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October 21, 2021

VIA EMAIL

East Coventry Township
855 Ellis Woods Road
Pottstown, PA 19465

Re: Nolt Trucking/Spring City Acres, LLC Building Permit Application

Dear East Coventry Township Supervisors:

Our firm represents Lloyd Z. Nolt Trucking, Inc., which owns Spring City Acres, LLC, a farming operation located at 851 Bethel Church Road, Spring City, PA 19475 (collectively, "SCA Farm"). I write regarding East Coventry Township's ("Township") recent denials of SCA Farm's permit application ("Permit Application") to construct an engineered manure/food processing residual ("FPR") tank ("Tank").

As set forth below, the Township's decision to deny the Permit Application and require SCA Farm to adhere to certain requirements in connection with construction/use of the Tank is contrary to both Pennsylvania law and the Township's Zoning Ordinance. Accordingly, we respectfully request that the Township immediately reconsider its decision and grant a building permit to SCA Farm so that it may proceed with construction of the Tank.

I. SCA Farm and the Purpose of the Tank

SCA Farm is located on prime agricultural land in the Township's Farm Residential ("FR") district. SCA Farm grows and sells various crops, including corn, soybean, and small grains. In connection with its farming operations, SCA Farm intends to land-apply manure and FPR, a widely-accepted, customary practice that (i) provides essential nutrients to soils and crops, and (ii) allows SCA Farm to avoid the use of chemical fertilizers. *See* Pennsylvania Department of Environmental

Protection's Food Processing Residual Manual, excerpts of which are attached as Exhibit A; *see also* SCA Farm's July 14, 2021 Letter, attached as Exhibit B. This practice falls squarely into the Pennsylvania Right to Farm Act's definition of "normal agricultural operation[s]," which seeks to protect the "activities, practices, equipment and procedures that farmers adopt, use or engage in…production, harvesting and preparation for market or use of agricultural, agronomic, horticultural, silvicultural and aquacultural crops and commodities…" 3 Pa. Stat. § 952. Indeed, the U.S. Environmental Protection Agency ("EPA") and the Pennsylvania Department of Environmental Protection encourage land application of FPR in farming, noting that it is a beneficial use of the organic by-products generated by food processors. *See* EPA Sustainable Management of Food Basics, Food Recovery Hierarchy, and EPA Guide to Field Storage of Biosolids, excerpts of which are attached as Exhibit C; *see also* Exhibit A, at pp. 3, 7-8 (noting also that land application of FPR constitutes "normal farming operation").

To collect the necessary volume of FPR that it needs to fertilize its crops, SCA Farm will store manure and FPR in the Tank, periodically emptying it when it engages in the land-application process. The Tank will support SCA Farm's primary – and only – use of the property and onsite facilities, i.e., farming.[1] *See id.*; *see also* SCA Farm's September 11, 2021 Letter, attached as Exhibit D. To be clear, the Tank, and SCA Farm's intentions to construct it, will be entirely incidental to SCA Farm's current and future farming operations and existing farming structures on the property. *See* Exhibits B, D.

II. The Township's Position is Contrary to Pennsylvania Laws and Regulations

Because the Tank will be part of SCA Farm's normal farming operations and its use is purely agricultural in nature, the Township's current position violates Pennsylvania's Agriculture, Communities, and Rural Environment Act ("ACRE"). Moreover, the Township's interpretation and application of its Zoning Ordinance ("ZO") in connection with the Permit Application is inconsistent with Pennsylvania law and contradicts the very language within the ZO.

A. The Purpose and Protections of ACRE

The purpose of Pennsylvania's Agricultural, Communities, and Rural Environment law ("ACRE") is to protect Pennsylvania's farms and farmers, by preventing municipalities from enacting and enforcing local ordinances that regulate normal agricultural operations in violation of state law. *See* PA Attorney General ACRE Summary, attached hereto as Exhibit E. Section 312 of ACRE states

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[1] SCA Farm's current facilities include a beef barn and other buildings – a bank barn, a free-stall animal barn, and equipment storage structures – used in its farming operation. *See* Exhibit B, which includes an aerial photograph of the existing SCA Farm's structures.

that local ordinances are "unauthorized" when they "prohibit" or "limit" agricultural operations. 3 Pa.C.S.A. § § 312. ACRE also establishes that nutrient management, odor management and the regulation of class A or B biosolids are the **subject of ACRE regulation and outside the purview of local municipality regulation**. *See id.* at § 313 (c)(1)-(2) (emphasis added). The Nutrient Management and Odor Management chapter within ACRE, applies to normal agricultural operations and includes a preemption section which states:

> (a) This chapter and its provisions are of Statewide concern and occupy the whole field of regulation regarding nutrient management and odor management, to the exclusion of all local regulations.
>
> (b) No ordinance or regulation of any political subdivision or home rule municipality may prohibit or in any way regulate practices related to the **storage, handling or land application of animal manure or nutrients or to the construction, location or operation of facilities used for storage of animal manure or nutrients** or practices otherwise regulated by this chapter if the municipal ordinance or regulation is in conflict with this chapter and the regulations or guidelines promulgated under it.
>
> (c) No ordinance or regulation of a political subdivision or home rule municipality may regulate the **management of odors generated from animal housing or manure management facilities** regulated by this chapter if the municipal ordinance or regulation is in conflict with this chapter and the regulations or guidelines promulgated under it.
>
> (d) Nothing in this chapter shall prevent a political subdivision or home rule municipality from adopting and enforcing ordinances or regulations which are consistent with and **no more** stringent than the requirements of this chapter and the regulations or guidelines promulgated under this chapter.

Id. at § 519 (emphasis added).

B. The Township's Position Violates ACRE

Here, the Township's decision to deny SCA Farm's Permit Application on the basis that the Tank constitutes an additional principal use of SCA Farm's property is unsupported by the facts and contrary to ACRE.[2]

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[2] While the Township's ordinances do not appear to directly contradict ACRE, the Township's interpretation and application of them in connection with the Permit Application squarely does.

In its September 28, 2021 letter, the Township determined that the Tank would not qualify as an "accessory structure" as defined by the ZO and, in turn, that more burdensome ordinance requirements would apply to the construction of the Tank. *See* September 28, 2021 Letter, attached as Exhibit F. As the basis for its decision, the Township alleged that the Tank constituted an "additional principal use" of SCA Farm's property due to the transport and storage of FPR, and the "truckloads of traffic" associated with SCA Farm's use of the Tank. *See id.* Because the Township disregarded that SCA Farm's construction and use of the Tank constitutes an integral – and subordinate – aspect of SCA Farm's normal farming operations, the Township's position violates ACRE.[3] Indeed, the Township's interpretation of what constitutes an "accessory structure" under these circumstances is contrary to (i) the information that SCA Farm provided with its application and in subsequent correspondence with the Township; (ii) federal and state regulatory guidance; and (iii) ACRE, which establishes that storage and use of manure/FPR is not only customary in farming practices, but encouraged and protected by law.[4]

C. The Township's Position Violates the Pennsylvania Municipal Planning Code

In addition, the Township's misplaced interpretation of its ZO and its resulting decision to deny the Permit Application is wholly inconsistent with the Pennsylvania Municipal Planning Code ("MPC"). Section 10603 (h) of the MPC states:

> Zoning ordinances shall encourage the continuity, development and viability of agricultural operations. Zoning ordinances may not restrict agricultural operations or changes to or expansions of agricultural operations in geographic areas where agriculture has traditionally been present unless the agricultural operation will have a direct adverse effect on the public health and safety.

Here, the Township's denial of the Permit Application serves to impermissibly limit – and regulate – agricultural vitality and development in the Township. Indeed, the Township acknowledged that the Tank constitutes an "agricultural building," exempt from the requirements of the Pennsylvania Uniform Construction Code. *See* Exhibit E, at ¶ 1, 4. That acknowledgment, and the MPC's prohibition against municipalities' restricting agricultural expansion, contradicts the Township's denial of the Permit Application and its requirement that SCA Farm adhere to more onerous construction and approval requirements.

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[3] In addition, the Township implied in its September 28, 2021 Letter that it intends to regulate odor in connection with the Tank, which also violates ACRE. *See id.* at ¶ 5.

[4] Insert citations to FPR/land-application as normal farming operations -from Rogers letters.

D. The Township's Position Conflicts with the Language of the Zoning Ordinance

The Township's position also contradicts the language of the ZO, which adheres to MPC ordinance requirements by permitting a landowner in the FR district to build agricultural structures by right. *See* ZO, at §27-502 (1)(A).[5] The ZO includes in its definition of "agriculture" the "cultivating of soil…[.]" *See* §27-202.

III. Conclusion

In light of the foregoing, SCA Farm respectfully requests that the Township reconsider the positions set forth in its September 28, 2021 letter and grant SCA Farm a building permit for construction of the Tank. While it is our sincere hope that we can work through these issues, we reserve the right to elevate this issue to the Attorney General's Office or pursue other available legal recourse, should it become necessary.

Should you wish to discuss any of the above, please do not hesitate to contact me.

Very truly yours,

Caroline Keating McGlynn

CKM: Encl.

[5] The Zoning Ordinance only requires that a building/structure is located more than 100 feet from any lot line, which will be the case here. *See id.*; *see also* Nolt Trucking Circular Concrete Storage Tank Plans, which SCA Farm submitted with its July 14, 2021 Letter.

EXHIBIT A

159 A.3d 540
Superior Court of Pennsylvania.

Kelly BRANTON; Shawn Branton; Mitchell Branton, a Minor, by Kelly Branton and Shawn Branton, Guardians; Lilly Branton, a Minor, by Kelly Branton and Shawn Branton, Guardians; Beck Branton, a Minor, by Shawn Branton, Guardian; Pat Courtwright; Philip Courtwright; Gary E. Johnson; Georgina B. Johnson; Carol Kline; Richard Long; Ann McKean; Thomas J. McKean; Deborah A. Muthler; Stephen K. Muthler; Stephen P. Rice; Susan Rice; and Kim Shipman, Appellants
v.
NICHOLAS MEAT, LLC; Brett Bowes d/b/a Bowes Farm; Camerer Farms, Inc.; and Jab Livestock, LLC, Appellees

No. 536 MDA 2016
|
Argued November 1, 2016
|
FILED APRIL 04, 2017

Synopsis
Background: Neighboring land owners brought private nuisance action against farmers after they began to spread food processing waste on farm. The Court of Common Pleas, Lycoming County, Civil Division, Richard A. Gray, J., No. 13-01502, 2016 WL 1270378, granted summary judgment in favor of farmers. Land owners appealed.

Holdings: The Superior Court, No. 536 MDA 2016, Olson, J., held that:

[1] farmers were in substantial compliance with the statutory requirements governing residual waste;

[2] spreading of food product waste by farmers was a normal agricultural operation;

[3] owners' factual averment, that storage tank on farm became operational at a date that was earlier than one year prior to filing complaint, was not a binding judicial admission; and

[4] construction of storage tank to store food process waste was a substantial change in physical facilities of farmers' operation.

Affirmed in part, vacated in part, and remanded.

West Headnotes (19)

[1] **Appeal and Error** 🔑 De novo review

The trial court's entry of summary judgment presents a question of law, and therefore the Superior Court's standard of review is de novo and its scope of review is plenary.

4 Cases that cite this headnote

[2] **Nuisance** 🔑 Actions

The statute governing limitations on public nuisances is a statute of repose and not a statute of limitations. 3 Pa. Stat. Ann. § 954(a).

1 Cases that cite this headnote

[3] **Statutes** 🔑 Evidence as to construction in general; admissibility

When interpreting a statute, the Superior Court is guided by the Statutory Construction Act of 1972. 1 Pa. Cons. Stat. Ann. § 1501 et seq.

[4] Statutes Intent

The paramount interpretative task of the Superior Court is to give effect to the intent of the General Assembly in enacting the particular legislation under review.

1 Cases that cite this headnote

[5] Statutes Plain Language; Plain, Ordinary, or Common Meaning

The best indication of the General Assembly's intent in enacting a statute may be found in its plain language.

1 Cases that cite this headnote

[6] Statutes Natural, obvious, or accepted meaning
Statutes Grammar, spelling, and punctuation
Statutes Dictionaries

The Superior Court must construe words and phrases in statutes according to rules of grammar and according to their common and approved usage; one way to ascertain the plain meaning and ordinary usage of terms is by reference to a dictionary definition.

1 Cases that cite this headnote

[7] Nuisance Actions

Farmers were in substantial compliance with the statutory requirements governing residual waste for at least one year prior to public nuisance action filed by neighboring land owners after farmers began spreading food processing waste on farm; although farmers were cited on three occasions for spreading food product waste, technical violations of a federal, state, or local law did not strip farmers of protection under Right to Farm Act, and Department of Environmental Protection stated there was no problem with farmers' spreading of food processing waste. 3 Pa. Stat. Ann. § 954(a); 25 Pa. Code §§ 287.101(b)(2), 291.201(a), 299.115.

[8] Nuisance Actions

Under the plain language of the statute governing limitation on public nuisances, an agricultural operation must be in substantial compliance with applicable federal, state, and local laws at least one year prior to the filing of a complaint. 3 Pa. Stat. Ann. § 954(a).

[9] Nuisance Actions

Spreading of food product waste by farmers was a normal agricultural operation under the Right to Farm Act, for purposes of substantial compliance rule applicable to nuisance action brought by neighboring land owners; General Assembly stated that normal farming operations include spreading food product waste as fertilizer, and it was inconceivable that the General Assembly meant for the spreading of food product waste to be considered a normal farming operation but then not be considered a normal agricultural operation. 3 Pa. Stat. Ann. § 952; 35 Pa. Stat. Ann. § 6018.103.

1 Cases that cite this headnote

[10] Courts Decisions of co-ordinate courts of same state

Although a decision of the Commonwealth Court is not binding upon the Superior Court, it can be considered as persuasive authority.

[11] Statutes Giving effect to entire statute and its parts; harmony and superfluousness

The General Assembly is presumed not to intend any statutory language to exist as mere surplusage and, accordingly, courts must construe a statute so as to give effect to every word.

[12] Nuisance Actions

For purposes of statutory limitation on nuisance suits arising from agricultural operations, spreading food product waste on farmland to provide nutrients for the soil is a normal agricultural operation, and storage of food product waste is also a normal agricultural operation. 3 Pa. Stat. Ann. § 954(a); 35 Pa. Stat. Ann. § 6018.103.

[13] Evidence Pleadings

Neighboring land owners' factual averment, that storage tank on farm became operational at a date that was earlier than one year prior to filing nuisance complaint against farm, was not a binding judicial admission; the only competent evidence proved that tank did not become operational until less than one year prior to the filing of complaint, farmers could not establish that tank existed substantially unchanged since the established date of operation and was a part of normal agricultural operations, and thus farmers could bring nuisance action based on construction of tank. 3 Pa. Stat. Ann. § 954(a).

