the prescribed limits and the storage of equipment used.* It excludes the raising of fur-bearing animals, riding academies, livery or boarding stables and dog kennels" (emphasis added).

While this definition does not comport with AML, because of its exclusions, it does include a farm winery building.

Kinderhill v Walker (*supra*, [3d Dep't, 1976] , "The zoning ordinance in question by its very terms and the inclusion of definitions set forth in other State publications, demonstrates a clear intent to include petitioner's operation within the contemplated farm enterprises…."), *Southampton v Equus* (*supra* at 213, [2d Dep't, 1994], "It is noteworthy that no New York court has held that the breeding of horses does not constitute 'agricultural production' as defined in AML § 301") **,** and *Lufkin v Assessor of Town of Washington* (*supra*, at 779 [Sup Court of Dutchess County, 2000]), all involve the definition of "agriculture" with implicit or explicit reference to the AML definition of "farm operation" (§ 301 (11) and at p. 12). The instant case is plainly analogous. §§ 140 (117.3) and 140 (134) define "agriculture" as "all agricultural operations and activities …as such terms are defined in or governed by Agriculture and Markets Law of the State of New York *and* on lands qualified under Ulster County and NYS law for an agricultural exemption by the Assessor of the Town" (emphasis added). Since the AML definition of "agriculture" makes clear that a building in which processing or sales takes place is an agricultural building regardless of whether or not the acreage beneath it is counted toward an agricultural assessment/exemption, the Inspector and the Zoning Board interpretation is clearly at odds with AML.

C. Definitional Scheme of Town's Own Code is Inconsistent

In both Articles XIIIA and XV of the zoning code, the definition section commences: "*As used in this article*, the following terms shall have the meaning indicated (emphasis added, except that in Article XV, it says "Chapter" instead of "Article", an obvious drafting error).

In both Articles XIIIA and XV, "agriculture" is defined for the sole purpose of exempting it and for no other purpose whatsoever (Code §§ 140 [117.2], 140 [117.5], 140 [133], and 140 [135]). In Articles XIIIA and XV, the specific words--"As used in this article"--override the general statement in § 140 (4) (A): "If a term is not listed below, but is defined in…Chapter 140 of the Town Law, then for the purpose of these regulations the meaning of that term shall be defined therein." This court said in *Blalock v Olney*, 17 AD3d 842, 844 (3d Dep't, 2005), "[S]pecific rules prevail over the general rule when the circumstances for their operation are present (see *Catlin v Sobol*, 77 NY2d 552, 563-564 [Ct App, 1991])." (See also *People v Walker*, 81 NY2d 661, 664 [Ct App, 1993] and McKinney's Statutes § 113 at 235-238.)

On this subject of statutory construction, the uncontroverted, expert recommendation of the UCPB, requested by and given to the Zoning Board, favored the Petitioners-Appellants. It states:

> "'Agriculture' is not specifically defined in the body of the New Paltz Zoning Code definitions. However, the Zoning Code provides for definitions that appear elsewhere in the Zoning Code to be utilized….
>
> It is with some trepidation that the ZBA should accept reaching into the Steep Slopes and the Clearing and Grading statutes for the definition of 'agriculture.' With regard to the Clearing and Grading statute, it is clear that all definitions in it are confined to the Clearing and Grading 'article,' as is explicitly stated.

The Steep Slopes statute is more sloppily written, with references throughout to 'chapter' rather than 'article.' The thrust of the definitions in both of these articles is to strictly define agriculture, by relating it to Agriculture and Markets Law (AML), and then exempt it from the article. Applying the definition of 'agriculture' to the entire zoning chapter does not appear to have been intended when these articles were written." (See ROA at 425-431, particularly at 426.)

Further support for this argument can be found in the following examples:

1. "Applicant" is narrowly defined in Article XV as "A person requesting a steep slope permit from the Town in accordance with the provisions of this chapter" (Code § 140 [134], ROA at 1064) but "Applicant" is not defined in § 140 (4) (A). Despite the language set forth in § 140 (4) (A), it is obvious that the definition of "Applicant" in the definitions section of Article XV is not intended to be applied to the zoning ordinance as a whole because there are many different types of "applicants" within the context of the zoning ordinance besides those requesting a steep slope permit.

2. Articles XIIIA and XV contain some terms that are identical but are defined differently for the purpose of each Article. For example, Article XIIIA defines "Clearing" as "Destruction and removal of vegetation by manual, mechanical, biological or chemical methods" (Code activity which removes or significantly disturbs trees, brush, grass, or any other type of vegetation" (Code § 140 [134], ROA at 1064).

When the rules of statutory construction are applied to zoning code §§ 140 (4) (A), 140 (117.3) and 140 (134), it is obvious that the term "agriculture" is not defined in § 140 (117.3) and § 140 (134) for the purpose of determining whether a particular use is permitted within the A-1.5 zoning district.

