COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL
September 4, 2009

TOM CORBETT
ATTORNEY GENERAL

Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120
[redacted]

VIA FACSIMILE AND FIRST CLASS MAIL

Josele Cleary, Esquire
MORGAN, HALLGREN, CROSSWELL & KANE, P.C.
P.O. Box 4686
Lancaster, PA 17604

RE: Elizabeth Township Zoning Ordinance

Dear Ms. Cleary:

In follow-up to our phone conversation, this letter will detail the provisions of the Elizabeth Township Zoning Ordinance that present problems under ACRE, Act 38, and suggest changes to the ordinance that would correct those problems.

We begin with a brief overview of relevant portions of the Nutrient and Odor Management Act (NOMA), 3 P.S. § 501 *et seq.*, and NOMA regulations, 25 Pa. Code § 83.201, *et seq.*, in relation to discussing the legal problems with the ordinance. The State Conservation Commission (SCC) regulates all aspects of nutrient and odor management for Concentrated Animal Operations (CAOs) and Concentrated Animal Feeding Operations (CAFOs). The SCC's Facility Odor Management regulations (odor management regulations) require all CAOs or CAFOs to develop and implement odor management plans when building new animal housing or manure management facilities. The odor management regulations specify the criteria and requirements for the "construction, location and operation of animal housing facilities and animal manure management facilities, and the expansion of existing facilities." 25 Pa. Code § 83.702(3); SCC Fact Sheet, SUMMARIZING PA.'S ODOR MANAGEMENT REGULATIONS (ACT 38 OF 2005) (SCC-OM1, December 2008) (www.agriculture.pa.us/scc) (Exhibit A hereto).

An odor management plan (OMP) is a "written site-specific plan identifying the Odor [Best Management Practices] to be implemented to manage the impact of odors generated from animal housing and manure management facilities located or to be located on the site." 25 Pa. Code § 83.701. An OMP must be prepared by a certified Odor Management Specialist and must be approved by the SCC prior to construction or use of the new facilities built after the effective

date of the regulations (February 27, 2009). 25 Pa. Code § 83.741 (e), (f), (h); Exhibit A. An OMP is created by using the Pennsylvania Odor Site Index, which was developed by odor management experts from The Pennsylvania State University College of Agricultural Sciences, in cooperation with the SCC for carrying out NOMA. See Exhibit A. The Pennsylvania Odor Site Index (OSI) is the "field evaluation methodology developed specifically for this Commonwealth and approved by the [SCC], which applies site-specific factors such as proximity to adjoining landowners, land use of the surrounding area, type of structures proposed, species of animals, local topography and directions of prevailing winds, to determine potential for odor impacts." 25 Pa. Code § 83.701; Exhibit A. The OSI is designed to estimate the potential risk of odor impacts associated with a facility and guides the operator in the siting, sizing, design, construction, operation, and management of regulated facilities and their associated Odor Best Management Practices. The extent of the surrounding area included in the OSI evaluation is determined by the number of animal equivalent units on the agricultural operation. 25 Pa. Code § 82.771(b)(1)(i). An alternative method for assessing potential odor impacts on neighboring lands, other than the OSI, may be used if approved by the SCC.

The odor management regulations do not impose blanket setback distances to address potential odor impacts from animal housing or manure management facilities. Instead, an OMP includes Odor Best Management Practices that are necessary to address the potential impact of offsite migration of odors based on the OSI evaluation of the proposed facility on the site. 25 Pa. Code §§ 83.771(c), .781. The distance of the regulated facility to the nearest property line is one of many factors considered in the OSI evaluation. For operations that are found through the OSI to have something greater than a low potential for odor impacts, there are two levels of Odor Best Management Practices that are required under an OMP. Level one are primarily management-oriented practices required based on the species of animal proposed on the site, and level two are primarily specialized structural practices that are applicable to the type of operation proposed and are in addition to level one practices. 25 Pa. Code § 83.781. The SCC approves the siting of a facility in coordination with imposing the required Odor Best Management Practices under the OMP in order to address potential odor impacts on neighboring properties. The NOMA and its accompanying regulations preempt local regulation inconsistent with or more stringent than the act or regulations under the act. See 3 Pa. C.S. § 519; 25 Pa. Code § 83.705.

In addition to the NOMA, the Right to Farm Act (RTFA) precludes a municipality from regulating normal agricultural operations as a nuisance, and also precludes nuisance actions against an agricultural operation expanding its facilities pursuant to an approved nutrient management plan. 3 P.S. §§ 953, 954. The Agricultural Area Security Law (AASL) precludes a municipality from enacting ordinances which would unreasonably restrict farm structures or farm practices within the area. 3 P.S. § 911. The Municipalities Planning Code (MPC) precludes a municipality from enacting a zoning ordinance that regulates activities related to commercial agricultural production if it exceeds the requirements imposed under the NOMA, RTFA or AASL, regardless of whether any agricultural operation within the area to be affected by the ordinance would be a concentrated animal operation as defined by the NOMA. 53 P.S. § 10603(b). The MPC also provides that no public health or safety issues shall require a

municipality to adopt a zoning ordinance that violates or exceeds the provisions of the NOMA, AASL, or RTFA. 53 P.S. § 10603(h).

Against this background, we turn to the legal problems with the ordinance and to suggested changes that would correct those problems. The starting point is the ACRE law, which prohibits a municipality from adopting or enforcing a local ordinance prohibited or preempted by State law. See 3 Pa. C.S. §§ 312, 313. The State laws implicated under our ACRE analysis are set forth above.

Section 185-13 defines "intensive agricultural operation" as "[a]ny agricultural animal operation which exceeds two animal equivalent units (AEUs) per acre on an annualized basis." This conflicts with the NOMA's definition for concentrated animal operation as "an agricultural operation with eight or more animal equivalent units [AEUs] where the animal density exceeds two AEUs per acre on an annualized basis." 25 Pa. Code §§ 83.201, .262. Our experts have advised that excluding the "eight or more AEUs" phrase from the ordinance definition results in including agricultural operations that are too small to be subject to the NOMA, thus it conflicts with and is more stringent than the NOMA. Also, the ordinance neither defines CAFO, nor includes it under the definition for "intensive agricultural operation." The definition problems would be corrected if Section 185-13 were amended to define "intensive agricultural operation" by incorporating the State law definitions for CAO and CAFO. A better approach, however, would be to amend the ordinance to delete the term "intensive agricultural operation" and simply add the terms CAO and CAFO using the State law definitions.

Section 185-28(J)(2) imposes a 500 foot setback for animal housing facilities on CAOs from adjoining residences or commercial buildings. Section 185-28(J)(3) states that the Zoning Hearing Board may grant a special exception to reduce this setback distance if it can be shown that "because of prevailing winds, topography, unusual obstructions, or other conditions, a lesser distance would protect adjoining lands from odor, dust, or other hazards." Taken together, these Sections are clearly an attempt by the Township to regulate odors on CAOs and to regulate normal agricultural operations as a nuisance. The 500 foot setback for animal housing facilities on a CAO conflicts with, and therefore is preempted by, the SCC's odor management regulations, which approve the siting of new animal housing facilities on CAOs in coordination with imposing the required Odor Best Management Practices under an OMP. Furthermore, based on consultation with our experts, a blanket setback distance is not a scientifically defensible method to manage the impact of odors.

The setback problems would be corrected if Section 185(J)(3) was deleted and Section 185(J)(2) was amended to provide that new animal housing facilities on CAOs or CAFOs are to be sited and operated as required under an approved Odor Management Plan.

Also, for your review, I enclose an opinion by the Superior Court of Pennsylvania in Horne v. Haladay, 728 A.2d 954 (Pa. Super. 1999) in which it held that a poultry house with 122,000 laying hens is a normal agricultural operation, and a recent decision by the Snyder County Court of Common Pleas in which it held that a poultry barn housing 16,000 chickens is not a nuisance as a matter of law.

I am available to discuss these matters at your convenience, and I look forward to your prompt response.

Sincerely yours,

Susan L. Bucknum

SUSAN L. BUCKNUM
Senior Deputy Attorney General

SLB/
Enclosures (via First Class Mail only)
cc: J. Dwight Yoder, Esquire

Fact Sheet SCC-OM1, December 2008

EXHIBIT
A

Summarizing Pa's Odor Management Regulations (Act 38 of 2005)

Who is regulated:

- ✓ When new or existing Concentrated Animal Operations (CAOs) or Concentrated Animal Feeding Operations (CAFOs) construct new or expand existing manure storage or animal housing facilities after February 27, 2009, (the effective date of the regulations) they will be required to develop and implement an Odor Management Plan (OMP) for those facilities. It should be stressed that **only** the manure storage or animal housing facilities that have new construction activities (building new or expanding existing facilities) are regulated facilities.

- ✓ The regulations do not apply to existing facilities nor do they address land application of manure.