2 Cases that cite this headnote

[14] Estoppel Pleadings

When a man alleges a fact in a court of justice, for his advantage, he shall not be allowed to contradict it afterwards.

[15] Evidence Judicial Admissions

For an averment to be a judicial admission: first, the averment must be made in a verified pleading, stipulation, or similar document, second, the averment must be made in the same case in which the opposing party seeks to rely upon it, third, the averment must relate to a fact and not a legal conclusion, fourth, the averment must be advantageous to the party who made it, and finally, the fact must be plausible.

3 Cases that cite this headnote

[16] Nuisance Actions

Evidence did not support farmers' claim that storing food processing waste in storage tank was covered by a nutrient management plan, pursuant to statute of repose governing nuisance action brought by neighboring land owners after farmers began spreading waste on farm; the only storage tanks mentioned in any of the nutrient management plans were two other storage tanks separate from tank in dispute. 3 Pa. Stat. Ann. § 954(a).

[17] Limitation of Actions Injuries to property in general

Construction of a storage tank to store food process waste was a substantial change in physical facilities of farmers' operation under Right to Farm Act, and thus nuisance claim

brought by neighboring land owners based on construction of storage tank was not barred by the one-year statute of repose for public nuisances; construction of tank took three to four months, and the tank was capable of holding 2,400,000 gallons of waste, and was a substantial expansion to the physical facilities of farmers' agricultural operation. 3 Pa. Stat. Ann. § 954(a).

1 Cases that cite this headnote

[18] **Nuisance** Actions

If the physical facilities of an agricultural operation undergo an important expansion or alteration, and that important expansion or alteration impacts the underlying condition or circumstance complained of, the Right to Farm Act does not bar nuisance action so long as the complaint is filed within one year of the date the substantially altered or expanded physical facility becomes operational. 3 Pa. Stat. Ann. § 954(a).

[19] **Appeal and Error** Theory and Grounds of Decision Below and on Review

The Superior Court may affirm the trial court's decision on any basis.

***543** Appeal from the Judgment Entered March 4, 2016, In the Court of Common Pleas of Lycoming County, Civil Division at No(s): 13–01502, RICHARD A. GRAY, J.

Attorneys and Law Firms

Kevin C. Boylan, Kingston, for Branton, K., Branton, S., Branton, M., Branton, L., Branton, B., Courtwright, P., Courtwright, P., Kline, Long, McKean, A., McKean, T., Muthler, D., Muthler, S., and Shipman, appellants.

James C. Clark, Warrington, for Nicholas Meat and Camerer Farms, appellees.

BEFORE: BOWES, OLSON and STABILE, JJ.

Opinion

OPINION BY OLSON, J.

Appellants, Kelly Branton *et al*, appeal from the judgment entered on March 4, 2016 in favor of Nicholas Meat, LLC ("Nicholas"), Brett Bowes d/b/a Bowes Farm, Camerer Farms, Inc. ("Camerer Farm" and together with Nicholas and Bowes Farm "Farmers"), and JAB Livestock, LLC ("JAB").[1] After careful consideration, we hold that Appellants' action is partially barred by the Right to Farm Act ("RTFA"), 3 P.S. §§ 951–957. Accordingly, we affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

The factual background and procedural history of this case are as follows. Nicholas operates a slaughterhouse in Loganton, Pennsylvania. The slaughterhouse generates food processing waste ("FPW"),[2] which is rich in nutrients essential to farming. Beginning in 2011, Nicholas began transporting FPW from the slaughterhouse to the Bowes and Camerer Farms. The FPW is immediately spread on the Bowes and Camerer Farms and/or stored in a 2,400,000 gallon tank on the Bowes Farm ("the storage tank"). The FPW stored on the Bowes Farm is later spread on the Bowes and Camerer Farms.

On March 17, 2011, the Pennsylvania Department of Environmental Protection ("DEP") issued Camerer Farm a notice of violation ("NOV").[3] Appellants' Brief in ***544** Opposition to Motion for Summary Judgment, 1/19/16, at Exhibit 3. That NOV stated that Camerer Farm violated 35 P.S. §§ 6018.302(a) and 6018.610(1) by spreading FPW between February 25 and 27, 2011. DEP informed Camerer Farm that it needed a nutrient management plan[4] or needed a permit for spreading FPW on its land. The following day, March 18, 2011, DEP issued a NOV to Nicholas for permitting its FPW to be spread on Camerer Farm between February 25 and 27, 2011. Appellants' Brief in Opposition to Motion for Summary Judgment, 1/19/16, at Exhibit 4. That NOV stated that Nicholas violated 25 Pa. Code § 291.201(a) in allowing its FPW to be spread on Camerer Farm.

On April 15, 2013, DEP issued a NOV to Nicholas for providing FPW which was spread on Bowes Farm in late March and/or early April 2013. ***See*** Appellants' Brief in Opposition to Motion for Summary Judgment, 1/19/16, at Exhibit 5. That NOV stated that Nicholas violated 35 P.S. 8.610(9) and 25 Pa. Code § 287.101(b)(2) by permitting its FPW to be spread within 150 feet of a stream and in an area not covered by a nutrient management plan. That same day, April 15, 2013, DEP issued a NOV to Bowes Farm for spreading FPW in late March and/or early April 2013. ***See*** Appellants' Brief in Opposition to Motion for Summary Judgment, 1/19/16, at Exhibit 6. That NOV stated that spreading FPW within 150 feet of a stream and in an area not covered by a nutrient management plan violated section 287.101(b)(2).

On June 14, 2013, Appellants filed a complaint which alleged negligence and a temporary private nuisance.[5] Less than one month later, DEP issued a NOV to Bowes Farm for spreading FPW on June 25, 2013. Appellants' Brief in Opposition to Motion for Summary Judgment, 1/19/16, at Exhibit 7. That NOV stated that Bowes Farm violated section 287.101(b)(2) by spreading FPW during summer when the relevant nutrient management plan stated that FPW would not be spread during summer.

On November 15, 2013, Appellants filed their second amended complaint. On December 18, 2015, Farmers moved for summary judgment.[6] As part of their summary judgment motion, Farmers argued that Appellants' claims were barred by RTFA's statute of repose. On March 4, 2016, the trial court granted Farmers' summary judgment motion. Contemporaneously therewith, the trial court issued an opinion outlining its rationale for granting summary judgment. ***Branton v. Nicholas Meat, LLC***, 2016 WL 1270378 (C.C.P. Lycoming Mar. 4, 2016). This timely appeal followed.[7]

***545** Appellants present three issues for our review:

> 1. Did the [t]rial [c]ourt err as a matter of law in holding on [s]ummary [j]udgment that [Appellants'] claims were barred by [RTFA] despite the evidence presented by [Appellants] that [Farmers'] practice of spreading [FPW] was unlawful and in violation of various regulations, codes[,] and statutes?
>
> 2. Did the [t]rial [c]ourt err as a matter of law in rejecting [Appellants'] claim that [Farmers'] practice of spreading [FPW] was not a "normal agricultural operation" under the RTFA?
>
> 3. Did the [t]rial [c]ourt err as a matter of law in holding on [s]ummary [j]udgment that [Appellants'] claims were barred by RTFA despite the evidence presented by [Appellants] that the addition of a[n FPW] waste storage tank on the Bowes Farm in April 2012 was a substantial change under the RTFA?

Appellants' Brief at 7.

[1]All three of Appellants' issues challenge the trial court's determination that RTFA bars their action against Farmers and JAB. "The trial court's entry of summary judgment presents a question of law, and therefore our standard of review is *de novo* and our scope of review is plenary." ***Fisher v. A.O. Smith Harvestore Products, Inc.***, 145 A.3d 738, 741 (Pa. Super. 2016) (*en banc*) (citation omitted).

[2]RTFA provides, in relevant part, that:

> No nuisance action shall be brought against an agricultural operation which has lawfully been in operation for one year or more prior to the date of bringing such action, where the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation and are normal agricultural operations, or if the physical facilities of such agricultural operations are substantially expanded or substantially altered and the expanded or substantially altered facility has either: (1) been in operation for one year or more prior to the date of bringing such action, or (2) been addressed in a nutrient management plan approved prior to the commencement of such expanded or altered operation pursuant to [3 Pa.C.S.A. § 506], and is otherwise in compliance therewith[.]

3 P.S. § 954(a). Section 954(a) is a statute of repose and not a statute of limitations.[8] ***Gilbert v. Synagro Cent., LLC***, 131 A.3d 1, 15 (Pa. 2015). There are three key requirements for section 954(a) to bar a nuisance action: (1) the agricultural operation ***546** against which the action is brought must have lawfully operated for at least a year prior to the filing of the complaint; (2) (a) the conditions or circumstances that are the basis for the complaint must have existed substantially unchanged since the established date of operation, or (b) if physical facilities have been substantially expanded or altered such facilities must have (i) operated for at least one year prior to the filing of the complaint or (ii) been addressed in a nutrient management plan approved prior to the commencement of such expanded or altered operation; and (3) the conditions or circumstances are normal agricultural operations.[9] ***See*** 3 P.S. § 954(a).

We begin our analysis by examining what standard

governed the trial court's consideration of Farmers' summary judgment motion. Appellants argue that the trial court was required to apply the general summary judgment standard. According to Appellants, summary judgment was only appropriate if "the record clearly demonstrates that there [were] no genuine issue of material fact[.]" ***Telwell Inc. v. Grandbridge Real Estate Capital, LLC***, 143 A.3d 421, 425 (Pa. Super. 2016) (citation omitted). According to Appellants, the trial court (and this Court) "must view the record in the light most favorable to [Appellants], resolving all doubts as to the existence of a genuine issue of material fact against [Farmers]." ***Id.*** (citation omitted).[10] Farmers, on the other hand, argue that the applicability of the statute of repose was a purely legal question for the trial court to decide. ***See Smith v. Workmen's Comp. Appeal Bd. (Concept Planners & Designers)***, 543 Pa. 295, 670 A.2d 1146, 1148–1149 (1996). Thus, according to Farmers, there was no genuine issue of material fact relating to the applicability of the statute of repose.

We agree with Farmers that the applicability of the statute of repose in this case was a purely legal question that the trial court could decide on a motion for summary judgment. In ***Gilbert***, our Supreme Court explained that

> generally, statutes of repose are jurisdictional and their scope is a question of law for courts to determine. ... [T]here may be cases in which a statute of repose's applicability turns on resolution of factual issues. In such cases, the facts relevant to jurisdiction are so intertwined with those relating to the merits of the action, the jurisdictional determination will necessarily involve fact finding.

Gilbert, 131 A.3d at 15 (internal citations omitted).

In ***Gilbert***, the appellees were individuals who owned or resided on properties adjacent to a farm known as Hilltop Farms. Biosolids were spread on 14 fields of Hilltop Farms. The appellees alleged that extremely offensive odors emanated from the spread biosolids. The appellees sued various entities and individuals, including the owner of Hilltop Farms, claiming private nuisance, negligence, and trespass. ***547** Appellants moved for summary judgment on the basis that the appellees' nuisance claim was barred by the one-year statute of repose in section 954(a) of the RTFA. In finding that the RTFA statute of repose barred the appellees' nuisance claim, our Supreme Court held as follows:

> the only question was whether the application of biosolids is a "normal agricultural operation;" there was no pertinent question regarding the character of the substance in this specific case or appellants' use of it at Hilltop Farms.
>
> * * *
>
> [T]he necessary facts are undisputed and of record. These facts include the tinning and quantity of appellants' application of biosolids, the responsive actions by appellees and the tinning of those actions, the regulatory oversight of appellants' biosolids application, and the history and extent of biosolids usage in Pennsylvania's farming industry. ... [N]either party's conduct is unknown or in dispute. Rather, the only question is whether appellants meet the statutory requirements necessary to avail themselves of the RTFA's statute of repose. This question does not involve fact finding; it involves the application of a statute's definition to the record's facts. It is well settled that determining whether an activity, entity, or object falls within the meaning of a statutory definition is a matter of statutory interpretation, and thus is a question of law for the court to decide. Accordingly, the determination of whether [section] 954(a) applied in the instant matter was a question of law for the trial court.
>
> * * *
>
> Th[e General Assembly's intent in passing RTFA] cannot be achieved by permitting the applicability of the RTFA's statute of repose to be dependent on an idiosyncratic determination of a farming practice's "normality" as perceived by a jury in a specific case. ... [T]he inquiry under [section] 954(a)—whether an activity is a "normal agricultural operation"—is a categorical inquiry for the court. Otherwise, agricultural practices would be subject to nuisance suits based on varying local perceptions of what constitutes a "normal agricultural operation," as parochial opinion differs from jury to jury and juror to juror. What is common in one area may be foreign to another. Having courts apply the RTFA's definitions achieves the meaningful degree of legal certainty, uniformity, and consistency that the RTFA was intended to provide to farms.

Gilbert, 131 A.3d at 16–18 (internal citations, footnote, and certain paragraph breaks omitted).

All three of the issues raised by Appellants in this case similarly deal with pure questions of law. In their first issue, Appellants argue that Farmers' activities were unlawful. There is no dispute about what the relevant federal, state, and local laws were during the applicable time period nor is there any dispute about the factual activities surrounding Farmers' use and storage of FPW.

Instead, the only dispute is whether those activities violated various federal, state, or local laws and, if so, whether such noncompliance resulted in Farmers' activities being unlawful. Whether a practice violates federal, state, or local law is a pure question of law which the trial court could decide on summary judgment. Similarly, whether a violation of federal, state, or local law rendered Farmers' agricultural operations unlawful is a pure question of law which the trial court could decide on summary judgment.

In their second issue, Appellants argue that spreading FPW is not a normal agricultural operation. As in ***Gilbert***, there is ***548** "no pertinent question regarding the character of the substance in this specific case or [Farmers'] use of it at [the Bowes and Camerer Farms]." ***Gilbert***, 131 A.3d at 16. Thus, just as our Supreme Court held that whether biosolid use is a normal agricultural operation was a pure question of law in ***Gilbert***, we hold that whether the spreading and storage of FPW is a normal agricultural operation in this case is a question of law which the trial court could decide on summary judgment.

In their third issue, Appellants argue that the addition of a storage tank on the Bowes Farm constituted a substantial change under the RTFA. Again, there is no factual dispute about the erection of the storage tank on the Bowes Farm. Instead, the only question is whether the erection of the storage tank was a "substantial change" under section 954(a) that occurred within one year of the date on which Appellants filed their original complaint. This is a question of statutory interpretation. As such, it presents a pure question of law which the trial court could decide on summary judgment.

