

A regular meeting of the Town of Victor Zoning Board of Appeals was held on June 20, 2016 at 7:00 P.M. at the Victor Town Hall, 85 East Main Street, Victor, New York, with the following members present:

PRESENT: Keith Maier, Chairman; Scott Harter, Vice-Chairman; Michael Reinhardt; Mathew Nearpass; Donna Morley

OTHERS: David Hou, Town Attorney; Sean McAdoo, Code Enforcement Officer; Dave Tantillo, Town Board Liaison; Connor Gallagher; John Sheehan; Betsy Kubiak; John Billone Jr.; Jess Sudol, Passero Associates; Mike Tascione, City Tavern; Alan Russell, City Grill; Debby Trillaud, Secretary

The meeting was opened and the Flag was saluted.

Mr. McAdoo was welcomed as the attending Code Enforcement Officer for the meeting.

Jess Sudol requested that the other applicant, Song Hill Winery, present first as he wanted to wait until Mr. Nearpass arrived at the meeting.

### **PUBLIC HEARING**

**SONG HILL WINERY** (Interpretation)  
521 County Road 9  
Appl. No. 11-Z-16

Code Enforcement Officer, Sean McAdoo, for an interpretation regarding a request to allow a summer festival to sell/promote wine, jam, and farm products at Song Hill Winery, 521 County Road 9, (6717 Song Hill Lane) Victor, NY, with regards to a Zoning Board of Appeals resolution dated May 6, 2013 and the Town Code Farming chapter 108.

On May 6, 2013 the Town of Victor ZBA approved a non- public wine making use on the property with the condition that there shall be no retail space and that the operation shall not be open to the public for wine tasting or wine tours.

The secretary read the legal notice as it was published in The Daily Messenger on June 12, 2016.

Connor Gallagher of 40 Main Street, Phelps, New York addressed the Board.

Mr. Gallagher – I lease a portion of the property at 6717 Song Hill Lane.

I know that I sent an extensive amount of material including a long letter to you regarding the Notice of Determination. I will briefly summarize that here. Essentially we are requesting permission to do a farm festival. This property has been doing these festivals for over 25 years. It

started with horses and then when the farm tried to convert to a tree farm nursery they would have these festivals which I included advertising materials for that. They would allow the general public to come in a couple of times a year over a weekend. People could walk the property and purchase flowering trees and other nursery products from the farm. We were able to find advertisement going back to 1995, but this process started prior to that.

The reason why we think we should have the right to do this is several. First and foremost the property in question is a farm. It meets all the definitions of farm including those quoted by the building department in its notice of determination. It's been recognized as a farm by this Board in the very use variance in question, as well as the State of New York. As a requirement of being a farm winery, you have to be located on a farm. So the State of New York has recognized us as a farm as well as the letter you have there from the farm's accounting firm that it has always been used for agricultural use.

Secondly, the property has been allowed to hold these farm festivals to market its products for over 25 years. Third the farm was granted a use variance to have a farm winery because, among other reasons, there is a financial hardship on the property and because a farm winery is completely congruent with things that were already going on upon the property, mainly converting it to vineyard and orchard land.

While the Zoning Board restricted the farm winery from the full rights and privileges granted by the State Liquor Authority, by not allowing the winery to have a fully functioning retail tasting room open to the general public, however, we don't believe that it is reasonable to interpret this restriction to apply to anything other than the rights and privileges allowed specifically to adding that new right, the farm winery to the property.

We don't think that it is either reasonable, nor within the realm of common sense:

1. Removing property rights from a property does not fall within the definition of a use variance;
2. While it is considered reasonable to put restrictions on new property rights, in this case, allowing the farm winery and not allowing the full rights and privileges of that farm winery, it's not reasonable to extend those restrictions to preexisting property rights.
3. It doesn't make common sense because at the end of the day the purpose of the use variance was to alleviate a financial hardship on the property.
4. It would not make any sense whatsoever to overturn decades of precedent by restricting business operations on the property that have taken place for decades as doing so would absolutely increase the financial hardship on the property.

Ms. Morley stated she had no questions at the moment.

Mr. Harter – The question I have is that when you were here we granted you a use variance some years ago now there was a restriction against what you are currently seeking as I understand it. Is that correct?

Mr. Gallagher – No.

Mr. Harter – There is no restriction? As part of the use variance that we granted, didn't we have a condition in our variance that said that you could do the grape harvesting etc., but didn't we specifically restrict that what you are asking for tonight?

Mr. Gallagher - No, I think that that interpretation should be limited, as I said, only to the new rights to the property. The State Liquor Authority, if you get a license to have a farm winery, which we have, allows you to have a fully functioning retail tasting room open to the general public on a regular basis. That was the whole purpose of that restriction. When we applied for the use variance we were saying, we won't realize that new right, to have a fully functioning retail tasting room open to the general public. That was the purpose behind the restriction. The purpose wasn't to disallow these farm festivals that we have been doing two or three times a year for the past 25 years. As I said it wouldn't make common sense for us to try and alleviate a financial hardship by putting in restrictions that would increase the financial hardship on the property. Basically I think it's akin to saying now you can't have a bed & breakfast on the property anymore because you are not allowed to be open to the general public. I don't think that the scope of a use variance falls within the letter of the law or under the interpretation that we were seeking in this instance.

Mr. Harter – I was on the Board when we granted you the use variance. My recollection of that hearing was that the reason that condition was put in is because we were sensitive to the neighboring residential properties and you proposed a fairly innocuous business as I recall. There was a mention from you that there would be no disturbance of the neighbors. I think the reason we put that condition on there was to guarantee that that would be the case. Now I think you are saying because of some State regulations that that supersedes the condition that we put on your resolution.

Mr. Gallagher – No, as you can see from those advertisements, we used to open the farm up when we had the tree nursery to the general public for two days over an entire weekend. We advertised that in the Democrat & Chronicle among other publications and this is not materially different from that at all. That didn't disturb the neighborhood, that was part of the neighborhood. This morning I received a letter of support from the neighborhood adjacent to us. What we are asking to do isn't anything different. What I said all along during that use variance is the reason we want the farm winery is that it is completely congruent to everything that is already going-on on the property. This again, is right in line with things that we were already doing on the property. It was definitely not our intention to restrict something like that which I think has been rather innocuous to the neighborhood in the past. Like I said, this has been going on for 25 years.

Mr. Harter – So what has been going for 25 years is extremely similar to what you are doing now, is that your point?

Mr. Gallagher – Absolutely. It's pretty much identical. They would open the farm up. In those cases it was for a much longer time period than we are proposing in this case but it was Saturday and Sunday 10:00a.m. to 5:00 p.m. The general public would come in; they would walk the property; look for trees; they had food catering; they had the barns decorated with different farm crafts; people could go into the barns and shop for different themed crafts throughout the barn.

Mr. Harter – So this time we are talking about wine, is that right?

Mr. Gallagher – Right, the difference is that we have a different farm product now. Again, everything else is virtually identical. This is an outdoor event, I'd like to make that clear. This isn't just a winery event. It's an outdoor event, if it rains it's going to be postponed. The whole point is to show people the work that we have been doing on the property, the landscaping, the vineyard that we put in, which I have given you some pictures. We've actually expanded it since then and are continuing to expand. We have vines in different stages that we really want to be able to walk people through, show them what we are doing, and show them the farming work that we are doing on the property.

Mr. Harter – I think another component of our granting the use variance at that time and another thought that's in my mind tonight is I think you positively impressed us when you came before us for the use variance originally. You may continue to do what you are doing for quite some time and it looks to me like you will do it well. But, our decisions are relatively permanent and they transfer with properties that transfer, that is the use variance, and someone may be there in the future that manages this site differently than you, perhaps not as well as you. That's one of the things that we have to take into consideration in as much as the neighbors may be very pleased with what you have done so far, and it looks like they are. There is no guarantee that you are going to be the guy ten years from now that is doing this and that they are going to be happy. We have to take that into consideration with our deliberations tonight and I think that it is important to let you know that.

Mr. Gallagher – Sure, I mean I wasn't the person who ran the horse shows 25 years ago when they would do these similar things with the horses. I wasn't the person who ran the nursery stuff either, so like I said, I think there is significant precedent for these exact type of activities that have been going on. I don't think that it could be interpreted that we are having a fully functioning open retail tasting room, seven days a week, regular traffic coming in and out. This is something that has been allowed on the property. Even though regular business things were not allowed on the property like I believe they weren't allowed to have riding lessons. They

couldn't have that kind of commercial activity with the public generally coming in on a regular basis, yet the property was still allowed to have these type of events.

Mr. Harter – OK, I'll be interested to hear what the other Board members have to say.

Mr. Reinhardt – I've taken some effort to look at the May 8, 2013 granting of the use variance and there are some curious things that I noted. The four conditions, did you review those before you made this application? (Yes) Because I would like to go over them with you. I'm thoroughly confused because what you are saying here today is far different than what your argument was for the use variance. At least that is my opinion.

One thing I'm hearing from you is this 25 year history of all the things that were going on on that property, yet back in 2013 you were adamant about the reason why you need this use variance is because you couldn't use the property as it is currently zoned for. Does that sound like it's consistent? It sure sounds like to me that you are saying one thing today but it really wasn't the same thing that you told us three years ago. How is that?