What is an Odor Management Plan (OMP):

1. An odor management plan is a written site-specific plan that assesses potential odor impacts from animal housing facilitates and manure storage facilities, and identifies practices, where relevant, to be implemented to manage the impact of offsite odors generated from these facilities.
   - Odor management plans are not required to eliminate odors, they only need to manage odor impacts. This aspect of the statute reflects the impracticality of completely eliminating odors associated with agricultural operations, as well as the evolving nature of the science of odor management and of the regulation of odor management.
   - Regulated farms must have an approved plan prior to construction of the new or expanded facilities, and they must fully implement the plan prior to commencing use of the new or expanded animal housing facility or manure storage facility.
2. The OMP has two main components: 1) an evaluation of the potential impacts; the preferred tool for evaluating the potential impacts is the Pennsylvania Odor Site Index, and 2) a listing of any necessary Odor BMPs to address odor impacts coming from the facilities covered under the plan.
   - First, an evaluation must be conducted, identifying the *potential* for odor impacts to neighboring properties. The regulations authorize use of the Odor Site Index developed by PSU odor management experts and approved by the Commission to perform this evaluation. Other evaluation methodologies are allowed, if approved by the SCC.
   - Second, if the evaluation identifies a medium or high potential for odor impacts, then the second step must be taken – identification of Odor BMPs to manage the odor impacts. This section envisions two levels of Odor BMPs, depending on the significance of the potential for odor impacts identified in the evaluation step. The SCC has issued an Odor Management Guidance document listing Odor BMPs consistent with this approach, and will issue the PA Odor BMP Reference List which provides detailed information on specific Odor BMP.

Notes:

- ✓ The new state odor management regulations preempt more stringent local regulations/ordinances on agricultural odors; however, they do not preempt the Nutrient Management Program criteria.
- ✓ Odor management plans must be written by a certified Odor Management Specialist. PDA administers the Odor Management Specialist Certification program.
- ✓ Odor management plans must be submitted for review and approval to the State Conservation Commission.
- ✓ Volunteers may also develop and implement odor management plans.
- ✓ The program allows for financial assistance for development of an odor management plan as well as for implementation of Odor BMPs in select situations. Farmers should contact the State Conservation Commission to asses the availability of funding for these efforts.
- ✓ For more information go to the State Conservation Commission's webpage at www.agriculture.pa.us/scc and click on the Odor Management Program link at the bottom of the page or contact Karl Dymond at (570) 836-2181.

728 A.2d 954, 1999 PA Super 64
(Cite as: 728 A.2d 954)

C

Superior Court of Pennsylvania.
Donald HORNE, Appellant,
v.
Gregory A. HALADAY, Francis A. Haladay, George S. Haladay, Gregory A. Haladay and James G. Haladay, t/d/b/a/ Haladay Bros. Poultry, Haladay Farms, A Partnership, By and Through Its Partners George S. Haladay, Gregory A. Haladay And Francis A. Haladay, Haladay Bros. Poultry, Inc., Haladay Bros. Poultry, A Partnership, Appellees.
Argued Dec. 16, 1998.
Filed March 30, 1999

Homeowner whose land adjoined property used as poultry business sued poultry business owner for private nuisance and negligence, alleging that business owner's failure to take reasonable steps to control flies, strong odor, excessive noise and waste, i.e., eggshells, feathers and dead chickens, caused substantial depreciation in value of homeowner's home. The Court of Common Pleas, Columbia County, Civil Division at No. 1623 of 1995, Naus, J., granted summary judgment for business owner. Homeowner appealed. The Superior Court, No. 324 Harrisburg 1998, Popovich, J., held that action was barred by Right to Farm Act's one-year limitations period.

Affirmed.

West Headnotes

[1] **Nuisance 279 ⚿6**

279 Nuisance
2791 Private Nuisances
2791(A) Nature of Injury, and Liability Therefor
279k6 k. Acts Authorized or Prohibited by Public Authority. Most Cited Cases
Homeowner's private nuisance action against owner of poultry business that was operated on adjacent land was barred by Right to Farm Act's one year limitations period, as poultry house was lawfully in operation in substantially unchanged manner for more than one year prior to date on which homeowner filed suit. 3 P.S. § 954(a) (1997).

[2] **Nuisance 279 ⚿6**

279 Nuisance
2791 Private Nuisances
2791(A) Nature of Injury, and Liability Therefor
279k6 k. Acts Authorized or Prohibited by Public Authority. Most Cited Cases
Right to Farm Act applied to homeowner's private nuisance suit against owner of poultry business that was operated on adjacent land, even though residential use of homeowner's property predated poultry farm. 3 P.S. § 951 (1997).

[3] **Nuisance 279 ⚿6**

279 Nuisance
2791 Private Nuisances
2791(A) Nature of Injury, and Liability Therefor
279k6 k. Acts Authorized or Prohibited by Public Authority. Most Cited Cases

Nuisance 279 ⚿65

279 Nuisance
2791I Public Nuisances
2791I(A) Nature of Injury, and Liability Therefor
279k65 k. Acts Authorized or Prohibited by Public Authority. Most Cited Cases
Right to Farm Act applies to both private and public nuisance actions, even though heading to relevant section of Act is "Limitation on public nuisances." 3 P.S. § 954 (1997).

[4] **Nuisance 279 ⚿46**

279 Nuisance
2791 Private Nuisances

728 A.2d 954, 1999 PA Super 64
(Cite as: 728 A.2d 954)

279l(D) Actions for Damages
279k46 k. Time to Sue and Limitations. Most Cited Cases
Homeowner's negligence claim against owner of poultry business that was operated on adjacent land was properly a nuisance claim, and thus, it was subject to Right to Farm Act's one-year limitations period. 3 P.S. § 954(a) (1997).
***954** Gregory T. Moro, Bloomsburg, for appellant.

Charles H. Saylor, Sunbury, for appellees.

Before POPOVICH, SCHILLER and OLSZEWSKI, JJ.

POPOVICH, J.:

¶ 1 This is an appeal from the order of the Court of Common Pleas of Columbia County, which granted appellees' motion for summary judgment and dismissed appellant's complaint. Herein, appellant contends that the lower court erred in granting summary ***955** judgment in favor of appellees on his claims of private nuisance and negligence. Finding no error in the decision of the lower court, we affirm.

¶ 2 Our standard of review in a motion for summary judgment is well-settled.

> This court will only reverse the trial court's entry of summary judgment where there was an abuse of discretion or an error of law. *Merriweather v. Philadelphia Newspapers, Inc.*, 453 Pa.Super. 464, 684 A.2d 137 (1996). Summary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material, fact and the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035.2, 42 Pa.C.S.A. In determining whether to grant summary judgment, a trial court must resolve all doubts against the moving party and examine the record in, a light most favorable to the non-moving party. *Id.* Summary judgment may only be granted in cases where it is clear and free from doubt that the moving party is entitled to judgment as a matter of law. *Id.*

Electronic Laboratory Supply Co. v. Cullen, 712 A.2d 304, 307 (Pa.Super.1998) (citation omitted). *See also*, *Harman v. Borah*, 720 A.2d 1058, 1061 (Pa.Super.1998); *Henninger v. State Farm Ins. Co.*, 719 A.2d 1074, 1075 (Pa.Super.1998). With this standard in mind, we review the trial court's grant of summary judgment.

¶ 3 The record reveal that appellant instituted this action by writ of summons filed on November 21, 1995. Subsequently, appellant filed his complaint to which appellees filed preliminary objections. The preliminary objections were sustained, and appellant was granted leave to amend his complaint. Appellant filed his amended complaint on October 31, 1996, in which he set forth a private nuisance claim and a negligence claim. Both causes of action were based on the same operative facts, as set forth in ¶¶ 17-24 and ¶¶ 25-27 of his complaint. Appellant alleged that in 1993, appellees began operating a poultry business on their property which is adjacent to appellant's premises. Appellees began their poultry operation in November of 1993, when they stocked their poultry house with 122,000 laying hens. Since that time, the only substantial change to appellees' operation was the construction of a decomposition building for waste, including dead chickens, in August of 1994. Appellant alleged that the poultry business interferes with his use and enjoyment of his property in the following ways:

> (a) by operating [their] poultry business is such a manner so as to create an excessive number of flies on [appellant's] real estate;
>
> (b) by operating [their] poultry business is such a manner so as to create a strong odor emanating on [appellant's] real estate each day;
>
> (c) by operating [their] poultry business is such a manner so as to create excessive noise, the sound of which are (sic) heard by [appellant] during all hours of the night;
>
> (d) by operating [their] poultry business is such a manner whereby [appellant] often finds eggshells, feathers and dead chickens on his real estate.

Appellant's Complaint, ¶¶ 20 and 26.

¶ 4 Appellant further alleged that appellees' failure to take reasonable steps to control the flies, strong odor, excessive noise and waste, i.e., eggshells, feathers and dead chickens, has harmed him by causing the substantial depreciation in value of his home in the amount of $60,000.00.

¶ 5 Appellees answered appellant's complaint and alleged that they operate their poultry business in a reasonable manner so as to minimize any flies, odor, noise and waste. Further, appellees alleged that they properly disposed of eggshells, feathers and dead chickens. Most importantly, in their new matter, appellee alleged that appellant's claims were barred by operation of the provisions of the Right to Farm Act, 3 P.S. §§ 951-957.

¶ 6 Following additional pleading and discovery, appellees moved for summary judgment. Significantly, appellant did not respond to the motion, via responsive pleading or opposing affidavits or additional discovery. The lower court agreed that appellant's private*956 nuisance cause of action was barred by operation of 3 P.S. § 954. The court also dismissed appellant's negligence claim since appellant failed to present any support for his claim in a response to appellees' motion for summary judgment. *See* Pa.R.C.P. 1035.3. This timely appeal followed.

[1] ¶ 7 We now consider appellant's claim that the lower court erred when it dismissed appellant's private nuisance claim. The lower court determined that appellant's nuisance claim was barred by the provisions of the Right to Farm Act, 3 P.S. §§ 951-957. We agree.

¶ 8 In an effort to protect agricultural operations from the encroachment of nonagricultural uses and the nuisance suits which inevitably follow, the Legislature enacted the Right to Farm Act, which, in part, provides:

§ 951. **Legislative policy**

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.