[13] [14] [15] [16]Having determined that all three of Appellants' issues raise pure questions of law (specifically questions of statutory interpretation) which the trial court properly decided on summary judgment, we turn to a *de novo* review of those determinations. "When interpreting a statute, this Court is guided by the Statutory Construction Act [ ] of 1972, 1 Pa.C.S.A. §§ 1501–1991." ***CitiMortgage, Inc. v. Barbezat***, 131 A.3d 65, 73 (Pa. Super. 2016). "Our paramount interpretative task is to give effect to the intent of our General Assembly in enacting the particular legislation under review." ***Egan v. Egan***, 125 A.3d 792, 795 (Pa. Super. 2015) (internal alteration and citation omitted). "[T]he best indication of the General Assembly's intent in enacting a statute may be found in its plain language[.]" ***Watts v. Manheim Twp. Sch. Dist.***, 632 Pa. 583, 121 A.3d 964, 979 (2015). We must construe words and phrases in statutes "according to rules of grammar and according to their common and approved usage[.]" 1 Pa.C.S.A. § 1903(a). "One way to ascertain the plain meaning and ordinary usage of terms is by reference to a dictionary definition." ***In re Beyer***, 631 Pa. 612, 115 A.3d 835, 839 (2015) (citation omitted).

When the plain language of a statute is ambiguous, we may consider, *inter alia,* the object to be obtained and the consequences of a particular interpretation. ***See*** 1 Pa.C.S.A. §§ 1921(c)(4) and 1921(c)(6). Moreover, when interpreting a statute we must presume "[t]hat the General Assembly [did] not intend a result that is absurd, impossible of execution or unreasonable." 1 Pa.C.S.A. § 1922(1). We must also presume "[t]hat the General Assembly intends to favor the public interest as against any private interest." 1 Pa.C.S.A. § 1922(5).

[12]In their first issue, Appellants argue that the trial court erred in determining that Farmers' agricultural operations were lawfully in operation since at least June 14, 2012, *i.e.,* one year prior to the filing of the instant lawsuit. Appellants aver that Farmers' operation were unlawful up until at least April 14, 2013, *i.e.,* two months prior to the filing of Appellants' complaint. Specifically, Appellants argue that the NOVs issued by DEP indicate Farmers' operations were unlawful. Moreover, Appellants argue that Farmers failed to properly control odors as required by various state regulations. Thus, according to Appellants, their lawsuit was filed prior to the date their cause of action was extinguished by RTFA's statute of repose. Farmers, on the other hand, contend that they have lawfully spread FPW since 2011, *i.e.,* more than one year prior to the filing of the instant action.

***549** The relevant portion of section 954(a) states that, "No nuisance action shall be brought against an agricultural operation which has lawfully been in operation for one year or more prior to the date of bringing such action[.]" 3 P.S. 954(a).[11] The phrase in dispute is "has lawfully been in operation." Specifically, Appellants argue that this phrase requires that the agricultural operation must not have violated a single federal, state, or local law during the relevant one-year time period. On the other hand, Farmers argue that section 954(a) only requires that an agricultural operation be in substantial compliance with relevant federal, state, and local laws.

RTFA does not define the term "lawfully." Appellants, therefore, correctly turn to the dictionary definition of the term in order to ascertain its plain meaning. Appellants' Brief at 24–25; ***see Beyer***, 115 A.3d at 839. Black's Law Dictionary defines the term lawful as, "Legal; warranted or authorized by the law; having the qualifications prescribed by law; not contrary to nor forbidden by the

law." *Black's Law Dictionary* 797 (5th ed. 1979).[12] Appellants contend that, because Farmers were cited on three occasions[13] for spreading FPW, Farmers' actions were *ipso facto* not legal. Thus, according to Appellants, Farmers' agricultural operations were not lawfully in operation for at least one year prior to the filing of the instant action.

What Appellants fail to acknowledge is the note to the definition of the term lawful contained within Black's. Specifically, the note to the term "lawful" states that:

> The principal distinction between the terms "lawful" and "legal" is that the former contemplates the substance of law, the latter the form of law. To say of an act that it is "lawful" implies that it is authorized, sanctioned, or at any rate not forbidden, by law. To say that it is "legal" implies that it is done or performed in accordance with the forms and usages of law, or in a technical manner. In this sense "illegal" approaches the meaning of "invalid." For example, a contract or will, executed without the required formalities, might be said to be invalid or illegal, but could not be described as unlawful. Further, the word "lawful" more clearly implies an ethical content than does "legal." The latter goes no further than to denote compliance, with positive, technical, or formal rules; while the former usually imports a moral substance or ethical permissibility. A further distinction is that the word "legal" is used as the synonym of "constructive," which "lawful" is not. ... But ***550** there are some connections in which the two words are used as exact equivalents.

Black's Law Dictionary 797 (5th ed. 1979).

[18]Our Supreme Court recognized this distinction between the terms "lawful" and "legal" as far back as 1893. Specifically, our Supreme Court stated that "there is a clear differential distinction between the words 'legal' and 'lawful[.]' " ***McCandless v. Allegheny Bessemer Steel Co.***, 152 Pa. 139, 25 A. 579, 585 (1893). In ***McCandless***, our Supreme Court held that the means used by the plaintiff (a sheriff) to protect the defendant (a company facing mob violence) were not legal; however, they were lawful. ***See id.***[14] As such, we hold that under the plain language of section 954(a), an agricultural operation must be in substantial compliance with applicable federal, state, and local laws at least one year prior to the filing of a complaint in order to satisfy the first requirement of section 954(a).[15]

This interpretation of the term "lawfully" in section 954(a) is consistent with this Court's decision in ***Horne v. Haladay***, 728 A.2d 954 (Pa. Super. 1999). In ***Horne***, as in the case *sub judice*, the plaintiff argued that the agricultural operation was not lawfully operated for at least one year prior to the filing of the nuisance action. This Court rejected that argument. Although there were no NOVs issued to the agricultural operation in ***Horne***, unlike the NOVs issued in this case, this Court also relied upon the fact that "the record reveal[ed] that [the agricultural operation] made every effort to comply with applicable statutes and regulations[.]" ***Id.*** at 959. The clear implication of this statement is, even if NOVs had been issued by the relevant regulatory agency, that would not *ipso facto* mean the agricultural operation was unlawful. Instead, this Court implied, as we have held above, that technical violations of a federal, state, or local law does not strip an agricultural operation of protection under RTFA.

Moreover, even if we were to hold that the plain language of section 954(a) with respect to the term "lawfully" was ambiguous, we would reach the same conclusion. As noted above, when statutory language is ambiguous we may consider, *inter alia,* the object to be obtained and the consequences of a particular interpretation when ascertaining the General Assembly's intent. ***See*** 1 Pa.C.S.A. §§ 1921(c)(4) and 1921(c)(6). As our Supreme Court stated in ***Gilbert***, the object to be obtained in RTFA is "reducing] the loss to the Commonwealth of its agricultural resources by limiting the circumstances under which agricultural operations may be the subject matter of nuisance suits and ordinances." ***Gilbert***, 131 A.3d at 17, *quoting* 3 P.S. § 951 (emphasis removed); ***see Horne***, 728 A.2d at 957. If **any** technical violation of **any** federal, state, or local law reset section 954(a)'s one-year time period, RTFA would not effectively limit the circumstances under which nuisance suits could ***551** be brought.[16] This is because a collateral consequence of adopting Appellants' interpretation of the term "lawfully" would be to encourage individuals and companies to report minor violations to relevant authorities in an attempt to reset section 954(a)'s one-year time period. As noted above, Appellants attempted to employ this tactic in the case *sub judice* by continually contacting DEP and complaining that Farmers were violating various state laws.

Furthermore, when interpreting a statute we must presume "[t]hat the General Assembly [did] not intend a result that is absurd, impossible of execution or unreasonable." 1 Pa.C.S.A. § 1922(1). Resetting section 954(a)'s one-year time period every time a minor violation occurs is both absurd and unreasonable. Even the most vigilant farmer in the Commonwealth may eventually violate a federal, state, or local law. The adoption of section 954(a) demonstrates the intent of the General Assembly that farmers not be stripped of RTFA protection for an entire

year because of a single violation. We must also presume "[t]hat the General Assembly intends to favor the public interest as against any private interest." 1 Pa.C.S.A. § 1922(5). Again, as stated in section 951, the public interest is in the promotion of agricultural activities within this Commonwealth. On the other hand, preventing malodors from emanating from a farm only promotes certain private interests. Thus, every tool of statutory interpretation indicates that Appellants' interpretation of the term "lawfully" is incorrect. Thus, even if the term "lawfully" were ambiguous, we would hold that an agricultural operation need only be substantially compliant with applicable federal, state, and local laws for at least one year prior to the filing of a complaint in order to satisfy the first requirement of section 954(a)'s statute of repose.

Having determined the meaning of the term "lawfully" in section 954(a), we turn to whether Farmers were in substantial compliance with applicable federal, state, and local laws for at least one year prior to the filing of the instant complaint. In this case, DEP *de facto* determined that Farmers substantially complied with applicable federal, state, and local laws for at least one year prior to the filing of the instant complaint. Specifically, on at least eight occasions between August 11, 2011 and the filing of the instant complaint on June 14, 2013, DEP stated there was no problem with Farmers' spreading of FPW. ***See*** Farmers' Motion for Summary Judgment, 12/18/15, at Exhibit M (August 16, 2011 DEP report stating that Nicholas' FPW could be spread on the Camerer and Bowes Farms); ***id.*** (February 22, 2012 DEP report stating that Nicholas' FPW was being spread in accordance with all relevant laws and regulations); ***id.*** (January 29, 2013 letter from DEP to State Representative Garth D. Everett stating that the spreading of FPW on the Camerer and Bowes Farms was lawful); ***id.*** (February 14, 2013 DEP report stating that the technique the Farmers used to spread FPW was not unlawful); ***id.*** (April 27, 2013 DEP report finding no violations in the spreading of FPW on the Bowes and Camerer Farms); ***id.*** (April 29, 2013 internal DEP email stating that there were no problems with spreading of FPW by Farmers); ***id.*** (May 6, 2013 DEP report stating that Farmers were following proper procedures in spreading FPW); ***id.*** (May 8, 2013 DEP report stating that ***552** Farmers were not spreading FPW too close to a stream). As noted above, DEP issued all of the NOVs in this case. Nonetheless, DEP repeatedly found that Farmers were lawfully spreading FPW. The minor technical infractions by Farmers were promptly resolved and DEP took no further regulatory enforcement action, *i.e.*, DEP did not fine Farmers nor did it attempt to prohibit Farmers from spreading FPW on the Camerer and Bowes Farms.

Appellants also argue that Farmers failed to comply with, *inter alia*, sections 287.101(b)(2) and 291.201(a) by failing to control FPW odors on days not covered by the NOVs. In support thereof, Appellants rely upon their deposition testimony. This testimony, however, was contradicted by DEP, the agency responsible for enforcing 25 Pa. Code §§ 287.101(b)(2) and 291.201(a). As noted above, a subset of Appellants called DEP to complain of malodors resulting from FPW dispersal. DEP enforcement officers responded to the scene of the alleged odors and "did not detect any malodors." Farmers' Motion for Summary Judgment, 12/18/15, at Exhibit M (February 22, 2011 DEP report); ***see also id.*** (November 22, 2011 DEP report stating "no strong odor" from spreading FPW). Appellants' arguments relating to 25 Pa. Code § 299.115 (storage) fail for the same reason. DEP inspected Bowes Farm several times after Farmers began storing FPW in the storage tank. ***See e.g.***, Farmers' Motion for Summary Judgment, 12/18/15, at Exhibit M (DEP visited Bowes Farm on April 11, 2013 and found no violations); ***id.*** (DEP visited Bowes Farm on April 27, 2013 and found no violations); ***id.*** (DEP visited Bowes Farm on May 4, 2013 and found no violations). DEP never reported a violation of section 299.115 nor did DEP mandate that Farmers make any changes in relation thereto. Thus, it is evident that Farmers were in substantial compliance with sections 287.101(b)(2), 291.201(a), and 299.115 for at least one year prior to the commencement of the instant action. Accordingly, we conclude that Farmers lawfully spread FPW on the Bowes and Camerer Farms for at least one year prior to commencement of the instant action.

[9]In their second issue, Appellants argue that the trial court erred in finding that spreading FPW is a normal agricultural operation. RTFA defines normal agricultural operation as:

> The activities, practices, equipment[,] and procedures that farmers adopt, use[,] or engage in the production and preparation for market of poultry, livestock[,] and their products and in the production, harvesting[,] and preparation for market or use of agricultural, agronomic, horticultural, silvicultural[,] and aquacultural crops and commodities and is:
>
> (1) not less than ten contiguous acres in area; or
>
> (2) less than ten contiguous acres in area but has an anticipated yearly gross income of at least $10,000[.00].
>
> The term includes new activities, practices,

> equipment[,] and procedures consistent with technological development within the agricultural industry. Use of equipment shall include machinery designed and used for agricultural operations, including, but not limited to, crop dryers, feed grinders, saw mills, hammer mills, refrigeration equipment, bins and related equipment used to store or prepare crops for marketing and those items of agricultural equipment and machinery defined by [3 P.S. § 1901 *et seq.*] Custom work shall be considered a normal farming practice.

3 P.S. § 952.

Farmers argue that this case is controlled by our Supreme Court's decision in ***553** ***Gilbert***. We disagree. In ***Gilbert***, our Supreme Court addressed whether the application of biosolids as fertilizer constituted a normal agricultural operation. ***Gilbert***, 131 A.3d at 19–23. DEP defines biosolids as "[n]utrient-rich organic material produced from the stabilization of sewage sludge and residential septage that meet specific criteria and are suitable for land application." ***See*** goo.gl/s4ulbW (last accessed Feb. 3, 2017). When compared to DEP's definition of FPW, note 2 ***supra***, it is evident that biosolids and FPW are distinct and a finding that application of biosolids is a normal agricultural operation does not *ipso facto* mean that application of FPW is a normal agricultural operation.

Nonetheless, we find our Supreme Court's discussion of whether the application of biosolids is a normal agricultural operation instructive in our analysis of whether spreading FPW is a normal agricultural operation. When determining if application of biosolids is a normal agricultural operation, our Supreme Court looked at "biosolids' history, related statutes and regulations, case law, and executive agencies' views[.]" ***Gilbert***, 131 A.3d at 20. A careful examination of these same factors as they relate to spreading FPW indicates that spreading FPW is a normal agricultural operation.

We begin with the history of FPW in Pennsylvania. Both experts from Pennsylvania who submitted reports to the trial court stated that spreading FPW is a normal agricultural operation within this Commonwealth. The experts' reports include the fact that FPW has been spread on farmland in Pennsylvania for over 15 years. Moreover, DEP has issued permits to spread FPW to approximately three dozen locations across the Commonwealth. As implied above, however, DEP does not issue permits for the vast majority of the operations that spread FPW. Instead, when FPW is spread pursuant to a nutrient management plan there is no need to obtain a permit from DEP. Thus, FPW has a long history of use in agricultural operations within the Commonwealth and Pennsylvania industry experts consider spreading FPW to be a normal agricultural operation.