Mr. Gallagher – I disagree, I think what you are confusing is farming practices and the actual product. The reason that we needed the use variance was because the product that we had was no longer financially viable. That was the whole point. The horse farm and the tree nursery were not financially viable to continue doing.

Mr. Reinhardt – So what is it that you want to do now with these festivals? It's a wine festival right?

Mr. Gallagher – It's really a farm festival. It is going to showcase some of our products but not just wine, also other grape products and other fruit products that we make on the property. It's a farm festival.

Mr. Reinhardt – As we went through the conditions, did you not agree to them when we offered them up to say would you be willing to abide by the conditions that we proposed?

Mr. Gallagher – Yes, and that's exactly why I'm here as well.

Mr. Reinhardt – Number two – the operation shall be limited to the production of farm winery. Your proposal now seems like it is beyond farm winery. It seems like you want to do more than just make the wine.

Mr. Gallagher – The property was already allowed to be a farm. It was already allowed to plant as many grapes as we wanted. The farm winery was added as an extra right to the property in

order to make a small farm plot like that financially viable by having a product that we could make; that we could increase in value.

Mr. Reinhardt – Aren't you looking to do more than to produce wine? With this proposal that you have now, it sounds like you don't agree with the opinion of our Code Enforcement Officer. It sounds like you want to go beyond just production of wine. You want to do more.

Mr. Gallagher – The use variance was for the production of wine only. The property has been allowed to farm for a long time. I didn't need to come here to ask to farm the property. I didn't need to come here to ask to have a farm festival. Those were prior rights allowed on the winery and that's the case precedent that I keep talking about. I didn't need to come here to get those rights, I needed to come here to get the right to turn the farm product into wine; to have a production facility on premise. That's the difference.

I was never saying that all of sudden we're going to stop farming the property. All of sudden we are going to stop being a farm. All of sudden we are going to stop having the rights that apply to a farm. I was asking for an extra permission. I offered up to limit those extra rights so I wouldn't have a big sign out with a public tasting room and people coming in and out every weekend, which is what is allowed under the State Liquor Authority by having that license. That's the difference. I never said that we were not going to farm the property anymore or continue acting like a farm and continue doing farm related activities.

Mr. Reinhardt – What about the last condition – Shall not be open to the public for wine tasting and tours and that is exactly what you are asking us to approve; yes or no?

Mr. Gallagher – No. It's not exactly what I was asking.

Mr. Reinhardt – What are you asking us to do here today?

Mr. Gallagher – I'm asking you to let us to continue doing what we have been allowed to do. The intention of that specific clause was to say that I wouldn't have a fully functioning retail tasting room on the property where people were coming in and out all the time and we don't have that and I'm not asking for that. I'm asking to have a farm festival which is different because it's once, twice, three times a year and the property has been allowed to do that which is why it is different.

Mr. Reinhardt – Are these festivals open to the public?

Mr. Gallagher – Correct. The property has been open to the public. Again, it's the same difference as the Town didn't allow the horse farm to have a riding studio where students could come in and start riding horses. That was not allowed. The Town allowed them to have these

types of farm festivals. They allowed them to have horse shows; they allowed them once or twice a year.

Mr. Reinhardt – We're not talking about horse festivals, we're talking about a wine festival.

Mr. Gallagher – Right, but I'm saying this is the exact same distinction. On the one instance you have customers coming in on a regular basis, you have a fully open business on a regular basis. On the other instance, you have a couple of weekends a year where you are marketing your product. It's the same distinction. I don't have a regularly open tasting room. Instead, we're doing a farm festival a couple of times a year. They are totally distinct property rights.

Mr. Reinhardt – Do you have any issue whatsoever with the decision that this Board made back in 2013?

Mr. Gallagher – No, the issue I have is with the interpretation. I don't think the interpretation applies to restrict prior rights to the property. That's why we are here, for the interpretation. I don't have an issue right now with anything that's in there, but if it's going to be interpreted that we can no longer do these types of farm festivals, then yes, there is going to be a huge business issue certainly, because I did not anticipate that.

Mr. Reinhardt – My understanding of taking issue with the decision of a use variance or a decision from the Board, is that you have a limited period of time to, if you will, appeal the decision. My understanding is that time has long since passed. It sounds like to me that you are arguing that you want to appeal the decision back in 2013 because you don't like how it was written or because you want to do some things differently.

Mr. Gallagher – No, like I said, I think right now we are debating what the intention is of those restrictions. I think I had a different idea of what they meant than what the Code Enforcement Officer said in his determination.

Mr. Nearpass – I tend to agree with my colleague Mike on this one. I was here and I voted for the use variance. I'm looking at it again and it says, a use variance to allow a non-public wine production facility in a vacant building. The request that you have, and I'm referring to your letter dated May 10, 2016, "we believe that this is an essential marketing opportunity for the farm winery".

It was very clear back then; I don't recall any discussions, nor did I hear or see anything that talked about festivals and wine tasting and when we went through these conditions I'm fairly certain that it was yes, this is just a production farm winery, that's all we are, that's all we'll ever be, that's all we are asking you to be. The festival is in the spirit of the farm winery, not in the spirit of a horse farm or another farm production.

Mr. Gallagher – It is in the spirit of farm production. If you look at the guidelines that I supplied from Ag and Markets, that’s exactly what they talk about that these types of festivals have to be to market your farm product. They consider wine part of the farm product.

Mr. Nearpass – I’m just reading your statement that says, “We believe that this is an essential marketing opportunity for the farm winery.” There were no discussions and actually back then you didn’t need to have marketing opportunities on your property because as Mike talked about there were four criteria which very clearly said, no retail space, not open to the public. I would have thought that if you had this in mind and it was part of your business plan back then, that those would have set off red flags in your mind and you never would have agreed to those four conditions.

Mr. Gallagher – Yes, if I had anticipated that it would be interpreted now to remove rights that we previously had on the property, absolutely, I would have reworded this.

Mr. Nearpass – “There will be no retail space”. (Correct) What retail space was there prior to this existing in the farm winery operation?

Mr. Gallagher – What do you mean?

Mr. Nearpass – I’m referring to the third condition. (2013 Use Variance Resolution)

Mr. Gallagher – What that refers to is a retail tasting room, where you have a tasting room where people can come during regular business hours and they can buy wine. People can’t do that.

Mr. Nearpass – The operation shall be limited to the production of a farm winery.

Mr. Gallagher – Correct.

Mr. Nearpass – There was no discussion of festivals.

Mr. Gallagher – Again, I didn’t think I needed to do that because the farm previously had those rights. I wasn’t trying to alter rights to the farm. I was trying to add a production facility to the farm.

Mr. Nearpass – I certainly don’t recall it that way. I recall that you wanted to turn a vacant building into a production farm winery. It sounds like you successfully have. There was no discussion or need at the time and actually it was probably about a 180 degrees from that which was look, we are not going to have wine tours, we’re not going to do these types of things.

Mr. Gallagher – Right, we're not part of a wine trail, we're not part of anything like that. We don't have a public tasting facility.

Mr. Nearpass – What other means have you chosen to market your wine?

Mr. Gallagher – I sell via on-line and I sell at liquor stores.

Mr. Nearpass – Are there any other means of marketing your wine that you can do?

Mr. Gallagher – They are limited. If you look at the guidelines from Ag and Markets, having people, especially with wine, having people be able to, and this is a rare occasion. My grandparents got the right or discussed the right to have these festivals a long time ago. It was with the understanding that this was only a couple of times a year. It's important for people to come, see the vines, see what we're doing, and have a sense of place to associate with the wine. Those type of things are important. I don't need them on a regular basis currently, that's not something I'm seeking. I'm just trying to do something, I keep going back to it, which we have done. It's identical to the things that we have done over and over on this property for 25 years.

Mr. Nearpass – What have you done that is identical to what you are asking for today?

Mr. Gallagher – If you look at the advertising that I sent to you, the farm would have these events where people could walk the property, it's actually in an area of the farm where all the flowering trees were that they had to sell; holiday wreaths and décor; ivy topiaries; all these kind of related products. They would have those set up in different stalls on the farm. The public would come onto the property for one or two weekends a year. They would walk through the nursery area, pick out flowering trees to purchase; they would walk through the barn; they would pick out wreaths and other types of farm crafts.

Mr. Nearpass – That was part of the farming operation, not the production of wine.

Mr. Gallagher – Correct, and they would have brought in catering.

Mr. Nearpass – Do you see a distinction or a difference there?

Mr. Gallagher – The distinction is only the product. Instead of wreaths now we have wine and jams and things associated with fruit production. That's the difference.

Mr. Nearpass – I would like to listen to the other Board members, but I'm still having a hard time.

Chairman Maier – You’ve given us a lot of information, so I’m going to ask you some questions, and then we’ll see if the Board has any other questions, and then we will open it to the public. I think the context of what we are doing tonight is interpreting any laws that permit the festival. Is that correct David, whether it’s a State law, Local law, or the determination in 2013?