¶ 9 Although the Right to Farm Act was clearly enacted to protect agricultural uses of land, those persons negatively affected by an agricultural operation are not absolutely prohibited from filing nuisance suits against their agricultural neighbors. Rather, they must file their nuisance actions within one year of the inception of the agricultural operation or a substantial change in that operation, as provided by § 954(a) of the Right to Farm Act, or they must base their suit upon a violation of any Federal, State or local statute or regulation, as provided by § 954(b) of the Act. Specifically, the Right to Farm Act provides:

§ 954. **Limitation on public nuisances**

(a) 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 been in operation for one year or more prior to the date of bringing such action: Provided, however, That nothing herein shall in any way restrict or impede the authority of this State from protecting the public health, safety and welfare or the authority of a municipality to enforce State law.

(b) The provisions of this section shall not affect or defeat the right of any person, firm or corporation

> to recover damages for any injuries or damages sustained by them on account of any agricultural operation or any portion of an agricultural operation which is conducted in violation of any Federal, State or local statute or governmental regulation which applies to that agricultural operation or portion thereof.

¶ 10 Presently, the record clearly reveals that appellees began operation of their poultry house in November of 1993, when they stocked the house with 122,000 laying hens. The only change in their operation which could even be considered substantial took place in August of 1994, when appellees placed a decomposition house into operation. Appellant did not institute his suit until November 21, 1995, and he has not alleged that the poultry farming operation has changed in any manner since that time, except perhaps to concede that certain conditions have improved since the decomposition house was placed into operation. Thus, appellees' poultry house was lawfully in operation in a substantially unchanged manner for more than one year prior to the date on which ***957** appellant filed his nuisance suit, and the action is, therefore, time-barred by 3 P.S. § 954(a). Accordingly, we find that the lower court did not err in granting appellees' motion for summary judgment based upon the Right to Farm Act.[FN1]

> FN1. For the purposes of this appeal only, we have ruled that appellees' construction and subsequent use of the decomposition house was a substantial change in their poultry operation sufficient to start the one-year limitations period anew. We do so because even if we employ this later date to the benefit of appellant, his nuisance action is nevertheless barred by 3 P.S. § 954(a). It is, of course, arguable that the one-year period began in November of 1993, when the chicken house was stocked with 122,000 laying hens or in the Spring and Summer of 1994, when appellant began to experience problems with flies and odor. *See* Motion for Summary Judgment, Exhibit A, Deposition of Donald Horne, p. 42, 51.

[2] ¶ 11 Despite its clear application to the facts of this case, appellant insists that the Right to Farm Act does not apply to his private nuisance suit for several reasons. First, he argues that the Right to Farm Act was enacted to protect only ***existing*** agricultural operations from the encroachment of residential development, and since his residential use of his property predated appellees' poultry farm, § 954(a) of the Right to Farm Act does not apply. Upon review, we reject appellant's argument, as it is belied by the vary language of § 951 which, in pertinent part, states: "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.***" (emphasis added). Appellant's argument ignores the express policy of the Commonwealth to encourage the "development... of its agricultural land." Thus, the Right to Farm Act was enacted to protect appellees' right to develop their poultry operation, provided it is conducted in a manner that complies with applicable Federal, State and local statutes and regulations. ***See*** 3 P.S. § 954(b). The Act does not limit its application to nuisance suits except as set forth in 3 P.S. § 954(a), which requires nuisance actions to be filed within one year of the inception of the agricultural operation or within one year of a substantial change in that operation. As previously stated, appellant simply failed to file his nuisance action in a timely manner.

[3] ¶ 12 Second, appellant argues that the Right to Farm Act does not apply to bar his private nuisance action because 3 P.S. § 954, is headed "Limitation on public nuisances." However, as our Supreme Court stated in *Commonwealth v. Magwood*, 503 Pa. 169, 176, 469 A.2d 115, 119 (1983):

> While 1 Pa.C.S. § 1924 does indeed provide that "[t]he title ... of a statute may be considered in the construction thereof", that section also provides that "[t]he headings prefixed to titles, parts, articles, chapters, sections and other divisions of a statute ***shall not be considered to control*** ..." Emphasis added. It is also a "well-established rule" that the title "cannot control the plain words of the statute" and that even in the case of ambiguity it may be considered only to "resolve the uncertainty." ***Sutherland Statutory Construction*** § 47.03 (Sands 4th ed.1973).

¶ 13 While the heading to 3 P.S. § 954 is "Limitation on public nuisances," nowhere within the plain words of § 954 is there any indication that the Legislature intended the Act to limit only an individual's right to file a ***public*** nuisance action. Rather, the statute expressly provides, "***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) (emphasis added). In addition, a review of the remainder of the Right to Farm Act reveals no language which limits its application of public nuisance suits only. For example, 3 P.S. § 951, "Legislative Policy", in pertinent part, provides: "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." (Emphasis added). Significantly, the actual title of the act is "Protection of Agricultural Operations from Nuisance Suits and Ordinances." Thus, we opine that the language of the Right to Farm Act is not ambiguous and applies to both ***958** private and public nuisance suits, since the operative statutory language of the Act does not expressly limit its application to public nuisance suits, but rather, applies to all types of "nuisance suits and ordinances." 3 P.S. § 951. *See also*, Restatement (Second) of Torts § 821A ("In this Restatement "nuisance" is used to denote either (a) a public nuisance as defined in § 821B, or (2) a private nuisance as defined in § 821D").

¶ 14 Third, appellant appears to argue that 3 P.S. § 954(a) does not bar his nuisance cause of action because appellees' poultry house has not been "lawfully" in operation for one year prior to the date of his suit. His argument could also be interpreted as suggesting his action is not barred because it is based upon appellees' violation of Federal, State or local statutes or regulations. *See* 3 P.S. § 954(b).

¶ 15 Presently, appellees' poultry operation and appellant's land are located in an area zoned for agricultural purposes. Appellees' Answer and New Matter, ¶ 28; Appellant's Answer to New Matter, ¶ 28. Further, appellees' poultry farm clearly is a "normal agricultural operation" as defined by the Right to Farm Act.[FN2] Thus, from the averments in the pleadings, appellees' poultry farm appears to be a lawful agricultural entity to which the Right to Farm Act applies.

> FN2. 3 P.S. § 952 defines "normal agricultural operation" as: "The customary and generally accepted activities, practices and procedures that farmers 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 and harvesting of agricultural, agronomic, horticultural, silvicultural and aquicultural 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."

¶ 16 To avoid the application of the one-year limitations period or raise a material issue of fact regarding whether appellees' operation violates any statute or governmental regulation, appellant must adduce evidence that appellees' operation violated local, State or Federal statutes or regulations. 3 P.S. § 954(b). It is clear that summary judgment may be entered "if, after completion of discovery relevant to the motion, including production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury." Pa.R.C.P. 1035.2(2). Further, "[t]he adverse party may not rest upon the mere allegations or denial of the pleadings but must file a response within thirty days after service of the motion identifying (1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or (2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cite as not having been produced." Pa.R.C.P. 1035.3(a). Significantly, appellant did not file any response to appellees' motion for summary judgment. Thus, in violation of Pa.R.C.P. 1035.3(a), appellant has failed to identify sufficient evidence to avoid the entry of summary judgment.[FN3]

> FN3. We note that the appellant proposed to depose a government official and an expert

> in flies and odor within 90 days of the order of September 15, 1997, and thereafter file a supplementary brief within 30 days. However, appellant did neither.

¶ 17 Further, despite appellant's current assertion that the record reveals a genuine issue of material fact regarding whether appellees' operation of the poultry house complies with local, State and Federal laws, we find that appellant has failed to cited any portion of the record that indicates that appellees' poultry operation violated any statute or regulation. In fact, the only evidence to which appellant refers in support of his claim that appellees' operation of the chicken house is not lawful is the fact that appellees' farm has been inspected by George Hubbard of the local agricultural office, Tom Herman of the Department of Environmental Protection and a representative of the Department of Agriculture. Unfortunately for appellant, the record does not indicate these visits were in response to unlawful operations at the poultry house, and the record does not indicate whether any local, State or Federal *959 official ever cited appellees for failing to conduct their business in a lawful manner. Rather, the record reveals that appellees made every effort to comply with applicable statutes and regulations, as evidenced by a letter from Paul E. Knepley, DVM, of the Pennsylvania Department of Agriculture, which was attached to the affidavit of James G. Halady, filed on August 26, 1997. The letter reads as follows:

TO WHOM IT MAY CONCERN:

> Responding to a public complaint of unusually strong manure odor, I visited the Haladay Bros. Poultry Farm on June 26, 1996. I could not detect any manure odor at all from various vantage points approximately one-fifth of a mile from the layer house. Upon entering the parking lot, I could detect some manure odor (which was not strong) immediately adjacent to the buildings.
>
> When I interviewed the Haladay family, I was impressed with their knowledge of manure handling and fly control techniques. They have taken an aggressive, pro-active management approach to controlling flies and farm odors including soliciting expert advice from the Penn State University system, the Department of Environmental Protection, and other management resources. At the time of my visit they were using an effective manure additive to reduce ammonia odor as well as using a state-of-the-art electric fly control system.
>
> Having visited the facility, I cannot conclude there was much merit to the complaint. Haladay Bros. Poultry Farm appeared to be operated within normal and reasonable levels of odor and fly control, as well as having a well-informed pro-active management.