As to related statutes and regulations, our General Assembly has strongly implied that spreading FPW on farmland is a normal agricultural operation. Specifically, the definition of "normal farming operations" states that, "It includes the management, collection, storage, transportation, use or disposal of ... food processing waste ... on land where such materials will improve the condition of the soil, the growth of crops, or in the restoration of the land for the same purposes." 35 P.S. § 6018.103. In other words, our General Assembly stated that normal farming operations include spreading FPW as fertilizer. It is inconceivable that our General Assembly meant for the spreading of FPW to be considered a normal **farming** operation but not a normal **agricultural** operation. To the contrary, the term "normal farming operation" is narrower than the term "normal agricultural operation." ***Compare*** 3 P.S. § 952 *with* 35 P.S. § 6018.103. The term "normal farming operation" closely mirrors the pre–1998 version of RTFA's definition of "normal agricultural operation." In 1998, the General Assembly amended RTFA to broaden the term "normal agricultural operation." ***See*** 1998 P.L. 441, 441–442; ***see also*** ***Gilbert***, 131 A.3d at 20 (explaining the broadening of the term normal agricultural operation in the 1998 amendments to RTFA).

DEP, an executive agency involved in enforcement of the relevant regulations and statutes, believes spreading FPW is a normal agricultural operation. This is evidenced by the myriad regulations that ***554** DEP has promulgated relating to the dispersal of FPW. Appellants, in fact, rely upon many of these regulations when arguing that Farmers spread FPW unlawfully. ***See*** Appellants' Brief at 27–34 (arguing that Farmers' spreading of FPW failed to comply with 25 Pa. Code § 291.1 *et seq.*); ***id.*** at 35–44 (arguing that Farmers' spreading of FPW failed to comply with 25 Pa. Code § 287.1 *et seq.*). Moreover, DEP's Food Processing Residual Manual states FPW "can serve as both a soil conditioner and fertilizer. [FPW has] been recycled through [land application system] programs for decades." Appellants' Brief in Opposition to Motion for Summary Judgment, 1/19/16, at Exhibit 12.

As our Supreme Court has explained, "an interpretation of a statute by those charged with its administration and enforcement is entitled to deference, such consideration most appropriately pertains to circumstances in which the provision is not explicit or is ambiguous." ***Ins. Fed'n of Pennsylvania, Inc. v. Commonwealth of Pennsylvania Ins. Dep't***, 601 Pa. 20, 970 A.2d 1108, 1114 (2009) (citation omitted). Therefore, we conclude that DEP's

"experience and expertise in dealing with the regulation of [FPW] use and enforcement of the RTFA also supports a finding that the [spreading of FPW] is an accepted, well-regulated farming practice." ***Gilbert***, 131 A.3d at 23.

[10]We acknowledge that our holding today is in tension with the Commonwealth Court's decision in ***Walck v. Lower Towamensing Twp. Zoning Hearing Bd.***, 942 A.2d 200 (Pa. Cmwlth. 2008). "Although a decision of the Commonwealth Court is not binding upon this Court, it can be considered as persuasive authority." ***Nw. Sav. Bank v. Knapp***, 149 A.3d 95, 98 n.3 (Pa. Super. 2016) (citation omitted). In this case, however, we find the persuasive value of the Commonwealth Court's decision limited for several reasons.

In ***Walck***, the Commonwealth Court upheld a zoning board's determination that storage of FPW was not normal farming activity. ***Walck***, 942 A.2d at 209. This analysis, however, was based upon application of 3 P.S. § 501 *et seq.* The parties and the intervenor did not rely upon, nor did the Commonwealth Court cite, RTFA or section 6018,103. ***See generally Walck***, 942 A.2d 200; Walck's and Lorah's Brief, 2007 WL 5516380; Lower Towamensing Township's Brief, 2007 WL 5516382; Lower Towamensing Township Zoning Hearing Board's Brief, 2007 WL 5516381. As noted above, section 6018.103 explicitly defines the term "normal farming operations" to include storage of FPW. The definition of "normal agricultural operation" in section 952 is broader than the term "normal farming operations." The failure of the parties, the intervenor, and the Commonwealth Court to read 3 P.S. § 501 *et seq.* *in pari materia* with section 6018.101 *et seq.* greatly diminishes the persuasive value we attribute to the Commonwealth Court's decision. ***Cf.*** 1 Pa.C.S.A. § 1932(b) ("Statutes *in pari materia* shall be construed together, if possible, as one statute."). Moreover, the Commonwealth Court reviewed the zoning board's determination under a highly deferential standard of review. ***See Walck***, 942 A.2d at 205 n.5 (citation omitted). As noted above, in ***Gilbert*** our Supreme Court held that we must review almost all determinations that an activity is a normal agricultural operation *de novo*. ***See Gilbert***, 131 A.3d at 16–18. As such, notwithstanding the Commonwealth Court's decision in ***Walck***, the relevant factors indicate spreading FPW is a normal agricultural operation.

[11]Appellants argue that an agricultural operation cannot be normal if it is unlawful. ***See*** Appellants' Brief at 50–52. ***555** This argument fails for three reasons. First, the statutory definition of "normal agricultural operation," quoted above, does not incorporate therein a requirement that an activity be lawful to be considered a normal agricultural operation. More importantly, however, the General Assembly "is presumed not to intend any statutory language to exist as mere surplusage and, accordingly, courts must construe a statute so as to give effect to every word." ***Commonwealth v. Walls***, 144 A.3d 926, 934 (Pa. Super. 2016), *appeal denied*, 470 EAL 2016 (Pa. Feb. 23, 2017) (citation omitted). In this case, reading a lawfulness requirement into the third requirement of section 954(a), *i.e.*, the normal agricultural operation requirement, would make the first requirement, *i.e.*, the lawfulness requirement, surplusage. As such, we cannot construe section 954(a) in the manner proposed by Appellants while giving effect to every word. Finally, as noted above, we conclude that Farmers' spreading of FPW was lawful, even if intermittently out of compliance with federal, state, or local laws.

Appellants also argue that, even if spreading FPW is a normal agricultural operation, storing it in a tank is not. This argument is without merit. As noted above, our General Assembly specifically considered the storage of FPW when passing section 6018.103. That section provides that storage of FPW constitutes a normal farming operation. For the reasons stated above, we ascertain no reason why storage of FPW should not be considered a normal agricultural operation when the definition of "normal agricultural operation" is broader than the definition of "normal farming operation."

[12]We therefore hold that spreading FPW on farmland to provide nutrients for the soil is a normal agricultural operation. Moreover, storage of FPW is also a normal agricultural operation. As Farmers spread FPW to provide nutrients for the soil, their activities constituted normal agricultural operations. Accordingly, the third requirement of RTFA's statute of repose is satisfied.

In their final issue, Appellants argue that Farmers failed to satisfy the second requirement of section 954(a) because construction of the storage tank constituted a substantial change in the physical facilities of the agricultural operation. Farmers contend that this argument is without merit for three reasons. First, Farmers argue that even assuming *arguendo* that construction of the storage tank constituted a substantial change in the physical facilities of the agricultural operation, the statute of repose still bars the instant action because the storage tank was constructed in April 2012—more than one year prior to the filing of the instant complaint. Second, Farmers argue that even assuming *arguendo* that construction of the storage tank constituted a substantial change in the physical facilities of the agricultural operation less than one year prior to the commencement of the action, their spreading of FPW was covered by a nutrient management

plan. Finally, Farmers argue that construction of the storage tank was not a substantial change in the physical facilities of the agricultural operation.

We begin with Farmers' argument that the storage tank became operational in April 2012—more than one year prior to the filing of the instant complaint. In their second amended complaint, Appellants averred that:

> In approximately April of 2012, the [2,400,000] gallon storage tank was constructed on property owned and/or controlled by [Bowes Farm] and/or Camerer Farm[ ].
>
> Since the storage tank was erected, [JAB, Nicholas, and Bowes Farm] have ***556** transported and dumped, and/or participated in the transportation and dumping of the residual waste into the [2,400,000] gallon tank in such a manner that frequently releases offensive odors that have impaired and continue to impair [Appellants'] use and enjoyment of property and quality of life.

Appellants' Second Amended Complaint, 11/15/13, at 10 (paragraph number omitted). Appellants consistently repeated some form of this averment throughout their second amended complaint. ***See id.*** at 21 ("Upon reasonable belief, from approximately April of 2012 to the present, on a near daily basis, [JAB, Bowes Farm, and/or Nicholas] have transported and dumped, caused to be transported and dumped, and/or directed the transportation and dumping of large quantities of residual waste from [Nicholas] into the [2,400,000] gallon storage tank[.]"); ***id.*** at 23 (same allegation as to Nicholas, Bowes Farm, and Camerer Farm); ***id.*** at 24 ("The vast amount of waste stored in the tank and frequent offensive and noxious odors and other emissions from the aforementioned waste storage activities of [Nicholas, Bowes Farm, and Camerer Farm] occurring from approximately April of 2012 to the present"); ***id.*** at 30; ***id.*** at 31; ***id.*** at 37; ***id.*** at 39; ***id.*** at 39–40; ***id.*** at 45; ***id.*** at 46–47; ***id.*** at 52–53; ***id.*** at 54; ***id.*** at 55; ***id.*** at 60–61; ***id.*** at 62; ***id.*** at 67–68; ***id.*** at 69; ***id.*** at 70; ***id.*** at 75–76; ***id.*** at 77; ***id.*** at 82–83; ***id.*** at 84; ***id.*** at 90–91; ***id.*** at 92; ***id.*** at 97–98; ***id.*** at 99; ***id.*** at 100; ***id.*** at 105–106; ***id.*** at 107; ***id.*** at 112–113; ***id.*** at 114–115; ***id.*** at 115; ***id.*** at 121; ***id.*** at 122; ***id.*** at 128; ***id.*** at 130; ***id.*** at 131; ***id.*** at 136; ***id.*** at 137; ***id.*** at 143; ***id.*** at 145; ***id.*** at 145–146; ***id.*** at 151; ***id.*** at 152; ***id.*** at 158; ***id.*** at 160; ***id.*** at 160–161; ***id.*** at 166; ***id.*** at 167; ***id.*** at 173; ***id.*** at 175; ***id.*** at 175–176; ***id.*** at 181; ***id.*** at 182; ***id.*** at 188; ***id.*** at 190; ***id.*** at 191; ***id.*** at 196; ***id.*** at 197–198; ***id.*** at 203–204; ***id.*** at 205; ***id.*** at 206; ***id.*** at 212; ***id.*** at 213; ***id.*** at 219; ***id.*** at 221; ***id.*** at 221–222; ***id.*** at 227; ***id.*** at 228; ***id.*** at 234; ***id.*** at 236; ***id.*** at 236–237; ***id.*** at 242; ***id.*** at 243; ***id.*** at 249; ***id.*** at 251; ***id.*** at 251–252; ***id.*** at 257; ***id.*** at 258; ***id.*** at 264; ***id.*** at 266; ***id.*** at 266–267; ***id.*** at 272; ***id.*** at 273; ***id.*** at 279; ***id.*** at 281; ***id.*** at 281–282; ***id.*** at 287; ***id.*** at 288.

Farmers, in their motion for summary judgment, argued that the storage tank became operational in April 2012. Farmers' Motion for Summary Judgment, 12/18/15, at 13. In support thereof, Farmers cited to paragraph 46 of Appellants' second amended complaint. Farmers made this same argument in their brief in support of their summary judgment motion. Farmers' Brief in Support of Motion for Summary Judgment, 12/18/15, at 17.

In their brief in opposition to Farmers' summary judgment motion, Appellants asserted for the first time that the tank was not operational until at least July 13, 2012, less than one year prior to the filing of the instant complaint. ***See*** Appellants' Brief in Opposition to Motion for Summary Judgment, 1/19/16, at 20. In support of this argument, Appellants cited to the deposition testimony of Brett Bowes, the proprietor of Bowes Farm. ***See id.*** *citing* ***id.*** at Exhibit 14.

[13] [14]Although not phrased as such before either the trial court or this Court, Farmers essentially argue that Appellants were barred from offering Brett Bowes' deposition testimony to disprove the averments made in their second amended complaint which serve as judicial admissions. In 1853, our Supreme Court first applied this principle under Pennsylvania common law. Specifically, our Supreme Court stated that, "When a man alleges a fact in a court of justice, for his advantage, he shall not be allowed to contradict it afterwards. ***557** It is against good morals to permit such double dealing in the administration of justice." ***Willis v. Kane***, 2 Grant 60, 63 (Pa. 1853).

[15]Our review of ***Willis*** and its progeny[17] elucidates the following requirements for an averment to be a judicial admission. First, the averment must be made in a verified pleading, stipulation, or similar document. Second, the averment must be made in the same case in which the opposing party seeks to rely upon it. In other words, an averment made in a pleading in an unrelated cause is not a judicial admission that precludes a party from contradicting that averment.[18] Third, the averment must relate to a fact and not a legal conclusion. Fourth, the averment must be advantageous to the party who made it. Finally, the fact must be plausible.

In this case, the first three requirements are easily satisfied. Appellants' second amended complaint was verified by Appellants. The averments were made in the instant action, not another unrelated action. Third, whether the storage tank became operational in April 2012 is a factual, not legal, question. Thus, we focus our attention on the final two requirements to determine whether the averments made in Appellants' second

amended complaint were judicial admissions which bind Appellants.

As to the fourth requirement, that the averments in Appellants' second amended complaint be advantageous to them, we find ***DeMuth v. Miller***, 438 Pa.Super. 437, 652 A.2d 891 (1995), *appeal denied*, 542 Pa. 634, 665 A.2d 469 (1995), most analogous to the case *sub judice*. In ***DeMuth***, the plaintiff averred in his verified complaint that, "[t]he [e]mployment [a]greement between the parties was not renewed or extended at its expiration on 31 May 1990." ***Id.*** at 894 (citation omitted; emphasis removed). At trial, the plaintiff attempted to prove that the parties had an employment contract past May 31, 1990. The defendant objected, arguing that the plaintiff was barred from arguing that an employment contract existed between the parties because he judicially admitted in his verified complaint that no such contract existed. This Court rejected that argument and held that the verified averment in the plaintiff's complaint was not a judicial admission. ***See id.*** at 894–895. In reaching that conclusion, this Court held that it was improper to look at the averment made in the plaintiff's complaint in a vacuum. Instead, this Court held that the averment must be "viewed in the context of the remaining allegations and damages sought to be recouped." ***Id.*** at 894. Viewing the pleading as a whole, this Court stated that:

> [W]e fail to discern how it would be beneficial to the plaintiff to treat as an admission the expiration of the contract ***558** containing verbiage entitling him to dismiss the defendant for cause and seeking compensation for violation of the non-competition clause. Accordingly, given the non-beneficial aspects flowing from labelling [p]aragraph 5 as an admission (so as to preclude the plaintiff from offering evidence of the defendant's conduct as violative of a contract), we hold that [p]aragraph 5 does not rise to the level of a judicial admission.