Attorney Hou – Well no, procedurally you’ve been asked to issue an interpretation of whether or not Sean’s consideration and interpretation is correct or not. The outcome of your decision is going to be affirming or reversing Sean’s interpretation that the condition that prohibits the operation not being open to the public for wine tasting would prohibit the proposed use. That’s what you are interpreting tonight.

Chairman Maier – This is a residential property in an R-2 zoned district, is that correct Sean? (Yes) Which is different than an RA, RA is residential agricultural. Do you have anything in the Code that allows festivals or gatherings of this type in the Town of Victor?

Mr. Gallagher – We are allowed to perform customary agricultural operations on the farm.

Chairman Maier – I’m being specific. This is a residential district. Are festivals allowed in the Town of Victor in a residential district?

Mr. Gallagher – These types of festivals have been allowed on the property in the past.

Chairman Maier – I’m asking, based on the Town Code, are festivals allowed in the Residential, R-2 district?

Mr. Gallagher – Yes, believe so. This would fall under agricultural practices which include all activities conducted on a farm necessary to the operation of a farm.

Chairman Maier – I don’t want to confuse things because we have a lot of information in front of us and I want to make sure that we keep the context correct. Let me ask Sean, Sean is a festival of this type allowed in a residential district in the Town of Victor?

Mr. McAdoo – Generally speaking a private festival, I’ll preface that with a party, in a residential district would be considered a customary accessible use. As far as if the homeowner wishes to throw a party in his backyard and wishes to invite all his neighbors and friends, that would be a permitted use, correct.

Chairman Maier – But is a business allowed to do that?

Mr. McAdoo – A business use does not have the right to operate said business in the zoning district without having the use variance.

Chairman Maier – Ok, so based on that information I am interpreting that it is not permitted.

Mr. Gallagher – You're suggesting that all of the events that we have had on the property for the past 25 years ...

Chairman Maier – All we're doing is that we are being asked to interpret the laws. You've brought up that the New York Liquor Authority has you as a farm winery. Can you provide us with any information that says that it's permitted, under this permit, that supersedes Town Code or Town Law or Municipal Law.

Mr. Gallagher – The standard based on Ag and Markets Law ....

Chairman Maier – I just want to be specific with this because again, there has been a lot of information and we keep talking farm. I think I've done my homework correctly, I just want to make sure that we keep it within the context of each segment of the authority that we are talking about. We're looking at all the information that you have given us that you believe indicated that you are permitted to do it and I'm asking for specifics. If the Liquor Authority gives you the authority to do it, promotes it...

Mr. Gallagher – This is from the Department of Ag and Markets; I'm inspected by the Department of Ag and Markets. This is in the guidelines that I provided to you. Guidelines for review of local laws affecting farm operations....

Chairman Maier – This is the New York State Liquor Authority; this one, which I'm going to get to is Ag and Markets. Does the liquor authority in New York State supersede the Town Code or give you permission, do you have evidence that it gives you permission, to have these types of public meetings or gatherings?

Mr. Gallagher – I don't know specifically in terms of the Liquor Authority.

Chairman Maier – So we have Ag and Markets in front of us. Are you familiar with Section 301 and the context of Section 301 and Section 305 of Ag and Markets Law?

Mr. Gallagher – Somewhat.

Chairman Maier – it pertains to those properties in an Ag District. If I'm correct, Sean, you can correct me if you like, but my understanding is that this that you are familiar with, this pertains to farms that are in an Ag district.

Mr. Gallagher – You are saying only farming in an Ag district?

Chairman Maier – Is that correct Sean?

Mr. McAdoo – That's my understanding, yes.

Mr. Gallagher – So you are saying the Town Code makes a distinction between farms in an Ag district and farms not in an Ag district?

Chairman Maier – Yes, it does. Let me explain Ag districts for you. What New York State did was a while ago they said that farms are really important and we want to preserve farming. They went to the municipalities and said this is what we would like to do and this is what we would like to implement in terms of your Code. I think a lot of Towns set up Ag districts. There was a lot of criteria that the Towns used in terms of soils, proximity of open land, land that they wanted to preserve for farming. They said these areas, kind of an overlay district, these areas, these are important to us, we want to reserve these for farm land.

From the perspective of the Town, the Town gives those individuals in an Ag district a little bit more leeway because there is the effort to promote farming in New York State.

The rules in an Ag district are a little different than what's in a non-Ag district.

Mr. Gallagher – It's not in the Town Code, this is New York State Law.

Mr. McAdoo – As I understand it, and this may be a different perspective that says the same thing, everybody has the right to farm. They have a right to grow crops, they have a right to raise livestock. Those is what our Town Code specifically says is permitted. The Ag and Markets go on to talk about the fact that not everything in farming is simply growing the crop, harvesting, and selling it. There is some production. Two areas that I am aware of that are challenging to the local zoning codes are maple sugar production and winery production because they are actually production. Now, in a farm that has unlimited resources to produce enough product it's a moot point. You are growing it on the property; you're producing it on the property; and you are selling it from the property. Where we are running into the challenge here, is unfortunately winery, and Connor knows a whole lot better than I, it takes a lot more than what you can typically grow in a single normal parcel, so he is required to import. At first I thought that he imported everything. I wasn't aware that he was growing grapes, which is a fantastic thing. Now he is doing a mix, some grown on property, some not. That's where the Code gets extremely gray. That's what we are challenged with. When I research and make a determination, once we

get to the productions side the Ag and Markets Law doesn't give that right anymore automatically. That's where Ontario County has said if you put the property in an Ag district, you get the full rights of law. Full rights – that's where you have to have seven acres of property in production over a certain dollar value and I'm not an expert on what those triggers are.

Chairman Maier – They are different formulas.

Mr. McAdoo – Different formulas depending what they are and that's what that was designed to do. To recognize that you can produce but to produce it successfully does require those levels. That's why in my determination I mentioned that I didn't see those being registered because that is what I have to base my decision on. That's the other way of approaching exactly what you said. It doesn't say that you are not a farm it just says you haven't met the threshold, as I understand it, that gives you the full rights of Section 301 of the Ag and Markets law.

Mr. Gallagher – Who sets that threshold though?

Mr. McAdoo – That is from the Ag and Market Law administrated through the assessor's office who verifies that information. As I understand it, in this case, it's \$10,000 I believe.

Mr. Gallagher – No, that's for tax purposes. So are you using Ag and Markets Law to make this determination?

Mr. McAdoo – I am using the fact that it is not listed as an Agricultural district. This section, because it's in the production end, it doesn't trigger it.

Mr. Gallagher – Based on Ag and Markets Law though. So you are applying Ag and Markets Law here and one of the guidelines that I gave you was the Five Year Startup; so I haven't hit some of those thresholds because under Ag and Markets Law you're given time to meet those production standards because vines don't start producing the day that you plant them. They take several years, and you're given five years for a vineyard. If you look at the guidelines from the startup, we fall well within that. You can't use Ag and Markets Law to rule us out because Ag and Markets has specifically carved out a niche for us. I actually called them and asked when that clock would start and they said at the point of planting. In our case the wine grapes would be 2014.

Chairman Maier – That's part of it, OK, but Ag and Markets Law does not supersede municipal law. I think they are pretty clear about that. That's what I am asking. Is there something in writing that you can show to us, other than what we have, that says that you can operate this on that parcel, because we're making an interpretation?

Mr. Gallagher – Number one, I would state case precedence, and the fact that we have been doing it for 25 years. Number two, I would say under the definitions of farming in the Town Code, it said – includes all activities conducted on a farm, necessary to the operation of the farm, and there is nowhere in the Town Code that defines operation of a farm differently than Ag and Markets. We would have to look, unless there is something that you can point to in the law that says the Town Code is going to interpret the operation of a farm differently, then we have to defer to Ag and Markets and they specifically say that these direct marketing activities are necessary to the operation of a farm.

Chairman Maier – How do they classify a farm? How big is the size of the farm?

Mr. Gallagher – We have 31 acres.

Chairman Maier – How much of that 31 acres is farmed for the business of wine production?

Mr. Galagher – We're still planting. We have about an acre planted.

Chairman Maier – That didn't look like an acre. What does Ag and Markets classify as acreage.

Mr. Gallagher – In the definitions that I gave you, Ag and Markets specifically carves out, I can read it to you, but they specifically say land being planted to vineyards. We are continuously planning.

Chairman Maier – Is it seven acres or more?

Mr. Gallagher – Currently? Again, I don't think that is a correct interpretation of Ag and Markets Law that I have to be seven acres or more today. I have to be in the process of planting up to that and we are in the process of doing that.

Mr. Reinhardt – My understanding of a use variance is that the Code allows you to do certain things. In my vision there it's a circle around a number of types of things you can do with that particular property. The Code says you can do A, B, C and D. When an applicant comes in for a use variance, he's arguing – I can't really use it as A, B, C, and D, I need you to stretch this just for me. Make an exception to the rule and call it D1 or something to make that circle a little bit bigger. That's what happened when that use variance was granted. Anything that your festivals, once it touches the idea of the winery, the vineyard, anything that you ask for the use variance, that's where those conditions come into play. I don't know where you think your rights are being taken away. If you want to keep using the property as the Code permits it to do, you want a festival for, I don't know, what else do you grow there, fruit trees? (Yes)

The use variance has nothing to do with an apple tree. You want to have an apple tree festival, have at it, but all the things that you are asking for are very akin to a vineyard. A tour for the vines, you admitted it right here, unless you are saying something different again, you want to advertise and market the vineyard. This Use Variance and those conditions absolutely apply to it. No one is taking anything away from you, that's how I see it.