¶ 18 Upon review, we find that there simply is no evidence of record which would raise a genuine issue of material fact regarding whether appellees' operated their poultry house in an illegal manner, and, accordingly, the lower court did not err in granting summary judgment. *Ertel v. Patriot-News Co.*, 544 Pa. 93, 101-102, 674 A.2d 1038, 1042 (1996) ("a non-moving party must adduce sufficient evidence on an issue essential to his case and which he bears the burden of proof such that a jury could return a verdict in his favor").

¶ 19 In sum, we agree with the lower court's conclusion that appellant's nuisance suit instituted by writ of summons on November 21, 1995, is time-barred by operation of 3 P.S. § 954(a), since appellees' poultry business has operated in a substantially unchanged manner since August of 1994, and it is clear from the record that the facts underlying appellant's nuisance action existed by August of 1994, if not earlier. Further, appellant has not adduced evidence which would raise a genuine issue of material fact regarding whether appellees' operation violated any Federal, State or local statute or regulation. Thus, the lower court properly granted summary judgment of appellant's private nuisance claim.

¶ 20 We turn now to appellant's argument that the lower court erred in granting summary judgment as to his negligence claim, which he contends differs from his nuisance cause of action. In *Kramer v. Pittsburgh Coal Co.*, 341 Pa. 379, 380, 19 A.2d 362, 363 (1941), our Supreme Court stated:

> "The term [nuisance] signifies in law such a use of a property or such a course of conduct as, irrespec-

> tive of actual trespass against others or of malicious or actual criminal intent, transgresses the just restrictions upon use or conduct which the proximity of other persons or property in civilized communities imposes upon what would otherwise be rightful freedom. In legal phraseology, the term 'nuisance' is applied to that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction or injury to a right of another, or of the public, and producing such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage." 46 C.J. 645, 646. "Nuisance is distinguishable from negligence." *Id.*, 650. "The distinction between trespass and nuisance consists in the former being a direct infringement***960** of one's right of property, while, in the later, the infringement is the result of an act which is not wrongful in itself, but only in the consequences which may flow from it." *Id.*, 651.

While nuisance is distinguishable from negligence, we find that the distinction does not support appellant's right to pursue a negligence action in this case.

[4] ¶ 21 Presently, the exact same facts support both appellant's nuisance and negligence claims. Appellant ignores the fact that appellees' operation of their poultry farm is an infringement upon the use of appellant's property which "is not wrongful in itself, but only in the consequences which may flow from its[,]" and, thus, is properly a nuisance claim. *Kramer*, 19 A.2d at 363. Since appellant's negligence claim is really a nuisance claim, we find it is time-barred by operation of 3 P.S. § 954, as previously discussed.

¶ 22 Order granting summary judgment is affirmed.

Pa.Super.,1999.
Horne v. Haladay
728 A.2d 954, 1999 PA Super 64

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PROTHONOTARY
SNYDER CO.

Nuisance: poultry farm

WILLIAM REMALEY and BARBARA REMALEY, husband and wife,	:	IN THE COURT OF COMMON PLEAS OF THE 17TH JUDICIAL
Plaintiffs	:	DISTRICT OF PENNSYLVANIA
vs.	:	SNYDER COUNTY BRANCH
DAVID ZOOK and THELMA ZOOK, husband and wife; and LEANDER ZOOK and NEILA ZOOK, husband and wife,	:	CIVIL ACTION – LAW AND EQUITY
	:	NO. CV-580-2007
Defendants	:	

DECISION – NONJURY TRIAL

Knight, J. - April 29, 2009

1. Background.

The present case involves a lawsuit brought by the Plaintiffs William and Barbara Remaley against the Defendants the Zooks for their construction in 2007 of a poultry barn across the road from the Plaintiffs' property about 100 feet from their property line. The poultry operation houses approximately 16,000 chickens. The Plaintiffs contend that the operation generates odors that at certain times of the year interfere significantly with the Plaintiffs' use and enjoyment of their property.

5. Defendants David and Thelma Zook are the owners of approximately 125 acres of real property adjacent to the Plaintiffs' property.

6. The Defendants' property[1] has an address of 64 North Hill Drive, Middleburg, Middlecreek Township, Snyder County, Pennsylvania, 17842.

7. The Defendants' property abuts the Plaintiffs' property and the two properties are separated by Kratzer Road.

8. The Plaintiffs' property is located on the south side of Kratzer Road and The Defendants' property is on the north side of Kratzer Road.

9. The Plaintiffs' residence sits approximately 450 feet back from Kratzer Road.

10. A woods lies between the Plaintiffs' residence and Kratzer Road, on the Plaintiffs' property although the Plaintiffs' driveway is open directly to the road across from which the Defendants' property is located.

11. Defendants David and Thelma Zook have owned their property since 1979.

12. From 1956 until 1979 Defendant David's Zook's parents owned the Defendants' property.

13. From 1979 until February of 2009 Defendants David and Thelma Zook operated a dairy farm on their property.

[1] For convenience we will refer to all four of the Zooks collectively as the Defendants unless otherwise stated.

14. Prior to Defendants David and Thelma Zook obtaining ownership of the Defendants' property, Defendant David Zook's parents also operated a dairy farm on the Defendants' property.

15. Defendant Leander Zook is David and Thelma Zook's son.

16. Defendant Neila Zook is Leander's Zook's wife.

17. The Defendants' property and the Plaintiffs' property are located in a rural, farming area of Middlecreek Township, Snyder County. The two properties border on and are partially located in Penn Township, Snyder County.

18. Middlecreek Township does not have a zoning ordinance.

19. Agricultural uses of property are permitted everywhere in Middlecreek Township.

20. The Defendants' property is located in an Agricultural Security Area.

21. No portion of The Defendants' property has been subdivided.

22. A small field lies between Kratzer Road and the poultry barn on the Defendants' property that is the subject of this lawsuit. (See Defendants' Exhibit 5.2).

23. There is a bank between the poultry barn and Kratzer Road. (See Defendants' Exhibit 5.4).

24. The bank is situated such that Kratzer Road is above it. (See Defendants' Exhibit 5.5).

25. Construction on the Defendants' property is limited as a result of the uneven terrain and significantly steep hills.

26. In or about 2007 the Defendants entered into an agreement with one-another pursuant to which Defendants Leander and Neila Zook rent the subject property from Defendants David and Thelma Zook.

27. The rental term of the lease agreement is 100 years.

28. The purpose of the lease agreement was to permit Defendants Leander and Neila Zook to obtain the financing necessary to construct a poultry barn on the property.

29. Defendants Leander and Neila Zook wanted to continue on with the family farm, but that the dairy operation could not support all of the Zook family.

30. Because the dairy operation could not generate enough income to support two families, the Defendants decided to build the poultry barn.

31. The Defendants reduced the dairy heard from approximately seventy (70) cows to twenty (20) heifers in February of 2009.

32. Though the Defendants' property is located partially in Middlecreek Township and partially in Penn Township, the poultry barn was constructed entirely within Middlecreek Township.

33. The original site selected by the Defendants was located partially in Middlecreek and partially in Penn Township. Officials from Penn Township requested that the Defendants move the original site approximately 90 feet to

the west so that the poultry barn was entirely within the confines of Middlecreek Township. The Defendants complied with this request.

34. On February 6, 2007 the Defendants applied for a building permit from the Structure Permit Officer of Middlecreek Township. (Defendants' Exhibit 2).

35. Middlecreek Township approved the building permit application on February 6, 2007 (Defendants' Exhibit 2).

36. The Middlecreek Township Subdivision and Land Development Ordinance includes a setback provision requiring that structures be at least twelve (12) feet from a property owner's property line.

37. The poultry barn is well beyond twelve feet from Kratzer Road.

38. Construction of the poultry barn began in April of 2007.

39. The poultry barn sits on the side of a hill. (See Defendants' Exhibits 5.1, 5.2, 5.3, 5.4, 5.8, 5.10, 5.11, 5.14 and Plaintiffs' Exhibit 22).

40. The poultry barn was constructed by Ag Depot, which has had extensive experience in the construction of poultry barns in and around Snyder and surrounding counties.

41. Curtis Dietz from Ag Depot assisted in the selection of the placement of the poultry barn.

42. Mr. Dietz has built approximately twenty-five (25) to thirty (30) other poultry barns in Snyder County and surrounding counties.

43. The location that was selected was the best placement of the poultry barn given the natural terrain of the Defendants' property.

44. The poultry barn is approximately 495 feet long by 55 feet wide and is located approximately 500 feet from the front door of the Plaintiffs' residence.

45. Incorporated into the poultry barn design are four large fans and four small fans that provide necessary ventilation for the poultry. The fans appear in four sets. Each set contains one large fan and one small fan. (Defendants' Exhibit 5.3).

46. The fans blow air from the interior of the barn to the outside, and face towards a bank between the barn and Kratzer Road. (See Plaintiffs' Exhibit 29)

47. In addition to the bank, the Defendants have built up a large pile of dirt on the side of the hill closest to Kratzer Road. (See Defendants' Exhibits 5.8, 5.9, 5.10, 5.13).

48. The poultry barn contains a manure storage area on the eastern end.

49. The manure storage area is completed under cover. Eighty (80%) of the manure storage area is fully enclosed, while twenty (20%) percent sits inside an opening on the eastern end of the poultry barn. (Plaintiffs' Exhibit 35).

50. None of the fans blow out of the manure storage area.

51. A chicken run is located on the southern side of the poultry barn facing the Plaintiff's property.

52. The Plaintiffs were aware of the commencement of construction of the poultry barn in April of 2007.

53. Immediately upon learning about the Defendants' plans to construct the poultry barn, the Plaintiffs contacted the Defendants and discussed with the Defendants the possibility of another location for their barn.