D. Agriculture Should Be Defined By Its Common Meaning

The second sentence of the zoning code § 140 (4) (A), which reads, "Otherwise, words not specifically listed in this section assume the definition employed in common usage", prevails in defining a permitted use in A-1.5. Petitioners-Appellants' proposed use was proven to be "agriculture" under the "common usage" definition.

The proposed farm winery, including the subject building used as a winery, is an agricultural use within the common meaning of the word "agricultural", regardless of whether or not the acreage under the subject building is counted toward an agricultural value assessment/exemption. This court has always taken the view that "the ordinary, everyday meaning of these terms is to be applied. (See *Leisure Vue, Inc. v Commissioner of Taxation and Finance*, 172 AD2d 872 [3d Dep't, 1991] and *Slocum v D's & Jayes Valley Restaurant & Café, Inc.*, 182 AD2d 981 [3d Dep't, 1992].) This view is strongly articulated in *Caldwell v Alliance Consulting Group, Inc.*, 6 AD3d 761 (3d Dep't, 2004). "Where as here, the term at issue does not have a controlling statutory definition and is clear and unambiguous, courts should construe the term using its 'usual and commonly understood meaning'" (*Orens v Novello*, 99 NY2d 180 [Ct App, 2002] quoting *Rosner v Metropolitan Prop. & Liab. Ins. Co.*, 96 NY2nd 475, 479 [2001] and referencing McKinney's Statutes § 232 at 404-406).

Support for the conclusion that a farm winery (which *always* includes a building used for processing) is commonly known as an agricultural use and that Petitioners-Appellants' proposed winery was such was overwhelming. Numerous letters were submitted to the Zoning Board. They detail the agricultural nature of the proposed farm winery and wineries in general. They came from Julie Suarez**,** Director of the Public

Policy Division of the New York Farm Bureau (ROA at 103-104), Joyce M. Minard, President of the Regional Chamber of Commerce (ROA at 571), David H. Bova, Millbrook Vineyards and Winery (ROA at 532); Frederick Frank, Chateau Frank, Inc. (ROA at 533), Mark J. Wagner, Lamoreaux Landing Wine Cellars (ROA at 534), Charles Massoud, Paumanok Vineyards, Ltd. (ROA at 535-537), Ann Marie Borghese, Castello Di Borghese (ROA at 538), David Whiting, Red Newt Cellars (ROA at 554), Yancy Stanforth Migliore, Whitecliff Vineyards (ROA at 576), Phyllis Rich Feder, Clinton Vineyards (ROA at 577), Michael Migliori, President of the Hudson Valley Wine and Grape Association (ROA at 553) and James Tresize, President of the New York Wine & Grape Foundation, whose letter included the following:

> "In all regions of the country and world, wineries are accepted as part of the agricultural process….To re-classify Rivendell as something other than an agricultural operation, as all other wineries in the state are classified, would be an error…As President of the New York Wine & Grape Foundation, I support Rivendell Winery in its attempts to relocate in New Paltz and wish to again emphasize that a winery is indeed, by definition and practice, an agricultural use." (See ROA at 542.)

In addition to the aforementioned expert opinion letters, Yancy Stanforth Migliore, Whitecliff Vineyards, Phyllis Rich Feder, ClintonVineyards, Marc Stopke, Adair Vineyards, and Michael Migliore, President of the Hudson Valley Wine and Grape Association, appeared in person. (See ROA at 852-858 and 869-874.)

E. Legislative Intent

The lower court erred when it declared that because the statute was clear, it need not attempt to utilize outside sources to determine legislative intent. McKinney's Statutes § 111 at 225-227 states**:**

> "In considering the necessity of literal construction of a statute or the proprietary of a departure there from, it must be kept in mind that the intent of the Legislature is the primary object sought in the interpretation of statutes; and that whenever such intention is apparent it must be followed in construing the statute….In the interpretation of statutes, the spirit and purpose of the act and the objects to be accomplished must be considered and given effect, and the literal meanings of words are not to be adhered to or suffered to defeat the general purpose and manifest policy intended to be promoted. *The letter of a statute is not to be slavishly followed when it leads away from the true intent and purpose of the Legislature or leads to conclusions inconsistent with the general purpose of the statute or to consequences irreconcilable with its spirit and reason*; and statues are not to be read with literalness that destroys meaning, intention, purpose or beneficial end for which the statute has been designed" (emphasis added).