Mr. Gallagher – I would just direct you again to the definition given in the Code of the use variance. The authorization by the Zoning Board of Appeals for the use of land in manner which is otherwise not allowed or is prohibited by applicable zoning regulations. So, nowhere is it saying that we are going to restrict you from doing things that you have already been allowed to do. You said that our circle got a little bit bigger, but if you are not allowing us to do these farm festivals then I would suggest that our circle definitely gets smaller.

Mr. Reinhardt – You said here today, did you not, that the reason that you wanted to have these festivals is to market your wine. True or false?

Mr. Gallagher – To market all of our farm products and the wine is part of our farm products.

Mr. Reinhardt – We should go back and look at the record, when someone asked you, how are you marketing your wine, you said some on the web, but these festivals are how we want to market our wine.

Mr. Nearpass – You say it right here (in letter of intent). We believe that this is an essential marketing opportunity for the farm winery as it will enable customers to put a sense of place and origin alongside and enjoy our agricultural products.

Mr. Reinhardt – That flies right in the face of the conditions of the Use Variance.

Mr. Gallagher – I completely disagree.

Mr. Reinhardt – How so?

Mr. Gallagher – Because again, the conditions of the use variance, the intention of the condition of the use variance, and I'm the one who offered them up, so I know what I intended them to mean. They were to not have a regularly open retail place; not be part of a wine trail and have a lot of wine tourism coming through. That was the purpose. The purpose wasn't to stop these occasional wine festivals that we have once or twice a year. That was not the intention.

Mr. Reinhardt – The condition doesn't say I don't want to have a lot of wine tours, it says I shall not do it. The operation shall not be open to the public for wine tasting tours. Not anything about can I have one, can I have two; none, zero.

Mr. Gallagher – That was specifically meant to say that we weren't going to have a retail business in an agricultural neighborhood. If I worded it poorly, I'm sorry, I'm not an attorney, but the entire intention of that was to say here are some new rights to the property. Part of those new rights are to have a tasting room to be open to the public, have a cash register behind the tasting room bar, to be selling wine on a regular basis, and what I said was that's not what I'm going to be doing and I haven't been doing that.

Mr. Reinhardt – I think the Board knows where I stand, I'm done (with questions).

Mr. Nearpass – The other festivals, like the annual lavender harvest, how much did you charge for customers to come to the harvest?

Mr. Gallagher – What do you mean?

Mr. Nearpass – How much was charged? Was there a fee charged for anything?

Mr. Gallagher – No fee.

Mr. Nearpass – For this though, it says, we would like to open up the farm on an RSVP basis for a fee and for food available as well as.....

A woman in the Public audience spoke and said that people came to see our products and that in the past she had food catered at the events.

Mr. Nearpass – I'm sorry, I'm referring to the Song Hill Winery request. I think it is clear to me that the prior festivals were free and just open to the public. What you are asking for is a paid event.

Mr. Gallagher – (speaking to the woman in the audience) It's a distinction not what you were offering, what I am offering.

The reason for the fees is that we are a very small operation. We don't have the facilities to handle a 100 people coming in.

Mr. Nearpass – It sounds like for the other festivals you did, on the same property.

Mr. Gallagher – Yes, correct, it was a different operation at the time. Different people managing that event.

Mr. Nearpass – Ok, thank you.

Chairman Maier – I'll open it up to the public, if the public has any comments.

We have a letter of support that was submitted, dated June 15, 2016. It indicates that there are eight people on the petition that were in favor of the summer festival.

Mr. Nearpass – How many festivals do you believe you are entitled to do?

Mr. Gallagher – My grandmother was told verbally when she started doing these things about two to three.

Mr. Nearpass – How many do you think you are entitled to on an annual basis?

Mr. Gallagher – I would follow that precedent and say three a year.

Chairman Maier – We also got a letter from Mr. Wagner at 6662 Gillis Road. Mr. Wagner would not object to the festival.

The determination is whether to accept the determination of the Code Enforcement Officer. I will make a motion that we accept the determination of the Code Enforcement Officer prepared on May 13, 2016.

Mr. Reinhardt – I second it.

## **RESOLUTION**

WHEREAS, a notice of interpretation request by Sean McAdoo, Town of Victor Code Enforcement Officer, was received by the Secretary of the Zoning Board of Appeals on June 6, 2016, regarding the Victor Planning & Building Department determination, dated May 13, 2016, which determined that allowing a summer farm festival to sell/promote wine, jam, and farm products at Song Hill Winery, 521 County Road 9 / 6717 Song Hill Lane, Victor, NY 14564 would be in violation of the conditions imposed by the use variance granted by the Town of Victor Zoning Board of Appeals on May 6, 2013.

WHEREAS, a Public Hearing was duly called for and published in “The Daily Messenger” on June 12, 2016, whereby all property owners within 500 feet of the subject property were notified by U.S. Mail; and,

WHEREAS, a Public Hearing was held on June 20, 2016, at which time it was revealed that one letter was received in favor of holding the summer farm festival and one neighborhood petition with eight signatures was also in favor of the summer festival; and,

WHEREAS, after reviewing the file, all of the testimony given at the June 20, 2016 Public Hearing of the Zoning Board of Appeals, and any and all evidence submitted by interested parties, and all other proof in the record previously submitted, all of which are incorporated herein by reference, and after due deliberation, the Town of Victor Zoning Board of Appeals made the following findings:

1. On May 6, 2013, the Town of Victor Zoning Board of Appeals approved a use variance to allow a non-public wine production facility at 6717 Song Hill Lane with four conditions. Specifically, condition 2 states: "That the operation be limited to the production of a farm winery" and condition 4 states: "That the operation shall not be open to the public for wine tasting or wine tours".
2. The New York State Agriculture and Market's Law provides that local jurisdictions have certain oversights on regulation of farms. The NYS Agriculture and Market's Law also specifically excludes language on the processing of farm products. A winery processes the grapes. The property that Song Hill Winery is on is not in an Ontario County Agricultural District or receives agricultural tax exemptions. It is zoned Residential - 2.
3. There is no evidence that The New York State Liquor Authority that issued a Farm Winery License to Song Hill Winery LLC supersedes Municipal Law or gives permission for public gatherings.
4. The analysis and findings contained in the Determination of Sean McAdoo, dated May 13, 2016, and attached hereto and made a part hereof, are adopted and the Determination is affirmed in its entirety for all the reasons stated therein.

DECISION:

On motion made by Keith Maier, and seconded by Michael Reinhardt:

NOW, THEREFORE BE IT RESOLVED, that the Town of Victor Zoning Board of Appeals determines that the proposed farm festival at Song Hill Winery, 521 County Road 9 / 6717 Song Hill Lane, Victor, NY 14564 would be in violation of the conditions imposed by the use variance granted by the Town of Victor Zoning Board of Appeals on May 6, 2013 and that the

Determination of Sean McAdoo, dated May 13, 2016, which stated in conclusion that is hereby UPHELD.

This resolution was put to a vote with the following results:

Scott Harter	Aye
Michael Reinhardt	Aye
Keith Maier	Aye
Donna Morley	Aye
Mathew Nearpass	Aye

Mr. Gallagher thanked the Board members for their time.

**CITY TAVERN – COVERED PATIO (Area Variance)**

7635 State Route 96

Appl. No. 8-Z-16

Applicant is requesting a 52 foot front setback to construct a covered outdoor seating area, whereas Schedule II, Area and Height Requirements for Commercial Districts requires an 80 foot front setback.

On September 14, 2001 the New York State Supreme Court allowed a building setback of 73 feet and a parking setback of 70 feet. On May 10, 2016 the Town of Victor Planning Board approved an outdoor seating area with a 52 foot setback.

The secretary read the legal notice as it was published in The Daily Messenger on June 12, 2016.

Jess Sudol of Passero Associates, 242 West Main Street, Rochester, NY addressed the Board.

Mr. Sudol – Good evening. With me here this evening is also Alan Russel and Mr. Mike Tascione, both from City Grill in the city of Rochester and also from City Tavern. Actually, for those of you who have been up Route 96 recently you will have noticed since we appeared before this Board there have been some significant improvements to the building as the project is now fully underway.

As I just stated, we did appear before this Board several months ago requesting a variance to allow a covered patio to be constructed within 42 feet of the Route 96 right of way. We have since revised that application, actually moved the patio ten feet back so it's 52 feet from the right of way instead of 42 feet from the right of way. Actually I believe at the time, one of the suggestions that Mr. Harter made and what that essentially allowed us to do was line up with the existing parking that's north and kind of pull the whole patio back.