54. The Plaintiffs from the inception of planning for the barn had concerns about the location of the exhaust fans on the south side of the property facing their home.

55. Plaintiff William Remaley expressed to Defendant Leander Zook before the barn was built his concern about the location of the ventilation fans.

56. Defendant Leander Zook explained to the Plaintiffs that another location was not feasible for a variety of reasons, including but not limited to: (1) complying with the request from Penn Township to move the poultry barn 90 feet to the west; (2) the cost of running and maintaining utilities to another portion of The Defendants' property, (3) satisfying the requirements of their poultry contract which required the Defendants to provide access for delivery trucks for the delivery and pick-up of the poultry; (4) the undesirability of having the fans and the access way on the same side of the building; and (5) the limitations imposed by the natural terrain of The Defendants' property.

57. Construction of the poultry barn was complete as of August of 2007.

58. The poultry barn was built in accordance with all Middlecreek Township ordinances.

59. The poultry barn has been designated as a bio-security area in order to maintain the highest hygiene standards for the poultry.

60. In August of 2007, approximately 16,000 poultry were brought into the poultry barn.

61. The Plaintiffs initiated this lawsuit with a Writ of Summons on November 30, 2007 (approximately three (3) months after the poultry barn went into operation.)

62. The Plaintiffs' Complaint was filed on May 23, 2008.

63. In the *ad damnum* clause of their Complaint, the Plaintiffs request the Court to do the following:

> (a). Order the relocation of the eight (8) exhaust fans from the south to the north side of the poultry barn;
>
> (b) Order the placement of appropriate barriers (vegetative and/or other) to negate the impacts of the poultry barn from Plaintiffs' perspective.
>
> (c) Order the enclosing of the eastern end of the poultry barn containing the storage area and moving the "chicken run" to the north side of the building.
>
> (d) Enter judgment in favor of the Plaintiffs in an amount in excess of the limits of compulsory arbitration as compensation for the devaluation caused to the fair market value of Plaintiffs; property by the location and configuration of the poultry barn;

(e) Awarding plaintiffs punitive damages to compensate for Defendants Zooks' reckless indifference to Plaintiffs rights and property; and

(f) Award such other relief as is deemed necessary and proper under the circumstances.

64. Plaintiffs were used to the odors created by the dairy operation which previously existed on Defendants' property and never complained about the dairy operation.

65. They also occasionally experienced other agricultural odors in their rural area from the seasonal spreading of manure on the fields by area farmers.

66. The odor the Plaintiffs experience from the poultry barn in their view comes from chicken manure and dead animals.

67. The Plaintiffs experience odor from the poultry barn operations sixty percent (60%) of the time.

68. Of the sixty percent (60%) of the time Plaintiffs experience odor from the poultry barn operations, one third (1/3rd) or a total of twenty (20%) of the time is very bad, one third (1/3rd) or a total of twenty (20%) of the time is bad, and one third (1/3rd) or a total of twenty (20%) of the time is moderate.

69. The Plaintiffs admitted that forty (40%) percent of the time, they smelled no odor whatsoever. Further, of the remaining sixty (60%) percent of the time, the Plaintiffs admitted that only approximately twenty (20%) of the time is it "very bad."

70. When they experience very bad odor Plaintiffs cannot eat or sit on their screen porch. They cannot eat at their kitchen table or dining room table

with the door open. They need to close all of the windows in the house including their family room which in the back of the house. They must close their bedroom windows and sometimes are unable to sleep. If outside, Plaintiff Barbara Remaley sometimes becomes nauseated to the point that she has to go inside, close the windows to the house.

71. When the odor is bad, it is still quite strong and offensive, but because it did not last as long or occurred fewer times during the day, Plaintiff William Remaley characterized the odor as bad as opposed to very bad. Plaintiffs Remaley will often postpone their outdoor activities to another time on such days. In short, when the odor is bad or very bad Plaintiffs Remaley modify their behavior and are unable to continue their normal activities on their property.

72. When the odor is moderate, the odor is still offensive, but not as strong and lasts for a shorter period of time. Under such circumstances, the Plaintiffs are able to continue what they are doing but it is unpleasant and not enjoyable when the odor is present.

73. The impact of the odor is most evident on Plaintiffs' outdoor activities including: gardening and yard work; hanging laundry outside; their ability to socialize and entertain; eat and relax on their screened porch; and, their ability to keep their windows open for ventilation throughout their home but mostly in their bedroom where it impacts their ability to sleep.

74. Plaintiffs never know when the odor will come, it is very unpredictable. In their view it is affected by fan operation, wind direction, and other weather conditions. Thus, it is impossible to plan their activities ahead of time. Plaintiff Barbara Remaley does not plan picnics with her friends because she was embarrassed when during such an event the odor become so bad that all the food and people had to move inside.

75. The odor experienced by Plaintiffs may vary in terms of frequency, duration and intensity but in their view it is offensive and bad a significant portion of the time they experience the odor.

76. In early May of 2008, during an extremely bad odor night, Plaintiff William Remaley, in the process of investigating the source of the odor, discovered dead chickens on (not buried in) the manure pile of the poultry barn. (*See*, Plaintiffs Remaley's Exhibits Nos. 6-7).[2]

77. On at least three (3) other occasions, in June of 2008, and twice in August of 2008, Plaintiff William Remaley discovered dead chickens and/or broken eggs on (not buried in) the manure pile of the poultry barn which again proved to be the source of the odor which had traveled up to Plaintiffs Remaley's residence on the dates in question. (*See*, Plaintiffs Remaley's Exhibits Nos. 8-12).

[2] The Defendants want to make an issue of the fact that William Remaley trespassed on the Defendants' property in order to make his discovery. It is not clear how Plaintiff accessed the property since the bio-security area sign prohibiting entry is posted in only one location at the driveway entrance. There is no evidence that Plaintiff actually saw the sign.

78. Plaintiff William Remaley offered into evidence an "odor log" covering the period June 2008 to November 2008. See Plaintiffs' Exhibit 43. The log chronicled the degree of odor experienced by the Plaintiffs and other weather conditions they perceived during the time period.

79. The log showed "very bad" odor in the first two weeks of October, 2008. (Plaintiffs' Exhibit 43). Defendant Leander Zook testified that there were no chickens on the Defendants' property during this period. The only two people who testified to the effect of the poultry barn on the Plaintiffs' use and enjoyment of the Plaintiffs' property were the Plaintiffs themselves.

80. The Plaintiffs did not present any objective testimony from any other person to show that a reasonable person in their community would be affected in the manner that the Plaintiffs claim they have been affected by the Defendants' operation of their poultry business.

81. It is the declared policy of the Commonwealth of Pennsylvania to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. 3 P.S. §915. In 1982, the Commonwealth enacted the Pennsylvania Right to Farm Act, 3 P.S. §951 et seq. The purpose of the Right to Farm Act was to reduce the loss of agricultural resources by limiting the circumstances under which agricultural activities may be subject to nuisance suits and ordinances that restrict farming.

82. In May of 1998, the Pennsylvania Right to Farm Act was amended to exclude new or expanded farm operations from nuisance law suits as long as the operation has an approved Nutrient Management Plan, when necessary, and is in compliance with the Nutrient Management Act.

83. The Commonwealth of Pennsylvania allows poultry facilities to exist. In fact, the Pennsylvania Right to Farm Act, 3 P.S. §951 *et seq.* prohibits a municipality from imposing additional requirements than those required by the Commonwealth on landowners who operate agricultural facilities, including poultry barns. In fact, §953 of the Pennsylvania Right to Farm Act prohibits municipalities from including an agricultural operation conducting itself in accordance with normal agricultural operations in a municipality's definition of 'nuisance' so long as the operation does not have a direct adverse effect on public health and safety. 3 P.S. §953(a).

84. In 2005, the Pennsylvania Legislature passed the Act 38 of 2005, commonly referred to as ACRE (Defendants' Ex. 7 at p. 2)

85. The ACRE legislation addresses two areas: (1) unauthorized local ordinances that attempt to regulate agriculture; and (2) odor management for concentrated feeding operations.

86. Prior to the passage of the ACRE in 2005, the only regulation of odor in Pennsylvania was that developed in connection with the Pennsylvania Nutrient Management Act, 3 Pa. C.S. §§501-522. The Nutrient Management Act does not directly address odor. Instead, its main concern is water quality

management and the appropriate storage, handling, and land application of planned nutrient materials. These items unavoidably impact odor, however odor is not specifically addressed in the Nutrient Management Act. (Defendants' Ex. 7 at p. 2)

87. The Defendants' poultry facility is not large enough to require a Nutrient Management Plan under the Nutrient Management Act. (Defendants' Ex. 4)

88. The ACRE legislation passed in 2005 made certain additions to the Pennsylvania Nutrient Management Act and establishes the framework for facility odor management designed to reduce the impact of odor from concentrated animal operations.

89. The Pennsylvania State Conservation Commission was charged with the task of developing Facility Odor Management Regulations.

90. After the passage of the ACRE legislation, Interim Guidelines were established until final regulations could be created. (Defendants' Ex. 6)

91. Compliance with the Interim Guidelines by farmers was purely voluntary. (Defendants' Ex. 6 at p. 2)

92. Final Facility Odor Management regulations went into effect on February 27, 2009. (Defendants' Ex. 7 at p. 1)

93. Because the Defendants' poultry facility began operation in 2007, it is not subject to the Final Facility Odor Management regulations. Moreover, even if the Defendants' poultry barn had been built after the regulations

became effective in February of 2009, it is not large enough to meet the definition of a regulated facility.