Id. at 895 (citation omitted).

The factual averment that the storage tank became operational in April 2012 was not advantageous for Appellants. Although the emission of malodors from the storage tank was advantageous for Appellants, the averment that the storage tank became operational in April 2012 was not advantageous for Appellants. April 2012 was more than one year prior to the filing of the instant action and therefore that averment, if proven, would have meant that Appellants' claims were previously extinguished. This is similar to ***DeMuth*** where, if there were no employment contract between the parties, the plaintiff would not have been able to recover for a violation of the non-competition clause included therein. Thus, Appellants' averment that the storage tank became operational in April 2012 was not a judicial admission because it failed to satisfy the fourth prong of the test for an averment to be a judicial admission.

The only competent evidence presented to the trial court proved that the storage tank did not become operational until at least July 13, 2012, *i.e.*, less than one year prior to the filing of the instant complaint. Bowes Farm received a permit to construct the storage tank in April 2012. Appellants' Brief in Opposition to Motion for Summary Judgment, 1/19/16, at Exhibit 18. Brett Bowes testified that the storage tank, constructed on his farm, took three to four months to build after receiving the permit in April 2012. ***See id.*** at Exhibit 14. Thus, the only reasonable inference from Bowes' testimony was that the storage tank became operational, at the very earliest, in July 2012, *i.e.*, less than one year prior to commencement of the instant action. Farmers did not cite any evidence which contradicted Bowes' deposition testimony either in their brief in support of their summary judgment motion or in their brief before this Court. Thus, we conclude that the storage tank was not operational for at least one year prior to the filing of Appellants' complaint. Accordingly, Farmers failed to satisfy this option of the second requirement of section 954(a).

[16]Next, we address Farmers' argument that the storage of FPW is covered by a nutrient management plan. In order to satisfy the second requirement of section 954(a) via the nutrient management plan option, the expanded or altered physical facilities must be addressed in a nutrient management plan approved prior to the expanded or altered physical facilities becoming operational. In other words, it is insufficient, for purposes of this option of the second requirement, for the original physical facilities to be included in a nutrient management plan approved prior to the expanded or altered physical facilities becoming operational.

After a careful review of the certified record and section 954(a), we conclude that storage of FPW in the 2,400,000 gallon tank on Bowes Farm was not addressed in a nutrient management plan adopted prior to the storage tank becoming operational. Farmers attached the relevant nutrient management plans and modifications thereto to their motion for summary judgment. ***See*** Farmers' Motion for Summary Judgment, 12/18/15, at Exhibit AA. The only storage tanks mentioned in any of the nutrient management plans are the two ***559** storage tanks located on Nicholas' property. ***See id.*** (Nicholas "produces 40,000 gallons of [FPW per day] that is stored in two round concrete storages that measure 16 [feet] by 86 [feet] and 12 [feet by] 50 [feet] holding a total of

1,045,000 gallons."; Listing storage capacity of one tank as 175,000 gallons and capacity of other tank as 870,000 gallons.). There is no mention of the 2,400,000 gallon storage tank located on Bowes Farm. Thus, although the nutrient management plan covered the storage of FPW on Nicholas' property, and the spreading of FPW on the Bowes and Camerer Farms, it did not cover storage of FPW in the 2,400,000 gallon storage tank on Bowes Farm. As such, Farmers failed to satisfy this option for the second requirement of section 954(a).

[17]Finally, Farmers argue the storage tank was not a substantial change in the agricultural operation. Preliminarily, we must address two issues of statutory interpretation as it relates to this option for satisfying the second requirement of section 954(a). As noted above, in order to satisfy the second requirement of section 954(a), (a) the conditions or circumstances that are the basis for the complaint must have existed substantially unchanged since the established date of operation or (b) if physical facilities have been substantially expanded or altered such facilities must have (i) operated for at least one year prior to the filing of the complaint or (ii) been addressed in a nutrient management plan approved prior to the commencement of such expanded or altered operation. ***See*** 3 P.S. § 954(a). Farmers appear to argue that the condition or circumstance that is the basis for the complaint is the spreading of FPW on the Bowes and Camerer Farms. Farmers also aver that the spreading of FPW on the Bowes and Camerer Farms has existed substantially unchanged since it began in 2011. Thus, according to Farmers, it is immaterial if there was a substantial change in the physical facility of the agricultural operation.

This argument fails. Specifically, under Farmers' proposed interpretation, an agricultural operation, such as storage, could substantially expand its physical facilities and still be protected by RTFA's statute of repose as long as the underlying operation, *e.g.*, spreading FPW, was not substantially changed. This would render the language in section 954(a) relating to substantially expanded or altered physical facilities surplusage. As noted above, when interpreting a statute we presume the General Assembly did not intend superfluous language. ***See Walls,*** 144 A.3d at 934 (citation omitted). The clear implication of the General Assembly's inclusion of the language regarding substantially expanded or altered physical facilities is that substantially altered or expanded physical facilities *ipso facto* are a substantial change in the conditions or circumstances complained of so long as those substantially changed or altered physical facilities are related to the harm that is the subject of a complaint. In this case, the harm complained of encompasses malodors resulting from storage of FPW in the storage tank. Therefore, if the storage tank was a substantial expansion or alteration of the physical facilities, Appellants' action is not barred by RTFA's statute of repose.

[18]No appellate court in this Commonwealth has ever decided whether the expansion or alteration of a facility was substantial under RTFA.[19] Black's Law ***560** Dictionary states that "substantial" is a synonym for "material." ***See*** *Black's Law Dictionary* 1280 (5th ed. 1979). Black's defines "material" as "[i]mportant." ***Id.*** *at* 880. We believe that this definition is appropriate for section 954(a). Specifically, this requirement under section 954(a) is meant to ensure that an agricultural operation not go from a tiny operation with little impact on neighbors to a massive operation greatly effecting the lives of neighbors without providing those neighbors with an opportunity to file a private nuisance action. In other words, RTFA is meant to protect the status quo of an agricultural operation along with minor expansion or alteration consistent with technological advancements. It is not meant to protect agricultural operations that undergo major changes which impact the lives of neighbors. Therefore, if the physical facilities of an agricultural operation undergo an important expansion or alteration, and that important expansion or alteration impacts the underlying condition or circumstance complained of, RTFA does not bar the action so long as the complaint is filed within one year of the date the substantially altered or expanded physical facility becomes operational.

Turning to the storage tank at issue in this case, the evidence presented indicates that the construction of the storage tank was a substantial change in the physical facilities ***561** of the agricultural operation. As noted above, the evidence before the trial court was that the storage tank is capable of holding 2,400,000 gallons of FPW. To give some idea of how much that is, it would take a box approximately 68.5 feet long, 68.5 feet wide, and 68.5 feet high in order to hold 2,400,000 gallons of FPW. Visualized another way, 2,400,000 gallons would cover a football field (including endzones) with over five and one-half feet of FPW.

The size of the storage tank is not the only indicator of how substantial of an expansion the storage tank was to the physical facilities of the agricultural operation. Prior to April 2012, Bowes Farm lacked any storage facility for FPW. Thus, this was not a location that stored hundreds or even tens of millions of gallons of FPW that added a relatively small 2,400,000 gallon storage tank. Instead, this was a situation in which Bowes Farm went from

storing no FPW to an FPW storage capacity of 2,400,000 gallons.

As noted above, it took three to four months for construction of the storage tank. In other words, this was not a small construction job in which the tank was built in a few hours, days, or even weeks. Farmers attached to their summary judgment motion an exhibit in which Nicholas' proprietor stated that the storage tank cost $300,000.00 to construct. ***See*** Farmers' Motion for Summary Judgment, 12/18/15, at Exhibit B. All of these factors lead us to hold that the construction of the storage tank on the Bowes Farm was a substantial expansion to the physical facilities of the agricultural operation. As noted above, the expanded physical facility did not become operational until at least July 2012, *i.e.*, less than one year prior to the filing of Appellants' complaint. Therefore, Farmers failed to satisfy the second requirement of section 954(a) as it relates to the storage of FPW in the 2,400,000 gallon tank located on Bowes Farm.

Our conclusion that the construction of the storage tank on Bowes Farm was a substantial change in the physical facilities of the agricultural operation, and thus a substantial change in the conditions or circumstances complained of in Appellants' second amended complaint, however, does not mean that Appellants may continue prosecuting their complaint as it relates to the spreading of FPW. To the contrary, the storage of FPW is separate and distinct from the spreading of FPW. This is evidenced by the fact that FPW was spread on the Bowes and Camerer Farms for approximately 18 months without any storage located on Bowes Farm and/or Camerer Farm. Moreover, section 6018.103, states that normal farming operations include the use **or** storage of FPW. 35 P.S. § 6018.103. The use of the disjunctive "or" in the definition clearly indicates that storage of FPW, without regard to use, is a normal agricultural operation. Similarly, use of FPW, without regard to storage, is also a normal agricultural operation. In this case, Appellants separated the claims regarding storage of FPW from the claims regarding the spreading of FPW.

This separation of the claims relating to spreading and storage of FPW is consistent with the plain language of section 954(a). It is also consistent with other tools of statutory interpretation. Finally, it is consistent with the overall purpose of RTFA. Permitting Appellants to proceed with their claims relating to the spreading of FPW, when the statute of repose previously extinguished such claims, would have a chilling effect on farmers in this Commonwealth. Specifically, farmers would be discouraged from expanding their operations if they lost all RTFA protections because of one substantial change in the physical facilities of the farm. By separating the claims, we not only uphold the viable elements of Appellants' complaint, but also uphold the plain language and spirit of RTFA.

[19]In sum, we hold that a violation of a federal, state, or local law does not *ipso facto* render an agricultural operation unlawful. In other words, a lawful use is not rendered unlawful simply because an owner may have been cited for an infraction for noncompliance in connection with the use.[20] Instead, we hold that an agricultural operation is lawful if it substantially complies with relevant federal, state, and local laws. In this case, Farmers lawfully spread FPW for at least one year prior to the filing of Appellants' complaint. We also hold that spreading FPW on farmland to provide nutrients for the soil, and storage of FPW in tanks, constitute normal agricultural operations. Finally, we conclude that construction of the 2,400,000 gallon storage tank constituted a substantial change in the physical facilities of the agricultural operation less than one year prior to commencement of this litigation. Thus, we conclude that Farmers satisfied all three requirements of section 954(a), RTFA's one-year statute of repose, as it relates to the spreading of FPW; however, Farmers failed to satisfy the second requirement of section 954(a) with respect to the storage of FPW in the 2,400,000 gallon tank located on Bowes Farm. Accordingly, we affirm the judgment entered with respect to the claims arising from the spreading of FPW and vacate the judgment entered with respect to the claims arising from the storage of FPW in the 2,400,000 gallon storage tank located on Bowes Farm. We remand this case to the trial court for further proceedings consistent with this opinion including ruling, in the first instance, on the portion of Farmers' summary judgment motion arguing ***562** that Appellants' nuisance claim fails as a matter of law.[21]

Judgment affirmed in part and vacated in part. Case remanded. Jurisdiction relinquished.

All Citations

159 A.3d 540, 2017 PA Super 88

Footnotes

1 JAB's involvement in the legal issues we address herein is minimal. It is only responsible for transporting food processing waste.

2 FPW is defined as:

> Residual materials in liquid and solid form generated in the slaughtering of poultry and livestock, or in processing and converting fish, seafood, milk, meat[,] and eggs to food products. The term includes residual materials generated in the processing, converting[,] or manufacturing of fruits, vegetables, crops[,] and other commodities into marketable food items. The term also includes vegetative residuals from food processing activities that are usually recognizable as part of a plant or vegetable, including cabbage leaves, bean snips, onion skins, apple pomace[,] and grape pomace.

25 Pa. Code § 287.1.

3 All of the NOV's issued by DEP were the result of complaint inspections. In other words, the only reason DEP investigated Farmers was because a subset of Appellants complained to DEP. As discussed more fully ***infra***, the reasons for DEP's site visits to Farmers' facilities explains, in part, why we conclude that Appellants' construction of the term "lawfully" in 3 P.S. § 954(a) violates several principals of statutory construction.

4 A nutrient management plan is defined, in relevant part, as "[a] written site-specific plan which incorporates best management practices to manage the use of plant nutrients for crop production and water quality protection[.]" 3 P.S. § 503.

5 Appellants later withdrew the negligence portion of their complaint.

6 JAB filed a separate motion which joined in Farmers' motion for summary judgment.

7 On April 5, 2016, the trial court ordered Appellants to file a concise statement of errors complained of on appeal ("concise statement"). ***See*** Pa.R.A.P. 1925(b). On April 26, 2016, Appellants filed their concise statement. On May 11, 2016, the trial court issued an order which stated that the reasons it granted summary judgment appeared as of record in its March 4, 2016 opinion. ***See*** Pa.R.A.P. 1925(a). All issues raised on appeal were included in Appellants' concise statement.

8 As this Court has explained:

> A statute of repose, as opposed to a statute of limitations, is a statute barring any suit that is brought after a specified time since the defendant acted even if this period ends before the plaintiff has suffered a resulting injury. Another distinguishing characteristic is the corresponding legal effect of each statute. Statutes of limitations are a form of procedural law that bar recovery on an otherwise viable cause of action. Conversely, statutes of repose operate as substantive law by extinguishing a cause of action outright and precluding its revival.

Graver v. Foster Wheeler Corp., 96 A.3d 383, 386–387 (Pa. Super. 2014), *appeal denied*, 631 Pa. 738, 113 A.3d 280 (2015) (ellipsis, internal alteration, quotation marks, footnote, and paragraph break omitted); ***see also*** ***CTS Corp. v. Waldburger***, —— U.S. ——, 134 S.Ct. 2175, 2182–2184, 189 L.Ed.2d 62 (2014). Thus, "[w]hile a statute of limitations merely bars a party's right to a remedy, a statute of repose completely abolishes and eliminates a party's cause of action." ***Gilbert v. Synagro Cent., LLC***, 131 A.3d 1, 15 (Pa. 2015) (citation omitted).

9 In ***Gilbert***, our Supreme Court recited a simplified version of these requirements. ***See*** ***Gilbert***, 131 A.3d at 19 (citation omitted). This case, however, requires us to apply requirements that were not implicated in ***Gilbert.*** Therefore, we list all of the requirements set forth in section 954(a).

10 The thrust of Appellants' argument that fact finding precludes the entry of summary judgment on their claims is that various inquiries must be resolved before deciding whether certain activities or objects fall within the statutory definitions drawn by section 954(a) of the RTFA. Such inquiries, as our Supreme Court held and as we shall explain, involve application of statutory definitions to record facts and, hence, constitute matters of statutory construction.