One of the other developments that has occurred since we appeared before this Board, I believe it was three months ago, is at the time the request for the area variance for the front

setback was denied by a three to two vote. It was a gut check for us and we went back and we looked at things as hard as we possibly could to say what our next path forward is here. Clearly the Board has an issue with the proposal as it stood, so what might that look like. We discussed everything that was discussed that night. We looked at, can we put this patio to the south side of the building; can we put it to the north side; can we put it over here on the west side; are there other opportunities for us. Quite frankly, the answer really was no, in terms of is there an alternative to the location of the patio. I think if you recall the discussion we had there were alternatives associated with location and with the patio itself because of course the request was strictly for the covering of the patio, not necessarily the patio.

What we found was operationally, the way that the building functions, again it's an existing building that is currently being redeveloped, would simply not allow us to locate a patio area anywhere else on the property without having to do a major, completely cost restrictive overhaul to the interior of the building. That has to do with where the existing kitchen is and where the existing columns lie, and where the seating is, and where everything else would naturally fall. When you look at these areas here, the vast majority of this building, all these areas here, on this side, aren't even being touched. That's what allows this project to move forward from a functional perspective.

The other issue that we had is that we would be impacting the amount of parking. Subsequently, by impacting the amount of parking spaces that would automatically reduce our maximum occupancy loading. I don't expect everybody to necessarily be able to read the lower right hand corner of that drawing, but, you'll see that based on the current proposal there are a 152 proposed seating spaces on the inside of the facility and an additional 110 on the outdoor patio for a total of 262 which is the exact number that is allowed based on the existing 151 parking spaces once you subtract out 20 for the amount of anticipated employees. As I stated several months ago, the previous occupant, TGI Fridays was able to just about squeeze that many people inside the building, which is certainly not something that we think functions well. We don't think it worked for them. Frankly, we don't see any way that we could fit 262 people on the inside of this facility which again, is what we are allowed by Code.

As a result of all that, that analysis, we went through the iterations of that, we came back and said the only logical place for us to put this patio where it will actually work for us and the business is in the front yard. We went back to the Town Code where we found the support in the Route 96/Route 251 Overlay Corridor District which specifically talks about locating these types of seating areas to the front of the building. We also did some more research up and down the corridor and we did find locations of uncovered outdoor seating and covered seating along the Route 96 corridor. Not all of them necessarily located in the Town of Victor. One that is, is the UNO Pizzeria has some seating that is covered out in front of their facility; Papa Jacks ice-cream, right down here in the Village, actually has covered seating on the front of their building much closer to the road than our proposal is. There are also areas like Six50 that have parking that is actually closer to the road than us, but just don't fall in front of the building. There is, of course, Panera Bread, that is immediately next door to us who have their outdoor seating on the

front of their building. Panera Bread is a completely different operation because people go there, they buy a sandwich for lunch, they take five to ten minutes to eat it and then they are on their way. This is more of an establishment where we expect our patrons to be here for a dinner and to enjoy themselves for well over an hour. That is the program we follow in the City at City Grill and would hope to follow here. As a result of that analysis and gut check, we went to the Planning Board and said we would like to do an outdoor patio.

The Planning Board was looking at things like how are you going to impact the screening, the berming; how is this patio really going to interact with Route 96. We were able to work through all that essentially using the proposal this Board had previously seen just ten feet short. We were proposing similar landscaping. We did improve our landscaping as a result of our work with the Planning Board. During our discussions with the Planning Board they were excited about the project, they also recognized the corridor overlay district and the appropriateness of having parking in the front of the building. That was all part of those discussions. Subsequently the Planning Board granted a unanimous site plan approval to allow the patio to exist in the front of the building, extending approximately 20 feet in front of the current building wall. Of course, that of course does not include the cover, because the cover would still require the variance. Based on the site plan changes that we made and some of the progressions that I've referenced we did meet with Town staff and it was obviously determined that our change was substantial enough that it would allow us to come back to this Board. Otherwise, we would have never been placed on the agenda. Needless to say, here we are.

Some of the homework that we have done, and I apologize for not presenting this information the first time around, I think warrants some discussion. For starters, and I'm going to go through the five conditions of the variance and speak to each one of them and why they were denied. One of the first things we looked at was the potential impact to our neighbors. That's Panera Bread to the north and McDonalds to the south. In both cases, even a 30 foot covering would not have a line of sight impact within the limits what we would define as appropriate sight distance using NYS DOT guidelines. Also looking at the light, you'd actually have to be back behind the light for that to even start to come into play. When you look at the actual angles, the fact that the building are several 100 feet away and the fact that their front setback is so similar, there is not an angle where our covering would possible restrict their facility. Obviously they are well aware of our project, they are well aware of the fact that we are here this evening, and obviously have offered no objection. We did want to do the homework and make sure we weren't having an impact on our neighbors because that was certainly a point of discussion at that time.

What it really comes down to, as this Board knows better than most, is that it really becomes a situation of does the benefit to the applicant outweigh the detriment to the neighborhood and the character of the neighborhood. Again our primary neighbors are McDonalds and Panera Bread. Panera Bread interestingly enough does have seating on the front of their building. They also have a drive lane up there and parking, something that we do not have, but they are similar in character in that way. I don't see any way that we are really

impacting them. We're really participating in a redevelopment of the area and specifically with that site. I don't see any way in which we are impacting McDonalds. In fact, as part of the Planning Board review they did issue an environmental determination of no significance which confirmed the fact that we didn't have any environmental impact or any impact to neighboring properties, as part of our project. I don't know that the addition of the roof changes that much.

It does come down to the benefits of the applicant. Mr. Chairman, you quite pointedly asked what kind of fiscal impact does this have to the project, at the end of the last meeting. Again, I regret that we did not have the numbers and were not as prepared to specifically address that question. What we did do, since we were here, and I will credit Alan with the vast majority of this work, we did take a look at if we did have the covering or if we didn't have the covering, what might that look like fiscally. If we did not have the covering, really the only other alternative for us is the umbrellas. As discussed with this Board several months ago, any kind of awning or structural support that hangs off the building also requires a variance. So we are basically back to the same spot. It really comes down to this awning that was proposed, Debby we can flip back to it, just to show you what exactly that looks like. There is TGI Fridays, which nobody liked. There is the project proposal.

Images were projected that showed how the building currently looked and how it would look in the future upon completion. The image showed the structural supports and the covering system.

Mr. Sudol – We look back at 2015. We do have the ability to access climate data and see how many days it rained or did not rain. When it looks like it might be inclement weather and you have a situation with umbrellas, you can't take reservations. As a matter of fact, you essentially plan to not be outside that day. The covering system, what that allows us to do, and it's allowed Mr. Russell and Mr. Tascione the ability to do it, tried and true, not only in south Florida, but also at City Grill, is to operate under almost any reasonable weather conditions. If it's a hurricane out there and there are 60 mph winds and coming down sideways, which happens every once and a while, they are not necessarily going to be out there. During a standard rain, let alone a light mist, you certainly have the ability to continue to function in that facility. On top of that, not just on your day to day, and how many days does it rain, and I'm sure all of you can review our documents and see how we have done the math; there is also more advantage to the covering in that it is able to be heated. It can retain heat to a level much more than you were to expect if you were just out there without any structural covering under a fabric umbrella. When it's 52 degrees at night with a light breeze the difference between being in that umbrellas situation versus a covering that has heating built in, that has lighting built in, that has an ambient presence to it, is much different. Again, we know that from experience, not just speculation. In addition to being able to function and be open for more days in August, what the covering really allows us to do, because of the lighting, because of the covering, because of the ability to heat it, is it really allows us to be operational in November, October, and April, which is three months out of the year, 25% of the year, that we otherwise would not be able to accommodate those 110 people. If

you look at the financial numbers those 110 people roughly work out to \$3,500 on a daily basis. As you can see when you start doing the math, not just for the whole month, but also for days that you miss with rain, or days that you are actually able to function, you start to see that that adds up pretty quickly with a general estimate of \$350,000 to the business. We feel that is very significant. Of course, a good part of that money goes to being able to have more staff; not having to call your staff having to say it's going to rain tonight, we'd like you to stay home. Obviously, any dollar that we make there is a certain portion of it that goes back into the community and I think that's what Mr. Russell has tried to demonstrate here. There is also a maintenance issue when the patio is not covered. Again, we're looking at what is the benefit to the applicant. By having the covering, when leaves, sticks and twigs and everything fall on top of it, it acts as a roof, a shelter, you don't have that constant, that environmental element beating down on the furniture, beating down on the hardscape, beating down on the people, and leading to a deterioration; having to constantly sweep it. It's not necessarily the clean type of environment that you know, you might want to spend money for a bottle of wine and a good steak, obviously we accommodate to all levels but, personally I would much rather enjoy the clean environment of having the covered system. Also when you have umbrellas, they can blow away. They are much harder to maintain, they fade, you are constantly replacing them. Those are all subsidiary to the primary element which is the covering allows the use to function far more often than what would otherwise be allowed by the umbrella option which is a significant benefit to the applicant. We find it is really no detriment to any of the neighboring properties.