94. The only regulatory guidelines in effect at the time the Defendants' poultry barn began operating were the Interim Guidelines that were purely voluntary precursors to the final regulations.

95. The Facility Odor Management regulations provide that regulated facilities undertake an odor impact evaluation. 25 Pa. Code §83.771. The results of the odor impact evaluation determine the need for an Odor Management Plan. Odor Management Plans identify what management practices a regulated facility must implement.

96. The Facility Odor Management regulations provide for two levels of management practices. These practices are identified as Best Management Practices ("BMPs") in the Facility Odor Management Regulations. Facilities scoring between 50 and 100 must develop an Odor Management Plan that incorporates level one BMPs. Facilities scoring above 100 must develop an Odor Management Plan that incorporates level two BMPs.

97. Notwithstanding the fact that their facility is not subject to any obligation to do so, prior to the Plaintiffs' filing of the Plaintiff's Complaint in the above-captioned lawsuit the Defendants voluntarily engaged an odor evaluation specialist to conduct an evaluation of the facility under the Regulations' predecessor Interim Guidelines.

98. The Interim Guidelines and the Regulations acknowledge that a complete elimination of odors is not practical or economically feasible. (Defendants' Ex. 6, pg. 3; Defendants' Ex. 7, pg. 3, 20)

99. The State Conservation Commission specifically rejected the suggestion that property values and health effects be considered when determining the impact of an agricultural use of property. ((Defendants' Ex. 7 at 4-5)

100. The scientific research employed by Penn State University researchers did not consider health effects and property values. (Defendants' Exhibit 7 at 5). The State Conservation Commission believed that the legislature did not want these factors to be considered in evaluating odor management.

101. Part of the purpose of the Odor Management Regulations is to establish and protect the preemption of odor management programming. (Defendants' Exhibit 7 at 6)

102. Dr. Robert Mikesell is an Animal Science Professor at the Pennsylvania State University and was qualified by the Court as an expert in livestock odor management.[3] Dr. Mikesell was instrumental in developing the siting index set forth in the final odor management regulations. (Defendants' Exhibit 8)

[3] Dr. Mikesell was not paid for his report or testimony. We found Dr. Mikesell to be a highly credible and helpful witness.

103. Dr. Mikesell conducted an odor management evaluation of the Defendants' poultry facility in January of 2008. (Defendants' Exhibit 9).

104. The purpose of the siting index is *objectively* to evaluate odor impact potential from new or expanding livestock operations. Though the purpose is to objectively evaluate odor impact potential, the evaluation was conducted using actual odor impact studies. Odor impact *potential* analysis and *actual* odor impact are very closely related.

105. Dr. Mikesell's programs are referenced in the Odor Management Regulations' preamble. (Defendants Exhibit 7 at 2).

106. Dr. Mikesell participated in the gathering of data used to develop objective standards for odor management, including interviews of neighbors of existing agricultural facilities. The Odor management regulations indicate that the program was developed using data from hundreds of personal interviews by Penn State University researchers who studied conflicts between farms and their neighbors. (See Defendants Exhibit 7 at 5).

107. Through his work with Penn State Dr. Mikesell is familiar with wind patterns in Pennsylvania.

108. Dr. Mikesell viewed the Defendants' property on January 23, 2008.

109. Dr. Mikesell conducted an odor impact evaluation of the Defendants' poultry facility and concluded that the Defendants' poultry operation scored 79.65 points in the odor evaluation. Facilities scoring 79.65

points fall into a Level One category for potential odor conflict under the Regulations. (Defendants' Exhibit 9).

110. According to Dr. Mikesell, the removal of the Defendants' fifty dairy cows and the fact the Defendants' property is in an agricultural security area would have further reduced the Defendants' score.

111. The poultry barn was already placed on the Defendants' property when Dr. Mikesell's analysis was conducted and would not have altered the outcome of the analysis.

112. Dr. Mikesell's evaluation concluded that if the Defendants' facility were regulated, its BMP would include the following:

(1) Cake out litter and till litter between flocks.

(2) Monitoring of water lines and drinkers for leaks;

(3) Monitoring for egg jams;

(4) Minimization of feed wastage; and

(5) Phasing feed to reduce nutrient excretion.

(Defendants Ex. 9)

113. The Defendants' poultry barn mechanically removes all litter from the flock housing area every day, which is superior in terms of odor management than caking out litter and tilling litter between flocks.

114. The Defendants regularly monitor water lines and drinkers for leaks.

115. The Defendants regularly monitor for egg jams.

116. There is minimal feed wastage in the poultry barn.

117. The Defendants have a contract with Kreamer Feeds ("Kreamer") pursuant to which the Defendants house the poultry. The poultry are owned by Kreamer.

118. According to Kreamer Feeds the poultry are on a dietary plan that reduces nutrient excretion.

119. The Defendants comply with all Level One BMPs.

120. Dr. Mikesell's evaluation provides that the planting of a vegetative belt of trees would not be required if the Defendants' poultry barn were regulated because this is a level two BMP.

121. Dr. Mikesell informed the Defendants of this fact, but they voluntarily planted a vegetative belt on their property anyway. (See Plaintiffs' Exhibit 29, 30). Dr. Mikesell testified that though the trees were small now, they would provide added bufferage in the future.

122. The Plaintiffs have adequate room to plant additional vegetative barriers on their own property. Notably, the Plaintiffs have planted trees that are the exact same size as the Defendants'. (See Defendants' Exhibit 5.6).

123. While compliance with BMPs is purely voluntary on the part of the Defendants from a regulatory standpoint, these practices are encouraged and/or required by the Defendants' poultry supplier, Kreamer Feeds.

124. The contract between Kreamer and the Defendants requires, *inter alia*, the following:

(1) That Defendants dispose of dead poultry in accordance with local and state disposal laws. (Kreamer Contract at 10 and Ex. A).

(2) That the Defendants clean out the poultry barn prior to delivery of a flock of poultry and within two (2) weeks after the previous flock has been removed. (Kreamer Contract at 12)

(3) That the Defendants dispose of manure in accordance with local, county and state laws. (Kreamer Contract at 12)

(4) That Kreamer will pay to wash and disinfect the poultry barn. (Kreamer Contract at 12)

(5) That visitors are not to enter into the poultry facility. (Kreamer Contract at Ex. A)

(6) That every effort is made to eliminate feed wastage. (Kreamer Contract at Ex. A)

(7) That the Defendants monitor the water usage of the birds by a water flow meter. (Kreamer Contract at Ex. A)

(8) That the poultry barn be properly ventilated. (Kreamer Contract at Ex. A)

(9) That good insect and rodent control be practiced with baits approved by Kreamer. (Kreamer Contract at Ex. A)

(10) That the Defendants prevent wetness and litter in the poultry barn. (Kreamer Contract at Ex. A)

(11) That broken eggs, dead birds, and feed spillage be removed from the facility immediately. (Kreamer Contract at Ex. A)

125. Though the Defendants are primarily responsible for the maintenance and care of the poultry, Kreamer routinely inspects and monitors the poultry barn to ensure compliance.

126. Inspections occur at least once a week and sometimes more often.

127. As the owner of the poultry, Kreamer has an interest in making sure that the poultry facilities are hygienic.

128. Kreamer considers the Defendants' care and maintenance of the poultry barn and their flocks to be excellent. Kraemer's manager, Keith Fleetwood, described the Defendants' poultry barn as the model poultry operation.

129. The inspections conducted by Kraemer employees and supervised by Mr. Fleetwood did not identify any significant problems.

130. The procedure used by Defendant is to remove and compost dead chickens ("mortalities") and broken eggs daily is in compliance with Kraemer recommendations.

131. Proper composting requires that any mortalities (dead animals) be covered with dirt or manure.

132. At all times that Mr. Fleetwood or any inspectors have visited the operation, there has been no evidence that the Defendants are not following proper composting procedures.

133. According to Defendant Leander Zook, two to three chickens die per week, and per the recommended procedure are covered with manure.

134. The manure scrapers operate two times a day covering any mortalities with manure. Defendant Leander Zook inspects several times a week to make sure all mortalities are covered with manure. If they are not completely covered, he covers them.

135. None of the Defendants' other neighbors have raised an objection to the Defendants' poultry operation.[4]

136. Frederick Boonie ("Boonie") has lived near the Defendants' property for 15 years and has not noticed an increase in odor since the poultry barn was built.

137. Robert Zeigler has lived approximately one-quarter of a mile from the Defendants' property since 1977 and has not noticed an increase in odor since the poultry barn was built.

138. Charles Shroat has lived next to The Defendants' property for 26 years.

139. Since the poultry barn was built, Mr. Shroat has only smelled an unpleasant odor four or five times per year. Shroat's property sits down-wind (to the immediate east) of the Defendants' poultry barn and Shroat's property is closer to the manure storage area than any other property. The view from Mr. Shroat's house is depicted in Plaintiffs' Exhibit 26.

140. Donald and Doris Auman live close to the Defendants' property. Mr. Auman has no objection to the Defendants' poultry barn.

141. Christopher Schaeffer and his wife, Jennifer Schaeffer, built a house near the poultry barn at approximately the same time as the poultry barn was constructed.

[4] The location of the various neighbors in relation to the Plaintiffs' and Defendants' properties is shown on Plaintiffs' Exhibits 44 and 45.

142. For the past two (2) years Christopher Schaeffer has not smelled any odor from the poultry barn.

143. Mr. Schaeffer frequently jogs on Kratzer Road between the Plaintiffs' property and the Defendants' property and has never smelled any odor from the Defendants' poultry barn.