11 The Pennsylvania Farm Bureau, as *amicus curiae*, urges us to hold that this portion of section 954(a) refers to the farm itself and not the specific agricultural activity conducted on the farm. In ***Gilbert***, the parties briefed this issue; however, our Supreme Court declined to decide it. ***See*** ***Gilbert***, 131 A.3d at 15 n.17. As the parties have not fully briefed this issue and we conclude that, even assuming *arguendo* that the one-year time frame refers to the specific agricultural activity instead of the farm, Farmers operated lawfully for at least one year prior to the filing of Appellants' complaint, we decline to reach the issue raised by *amicus*. Nonetheless, we thank *amicus* for bringing to our attention other "relevant matter[s] not already brought to [our] attention by

the parties[.]" Pa.R.A.P. 531 note (citation omitted).

12 Black's is now in its tenth edition; however, we use the fifth edition because it was the most current version at the time RTFA became law in 1982.

13 Although DEP issued Farmers a total of five NOVs, twice DEP issued nearly identical NOVs to Nicholas and the farm on which FPW was spread. Thus, for all practical purposes, DEP cited Farmers on three separate occasions.

14 A simple illustration shows the distinction between "lawful" and "legal." If an individual who possess a valid driver's license is speeding, he is not legally operating the vehicle because he is driving over the posted speed limit. Nonetheless, he is lawfully operating the vehicle because he is licensed to do so.

15 We reject Farmers' argument that section 954(b) of the RTFA requires a causal connection between the harm that is the subject of Appellants' complaint and the unlawful agricultural operation. Section 954(b) merely states that section 954(a) does not apply to actions brought for violation of federal, state, or local laws. ***See Gilbert v. Synagro Cent., LLC***, 90 A.3d 37, 42 (Pa. Super. 2014), *rev'd in part on other grounds*, 131 A.3d 1 (Pa. 2015). Section 954(b) does not, as Farmers contend, broaden the scope of section 954(a).

16 In their reply brief, Appellants argue that, because they lived on their land prior to Farmers spreading FPW, the purpose of RTFA would be advanced by permitting this action to proceed. Appellants' Reply Brief at 35. This is the exact argument that this Court rejected in ***Horne***. ***Horne***, 728 A.2d at 957.

17 Specifically, we reviewed ***Linefsky v. Redevelopment Auth. of the City of Philadelphia***, 698 A.2d 128, 133 (Pa. Cmwlth. 1997) (citations omitted); ***Gross v. City of Pittsburgh***, 686 A.2d 864, 867 (Pa. Cmwlth. 1996); ***Riddle v. Pennsylvania Dep't of Transp.***, 136 Pa.Cmwlth. 508, 583 A.2d 865, 867 (1990) (citation omitted); ***Nasim v. Shamrock Welding Supply Co.***, 387 Pa.Super. 225, 563 A.2d 1266, 1267 (1989) (citation omitted); ***Rizzo v. Haines***, 520 Pa. 484, 555 A.2d 58, 69 (1989) (citations omitted); ***Jewelcor Jewelers & Distributors, Inc. v. Corr***, 373 Pa.Super. 536, 542 A.2d 72, 75 (1988); ***Silco Vending Co. v. Quinn***, 315 Pa.Super. 367, 461 A.2d 1324, 1326–1327 (1983); ***Dale Mfg. Co. v. Bressi***, 491 Pa. 493, 421 A.2d 653, 655 (1980) (citation omitted); and ***Tops Apparel Mfg. Co. v. Rothman***, 430 Pa. 583, 244 A.2d 436, 438 (1968) (citation omitted).

18 The party may still be barred from contradicting the averment because of some other judicial principle, *e.g.*, judicial estoppel. We focus our attention, however, on the concept of judicial admissions.

19 In ***Horne***, this Court acknowledged a question about whether the construction of a decomposition house was a substantial expansion or alteration of the physical facilities of the agricultural operation; however, this Court declined to decide the issue because even assuming *arguendo* that it was a substantial expansion or alteration, the decomposition house had been operational for at least one year prior to the filing of the complaint. ***Horne***, 728 A.2d at 957 n.1.

20 It is possible that a serious violation or continued noncompliance may lead to a finding that the operation is unlawful, but that is not the situation in this case.

21 In their summary judgment motion, Farmers argued that the utility of their activities outweigh any harm to Appellants. No party briefed or argued this issue before this Court. Moreover, the trial court did not address the issue in its opinion granting summary judgment. Although we could reach the issue because we may affirm the trial court's decision on any basis, ***Commonwealth v. Rosser***, 135 A.3d 1077, 1087 (Pa. Super. 2016) (*en banc*) (citation omitted), we exercise our discretion and remand this matter so that the trial court may rule on the issue in the first instance.

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2016 WL 1270378 (Pa.Com.Pl.) (Trial Order)
Court of Common Pleas of Pennsylvania.
Lycoming County

Kelly BRANTON, et al.,
v.
NICHOLAS MEAT, LLC, et al.

No. 13-01502.
March 4, 2016.

Summary Judgment

Peter Britton Bieri, Esq. Speer Law Firm, P. A., 104 W. 9th Street, Suite 400, Kansas City, MO 64105, for plaintiffs.

Edward Ciarimboli, Esq. & Clancy Boylan, Esq., Fellerman & Ciarimboli, 183 Market Street, Suite 200, Kingston, PA 18704, for plaintiffs.

John J. Haggerty, Esq. & James C. Clark, Esq., Nicholas Meat, LLC and Camerer Farms, Inc., Fox Rothschild LLP., 2700 Kelly Road, Suite 300, Warrington, PA 18976, for defendants.

Kristi A. Bucholz, Esq. Brett Bowes d/b/a/ Bowes Farm by Wilson Elser Moskowitz Edelman & Dicker LLP, 2 Commerce Square, Suite 3100, 2001 Market St., Philadelphia, PA 19103, for defendants.

J. David Smith, Esq., McCormick Law Firm, for Defendant, JAB Livestock, LLC April McDonald, CST (please remove all scheduled dates).

Richard A. Gray, Judge.

OPINION AND ORDER

***1** Before the Court are Defendants' motions for summary judgment based upon Pennsylvania's Right to Farm Act, 3 P.S. §§ 951-957. Upon review and consideration of the argument, motions, briefs, and the summary judgment record of evidence, the Defendants' motions for summary judgment are GRANTED. The Court provides the following in support of its decision.

FACTUAL BACKGROUND

This case arises from Defendants' farming activities, chiefly spreading food processing residual ("FPR"), broadly described as organic animal material, on Defendants' Camerer and Bowes fields in the Antes Forte area of Lycoming County. Neighboring land owners filed suit as a result of allegedly strong obnoxious odors emanating from the fields.[1]

The following facts are essentially undisputed. *See*, page 2 of Plaintiffs' brief. Defendants are family-owned farming businesses. Defendant Nicholas Meat, LLC, ("Nicholas Meat") owns and operates a slaughterhouse in Loganton,

Pennsylvania which generates FPR and temporarily stores FPR for transport. Five USDA inspectors check that the Nicholas Meat facility is properly run. Defendants collect the FPR and transport it eighteen miles, where it is either immediately spread on the Bowes and Camerer Farms in Jersey Shore, PA or stored in a 2.4 million gallon storage tank on the Bowes Farm. Spreading FPR on the farmland enriches the nutrient value of the soil and boosts crop production.

Defendants began spreading FPR on the farms in 2011 after consulting with the Pennsylvania Department of Environmental Protection (DEP) and developing a Nutrient Management Plan (NMP). The NMP involves a nutrient balance sheet and guides the total amount and scheduling of spreading the FPR. Defendants hired a specialist in nutrient management planning. Pursuant to the nutrient management plan, defendants are permitted to spread up to 9,000 gallons of organic wastewater per acre at one time. The specialist writes and develops NMPs and balance sheets for all of the spreading on the farms. The land application at the farms is overseen and regulated by DEP. Since 2011, DEP has visited the farms dozens of times and investigated plaintiffs' complaints. Failure to fully comply with the NMPs can result in DEP issuing a notice of violation (NOV) indicating that the conduct occurred without a permit and without adhering to the best management practices. Since 2011, DEP has issued NOVs to the defendants for three instances of specific conduct.[2] DEP never fined defendants. DEP never ordered defendants to cease operations.

***2** Bowes Farm includes about 156 acres that has been in the Bowes family for generations. The owner, Mr. Bowes, also owns Defendant JAB Trucking, which transports the FPR from Nicholas Meat to the Bowes and Camerer farms. Camerer farm is about 800 acres adjacent to Bowes. Since 1979, the Camerer farm has produced seed corn, commercial corn and soy. The owner of Camerer farms, Mr. Camerer, also farms about 200-300 acres on Bowes Farm. Since April 2012, Defendants have stored FDR in a 2.4 million gallon storage tank existing on Bowes Farm prior to land application. See Plaintiffs' Second Amended Complaint, ¶¶ 46, 51. Representatives from DEP have visited the farms and observed the generation, storage, transportation and spreading of the FPR on the farms.

Plaintiffs initiated this lawsuit on June 14, 2013. Plaintiffs complain that the offensive odors and emissions impair their ability to use and enjoy their property which is within the surrounding 2 miles of the farms.

DISCUSSION

Oral argument focused on the Supreme Court's recent decision in *Gilbert v. Synagro Cent., LLC*, 2015 Pa. LEXIS 2998, 41-42 (Pa. Dec. 21, 2015). Defendants claim this decision -which concluded that the application of waste to farms is a normal agricultural operation - is dispositive here. Plaintiffs claim that violations of statutes, rules and regulations, coupled with construction of a storage tank, factually distinguish this case from *Synagro*. This Court concludes that *Synagro* is controlling and Defendants' motions for summary judgment are granted and Plaintiffs' Complaint is dismissed.

This decision falls under Pennsylvania's Right to Farm Act. Section 951 of that Act sets for the legislative policy of the Commonwealth as follows.

It is the declared policy of the Commonwealth to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. When nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits and ordinances. As a result, agricultural operations are sometimes forced to cease operations. Many others are discouraged from making investments in farm improvements. It is the purpose of this act to reduce the loss to the Commonwealth of its agricultural resources by limiting the circumstances under which agricultural operations may be the subject matter of nuisance suits and ordinances. *Gilbert v. Synagro Cent.*, LLC, 2015 Pa. LEXIS 2998, 46-47 (Pa. Dec. 21, 2015), *quoting*, 3 P.S. § 951 (emphasis added).

Our Supreme Court sweepingly endorsed this policy in *Synagro*, *supra*. This policy is confirmed further by the title of the chapter, 14B, "PROTECTION OF AGRICULTURAL OPERATIONS FROM NUISANCE SUITS AND ORDINANCES." 3 P.S. Ch. 14B, §§ 951-957. *Synagro*, *supra*, *citing*, 3 P.S. Ch. 14B, §§ 951-957.

In furtherance of the expansive protections, 3 P.S. 954 creates a one year statue of repose which bars this suit because the record reflects the application of waste began in 2011 and the suit was filed in July 2013.

The Plaintiffs' argument that the farming operations were unlawful (and therefore beyond the scope of the Right to Farm Act) is without merit. First, the regulations, codes and statues allegedly violated are essentially enforced by governmental agencies, such as DEP, and yet DEP has taken no action to shut down the operation.[3] DEP has not fined Defendants. Instead, Defendants remedied the violations. Plaintiffs do not cite any cases in the Commonwealth in which a Court has ruled that the Right to Farm Act does not protect a family run farm because DEP issued NOVs or because instances of non-compliance with regulations, codes and/or statues rendered the farms unlawfully operated. Second, in *Synagro*, DEP issued NOVs very similar to the violations in the instant case and yet the farming operations at issue fell within the protections of the Right to Farm Act. The violations were deemed unrelated to any harm.[4]

***3** Similarly, Plaintiffs' argument that the addition of a storage tank on the Bowes Farm in April 2012 is a substantial change is likewise without merit. What is at issue is the application itself, which has been in existence since 2011.[5]

In short, dismissal is mandated by the public policy of the Commonwealth as set forth the by Legislature and sweepingly endorsed by the our Supreme Court *Synagro*.

Accordingly, the Court enters the following Order.

ORDER

AND NOW, this *4th* day of **March 2016** it is ORDERED and DIRECTED that summary judgment is GRANTED in favor of the Defendants. Plaintiffs' complaint is dismissed. This matter is removed from the trial list and from the Court's schedule. All matters that have been scheduled are cancelled.

March 4, 2016 Date

BY THE COURT,

_____

Richard A. Gray, J.

cc: Peter Britton Bieri, Esq. for Plaintiffs

SPEER LAW FIRM, P. A., 104 W. 9th Street, Suite 400, Kansas City, MO 64105 Edward Ciarimboli, Esq. & Clancy Boylan, Esq. for Plaintiffs

FELLERMAN & CIARIMBOLI, 183 Market Street, Suite 200, Kingston, PA 18704 John J. Haggerty, Esq. & James C. Clark, Esq. for Defendants Nicholas Meat, LLC and Camerer Farms, Inc.,

Fox ROTHSCHILD LLP., 2700 Kelly Road, Suite 300, Warrington, PA 18976 Kristi A. Bucholz, Esq. for Defendants, Brett Bowes d/b/a/ Bowes Farm by WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

2 Commerce Square, Suite 3100, 2001 Market St., Philadelphia, PA 19103 J. David Smith, Esq., McCormick Law Firm, for Defendant, JAB Livestock, LLC April McDonald, CST (please remove all scheduled dates)

Footnotes

1 On November 15, 2013, Plaintiffs filed their second amended complaint containing a separate count by each individual plaintiff against all defendants for two causes of action: temporary nuisance and failure to abate and negligence. In their brief, Plaintiffs have withdrawn the negligence claims.

2 Plaintiffs assert that five notices were issued. Two of the NOVs were directed to different defendants for the same conduct. As a result of a complaint made to DEP on March 4, 2011, DEP issued a notice of violation to William Camerer III of Camerer Farms dated March 17, 2011 and one to Gene Nicholas of Nicholas Meat dated March 18, 2011 upon determining that FPR from Nicholas Meet was being spread on the Camerer Farms between February 25 and February 27, 2011 without a NMS covering those fields at that time. As a result of a complaint made to DEP on April 2, 2013, DEP issued a notice of violation dated April 15, 2013 to Brett Bowes and one to Nicholas Meat essentially for the ponding and spreading of FPW within the required 150ft set back from a stream. As a result of a complaint made, on July 8, 2013 DEP issued a notice of violation for spreading FPR in fields that at the time did not have an NMS for spreading during summer months.

3 Five USDA inspectors check that the Nicholas Meat facility is properly run.

4 3 P. S. § 954(b) essentially provides that the Right to Farm Act does not defeat the right of any person to recover damages for harm caused by farming operations that violate statutes or regulations. However, that provision does not apply to injunctive relief and an action to recover such damages must establish a causal connection between the violation and harm. In the present case, Plaintiffs' only remaining counts are for nuisance and failure to abate, seeking an injunction and damages.