Quickly I wanted to touch on lighting. We have to light it no matter what. When it is nice out, if we weren't to proceed with the covering and we were lighting it, you'd have a combination of building mounted lights projecting light out from the building. We'd also have to have some kind of light poles inside the patio. It would really get to be a combination of different things that we would need to do to accomplish the appropriate lighting levels. That is hard to do without putting light poles every 20 feet because you want each table to have a certain amount of lumens, especially with people hanging out eating dinner. They want to be able to see their food. With a covering system you can have all that recessed lighting. You can have lighting similar to that in this room. While it is not the primary benefit I certainly thought it was worth mentioning for this particular application. Those are primary changes that we made. We think it comes down to benefit to the applicant, which we feel is significant, versus detriment to the neighborhood.

Mr. Russell – I just want to tell you how I got the data. I took base sales of 2.75 million, which is the absolute least we have to make to turn a profit. I believe in under promising, over delivering. We're hoping to do a lot better than this. This is the absolute lowest these numbers would be. There is going to be a much bigger return to the Town. The other thing about the sales tax, I didn't bring it up last time because everybody knows how much more it is. Not only are we looking for sales tax from this county. I don't want the business' down here sales tax; I don't want to cannibalize the restaurants that are in the Town. I want to bring from Genesee and Monroe and bring new tax dollars in. The question is the days we can use the patio and the days

we can't use the patio. If you have any questions regarding that, I'd like to be addressed. That's why I came because last time I think there were questions that were asked towards a restaurateur and they weren't answered properly. Like your question with the front of the building. We would love to put the patio on the front of the building. It would be super cool, it would just be 100 feet from the kitchen and the food just can't be run that far; plus we would lose 40 parking spots. Thank you.

Mr. Nearpass – Are those economic numbers incremental or not? The benefit to the local economy, you believe that 238K is incremental meaning without the patio it will stay in Monroe County or Genesee County?

Mr. Russell – Yes, I agree 100% we'll pull from...we have an *inaudible* group and business group in Fairport and Monroe County, Pittsford. We're not going to cannibalize the restaurants that are here in Town.

Mr. Sudol – One more thing that I said I would, if you don't mind, I want to go through the five standards and address what our thought process was coming back before this Board with each one of those. Those findings as they relate to the denial.

The first one deals with the potential to impact the visibility to the property to the north. As I said previously, we did take a look at that. Not only do we feel that we were not impacting those view corridors with our previous proposal, but that has since been pulled back an additional ten feet. In terms of the potential for cutting into the berm that's mentioned in this justification, while I don't find that the patio itself and cutting into the berm has anything whatsoever to do with this particular area variance request, I can say that all of that was reviewed as part of Site Plan approval and mitigated appropriately.

The benefit can be sought by some other method – Again, we did talk about that. There really was no other feasible alternative for us which is why we have moved forward with the design on the front. I think we've done our best to explain that. The other alternative would still require a variance, such as awnings and things of that nature.

Number three, whether it is substantial – I do a lot of these variances, all across western New York and the substantial question is often times subject to individual interpretation. We use a rule of thumb, whether it's right or wrong, of 50 %. If you have a 100 foot setback, anything less than 50 feet is substantial because it meets 50%. You can also measure whether or not it's substantial by the surroundings which is probably more appropriate than an off the hip kind of rule. In this case we have reduced it so we feel it's not as substantial. Also, specifically in this justification it talks about there being no covered patios along that corridor or close to the corridor. Again, I think I have sited some examples that are within the corridor that do have covered patios that are actually closer than us. Granted I spent some time trying to figure out exactly where some of those properties fall, not whether they are in Town limits, not what particular municipal jurisdiction they are in; I don't think it can be denied that they fall within

the corridor. They are subject to similar average daily traffic loading, granted perhaps not at the exact same speed, but the fact is they are part of the Route 96 corridor and do have similar situations.

Lastly, whether or not the variance will have an adverse impact on the physical environment; again, it speaks to the amount of the setback requested. We have reduced that substantially, and the potential for it to be a visual impact to the north. Again, we've gone out and looked at that to ensure that that is not the case. With respect to adverse impact on the environment, I will remind the Board that although it is a separate action, as part of the Site Plan Approval a SEQR determination was in fact offered.

I don't believe that number five is relevant. It is it self-created; are there factors that led us to where we are, yes, is it self-created, of course just by the nature of the fact that we have a proposal. I would be happy to answer any questions.

Mr. McAdoo – I have a technical question if you don't mind. I caught this when you showed the picture. Can you show the picture of the awning as you were thinking of doing it? What is truly your depth? You have shown on the picture here 20 feet.

Mr. Sudol – Twenty feet would be to the farthest point of the entire structure, including the roof, the foundation, the wall, and everything.

Mr. McAdoo – That's not what your plans show, you realize that, right?

Mr. Sudol – Which plans?

Mr. McAdoo – The plans that you submitted to us do not show that. Your plans dated May 23<sup>rd</sup> show 20 feet as an interior dimension. That could be a difference up to a foot and a half. That could be a problem. Your plans show 20 feet on the inside.

Mr. Sudol – That's a mislead.

Mr. McAdoo – So you can get three tables in there still. (Correct) Ok, I just wanted to clarify.

Mr. Russell – That's just a rendering we had before we even started this process. This was just to give you an example to show what we are looking for with coverings. When you are looking at the model plan, I think it is very dissatisfying to what we actually want to do. This is just a rendering that we have done, it has nothing to do with the Code.

Mr. McAdoo – I just want to make sure that the right number was on there for the Board to discuss.

Mr. Sudol – Obviously if we were to, as we just learned with the previous application, if a variance were granted, we'd be held to that standard. We're required to live by it, we couldn't come in with a 21 foot deep plan.

Mr. Reinhardt – My personal opinion about statistics and numbers is they are a bit like a house of cards. Once you start finding fault with any one of them or they become suspect, the house of cards falls apart. Hold onto that thought a second.

Part of it is with the seating diagram, and I understand what you are saying, this is how you want the tables to be placed. I understand that Fridays jammed probably too many tables in the space and made it a bit uncomfortable, but because of the nature and design of what you are trying to do, and have an outdoor patio, it's a function of how many tables and chairs then, that you could fit on the inside. The doors need to be open to access the patio, that's how I'm describing a house of cards. I'm not completely buying that this is the only way to do this and it's the only way to run your business, to have a patio like that.

Mr. Sudol – The patio is being proposed, the patio is being built.

Mr. Reinhardt – I can only imagine one restaurant, maybe you know it or don't, it's a restaurant called Ember in Livonia. What they have is a bit of a courtyard, a patio area, and they don't have umbrellas, they have what appear to be something like sails off a sailboat and they stretch them. They are not umbrellas but they allow sun to come in, they keep the sticks and leaves and everything else off, but if I understand it, it's not a permanent structure. I'm not there enough, I don't know in the winter, I think they take those...

Chairman Maier – It's called a sail awning.

Mr. Russell – Can I answer that.

Mr. Reinhardt – Yes, go ahead, I'm curious if you thought about that idea.

Mr. Russell – Yes, I did think about it and I thought about your question last time when we were talking about the 250 seating. Fridays is one of the best corporations in the world. They know exactly how many people they can serve off that kitchen size. So, it doesn't matter if you approve me for a 5,000 square foot patio and I could get 400 tables on there. I can only serve 250 guests. Especially also when you move our new menu onto it. Like the other Board had said, there was a lot of fryer smell. We're 25% sauté, Fridays was about 75 % fried foods. So they could serve more people, faster. I think I can only serve 250 people. We're not looking to put more than 250 people in there. It might be less. The reason why Fridays could get so many people in it is one; the building was built 12 years ago when people were 30% smaller. Their booths that were four feet got six people in them at the time. We can't even get four people in a

booth with some people. Everything is bigger. If you look on the plan, I agreed with you last time when you pulled out the plan and indicated the booths, but if you look closely at our booths, two of the booths in the restaurant are 9' by 9' and fit six people; double the space that any restaurateur would put in, but it's part of our business plan. City Grill is 10,000 square feet; two thousand of it is hallway because it's grand and it's beautiful, but most restaurateurs would think we are crazy for wasting all that space that you can't sell anything in. Our seats in our restaurants are 22 inches wide. They're huge, they're beautiful, they're comfortable. Fridays seats were 16 inches. That's how they got everyone in there. We're not looking to see over 250 people, we may not even be able to put that many tables down. Surely to start, we're going to start with 200 and work our way up. At City Grill we were overwhelmed when we opened it. We opened it in nice weather and we were just jam packed.

Mr. Reinhardt – What about the sail awnings?

Mr. Russell – They don't stop rain; they don't stop the cold. That is what I'm looking to stop, is the cold and the rain. It's Rochester. I did this proposal and I knew it rained a lot here but it rained a lot more than I thought it would. Even if there is one cloud in the sky, I can't sit that patio, because if you were out to dinner, even though you say I'll take the chance, when it starts to rain and you've paid \$50 or \$60 for your meal and I don't have any place for you to go; like Panera Bread does when people want to go in; it's just a business killer.

Mr. Reinhardt – I see Ember in the summer and it seems that it is a great restaurant, they're making it work and I wonder why you don't consider that?