This Court stated in *Bonded Concrete v Zoning Bd. of Appeals of Town of Saugerties*, 268 AD2d 771, 773 (3d Dep't, 2000), "we conclude… that [the statute] is susceptible of either of …two different interpretations and thus is ambiguous, requiring interpretation to ascertain and give effect to the legislative intent underlying it (see *Ellington Constr. Corp. v Zoning Bd. of Appeals of Hempstead*, 77 NY2d 114, 121 [Ct App, 1990]; *Pardi v Barone*, 257 AD2d 42, 46 [3d Dep't, 1999]; McKinney's Statutes § 92, at 176-185, § 95, at 196-201, and § 96 at 202-211; cf., *Raritan Dev. Corp. v Silva* 91 NY2d 98,102 [Ct App, 1997])".

> "[W]here there is doubt as to the meaning of the language of a statute, various extrinsic matters throwing light on the legislative intent may be considered by the courts….Resort may be had to any authoritative source of information, including documents, and the court may also make use of general facts of common knowledge or public notoriety" (McKinney's Statutes § 120 at 242).

With the exception of the UCPB uncontroverted, expert recommendation, requested by and given to the Zoning Board, the Zoning Board called no witnesses nor took any testimony whatsoever to elucidate legislative intent regarding the definition of

“agriculture” as it pertains to permitted uses.

As discussed above in Point 1, D, Town Law Chapter #44, entitled “Agriculture and Open Space Preservation and Acquisition” and enacted August 23, 2007, (see p. 13,) attests to the Town’s collective state of mind, with its legislative purpose, “to provide mechanisms to protect the assets of the Town” which include “farm and forestry industries that are strong and sustainable.” (See p. 13 and New Paltz Town Code §§ 44 [2] and 44 [3].) Included in that definition is the word “viniculture.”

“Viniculture”, defined as “the cultivation or culture of grapes especially for *winemaking*” (emphasis added, Merriam-Webster Dictionary, 2009) is a purposeful choice of words because it distinguishes it from the more commonly used word, “viticulture”. “Vini” comes from the Latin “vinum” meaning “wine”, while “viti” is the Latin for “vitis” meaning “vine” (American Heritage Dictionary of the English Language, 4th Edition, 2009). The difference is between “winemaking” and simply “grapegrowing”. By using the word “viniculture,” AML and the Town adopted and specifically acknowledged “winegrowing” as an agricultural activity for their domains.

The Zoning Board made a conscious decision to ignore the Town’s Comprehensive Plan and its Open Space Plan when it analyzed and decided the instant Case, even though both such Plans are relevant and acknowledged authoritative sources to determine legislative intent with respect to provisions of zoning code.

A Comprehensive Plan is intended to serve as a guide for the orderly development of a municipality (Salkin, Patricia, New York Zoning Law and Practice, *supra*, § 4:03). It is proper for local boards to rely upon the municipality’s comprehensive plan in making zoning and planning decisions. (See *Commerce Bank, N.B. v Planning Board of*

the Town of Bedford, 47 AD3d 810 [2d Dep't, 2008].)

UCPB, in its uncontroverted expert recommendation, requested by and delivered to the Zoning Board, made this very clear to the Zoning Board when it explained:

> "Support for the common word 'agriculture' to include farm wineries can be found in the Town's adopted plans. The ZBA should give careful consideration to these in making its determination. Comprehensive Plans and their focus area counterparts (Open Space Plan) are the legal basis for the Town's zoning statute. In resolving ambiguity within the statute, their guidance may be crucial to ZBA.
>
> From Town Law Article 16 § 272 (a). Town comprehensive plan:
>
>> 11. *Effect of adoption of the town comprehensive plan. (a) All town land use regulations must be in accordance with a comprehensive plan adopted pursuant to this section.'*
>
> The New Paltz Comprehensive Plan appears to define wineries as specialty agriculture. It states:
>
>> 'Tourism continues to be an important part of the area's economic health, especially in Ulster County. Recently, late 1980's and 1990's, there has been an increase in <u>specialty agriculture, including Wineries</u>, Vegetable and Horse Breeding Farms, while the traditional Apple Industry remains important'[emphasis added]."

(See ROA at 427-428.)

The Comprehensive Plan and Open Space Plan contain numerous references to the importance of supporting farming, agriculture and agritourism in the Town. Significantly, the Open Space Plan sets forth the following concepts that emphasize the importance of providing flexibility to farmers to generate income to support farm operations:

> "Adapt regulatory tools to accommodate activities on the farm that support agriculture, such as farm stands, and bed & breakfasts. Ensure that the zoning code provides adequate flexibility for farms to diversify and generate income to support farm operations" (ROA at 324-325). Ensure agritourism options are fully supported" (ROA at 327.)

The Town's Comprehensive Plan and Open Space Plan also reflect the public policy set forth in the New York State Constitution with respect to the importance of promoting agriculture:

> "The policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products" (McKinney's Const. Art.14 § 4 at 371).