5 A substantial change in the farming activities which form the basis of the nuisance resets the one year statute of repose under the Right to Farm Act. The Court notes that the Plaintiffs Second Amended Complaint indicates that the use of the tank occurred in April 2012, which is more than one year prior to the filing of the instant litigation. See Plaintiffs' Second Amended Complaint, ¶¶ 46, 51. Furthermore, Defendants have stored FPW at Nicholas Meat since 2011.

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EXHIBIT B

---------- Forwarded message ---------
From: **Bill Rogers** <bill.rogers@aetagconsulting.com>
Date: Fri, Sep 10, 2021 at 2:26 PM
Subject: Bethel Church Road
To: Harry Weaver, MCP, BCO <hweaver@barryisett.com>
Cc: lzntrucking@gmail.com <lzntrucking@gmail.com>, Mark Hosterman (mhosterman@wispearl.com) <mhosterman@wispearl.com>, David Kraynik (dkraynik@eastcoventry-pa.gov) <dkraynik@eastcoventry-pa.gov>

Dear Mr. Weaver, Mr. Kraynik, & Mr. Hosterman;

Thank you again for taking time to meet this morning, I hope the discussion was helpful.

One item you requested was locations of other storages and farms that are also operated by LZN Trucking.

#1 - 1164 Pine Hill Road, Lititz, PA 17543 - Warwick Township, Lancaster County

#2 - 1177 Gypsy Hill Road, Lancaster, PA 17602 - West Lampeter Township, Lancaster County

#3 - 36 Krumstown Road, Myerstown, PA 17067 - Millcreek Township, Lebanon County

Sincerely,
Bill Rogers

--
Bill Rogers
AET Consulting, Inc.
PO Box 299
Lititz, PA 17543

Office: 717-625-2218
Mobile: 717-475-3583

EXHIBIT C

AET

Agricultural Consulting

July 14, 2021

East Coventry Township
855 Ellis Woods Road
Pottstown, PA 19465

RE: Future Construction of Manure/Waste Storage Structure by Spring City Acres, LLC

Dear East Coventry Township;

Enclosed are the engineered drawing and building permit application for the planned manure/waste storage structure that Spring City Acres, LLC plans to construct on their farm located at 851 Bethel Church Road, Spring City, PA 19475. This farm is located within the FR Zoning District. The planned structure will be used to store Manure and/or Food Processing Residual (FPR) that will be land applied on the fields owned by Spring City Acres, LLC within the township. This land application is a beneficial reuse of the stored materials as a replacement for the purchase of commercial fertilizer.

No structures will be removed from the property and no additional driveways will be added. The storage structure is a 'Zero' stormwater discharge structure, 100% of the rainfall that falls on the structure is contained within the structure with Zero stormwater discharge. For stormwater management, a freeboard requirement of 6" is included within the structure to contain stormwater. The stormwater management plan is to utilize the single non-structural BMP that is listed in the Stormwater Management Manual that allows for collection and reuse at a later time. This structure will collect the rainfall on the new impervious surface and land apply (reuse) it when weather conditions allow for field applications. Therefore, this structures stormwater management plan meets the requirements of the Manual.

If you have any questions or need any additional information, please contact me at 717-475-3583.

Sincerely,

William J. Rogers

BUILDING PERMIT APPLICATION

(3 COPIES OF APPLICATION & ATTACHMENTS ARE REQUIRED WITH ORIGINAL SIGNATURES)

Applicant's Name Nolt Trucking

Address: 1250 Lincoln Road
Lititz, PA 17543

Phone #: Home _____ Work 717-733-7226 Email LZNTRUCKING@gmail.com

Owner's Name Spring City Acres, LLC

Address: 851 Bethel Church Road
Spring City, PA 19475

Phone #: Home _____ Work 717-371-1463 Email _____

Job Site Location 851 Bethel Church Road, Spring City, PA 19475

Subdivision Name None Lot # None

Lot Size None

Office Use Only
Impervious Percentage Used _____

Type of Improvement (Check one or all that apply)

New Building	☐	Addition	☐	Alteration	☐
Wrecking	☐	Renovation	☐	Other	☒

If other is checked above, then describe the type if improvement:

Manure/Waste Storage Tank

Proposed Use (Residential) (Not Applicable)

One Family	☐	Two Family	☐	Other	☐
Garage	☐	Hotel/Motel	☐		

If other is checked above, then describe the type if improvement:

Proposed Use (Non-Residential)

Amusement	☐	Church	☐	Industrial	☐	Parking	☐
Utility	☐	Hospital	☐	Office	☐	Store	☐
Other	☒	If other, then describe the type of improvement:				Agricultural Use	

for the storage of Manure and/or Food Processing Residual

Describe in detail the proposed use of the building, (such as food processing, machine shop, parking garage, laundry building, etc...) If the use of the existing building is being changed from the current use, describe the new use. All applications must be accompanied by 3 sets of application and complete construction documents. All commercial projects require an engineered design, signed, and sealed by the design professional.

Cost of Improvement

Building _____

Electrical _____

Plumbing _____

Heating/Air _____

Other _____

TOTAL COST $_____

Principal Type of Construction

Masonry (Wall Bearing) ☐

Wood Frame ☐

Steel Structure ☐

Reinforced Concrete ☒

Type of Sewage Disposal

Community System ☐ None

Private (on-lot) System ☐
(include CCHD permit)

Type of Water Supply

Community System ☐ None

Private (Well) ☐
(include CCHD permit)

Dimensions (Residential) NA

Sq. Ft. of Basement _____

Sq. Ft. of 1st Floor _____

Sq. Ft. of 2nd Floor _____

Sq. Ft. of Garage _____

Size of Building

Number of Stories In Ground

Width 120' Diameter

Length _____

Height 16' deep

Principal Type of Heating NA

Gas ☐ Oil ☐ Electric ☐ Other (Describe) _____

Central Air Conditioning Yes ☐ No ☐ NA

Facilities NA

Number of Bedrooms _____

Number of Bathrooms _____

Number of Off-Street Parking Spaces NA

Enclosed _____ Outdoor _____

Contractor's Information unknown at this time

Name _____ Phone # _____

Address _____

_____

Contact Person _____

Architect/Engineer

Name Ben Postles Phone # 814-932-3081

Address 206 Saylor Farm Lane
Williamsburg, PA 16693

Contact Person Ben Postles

Authorization to Access Property

I hereby certify that I am the owner of record of the named property, or that the proposed work is authorized by the owner of record and that I have been authorized by the owner to make this application as his authorized agent. I hereby attest to the information on this application to be accurate and true to the best of my ability. I agree to conform to all applicable laws of East Coventry Township and certify that the code official or the code official's authorized representative shall have the authority to enter areas covered by such permit at any reasonable hour to enforce the provision of the code(s) applicable of such permit.

_____ _____

Signature **Date**

Nathaniel Nolt

_____

Print Name

WORKERS' COMPENSATION INSURANCE INFORMATION

A. Is the applicant a contractor within the Pennsylvania Workers' Compensation Law?

_____ Yes _____ No

If the answer is 'yes', complete Sections B, C, and D below, as appropriate.

B. Insurance information

Name of Applicant _____

Federal or State Employer Identification No. _____

Applicant is a qualified self-insurer for workers' compensation.
_____ Check if Certificate is attached

Name of Workers' Compensation Insurer _____

Workers' Compensation Insurance Policy No. _____
_____ Check if Certificate is attached

Policy Expiration Date _____

C. Is the applicant using any subcontractors on this project?

_____ Yes _____ No

If the answer is 'yes', the applicant hereby certifies that any and all subcontractors have presented proof to the applicant of insurance under the Pennsylvania Workers' Compensation Act.

D. Exemption

Complete Section D if the applicant is a contractor claiming exemption from providing workers' compensation insurance.

The undersigned swears or affirms that he/she is not required to provide workers' compensation insurance under the provisions of the Pennsylvania Workers' Compensation Law for one of the following reasons, as indicated:

____ Contractor with no employees. Contractor is prohibited by law from employing any individual to perform work pursuant to this building permit unless contractor provides proof of insurance to the Township.

____ Religious Exemption under the Workers' Compensation Law.

Subscribed and sworn to before me this
_____ day of _____, 20___

_____
Signature of Notary Public

My Commission expires: _____

Signature required for all applicants

Signature of applicant _____
Address _____
_____
County of _____
Municipality of _____

Lloyd Z. Nolt Trucking
Spring City Acres, LLC Farm

AET
Agricultural Consulting

Lloyd Z. Nolt Trucking
Spring City Acres, LLC Farm

AET
Agricultural Consulting

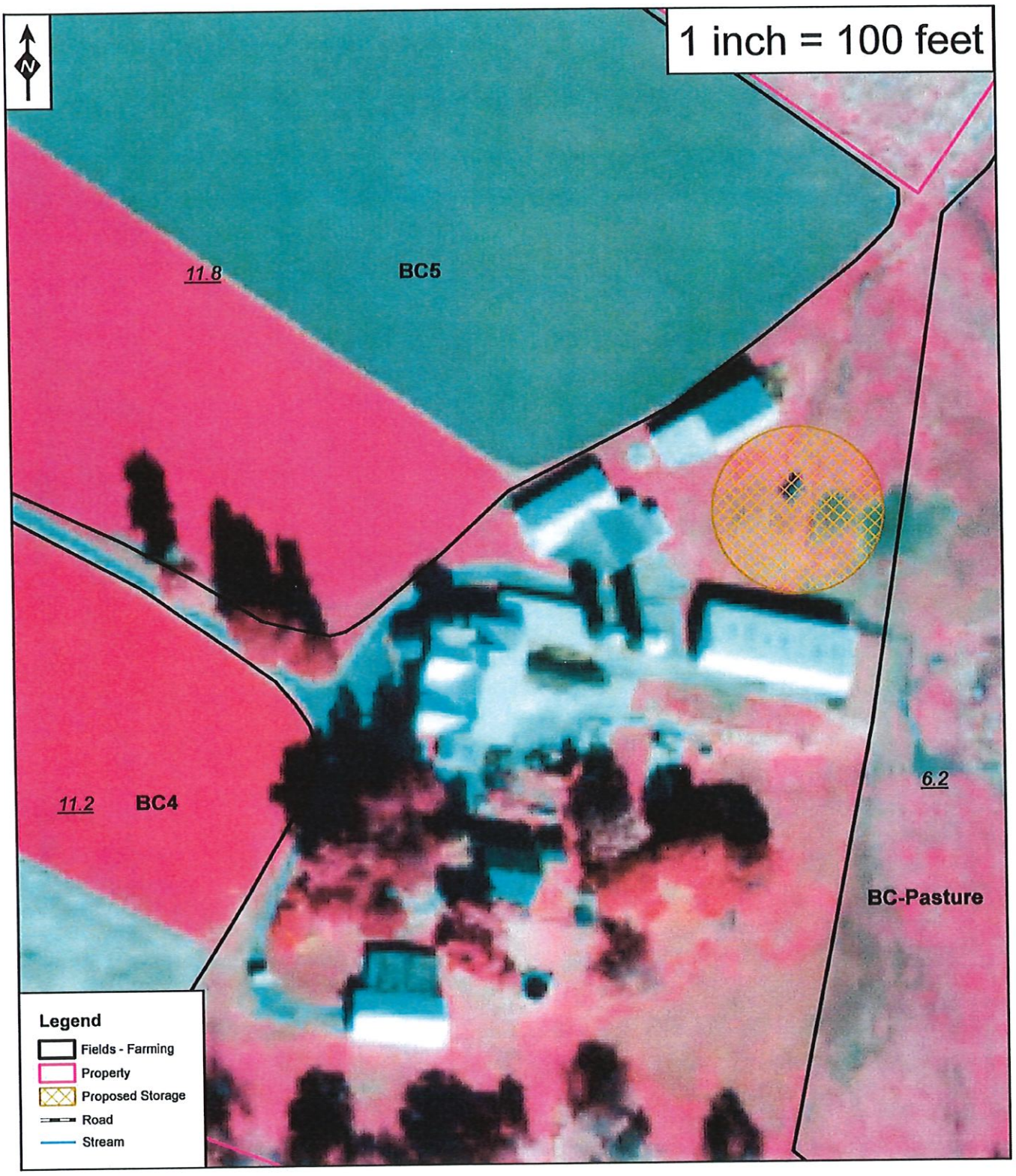

EXHIBIT D

Agricultural Consulting

September 11, 2021
East Coventry Township
Attn: Harry Weaver
855 Ellis Woods Road
Pottstown, PA 19465

RE: Proposed Manure/FPR Waste Storage Tank – 851 Bethel Church Road

Dear Mr. Weaver;

In response to the questions you asked in your latest email regarding the construction of this storage I am providing the following responses along with the attached material.

This farm historically raised animals that produced manure. From what I can tell most recently that has been beef manure produced in a solid form (bedded pack) that would be cleaned from the animal stalls and land applied to the adjacent agricultural land as a fertilizer source. Additional commercial fertilizer was also applied since there was not enough manure to meet the nutrient needs of the crops. This adjacent land was used to produce both feed for the animals and other commodities that were sold off of the farm (corn, soybean, hay).

The future plan is to continue to produce commodities to be sold off the farm but not to raise a substantial number of animals (there may be a few on the farm to harvest the grass within the pasture). The planned fertilizer source for the farm will be the imported Food Processing Residual Waste (FPR or FPW). This will be land applied, similar to the manure in the past, in the fall and spring. There are times during the year (snow covered, frozen, too wet, crops in the fields) that it is not feasible or recommended to be land applying the FPR. That is why a storage has been planned, to store the FPR until it is optimal for land application on the fields. In the past, the manure was stored within the animal housing units or stacked in the barnyard. With a liquid fertilizer source that is no longer feasible so an engineered storage is planned.

The majority of the FPR that is imported and stored will be utilized at 851 Bethel Church Road. However, Spring City Acres, LLC owns an additional 25 acres located at 970 Ebelhare Road that they also plan to utilize the FPR as the fertilizer source for the planned crops on those acres.

The primary use of these two tracts of land will be the continued production of agricultural commodities using the FPR as the fertilizer source to produce those crops. In the past the fertilizer source has been animal manures or commercial fertilizer.

Within the *Solid Waste Management Act* (Act of July 7, 1980 P.L. 380, No.97) there is a definition for 'normal farming operations' that states "..... It includes the storage and utilization of agricultural and food processing wastes.... It includes the management, collection, storage, transportation, use or disposal of manure, other agricultural waste and food processing waste, screenings and sludges on land where such materials will improve the condition of the soil, the growth of crops, or in the restoration of the land for the same purposes." I believe the planned storage that we have proposed and the land application of the FPR on the adjacent farm ground as the principal fertilizer source to produce crops falls within this definition such that what has been proposed will be a normal farming operation.