144. Gene Klinger and his wife, Estelle Klinger, have lived approximately one-half of a mile from the Defendants' property since 1964. Mr. Klinger has no objection to the poultry barn.

145. Marlin Kratzer has lived less than a mile from the Defendants' property for many years and has not noticed an increase in odor since the poultry barn was built.

146. Phillip Stahl and his wife, Darlene Stahl, have lived approximately one-quarter of a mile from the Defendants' property for approximately 20 years and Mr. Stahl has not noticed an increase in odor since the poultry barn went into operation.

147. John Yoder and his wife, Yanita Yoder, have lived near the Defendants' property for thirty-two (32) years. Their house is approximately 700 to 800 feet from the poultry barn. Mr. Yoder does not have an objection to it.

148. Carolyn Hauck and her husband, Joel Hauck, have lived near the Defendants' property for 14 years. Mrs. Hauck has only smelled an odor from the poultry barn once or twice. Her house is next door to the poultry barn, and

there is no vegetation between her house and the poultry barn. The Hauck is depicted as the blue house shown in Defendants' Exhibit 5.9.

149. Carl Landis ("Landis") is a Middlecreek Township Supervisor.

150. Mr. Landis confirmed that the poultry barn complies with Middlecreek Township set-back and permitting requirements.

151. The Township has not received complaints about the poultry barn.

152. All of the neighbors who testified at trial have routinely driven by the poultry barn since it went into operation and have not noticed odor.

153. All of the neighbors consider the Defendants' poultry barn is the type of property use that they expected for this area. No one who testified about the property (other than the Plaintiffs) was surprised or offended that the Defendants decided to use their property in this manner.

154. Aside from the Plaintiffs, no other property owner testifying noticed a significant increase in odor emanating from the Defendants' property as a result of the introduction of the Plaintiffs' poultry barn operation.

155. According to Dr. Mikesell, the wind generally travels from the northwest in an easterly direction in Pennsylvania.

156. According to Dr. Mikesell, the Plaintiffs' property would not be any more affected by the poultry barn than the Shroat Property or the Snyder Property, both of which are further east than the Plaintiffs' property.

157. No other neighbor finds the Defendants' poultry facility offensive, seriously annoying, or intolerable. To the contrary, the other neighbors are generally supportive of the Defendants' poultry facility.

158. During the Court's site view of the property, the only thing visible from most vantage points on the Plaintiffs' property was the white roof of the poultry barn. (See Plaintiffs' Exhibit 14). Furthermore, the site view occurred on March 27, 2009 when there was no foliage on the trees that are between the Plaintiffs' property and the poultry barn. The pictures presented by the Defendants that were taken in September of 2008 indicate that the trees fully obstruct the Plaintiffs' view of the poultry barn. (See Defendants' Exhibits 5.6 and 5.7)

159. The poultry barn is not out of character for this particular locality.

160. The Plaintiffs do not want to close down the poultry operation but only seek to have the fans moved from the south side to the north side of the property.

161. The Plaintiffs presented no expert testimony explaining the precise cause of the odors they experienced, nor any expert testimony to support their view that relocation of the fans from the north side to the south side of the poultry building would eliminate the odor problem.

162. According to Dr. Mikesell, the placement of the fans has little impact on odor because the "odor plume" leaves the fans between 6 inches and 30 feet and is thereafter immediately dissipated in the air.

163. According to Dr. Mikesell, studies show that odor perception and actual odor are two different things. The ability of an individual to see a ventilation fan increases the "perception" of odor but not the actual odor level.

164. According to Dr. Mikesell, some people have far less tolerance for odor than others.

165. According to Dr. Mikesell, moving the fans from one side of the poultry barn to the other would have no impact on the odor generated by the poultry barn and would not have any impact on the complaints made by the Plaintiffs.

166. Even assuming that relocating the fans would eliminate odors, the logistics of doing so would be prohibitively expensive.[5]

167. According to Dr. Mikesell, a complete elimination of odor from an agricultural facility is nearly impossible and is cost-prohibitive.

168. According to Dr. Mikesell, implementing the level two BMPs is prohibitively expensive with the exception of planting buffer trees, which the Defendants have already voluntarily done.

169. The Plaintiffs presented no evidence to show that the poultry operation is unreasonable.

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[5] No one gave a precise dollar estimate of the cost involved. Curtis Dietz said it would be a significant expense. He testified that moving the fans is "no big deal," but rather "it's everything that goes with it." The driveway approaching the barn would have to be relocated; the holes created in the building walls by taking out the fans (which are large) would have to be patched; overshots on the roof to protect the fans would have to be removed and relocated; a heating system inside the barn would have to be moved along with the gas line and a fog stem; vents would have to be moved. Dr. Mikesell testified along a similar line – that eliminating odors completely would be so costly as to eliminate animal agriculture.

170. The Plaintiffs presented no evidence to show that the Defendants are operating their poultry business in a reckless or dangerous manner.

171. According to Dr. Mikesell, no study has ever concluded that odors from agricultural operations are linked to adverse health effects in people.

3. Conclusions of Law

1. A poultry barn is not a *per se* public or private nuisance. See *Horne v. Haladay*, 728 A.2d 954 (Pa. Super. 1999).

2. The Pennsylvania Right-to-Farm Act, 3 P.S. §951 *et seq.* does not prohibit nuisance suits arising out of agricultural operations provided the agricultural operation has not been in existence for a year or more. 3 P.S. §954.

3. A private nuisance is distinguished from a public nuisance in that the latter is a nuisance common to the neighborhood while a private nuisance is one which inflicts personal injury to a private party or his/her property. *See, Helms v. D'Eletto*, 38 D. & C. 3d 473, 476 (C.P. Greene 1983), citing *Phillips v. Donaldson*, 112 A. 236, 237-238 (Pa. 1920).

4. A party who brings a private nuisance claim arising out of an agricultural operation within the limitations period set forth in Section 954 of the Pennsylvania Right to Farm Act must establish each of the elements of common law private nuisance claim in order to be afforded relief.

5. The burden of proof is on the Plaintiffs to show by a preponderance of the evidence that a nuisance in fact exists. *Hughes v. Emerald Mines Corp.*, 450 A.2d 1, 6 (Pa. Super. 1982); *Bradley v. South Londonderry Township*, 440

A.2d 665, 669 (Pa. Cmwlth. 1982); *Noerr v. Lewistown Smelting and Refining. Inc.*, 60 D. & C. 2d. 406 (C.P. Mifflin 1973).

6. Plaintiffs' burden of proving a nuisance must be met with definite, precise, and competent evidence. *Ribblett v. Cambria Steel Co.*, 96 A. 649, 651. (Pa. 1916).

7. The elements necessary to establish liability for the tort of private nuisance are set forth in Section 822 of the Restatement (Second) of Torts which provides, in pertinent part, as follows:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is ...(A) intentional and unreasonable...

8. Section 822 of the Restatement (Second) of Torts accurately reflects Pennsylvania law regarding the elements necessary to prove the tort of private nuisance. See *Waschak v. Moffat*, 379 Pa. 441, 109 A.2d 310 (1954) (adopting Section 822 of the original Restatement); *Kembel v. Schlegel*, 478 A.2d 11 (1984) (adopting Section 822 of the Restatement [Second] of Torts" as the test to determine the existence of a private nuisance"). See also *Karpiak v. Russo*, 676 A.2d 270 (1996) (recognizing that Section 822 of the Restatement [Second] of Torts contains the "authoritative definition of the tort of private nuisance").

9. Under Section 822 of the Restatement (Second) of Torts, the initial element of proof is that the Defendants' conduct is a "legal cause of an invasion of another's interest in the private use and enjoyment of land".

10. The term "legal cause" is generally defined in the Restatement (Second) of Torts as a "substantial factor" in causing a harm. Restatement (Second) of Torts, Section 431(a); *Ford v. Jeffries*, 379 A.2d 111, 114 (Pa. 1977).

11. A "substantial factor" does not require any particular quantification but means only that the actor's conduct be a cause that is significant or recognizable. *Jeter v. Owens-Corning Fiberglas Corp.*, 716 A.2d 633, 636-637 (Pa. Super. 1998).

12. As explained in Comment B to Section 821D of the Restatement (Second) of Torts, the "interest in use and enjoyment" includes "the pleasure, comfort, and enjoyment that a person normally derives from the occupancy of land."

13. To establish a nuisance it is not necessary that a defendant's action be injurious to health in order to be classified as a nuisance. *Kembel*, 478 A.2d at 15.

14. One of the "fundamental rights of citizens" is to the "free enjoyment of pure air to breathe and the comfort and use of their property." *Ivestri v. Metallic Finishers*, 74 Montg. Co. L.R. 356, 358 (1957).

15. Given that the odors described by Plaintiffs' commenced with the start of the poultry operation, a reasonable person could conclude that the Defendants' conduct has been a legal cause of the odors experienced by Plaintiffs.

16. Additionally, based on the Plaintiffs description of how the odors affected their daily enjoyment of their property at particular times of day, Defendants have caused an invasion of the Plaintiffs' private interest in the use and enjoyment of their land. *Diess v. Pennsylvania Department of Transportation*, 935 A.2d 895, 905-906 (Pa. Cmwlth. 2007).

17. Plaintiffs also need to establish that the harm caused by the invasion is significant. See Section 821F of the Restatement (Second) of Torts; *Karpiak* 676 A.2d at 272.

