



## MEMORANDUM

**TO:** Bartholomew County Board of Zoning Appeals  
**FROM:** Melissa Begley, Assistant Planning Director  
**DATE:** May 20, 2014  
**RE:** William Gelfius Conditional Use Request Re-docketing Discussion

Attached is a memo from Jeffrey Rocker, on behalf of William and Justin Gelfius. They are requesting an application for a conditional use to be placed on the June meeting agenda to allow a Confined Animal Feeding Operation to be located on the parcel behind 20565 East 200 North.

As you recall, a conditional use application for William Gelfius – Ag. Land LLC (B/CU-13-09) at the same location was requested to be withdrawn by the applicant before the February 24, 2014 special meeting. The text from the Board of Zoning Appeals Rules of Procedure regarding a “withdrawal with prejudice”, with the pertinent information underlined is copied below.

*A petition may be withdrawn by the petitioner at any time before the close of the public hearing, by oral request at the scheduled meeting or in writing. Any petition, which is withdrawn less than 14 days before the scheduled hearing, shall not again be placed on the docket for hearing within a period of one year from the date of the originally scheduled hearing, except upon a motion duly adopted by a majority of the members of the Board to permit such re-docketing.*

The decision to re-docket is solely at the discretion of the Board and there are no criteria for making the decision. The applicant has provided a discussion of how this request is substantially different than the previous version. However, this is not specifically a determination that the Board needs to make for re-docketing.

The request is listed as a discussion item. We have informed the surrounding property owners of the discussion and have explained that is not a public hearing item and the Board will not be taking any public comment.

## MEMORANDUM

**TO:** Bartholomew County Board of Zoning Appeals  
**FROM:** Jeffrey C. Rocker, on behalf of William Gelfius and Justin Gelfius  
**DATE:** May 12, 2014  
**RE:** William Gelfius and Justin Gelfius Application for Conditional Use

I appreciate the opportunity to address the Bartholomew County Board of Zoning Appeals (“County BZA”) with regard to the application of William Gelfius and Justin Gelfius for the approval of a CAFO as a conditional use. As you are aware, Staff’s position was that it was not clear that the application now before you was “substantially different” that the previous application filed by AgLand, LLC on December 23, 2013. As you recall, that previous application was withdrawn from consideration on prior to the February 2014 County BZA meeting.

Article V of the Bartholomew County Board of Zoning Appeals Rules of Procedure (“Disposition of Petitions”) specifically addresses the various ways in which a petition can be ruled upon or withdrawn. In reviewing the different results, there is a pattern. Petitions which have been denied following a hearing may not be re-filed within one year from the date of the disapproval unless this Board finds there is a substantial change in the petition or the circumstances affecting the petition. That provision reads as follows:

### **b. Re-filing**

No petition for a variance or conditional use which has been denied by the Board shall again be placed on the docket for hearing within a period of one year from the date of such disapproval, unless the Board finds that there is a substantial change in the petition or circumstances affecting the petition, in which case the matter may again be placed on the docket only if a motion to permit re-docketing is duly adopted by the Board.

### Bartholomew County Board of Zoning Appeals Rules of Procedures, Article V, Section 8.

The reasoning is clear. Once the County BZA has heard the petition and voted to deny it, the same petition would presumably get the same result. Redundant filings of the same petition would not be the best use of the County BZA’s time and resources. However, if the petition is substantially different, the result may change and the board can hear it. In that event, the County BZA acts as the gatekeeper to decide if the change in the petition or the circumstances are substantial or not prior to hearing the case.

On the other hand, a petition which is withdrawn more than 14 days before the hearing on the merits, may be filed without special approval or change. That provision reads as follows:

### **a. Without Prejudice**

Any petition may be withdrawn without prejudice provided a written request for withdrawal signed by the petitioner or an authorized representative is received by the Board’s staff at least 14 days before the scheduled hearing.

Bartholomew County Board of Zoning Appeals, Rules of Procedure, Article V(3)(a)

Note the absence of any requirement that the applicant change the petition, nor that the board has to approve an attempt to re-file it. The rationale is clear. If the petition has never been ruled on, the County BZA should hear it and give the petitioner a ruling on the merits of their proposal. There is no redundancy there.

In the final circumstance (which apply to this petition), a petition has been withdrawn within 14 days of the date of the hearing. These petitions have not been substantively ruled on but merely have been withdrawn too near to the hearing date. This could be for any number of reasons. However, the result is a mix of the two cases outlined above. The petition may not be re-docketed without approval of the County BZA. Notably missing is any requirement of substantive change. The import here is that the same petition cannot be re-docketed without the County BZA's approval. It would be nonsensical to treat this class of applicants with the same level of restriction as those who received a vote disapproving their petition. This is the "middle ground" between a vote on the merits and no hearing at all. The absence of the additional requirement of "substantial change" would appear to indicate that only the same petition could not be re-docketed without the County BZA approval. The language of that section is outlined below:

**b. With Prejudice**

**A petition may be withdrawn by the petitioner at any time before the close of the public hearing, by oral request at the scheduled meeting or in writing. Any petition, which is withdrawn less than 14 days before the scheduled hearing, shall not again be placed on the docket for hearing within a period of one year from the date of the originally scheduled hearing, except upon a motion duly adopted by a majority of the members of the Board to permit such re-docketing.**

Bartholomew County Board of Zoning Appeals, Rules of Procedure, Article V(3)(b)

To treat withdrawn applications the same as applications that were ruled upon is an overly harsh result and does not serve the goals of economy nor does it comport with Indiana's rules regarding statutory interpretation. One simply cannot "read into" the clear language of a rule, adding additional terms which do not exist. The reasonable interpretation is, at most, that the specific petition that was withdrawn may not be re-filed. This interpretation strikes a common sense balance where petitions that have been denied are subjected to the most rigorous requirements; petitions that were withdrawn more than 14 days before the hearing are subjected to the least; and, petitions which were withdrawn less than 14 days before the hearing are in the middle.

Petitioner would respectfully suggest that the County BZA Rule of Procedure have no requirement of "substantial change" as exists in the event of a petition that has been denied. For that reason, the petition before the County BZA need not be substantially different. Nonetheless, we would submit that the petition you now have before you is, in fact, substantially different and would, in any event, meet the standard applied to petitions that had been denied. In support of that position, I would state the following:

Substantially Different Parcel: The AgLand application contemplated an 11 acre parcel of land within the Gelfius' farm. This fact was set out in the application. The location of the 11.7 acre parcel

was lined out in the exhibits to the application and was according to a survey completed by Crowder & Darnall. While staff noted the property as 378.11 and 142.8 acres, that was not the application. The language below was screen captured directly from applicant's filed application:

**Approximately 11.7 acres will be deeded to Ag  
Land, LLC for accounting purposes and the construction site of the swine barns.**

The present application is, in fact, the full 142.8 acres instead of the 11 acres previously submitted.

Substantially Different Proposal: The application filed provides for a substantially different project. Clear and important differences are as follows:

1. 50% less swine. Traffic, water consumption, and manure storage were topics of discussion for the Ag Land application. Those items key off of number of swine. As such, the new application proposes a reduction to half as many swine. Notably, this proposal would allow for all manure to be spread on site.
2. Manure Storage: Capacity of storage (which is required to be a minimum of 180 days by IDEM) under the Ag Land application was 427 days. This application provides for storage capacity of 633 days (3.5 times the required time). Beyond simply a substantial reduction in manure, this proposal is substantially different as storage capacity impacts timing of manure application which was a concern.
3. Truck Traffic: This application contemplates approximately 166 annual truck trips (food, delivery, etc.) rather than 528 annual trucks (a 68% reduction). Additionally, this application has conclusively documented that the adjacent road allows sufficient width for safe passing.
4. Proximity to Waterway: The Ag Land proposal had the barn sited 700 feet from the creek (more than twice the distance required by IDEM). The present application proposes a 1200' distance (4 times the required distance and more than 50% further from the creek than the Ag Land application). In addition, it's further away from most neighboring homes.
5. Water Usage: This proposal contemplates approximately one half of the amount of water consumption as the Ag Land proposal.
6. Tree Buffer: A concern with the Ag Land application was that the tree buffer might be removed by neighboring landowners. This proposal includes documentation of the presence of a full tree buffer contained fully on the Gelfius land, eliminating the concern that those trees would be removed.

Different Applicant: The prior applicant was Ag Land, LLC. Ag Land, LLC is a limited liability company set up as a land holding company which was to be deeded 11.7 acres of land within the greater Gelfius parcel for the purposes of the operation. The new applicants are William and Justin Gelfius, the proposed operators of the facility. This removes confusion that the entity is somehow unrelated to the resident farmers.

In short, this application has substantial changes on virtually every issue raised by the staff, board or public. The only item remaining is the fact that this remains a CAFO.

It is also notable that Indiana reaffirmed its commitment to agriculture on March 14, 2014 when Governor Mike Pence signed the following into law:

*The general assembly declares that it is the policy of the state to conserve, protect, and encourage the development and improvement of agriculture, agricultural businesses, and agricultural land for the production of food, fuel, fiber, and other agricultural products. The Indiana Code shall be construed to protect the rights of farmers to choose among all generally accepted farming and livestock production practices, including the use of ever changing technology.*

If there is an issue of interpretation here, it should be interpreted to allow the application to be heard.

While I think it is clear that this application is not required to be substantially different, it is clearly so. My client's application is based on a different applicant, on a 130 acre larger tract of land, and seeks permission to operate a facility which is half the size, 50% further from the waterways, with an integrated tree buffer, 50% MORE capacity for safe storage of waste, using 50% less water and requiring 1/3 of the truck traffic.

As such, the applicants and I would respectfully ask that you consider this information and allow this application to proceed as filed.