Mr. Russell – To be honest with you, I had them in South Florida. They are great for shade but they are not great if you have 100 people sitting on your patio and you have nowhere else to put them, they're not going to do anything for me. I'm not disagreeing with you, but this is the restaurant business. I actually have a working model that's City Grill. Someone last time we were here had the opinion that no one wants to sit by the road and drink. One, we're set back 60 feet from the road. City Grill sits eight feet from East Avenue. It's dusty, it's dirty, the fire trucks start going by. It's an assault on you; we served 1,000 dinners just this past weekend on that patio.

Mr. Nearpass – So where you would like to place the patio now, is it within the space of the previous variance, the variance that was there before?

Mr. Sudol – The variance that was previously granted was for TGI Fridays. That was actually for an exterior wall. That allowed the setback to go from 80 feet to 72 feet. We're requesting an additional 20 feet. It's within 10 feet of our previous request, so it's less than our previous request. If it was within the variance that was granted for TGI Fridays, we wouldn't be here.

Mr. Nearpass – Mike has covered a couple of the things I was going to talk about. In general, I know you've explored a lot of other options, but I always try to ask the question, if you don't get the variance, what kind of options are you looking at?

Mr. Russell – If we don't get the variance, the patio has already been approved and it's being built. It's just going to help everybody; it's going to help money, the esthetics. Even right now the way the building is, if something doesn't go on the front of the building, you're never going to get that Victor look.

The image without the patio covering was projected.

Mr. Russell – It's going to be that with a patio with granite. It's getting there, but it's just super unattractive and doesn't look like it belongs in Victor. It's all about money and esthetics. I can, without the covering, I can eke out a living on it, but I can do a lot better with the covering and I can bring more money into the Town.

Mr. Harter – I wasn't here last week. Did we decide to rehear this because there were substantial changes?

Chairman Maier – Yes.

Mr. Harter – OK, so that decision was made last week. Another question I have is did the Architectural Review Committee of the Planning Board, did they look at the present versus the proposed? Did they render any opinion on it?

Mr. Sudol – Yes, it was approved as part of their decision. As a matter of fact, their actual reaction was this is absolutely fantastic. They were very excited about it.

Mr. Harter – So they liked it.

Mr. Sudol – Plus, we had the Town's third part architectural consultant reviewed it the first time around, before we even got here the first time, and approved it as well.

Ms. Morley didn't have any questions but thanked the applicant for bringing the extra information that answered questions that were asked at the last presentation. She said that that really made a difference.

Chairman Maier – Sean, what does the Code say about temporary awnings?

Mr. McAdoo – You are thinking for the patios? (Yes, sir) They cannot be up for more than 180 days or else they are considered permanent. The Code has a section for that.

Chairman Maier – OK, let's talk numbers. So when it rains, what happens to your occupancy?

Mr. Sudol – Our official occupancy is fixed.

Chairman Maier – I worked for a retailer for twelve years, so I have some experience with inclement weather. You can have the nicest place to go to, but I believe, and that's the question I'm asking, is what happens to the numbers when it's inclement weather? These months that you have included in your spreadsheet, in April when it rains what happens to the traffic in your restaurant on East Avenue? What happens to the traffic on those days?

Mr. Russell – It all depends on how long it has rained for the day. If it's a rainstorm where it's raining all day, it goes down. That's why, if you look at my data, when I said that it rained and there was precipitation, I didn't say all 30 days just because we have a covering. If it's pouring rain for two days the numbers will go down, regarding how many people are coming through the building. I'm talking more about on a Saturday night we have one cloud coming over and we're all watching it on the radar and people are begging to sit outside, we start driving a wait in that building to two to three hours. Just because I can't seat the patio until that cloud blows over. It's a great question, but I think we are talking about two different things. A whole day of rain versus... We just did a big fashion week event at midtown pool, we're a big sponsor of them. A week ahead it was saying that it was going to rain that day. We were thinking we had to cancel it, 300 people, I have to bring all that product down. Come that day, it just rained in the morning and then got sunny. If you don't know for sure, you can't plan on it.

Chairman Maier – I figured if you've been in the business long enough, you know that if it rains all day, you're going to change your staffing. (Oh, yes) If it rains all day, just roughly how much would it be reduced?

Mr. Russell – I just took the average day, what I did was just took 2.75 million and that would be average day if it just rained.

Chairman Maier – So this is at the Victor site or is this at the East Avenue site?

Mr. Russell – I took the exact model of East Avenue because it's going to be about the same thing. If we would have known now what we knew in East Avenue; we have a cantilever that's bronze and goes out half the patio, it would have gone the whole patio. The awning was a secondary thing after the first year. It rained so much and I lost so much money and made people unhappy. Then, the second year came around and with the awning cover it kind of rained

sideways. Then we had these little plastic things built that came down a little bit to stop the sideways rain because I had to pull tables. It was like a big picnic. We learned as we went along but the main factor is, it's cold and it rains here a lot.

The other one thing about the covering, it makes it super easy. If I have a 70 degree day in March, I can open those doors and my patio furniture is there and people will come running in. Any of the other bars, all there furniture is in storage and there is nothing they can do. We become indoor/outdoor in a snap and that is our business plan.

Chairman Maier – I've been driving up and down Route 96 on my way home. The questions I have is what kind of occupancy do the patios have on Route 96? Is it 100%, is it 50%, do you have any idea what they are seating at Panera, The Distillery?

Mr. Sudol – My experience today, it was 90 degrees out. So hot that most people didn't want to be out and a place like Panera was like 50%, but then when you got down here in the Village, it was 100%. There were people waiting; people waiting inside to come outside. I'm sure it is similar on nicer days.

Mr. Russell – I don't know if we can compare Panera Bread, they don't sell alcohol. It makes a huge difference on what you are willing to tolerate on the outside. The Distillery patio is almost the same size per their inside as ours is going to be. They would be about the only one where I would say has indoor/outdoor seating in every area they do. You never go to a Lone Star that has outdoor seating. At the mall where you have Champs, they don't have a covering, so if you go outside, you're literally being fried in a pan. So no one really wants to sit out there and they still have a decent sized patio.

Chairman Maier – So these numbers were just based on your experience at East Avenue?

Mr. Russell – Yes, in worst case scenario. The taxes I did, I didn't do payroll tax. I took the federal and state tax at poverty level.

Chairman Maier – Because you have submitted it as evidence that this will be extra revenue for the Town and the County. That's why I want to make sure that we are accurate with that.

Mr. Reinhardt – Intention to have bands, any live music out there?

Mr. Russell – No bands.

Mr. Nearpass – Are you going to have a similar drop down plastic on the side? (As City Grill)

Mr. Russell – No, because with this patio, it's designed better, how thick it is, it's not going to need it. We just have an awning where if the rain came in sideways, the way the water came down the awning, and we couldn't go too far and put a drain on it, the meniscus of the patio would cause the water to come back in and kind of shoot back at the people.

Mr. Nearpass – So you won't need one.

Mr. Russell – No, we won't need one.

Mr. Reinhardt – The polling of the five criteria, the only one I'm teetering on is the alternative method, but I'm not going to hang my hat on just that. I think you have made a lot of effort and pulled it back. It sounds far more reasonable than the last time. As it stands, I think collectively, with the five criteria, I'd be in favor of it.

Mr. Nearpass – Very similar, I'm in favor of it. I'm a little hesitant on the financial data because I'm pretty sure any of the other establishments, Champs, could come in to us tomorrow and say if we put a cover over this our revenue could go from \$100,000 to \$400,000 a year. I'm a little worried that we are setting some kind of precedent on the case that the applicant showed us a higher return, it seems like there would be a benefit to the community as a result of it, but I'm leaning more toward the aspect of you've done everything that you can. You did a great job pulling this together and showing us what the options were, it seems like it's the best option out there. You pulled back ten feet from the previous request. I'm not sure there is the ability to, or if you are even willing to reduce the variance from the last time. I'm much more for the benefits to the community.

Mr. Sudol – Just to answer your question, we're essentially almost past the bare minimum that we need for proper circulation with the furniture that we will be using, so we can't really go less than that.

Mr. Nearpass – I'm not asking you to go less. I thought the current plan was ten feet pulled back, from 30 feet to 20 feet.

Mr. Sudol – Yes, that's correct.

Mr. Nearpass – What I didn't want to have happen was you potentially improve it and then ten years later when you are "knocking it out of the park" you say we want to add another 10 feet.

Mr. Russell – Again, it's a great question, the kitchen still isn't big enough. The investment in the kitchen to serve more people just isn't there.

Mr. Harter – I was OK with it last time, with it pulled back ten feet more, I'm even more OK with it. I think the fact that ARC looked at it and was OK with it, that's a feather in your cap.

Ms. Morley – I'm good with it.

Chairman Maier – One of the questions I've got for you is that you are showing it as an open air design, if we put a restriction on that it be built as submitted, other than the architectural aspect, is that acceptable to you? (Sure) I think that you are presenting this as an open air alternative with a permanent roof. I'm asking if that would be an acceptable condition for you.

Mr. Russell – Can we put in a power shade for the sun?