I have attached a two-page document that briefly describes the land application system plan that Lloyd Z Nolt Trucking utilizes within their operation, a copy of DEPs regulations for the permitting requirements for the land application of FPR (287.101 b 2), a copy of the Food Processing Residual Management Manual (the entire manual is available on DEP's web site), and two pages of language from the Solid Waste Management Act.

If you have any additional questions please feel free to contact me at 717-475-3583.

Sincerely,

William J. Rogers
AET Consulting, Inc.

Land Application System Plan

Farm Site Selection:

Lloyd Z Nolt Trucking (Nolt) hires a consulting company to develop site maps for each farm that is utilized for the land application of Food Processing Residual Waste (FPR). They utilize the siting requirements listed in Chapter 8 of the Food Processing Management Manual to provide Nolt a map of the areas within a field that are suitable for the land application of FPR. They are including the suitability of the soil along with the setback requirements listed in table 8.11.

Material Analysis:

Nolt collects a sample annually from each FPR that is land applied on their farms. The main utilization of the FPR is as a fertilizer replacement; therefore, the analysis are completed for agronomic nutrient analysis. These results are utilized to determine application rates.

Material Selection:

Prior to starting to land apply any FPR Nolt collects a sample of the FPR and has it analyzed for nutrient analysis to make sure there is some beneficial use for land application of the FPR. A meeting is completed with the generator of the FPR so that Nolt can have an understanding of the material that is land applied. Once major question at this meeting is to make sure there is no human or septage waste included in the waste stream they are classifying as FPR. If there is any human or septage waste Nolt cannot land apply this material as a FPR. Secondly, we determine the treatment level completed at the producers operation. Many of the FPRs that are land applied are the by-products of a treatment operation such that the plant has completed treatment of the waste products. Lastly, an evaluation of the odor and potential fly and rodent attraction is completed personally by Nolt. There is nothing scientific about this evaluation, through many years of experience Nolt can determine if a material is going to have an odor that is offensive or attract flies or rodents. Materials need to have a low to medium odor and low attraction of flies or rodents to be included in the land application system. This is not to say that at times an individual load or group of loads might have an elevated odor due to issues at the producer's plant.

Land Application Procedures:

The FPRs are land applied utilizing standard tankers or other self-driven land application equipment. Whenever possible, FPR materials are injected into the soil to reduce potential for runoff and to reduce odor. At times, materials are land applied on the surface with no incorporation. Since the main goal is to utilize the FPR for fertilizer replacement and the goal is to produce the most crop as possible, soil compaction is always a concern during land application events. Therefore, when fields are not fit for land application and soils will be hurt, FPR materials are stored in DEP approved storage tanks. These tanks are utilized and then when fields are fit for land application they are emptied and land applied. To assist with odor reduction each storage tank is fitted with a fill tube that allows for FPR materials to be pumped into the storages under the liquid level so that the storage is not mixed when it is not necessary to mix.

Record Keeping:

During the land application procedure records are maintained on each load of FPR that is applied to a field. These records are maintained on a monthly basis for a given field. Each load is equal to 5,000 gallons of FPR land applied.

Nolt contracts with a local agronomic firm to soil sample each field on a regular basis. Each field is soil sampled once every three years for basic fertility values. These soil samples are utilized in the selection of fields for materials in a given year and for lime applications as needed. (some materials have higher levels of one nutrient and lower of another so they are moved around to different fields based on FPR analysis and soil sample results)

Nutrient Management:

Nolt contracts with a local agronomic consulting firm to provide guidance for land application rates. Utilizing the FPR results, the soil samples, our records for land application, and the planned crops for a given field the consulting firm completes a nutrient balance for the past years applications and provides guidance for the next years applications. Application rates are based mainly on Nitrogen with some evaluation of phosphorous in the planned FPR and the soil test phosphorous levels. In the past years soil test phosphorous levels have maintained on many farms and on the high testing farms started to reduce with the current land application guidance.

Since Nolt land applied a few different FPR materials, one of the FPR materials has been selected as the 'standard' and all the other FPR materials are given an equivalent value to that 'standard'. This simplifies application guidance. For example, if one field is determined to be able to receive 10 loads of the 'standard' FPR and Nolt plans to apply a different FPR that has a 2.0 standard equivalent, Nolt knows that it can only apply 5 loads of that material to that field since the planned FPR has 2 times the nutrient value as the standard. FRP used to determine the application rate.

FEES

PUBLIC NOTICE AND COMMENTS

Cross References

This subchapter cited in 25 Pa. Code § 287.601 (relating to scope); 25 Pa. Code § 288.111 (relating to basic requirements); and 25 Pa. Code § 289.111 (relating to basic requirements).

GENERAL

§ 287.101. General requirements for permit.

(a) Except as provided in subsection (b), a person or municipality may not own or operate a residual waste disposal or processing facility unless the person or municipality has first applied for and obtained a permit for the activity from the Department under this article.

(b) A person or municipality is not required to obtain a permit under this article, comply with the bonding or insurance requirements of Subchapter E (relating to bonding and insurance requirements) or comply with Subchapter B (relating to duties of generators) for one or more of the following:

(1) Agricultural waste produced in the course of normal farming operations, if the waste is not hazardous. An agricultural waste will be presumed to be produced in the course of normal farming operations if its application is consistent with that for normal farming operations. A person managing mushroom waste shall implement best management practices. The Department will prepare a manual for the management of mushroom waste which identifies best management practices and may approve additional best management practices on a case-by-case basis. If a person fails to implement best management practices for mushroom waste, the Department may require compliance with the land application, composting and storage operating requirements of Chapters 291, 295 and 299 (relating to land application of residual waste; composting facilities for residual waste; storage and transportation of residual waste).

(2) The use of food processing waste or food processing sludge in the course of normal farming operations if the waste is not hazardous. A person managing food processing waste shall implement best management practices. The Department will prepare a manual for the management of food processing

waste which identifies best management practices and may approve additional best management practices on a case-by-case basis. If a person fails to implement best management practices for food processing waste, the Department may require compliance with the land application, composting and storage operating requirements of Chapters 291, 295 and 299.

(3) The beneficial use of coal ash under Subchapter H (relating to beneficial use).

(4) The activities described in § 287.2(e)—(h) (relating to scope).

(5) The processing or disposal of residual waste described in § 287.2(b) that is subject to a permit issued by the Department under Article VIII (relating to municipal waste).

(6) The use as clean fill of the materials in subparagraphs (i) and (ii) if they are separate from other waste. The person using the material as clean fill has the burden of proof to demonstrate that the material is clean fill.

(i) The following materials, if they are uncontaminated: soil, rock, stone, gravel, brick and block, concrete and used asphalt.

(ii) Waste from land clearing, grubbing and excavation, including trees, brush, stumps and vegetative material.

(7) Processing that results in the beneficial use of scrap metal.

(c) Subsection (b) does not relieve a person or municipality of the requirements of the environmental protection acts or regulations promulgated thereto. Notwithstanding subsection (b), the Department may require a person or municipality to apply for, and obtain, an individual or general solid waste permit, or take other appropriate action, when the person or municipality is conducting a solid waste activity that harms or presents a threat of harm to the health, safety or welfare of the people or the environment of this Commonwealth.

(d) The Department will not require a permit under this article for cleanup or other remediation at the site of a spill, release, fire, accident or other unplanned event, unless the site is part of a permit area for an active facility or the proposed permit area in an application. In requiring cleanup or other remediation at the site, the Department may require compliance with only those provisions of this article that the Department determines necessary to protect human health, safety, welfare and the environment.

(e) The Department will not require a permit under this article for the movement of waste encountered when performing a site remediation under Chapter 250 (relating to administration of land recycling program) where the site-specific standard is specified as the remediation goal for contamination of soil and groundwater, provided the following conditions are met:

(1) The response to the release of regulated substances is being conducted pursuant to the site-specific standard in Chapter 250, Subchapter D (relating to site-specific standards).

Cooperative Extension

NRAES-92

The Food Processing Residual Management Manual

Robin C. Brandt, P.E.
Senior Engineer
Geo Decisions, Inc.
A Subsidiary of Gannett Fleming, Inc.
State College, Pennsylvania

and

Kelli S. Martin
Senior Research Technologist
Department of Agricultural and Biological Engineering
The Pennsylvania State University
University Park, Pennsylvania

Northeast Regional Agricultural Engineering Service
152 Riley-Robb Hall
Cooperative Extension
Ithaca, New York 14853-5701

SOLID WASTE MANAGEMENT ACT

Act of Jul. 7, 1980, P.L. 380, No. 97 Cl. 35

AN ACT

Providing for the planning and regulation of solid waste storage, collection, transportation, processing, treatment, and disposal; requiring municipalities to submit plans for municipal waste management systems in their jurisdictions; authorizing grants to municipalities; providing regulation of the management of municipal, residual and hazardous waste; requiring permits for operating hazardous waste and solid waste storage, processing, treatment, and disposal facilities; and licenses for transportation of hazardous waste; imposing duties on persons and municipalities; granting powers to municipalities; authorizing the Environmental Quality Board and the Department of Environmental Protection to adopt rules, regulations, standards and procedures; granting powers to and imposing duties upon county health departments; providing remedies; prescribing penalties; and establishing a fund. (Title amended Nov. 25, 2020, P.L.1233, No.127)

Compiler's Note: Section 905(b) of Act 12 of 1988 provided that Act 97 is repealed insofar as it is inconsistent with Act 12.

ARTICLE I
GENERAL PROVISIONS

Section 101. Short title.

This act shall be known and may be cited as the "Solid Waste Management Act."

Section 102. Legislative finding; declaration of policy.

The Legislature hereby determines, declares and finds that, since improper and inadequate solid waste practices create public health hazards, environmental pollution, and economic loss, and cause irreparable harm to the public health, safety and welfare, it is the purpose of this act to:

(1) establish and maintain a cooperative State and local program of planning and technical and financial assistance for comprehensive solid waste management;

(2) encourage the development of resource recovery as a means of managing solid waste, conserving resources, and supplying energy;

(3) require permits for the operation of municipal and residual waste processing and disposal systems, licenses for the transportation of hazardous waste and permits for hazardous waste storage, treatment, and disposal;

(4) protect the public health, safety and welfare from the short and long term dangers of transportation, processing, treatment, storage, and disposal of all wastes;

(5) provide a flexible and effective means to implement and enforce the provisions of this act;

(6) establish the Pennsylvania Hazardous Waste Facilities Plan, which plan shall address the present and future needs for the treatment and disposal of hazardous waste in this Commonwealth;

(7) develop an inventory of the nature and quantity of hazardous waste generated within this Commonwealth or disposed of within this Commonwealth, wherever generated;

(8) project the nature and quantity of hazardous waste that will be generated within this Commonwealth in the next 20 years or will be disposed of within this Commonwealth, wherever generated;

(9) provide a mechanism to establish hazardous waste facility sites;

(10) implement Article I, section 27 of the Pennsylvania Constitution; and

(11) utilize, wherever feasible, the capabilities of private enterprise in accomplishing the desired objectives of an effective, comprehensive solid waste management program.

Section 103. Definitions.

"Food processing waste." Residual materials in liquid or solid form generated in the slaughtering of poultry and livestock, or in processing and converting fish, seafood, milk, meat, and eggs to food products; it also means residual materials generated in the processing, converting, or manufacturing of fruits, vegetables, crops and other commodities into marketable food items.

"Food processing wastes used for agricultural purposes." The use of food processing wastes in normal farming operations as defined in this section.

"Normal farming operations." The customary and generally accepted activities, practices and procedures that farms adopt, use, or engage in year after year in the production and preparation for market of poultry, livestock, and their products; and in the production, harvesting and preparation for market of agricultural, agronomic, horticultural, silvicultural and aquacultural crops and commodities; provided that such operations are conducted in compliance with applicable laws, and provided that the use or disposal of these materials will not pollute the air, water, or other natural resources of the Commonwealth. It includes the storage and utilization of agricultural and food process wastes, screenings and sludges for animal feed, and includes the agricultural utilization of septic tank cleanings and sewage sludges which are generated off-site. It includes the management, collection, storage, transportation, use or disposal of manure, other agricultural waste and food processing waste, screenings and sludges on land where such materials will improve the condition of the soil, the growth of crops, or in the restoration of the land for the same purposes. (Def. amended July 11, 1990, P.L.450, No.109)

EXHIBIT E

AET

Agricultural Consulting

August 9, 2021
East Coventry Township
Attn: Harry Weaver
855 Ellis Woods Road
Pottstown, PA 19465

RE: Proposed Manure/FPR Waste Storage Tank – 851 Bethel Church Road

Dear Mr. Weaver;

I received your letter dated August 4, 2021 regarding the planned storage that Lloyd Z Nolt Trucking plans to construct at 851 Bethel Church Road.

1. The planned structure is a Manure/FPR Waste Storage Structure. Both Manure and FPR are classified within DEP's regulations as residual waste. According to PA Code Title 25 Chapter 83 (Agriculture Nutrient Management Regulations) a manure storage is defined as:

   Manure storage facility—

   (i) A permanent structure or facility, or portion of a structure or facility, utilized for the primary purpose of containing manure.

   (ii) Examples include: liquid manure structures, manure storage ponds, component reception pits and transfer pipes, containment structures built under a confinement building, permanent stacking and composting facilities and manure treatment facilities.

   (iii) The term does not include the animal confinement areas of poultry houses, horse stalls, freestall barns or bedded pack animal housing systems.

   Since the planned structure is defined as an agricultural waste storage structure I believe that it meets the exemption listed in Pennsylvania Municipalities Planning Code §503 (1.1)

2. I have spoken with Mr. Flaharty and I will provide him with the additional information that he has requested.

3. The proposed project is not a structure to process or treat agricultural products. However, I believe that it meets the requirements of the Pennsylvania Uniform Construction Code since the storage is required to meet PA – DEP's regulations listed in PA Code Title 25 Chapter 299. It is my belief that these standards of construction are greater than those listed in the PUCC. The planned structure is required to be inspected by a Professional Engineer, or his designee, during construction and when completed the Professional Engineer will provide a construction report that certifies the storage for use.

4. It is my belief that as an agricultural building and when the material stored is used within a normal farming operation that it is exempt from the listed zoning ordinance and is protected under Pennsylvania's Right to Farm Act as a normal farming activity. The only regulation for Agricultural odors is Title 25 Chapter 83 Section G. All other operations are unregulated and protected by PA's Right to Farm Act.

5. The planned storage does not exceed any of the standards listed in ZO §27-503. The lot coverage after construction will be less than 10% of the total farm area and the height will not exceed that listed within the same ordinance. The height of the planned storage will not be greater than 5 feet.

If you have any additional questions please feel free to contact me at 717-475-3583.

Sincerely,

William J. Rogers
AET Consulting, Inc.

EXHIBIT F