Quite obviously, in order to be operating under such policies and principals as those set forth in the Town's Comprehensive Plan and Open Space Plan, the Zoning Board could not endorse the use of the definition of "agriculture" from §§ 140 (117.3) and 140 (134). But by applying such a narrow definition of "agriculture" as that contained in §§ 140 (117.3) and 140 (134) for the purpose of determining whether the subject proposed farm winery constitutes an "agricultural use" permitted within the A-1.5 zoning district, the Zoning Board did exactly that. Not only were the Town Comprehensive Plan and Town Open Space Plan proper places to seek out legislative intent when drafting the definition of "agriculture", but it was improper for the Zoning Board to interpret the Town zoning code in contravention to those adopted Plans.

Town and State legislation evince public policy when they encourage and incentivize farming. The Zoning Board and lower court decisions, supporting suburban property values and endorsing the notion that the view shed is imperiled by a farm winery, and thereby prohibiting the establishment of such a farm, is contrary to such stated public policy at every level of government.

Point 3. THE LOWER COURT ERRED BY NOT REVIEWING THE ZONING CODE DE NOVO AND NOT GIVING DEFERENCE TO THE PROPERTY OWNER.

When a determination involves pure legal interpretation of statute, the court--

not the municipal agency--becomes the authority. In each such case, the court reviews the law de novo and no deference goes to the agency, regardless of such agency's expertise. (See *United University Professions v State of New York,* 36 AD3d 297 [3d Dep't, 2006].)

This is particularly true in zoning law. (See *New York Botanical Garden v Bd. of Standards and Appeals of the City of New York*, *supra*, at 419 [Ct App, 1998]; *Toys "R" Us v Silva*, 89 NY2d 411,419 [Ct of App, 1996]; *151 Route 17M Assoc. v Zoning Board of Appeals of the Town of Harriman*, 19 AD3d 422, 423 [2d Dep't, 2005].)

In *Bonded Concrete, Inc. v Zoning Board of Appeals of the Town of Saugerties* ([3d Dep't, 2000] *supra*, at 774), this Court said, "we are also guided by the well established but countervailing precept that zoning restrictions are in derogation of the common law and, as such, must be strictly construed against the municipality which enacted and seeks to enforce them, and that any ambiguity in the language employed must be resolved in favor of the property owner, (see *Allen v Adami*, 39 NY2d 275, 277 [Ct App, 1976]; see also *DeTroia v Schweitzer*, 87 NY2d 338, 342-343 [Ct App, 1995)]; *Capital City Rescue Mission v City of Albany Bd. of Zoning Appeals*, 235 AD2d 815, 816 [3d Dep't, 1997]; *Uciechowski v Ehrlich*, 221AD2d 866, 868 [3d Dep't, 1995]; *Hess Realty Corp. v Planning Commn.*, 198 AD2d 588, 589 [3d Dep't, 1993] and McKinney's Book 1, Statutes, 1971: § 311, at 473-474)." (See also *Blalock v Olney*, [3d Dep't, 2005, *supra*, at 843-844].)

VIII. CONCLUSION

Petitioners-Appellants respectfully request that this Court grant judgment in their favor:

Reversing on the law the November 18, 2008 decision of the lower court because it improperly upheld the December 17, 2007 Zoning Board affirmance of the July 26, 2007 interpretation of the Inspector that the proposed operation of a licensed New York State farm winery, on lands controlled by Wine, utilizing the existing building as set forth in the subject site plan application dated March 30, 2007, as amended, does not constitute a permitted use under the definition of "agriculture" pursuant to the Town zoning ordinance and AML; and

Declaring that the operation of a licensed NYS farm winery, on lands controlled by Wine, utilizing the existing building as set forth in the subject site plan application dated March 30, 2007, as amended, does constitute a permitted use pursuant to the Town zoning ordinance and AML; and

Directing Respondents and any others to issue to Petitioners-Appellants any necessary permits and take such other actions as may be appropriate in order to allow the establishment and operation of a New York State farm winery on the premises owned by Wine and directing Respondents to process any such application(s) lawfully, properly, and in conjunction with existing Town rules and ordinances, and in accord with the normal procedure applied to all other property owners and/or tenant applicants within the Town and granting injunctive relief enjoining all Respondents and any others from interfering further with the Petitioners-Appellants' efforts to secure any form of approvals or licenses associated with the intended permitted agriculture use of the

subject property and related rented properties, from County, State or other governmental authorities; and

Directing Town to correct the ambiguity that now exists with respect to the definition of “agriculture” in its Code and granting injunctive relief enjoining the Town Board from passing into law any definition which is not in conformance with the New York State Law definition of “farm operation” and which does not treat all farms, including farm wineries, equally; and

Granting Petitioners-Appellants such other and further relief as to this Court may seem just and proper, including costs, damages and reasonable attorney’s fees.

Respectfully submitted:

____

Susan L. Wine
Petitioner-Appellant Pro se
507 Albany Post Road
New Paltz, New York 12561
(917) 626-5535