Chairman Maier – It's on the record, I'm esthetically challenged, so I really don't know about that but I think that the context, visually it's going to impact. I think that you are demonstrating one impact now. The advantage of having it when you walk in, that you can't do, is that it's open. Visually it's a different appearance.

Mr. Nearpass – I agree. I think the intent is not that it turns into just an expansion of the building.

Mr. Russell – Right. In the future would you be disagreeable if we had some power shades, because we haven't built it yet, I'm worried if sun comes in. I don't want to build a wall or anything like that, but I don't want to revisit.

Chairman Maier – My preference is that it is as submitted. Again, you indicated that you could do it with the patio, you would prefer not to do it with the patio- that you would like to have a heated area. I'm willing to go along with that but we can get into semantics about putting something else in there.

Mr. Reinhardt – I agree and as you noticed from the questions and answers that we were getting from the applicant before you, in my opinion, he was saying three years ago I want A, B, and C and here is how it is. Then he comes back three years later and stretches that to beyond its limits.

What we are discussing here today is what we believe is what your intention is. I agree with Keith, the Chairman, that I don't want to hear, whether it be a month from now or five years from now that all of sudden you are morphing this thing into something that wasn't as you proposed it on June 20, 2016.

Mr. Russell – No, and I agree, I don't want it left open to say that we leave in seven years and whoever buys the place interprets that you can make a room out of it. I'm guaranteeing you that it's a patio and that's what we need to make money. I don't need another room or an extension on the other side. A patio is what we are looking for and that's the use we want to use it for.

Attorney Hou – If I may jump in here; from the perspective of implementing a condition that may not be enforceable, this may be one of those areas where because you are talking about potentially getting into specific mechanisms of enclosure when we're talking about a patio. I'm just suggesting that the Board consider a condition which achieves your goals. The condition would be simply that the structure could not be permanently enclosed. That's really what you are getting at, right? Without getting into the nuances like what type of sun shade he may put up. The nuances of that is what I'm implying as potentially being unenforceable, basically micromanaging the mechanism of that.

Chairman Maier – We're not going there. We're just going to it is a roof; it is a covered patio and that's it.

Mr. McAdoo – The Zoning Code clearly says buildings are defined by any structure having a roof, supported by columns or walls, used for shelter or enclosure. Whether this is enclosed or not, this is by definition of the Zoning Code a building. Just so you are aware of it.

Mr. Nearpass – I guess, David, I want to make sure there is a condition that does not turn this into an extension of the building. In that it's fully enclosed.

Mr. McAdoo – By zoning definition, if you ask me, if this were put in front of me, without needing a variance, I would interpret what they are doing there is a building by our Zoning Code. Not by State Code, not by...

Mr. Nearpass – So I'm wondering what restriction would we place on the variance, that you would look at and say, ah I get the intent of what this was for. This wasn't to create walls all the way around.

Mr. McAdoo – I think just define it as being open air. I think that is the key, open air without permanent windowing. That is all we could do as a practical definition.

Chairman opened the hearing to the public for comments.

John Billone Jr. addressed the Board.

Mr. Billone – Good evening. I'm the City Grill landlord in the City of Rochester. I'm also the developer of that property, also the president of the East Avenue Business and Neighborhood Association, second generation business. I'm also a resident in Mendon. Mom and Dad live up in Highland Green and my brother Joe also lives in that same area. I'm not sure my comments are necessary. It sounds like you are in favor of what they are proposing. I wanted to add a few comments which are really more about the dining experience. You are looking at your Code,

you're looking at setbacks and I think it's really important to talk about sustainability and talk about what makes businesses successful.

As a developer of City Grill in Rochester, I have to be honest, first of all the patio was the biggest asset of that particular location. I don't know if any of you have been to that location. The building sits on the northeast corner of the property. The patio faces south. It's the best corner in the City. We are also about four feet above grade which is a huge benefit. When Mike and Alan came to me about putting this awning on because they wanted to attach it to my building, I was very concerned. Not so much concerned about them attaching it to the building but so many people that could dine for lunch and dinners and enjoy the sun. I did not feel that the awning was a good move, even though I'm not a partner in the business I was giving my opinion that I didn't think the awning was a good move. Ironically, just the opposite has happened. That patio, there are many people that would prefer to be under that awning. There are tables that are in the sun. I know the umbrellas were brought up and that wasn't a good plan, but the awning, there is no doubt about it. The model that they've built has been on the quality of food; the service is phenomenal. The value for what you are paying for is really important, but I think overall it is the ambiance. The location really serves them well. They asked me to speak on behalf of this particular issue, which really is about just covering a patio, that's what has been presented. It sounds like with the fact that they've moved it back, you're certainly in favor of it. Identifying no permanent structure for a wall, because we do get some nasty storms and there have been times where shades have had to be dropped just to protect people.

This wasn't brought up, but I think I'll bring it up. They've got significant skin in the game up in the City. I didn't hear anybody talk about your contribution into this build out. It's a very significant build out. Whether that plays into the decision process, I really don't know, but it's well upward of a million dollars. As a landlord, even though we put a substantial amount of money into our project, they did too. I always felt, no matter what, they were going to make it work. There really wasn't an alternative. I know the investment they are making here and I can tell you Victor will be extremely proud to have this restaurant in its Town. Alan does a phenomenal job, Mike does as well. Their staff is phenomenal. I think once the restaurant opens up you'll find that it's going to really compliment what the current selections are in Victor. Thank you very much.

Chairman Maier – We heard from Ontario County. We did not need to refer the application to them for their review. Let me read the resolution.

## **RESOLUTION**

WHEREAS, an application was received by the Secretary of the Zoning Board of Appeals on May 23, 2016 from East Coast Tavern, LLC, 348 East Avenue, Rochester, NY 14607, requesting an area variance to allow a 52 foot front setback at 7635 NYS Route 96, in order to construct a covered outdoor patio whereas, Schedule II, Area and Height Requirements for Commercial Districts, requires an 80 foot front setback; and,

WHEREAS, on September 14, 2001, the New York State Supreme Court reversed the decision of the Town of Victor Zoning Board of Appeals of April 30, 2001 to allow a building setback of 73 feet whereas 80 feet was required and a 70 foot parking space setback whereas 80 feet was required; and,

WHEREAS, said application was referred by Alan Benedict, Code Enforcement Officer of the Town of Victor on the basis of the variance requested to the Town of Victor Code; and,

WHEREAS, a Public Hearing was duly called for and published in "The Daily Messenger" on June 12, 2016 and whereby all property owners within 500 feet of the application were notified by U.S. Mail; and,

WHEREAS, this application is classified as a Type II action under the State Environmental Quality Review Act and therefore does not require further action; and,

WHEREAS, the Ontario County Planning Board referred a very similar application back to the Town of Victor Zoning Board of Appeals on April 13, 2016 assigning the referral as a Class 1 Action; and, whereas on May 25, 2016 the Ontario County Planning Board stated that the application did not need to be re-seen by the County: and,

WHEREAS, a Public Hearing was held on June 20, 2016 at which time one individual spoke in favor of the application; and,

WHEREAS, after reviewing the file, the testimony given at the June 20, 2016 Public Hearing of the Zoning Board of Appeals, and after due deliberation, the Town of Victor Zoning Board of Appeals made the following findings of fact for denying a 52 foot front setback at 7635 State Route 96, Victor, NY 14564:

1. An undesirable change would not be produced in the character of the neighborhood or a detriment to nearby properties created by the granting of the area variance.

Justification: The Architectural Review Committee has given favorable feedback to the applicant for the structure and the patio itself has already been approved by the Town of Victor Planning Board.

2. The benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance.

Justification: The patio could be left uncovered, sails, umbrellas, or a temporary awning could be used.

3. The requested area variance is not substantial.

Justification: From a visual aspect there is no interference with the site line to Panera Bread. Again, the Architectural Review Committee has given a favorable opinion to the structure and the patio has already been approved by the Town of Victor Planning Board. The roof portion does not extend farther than the existing pavement, parking area, to the north.

4. The proposed variance will not have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district.

Justification: Architecturally it fits. There has been evidence submitted from an economic standpoint that there may be a benefit with having a roofed open air patio. The patio itself has already been approved by the Town of Victor Planning Board.

5. The alleged difficulty is self-created. This consideration is relevant to the decision of the board, but shall not necessarily preclude the granting of the area variance.

NOW, THEREFORE BE IT RESOLVED that the application of East Coast Tavern, LLC, 348 East Avenue, Rochester, NY 14607, requesting an area variance to allow a 52 foot front setback at 7635 NYS Route 96, in order to construct a covered outdoor patio whereas, Schedule II, Area and Height Requirements for Commercial Districts requires an 80 foot front setback BE APPROVED with the condition that the patio must be an open air patio with a fixed roof over a patio:

This resolution was put to a vote with the following results:

Keith Maier	Aye
Scott Harter	Aye
Donna Morley	Aye
Mathew Nearpass	Aye
Michael Reinhardt	Aye

Adopted: 5 Ayes, 0 Nays

On a motion by Keith Maier, seconded by Donna Morley, RESOLVED and unanimously agreed, that the meeting was adjourned at 8:55 PM.

Debby Trillaud, Secretary