18. Comment C to Section 821F of the Restatement (Second) of Torts explains what is meant by the term "significant harm" as follows:

> By significant harm is meant harm of importance, involving more than slight inconvenience or petty annoyance... In the case of a private nuisance, there must be a real and appreciable interference with the plaintiff's use or enjoyment of his land.
>
> See also *Karpiak*, 676 A.2d at 273.

19. As further explained in Comment D to Section 821F of the Restatement (second) of Torts (see also *Karpiak*, 676 A.2d at 273):

> When [the invasion] involves only personal discomfort or annoyance, it is sometimes difficult to determine whether the invasion is significant. The standard for the determination of significant character is the standard of normal persons in the particular locality. If normal persons living in the community would regard the invasion in question as definitely offensive, seriously annoying, or intolerable, then the invasion is significant...

20. In this case, the evidence that Plaintiffs' neighbors did not detect odors from the poultry operation does not necessarily negate the significance of

the invasion to the Plaintiffs since no neighbors are situated precisely like Plaintiffs in regard to the location of the Defendants' poultry business. The lack of complaint from neighbors merely shows that the Plaintiffs' complaints are unique. However, by their failure to offer testimony from persons visiting their property who experienced the odors reported by Plaintiffs in the same manner as Plaintiffs does go to a lack of "significance" of the invasion.[6]

21. Apart from establishing an invasion of the Plaintiffs' interest in the private use and enjoyment of their property, and significant harm flowing from that invasion, Plaintiffs also must prove that the Defendants' conduct was intentional and unreasonable.

22. Section 825 of the Restatement (Second) of Torts explains what constitutes an intentional invasion as that term is used in Section 822. Section 825 provides as follows:

> An invasion of another's interest in the use and enjoyment of land is intentional if the actors (a) acts for the purpose of causing it, or (b) knows that it is resulting or is substantially certain to result from his conduct.

See also *Hughes*, 459 A.2d at 4-5.

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[6] The Court could not find a case clarifying the type of proof needed. Some cases seem to put stock in the testimony of neighbors in the surrounding community. See e.g. *Karpiak v. Russo*, 676 A.2d 270, 273 (Pa. Super. 1996); *Moffat v. Moffat*, 160 A.2d 465, 471-472 (Pa. Super. 1960). We found one case, *McGrath and Snodgrass v. Durham*, CV No. 9403805 (C.P. Montg. 1998), in which the testimony was entirely on the basis of visitors to the subject property. We think that the type of testimony depends on the nature of the "invasion." Indeed, if the Plaintiffs' neighbors did experience the same thing as the Plaintiffs, it would have supported the element of "significance" for Plaintiffs' case. The fact that the testifying neighbors did not share Plaintiffs' experrience may have no effect on the "significance" element because of the unique position of the Plaintiffs' property.

23. As further explained in Comment C to Section 825 of the Restatement (Second) of Torts, to be intentional,

> An invasion of another's interest in the use and enjoyment of land need not be inspired by malice or ill will on the actor's part toward the other. [Rather] it is the knowledge that the actor has at the time he acts or fails to act that determines whether the invasion resulting from his conduct is intentional. He must know that it [the invasion] is resulting or is substantially certain to result from his conduct.

24. From the evidence that the Defendants were aware of the Plaintiffs' concerns and complaints about the location of the barn and the fans, but went ahead and constructed the barn, the Defendants' conduct was intentional. *Hughes*, 450 A.2d at 4-5 (Pa. super. 1982).

25. Section 826 of the Restatement (Second) of Torts provides guidance as to when an intentional invasion is unreasonable. "An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if (a) the gravity of the harm outweighs the utility of the actor's conduct." *Noerr*, 60 D. & C. 2d. at 446 (applying original Restatement of Torts Section 830).

26. Factors to be considered in determining the gravity of harm are stated and explained in Section 827 of the Restatement (Second) of Torts. Section 827 provides as follows:

> In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:
>
> (a) The extent of the harm involved;
>
> (b) The character of the harm involved;

(c) The social value that the law attaches to the type of use or enjoyment invaded;

(d) The suitability of the particular use or enjoyment invaded to the character of the locality; and

(e) The burden on the person harmed of avoiding the harm.

27. Section 828 of the Restatement (Second) of Torts further contains a list of factors that need to be considered in weighing the utility of the conduct. Section 828 provides as follows:

> In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:
>
> (a) The social value that the law attaches to the primary purpose of the conduct;
>
> (b) The suitability of the conduct to the character of the locality; and
>
> (c) The impracticability of preventing or avoiding the invasion.

28. Persons living in an area that has traditionally been used for a particular use must subject their personal desires, comforts and the depreciated value of their property to the public good. *City of Erie v. Gulf Oil Corp.*, 150 A.2d 351, 352 (Pa. 1959).

29. "Persons living in a community or neighborhood must subject their personal comfort to the commercial necessities of carrying on a trade or business, and where an individual is affected in his (her) taste, his personal comfort, pleasures, or preferences, must be surrendered to the comfort of the many." *Molony v. Pounds*, 64 A.2d 802, 804 (Pa. 1949).

30. The fact that a person's use of his/her property causes annoyance to a neighbor does not establish a nuisance and is insufficient to award an injunction of the use. *Id.*

31. "Where the annoyance arises from the conduct of a business which is not a nuisance *per se*, a strong effort will be made to conserve the rights of the parties. *Id.*

32. Equity will not ordinarily interfere unless the proof in a nuisance case shows that the injury arises either from improper conduct of the business or from one that could be remedied. *Id.*

33. In the present case, there is no evidence that the Defendants' business is being improperly conducted. To the contrary, the evidence supports the conclusion that the Defendants' poultry business is operating by the highest applicable agricultural standards.

34. It is unclear precisely what causes the odor experienced by the Plaintiffs.

35. The testimony of Defendant Leander Zook, Dr. Robert Mikesell, and Curtis Dietz confirms that the Plaintiffs' complaints could not be remedied without incurring prohibitive expense.

36. The complete elimination of all odor from the poultry operation is a practical impossibility.

37. Judged under the foregoing standards, the Defendants' conduct has not been unreasonable.

38. The gravity of harm suffered by the Plaintiffs does not outweigh the utility of the Defendants' conduct in operating a poultry farm in an agricultural community.

39. The fact that Middlecreek Township is unzoned means that the Plaintiffs must accept certain risks of development that are incompatible with their residential use.

40. The appropriateness of a particular form of relief in a nuisance case is to be tested by balancing the seriousness of the injury against the cost of avoiding it and the importance of the conduct causing it. *Hopkins v. Stepler*, 461 A.2d 1327, 1329 (Pa. Super. 1983), citing *Dexter v. Bebenek*, 327 A.2d 38, 39 (Pa. 1974). In the present case, the alleged injury is not permanently affecting the Plaintiffs' health and is not comparatively serious; the cost of avoiding it is significant; and the conduct causing it is extremely important in that the area of Middlecreek Township is predominantly a farming community, and has been such long before the Plaintiffs' purchased their property.

41. The Defendants' poultry barn does not constitute a nuisance as a matter of law.[7]

4. Summary, Comment, and Conclusion.

Our decision reflects our conclusion that the Plaintiffs have not established the elements of a nuisance. We are not unsympathetic to the

[7] We did not address the matter of the Plaintiffs' proof of the diminution of value in their residence offered by Arthur Bowen because we consider such evidence relevant only if we concluded that a nuisance in fact exists.

Plaintiffs' situation. The Plaintiffs were highly credible witnesses, and we have no doubt they personally are experiencing highly unpleasant odors which appear to them to be a result of the Defendants' poultry operation and which frequently interfere with their use and enjoyment of their lives at their home. We think additionally that the poultry barn itself, located across the road from the Plaintiffs, at the bottom of their driveway, takes away from the extraordinary beauty of their residence.

Unfortunately for the Plaintiffs, the reality is that they built their house right in the middle of Pennsylvania farmland, in a community where there is no zoning, and where the risk of livestock farming clashing with their personal interests is likely. We can find no fault with the way in which the Defendants are conducting their poultry operation. In fact, the evidence showed that the Defendants are very conscientious poultry farmers. Moreover, there was no evidence that the principal remedy which the Plaintiffs seek, the moving of the ventilation fans to the north side of the barn, would help in any way to alleviate any of the odors they are complaining about. The evidence was unclear as to what would remedy the odor problem for the Plaintiffs or even is causing the odors to travel to their property. According to Dr. Mikesell, the Pennsylvania State University livestock odor management expert, a tree buffer zone or shelter belt may be the most effective odor mitigation tool. Obviously, it will take time for the existing tree shelter belt to grow to a height to be beneficial. Possibly

the Plaintiffs can plant additional trees. If anything is the cause of Plaintiffs odor perception, according to Dr. Mikesell, it would be atmospheric conditions.

At the close of Dr. Mikesell's testimony we elicited from him the fact that Dr. Paul H. Patterson[8] at the Pennsylvania State University College of Agricultural Science offers technical assistance and advice to both business operators and members of the public on management of poultry odors. We encouraged the parties through their attorneys to contact Dr. Patterson before we rendered our decision in this case to see if the parties might agree upon some additional odor mitigation tools. We heard nothing further from either party, and assume for whatever reason the parties preferred a decision on the merits of the case from the Court. Possibly the Plaintiffs would find it helpful to contact Dr. Patterson on their own, regardless of the participation of the Defendants.

BY THE COURT:

Knight, J.

Copies to: Hon. Harold F. Woelfel, Jr., P.J.
J. Michael Wiley, J.D.
Ronald L. Finck, J.D.
Mary F. Leshinskie, J.D., Law Clerk
Judge's File

[8] Dr. Patterson is a professor in the Poultry Science Department.