

September 20, 2023

Via Email and Regular Mail

Robert A. Willig, Esquire
Senior Deputy Attorney General
Office of the Attorney General
1251 Waterfront Place
Mezzanine Level
Pittsburgh, PA 15222

Re: East Donegal Township – [REDACTED] ACRE Complaint

Dear Mr. Willig:

Our office serves as special counsel for East Donegal Township with respect to the ACRE inquiry filed by [REDACTED] through their legal counsel, dated August 1, 2023. Please allow this correspondence to set forth the Township's response and position on the issue raised in the [REDACTED] complaint – namely, whether the percentage limitations associated with the stormwater management exemption under the Township's Stormwater Management Ordinance for high tunnels (per Act 15 of 2018) is applied cumulatively or individually. It is the Township's position that the exemption is applied cumulatively.

By way of background, East Donegal Township and most municipalities were directed and required by the Commonwealth in the early to mid-2010s to adopt new Stormwater Management Ordinances to comply with the Pennsylvania Stormwater Management Act and the Cleans Streams Law. The state regulatory agencies, working in conjunction with county governments, prepared the forms of Stormwater Management Ordinances that each municipality was required to adopt. East Donegal Township did so in 2014. Per the Act and the resulting Ordinance, landowners must comply with certain planning and engineering requirements to assure that the rate, volume, direction and quality of stormwater resulting from new development is being addressed (being those projects that take place after the effective date of the Ordinance enactment). See East Donegal Township Stormwater Management Act, Section 39-23.¹

In 2018, the Pennsylvania Legislature amended the Stormwater Management Act to include an exemption for hoop houses or high tunnels under certain circumstances. Per Section 680.11(c) of the amended Stormwater Management Act, a high tunnel is exempt from the requirement to implement a stormwater management plan if:

¹ The Township's Code of Ordinances is available on its website at <https://library.municode.com>.

[REDACTED]

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- (i) the high tunnel or its flooring area does not result in an impervious area exceeding 25% of all structures located on the total contiguous land area; and
- (ii) the high tunnel meets one of the following:
 - (A) the high tunnel is located at least 100 feet from any perennial stream or watercourse, public road or neighboring property line.
 - (B) the high tunnel is located at least 35 feet from any perennial stream or watercourse, public road or neighboring property line and located on land with a slope not greater than 7%.
 - (C) the high tunnel is supported with a buffer or diversion system that does not directly drain into a stream or other watercourse by managing storm water runoff in a manner consistent with requirements of this act. 32 P.S. § 680.11(c).

32 P.S. § 680.11 (emphasis supplied).

The Township has interpreted Section 680.11(c) to limit the surface area of the total number of high tunnels on the property so that, in the aggregate, the high tunnels constructed after the effective date of the ordinance do not result in an impervious area that exceeds 25% of all structures on the land. **The Township has NOT interpreted the statutory language to impose any requirements other than limitation language in the Act.**

The Township's understanding is that the [REDACTED] want the provision applied to each individual high tunnel in a manner that does not limit the number of high tunnels that can be constructed provided that each one does not result in an impervious area exceeding 25% of all structures on the land.

There are no reported appellate or other court decisions that have directly addressed this issue. In the absence of any precedent, one must look to the language of the Act and the applicable Rules of Statutory Construction. The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. 1 Pa.C.S. § 1921. The primary purpose of the statute in question must guide the determination of the General Assembly's intent. *Vitac Corp. v. Workers' Comp. Appeal Bd. (Rozanc)*, 578 Pa. 574, 581 (2004). When statutory language is ambiguous, the rules of statutory construction and interpretation dictate that the statute must be interpreted and construed so that it is consistent with the General Assembly's intent in adopting the statute. 1 Pa.C.S. § 1921; *Vitac Corp. v. Workers' Comp. Appeal Bd. (Rozanc)*, 578

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Pa. 574, 581 (2004). The General Assembly's intent may be ascertained by considering, among other matters:

- (1) The occasion and necessity for the statute.
- (2) The circumstances under which it was enacted.
- (3) The mischief to be remedied.
- (4) The object to be attained.
- (5) The former law, if any, including other statutes upon the same or similar subjects.
- (6) The consequences of a particular interpretation.
- (7) The contemporaneous legislative history.
- (8) Legislative and administrative interpretations of such statute. Pa.C.S. § 1921.

The Legislative history of Act 15 of 2018 is not determinative, but gives a nod toward the continuing importance of balancing agricultural exemption and stormwater regulation. Generally, the Act recognizes the importance of stormwater management regulation. The General Assembly found that inadequate management of stormwater runoff increases flood flows and velocities and contributes to erosion and sedimentation, thus threatening public health and safety. 32 P.S. § 680.2(1). Therefore, the purpose of the Pennsylvania Stormwater Management Act is to encourage the management of stormwater runoff to protect and conserve ground waters in the interest of protecting public health, safety and welfare. 32 P.S. § 680.3.

Act 15 of 2018 was first introduced by State Representative Zimmerman as House Bill 1486. He circulated his legislative background memorandum in which he noted that:

- Counties and municipalities across the Commonwealth have made great strides by investing significant resources in managing stormwater runoff;
- There had been confusion in the implementation of the Act in how "high tunnels" used for storage or to grow agricultural commodities were treated, with some municipalities treating them as impervious and others not.
- In order to provide consistency, Zimmerman noted that he was introducing the legislation to exempt "'high tunnels' that meet certain parameters from any requirements under Act 167 and direct[] local governments to amend their plans, ordinances or regulations to reflect this change."

See Zimmerman Legislative Memo, attached hereto as Exhibit A. The above referenced statutory language then followed.

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[REDACTED] interpretation of Section 680.11(c) would be inconsistent with the above and would lead to an absurd result. Of course, it merits mention that the Township is not implying that the Fishers or their arguments are "absurd." Rather, the logical extension of their interpretation would nullify the Act 15 of 2018 percentage limitation and lead to an absurd result contrary to the Stormwater Management Act and the resultant regulations. Such an interpretation would nullify any percentage limitation on high tunnels' compliance with stormwater management regulations.

In ascertaining the intention of the General Assembly, the consequences of a particular interpretation of a statute must be considered because it is presumed that the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable. 1 Pa.C.S. § 1922; *Land Acquisition Serv., Inc. v. Clarion Cnty. Bd. of Comm'rs*, 605 A.2d 465, 467-68 (Pa. Cmwlth. 1992); *Valley Forge Indus., Inc. v. Armand Constr., Inc.*, 394 A.2d 677, 678 (Pa. Cmwlth. 1978).

Here, to apply the percentage limit on an individual, high tunnel by high tunnel basis, the exemption would swallow the rule. For example, if a property had 20,000 square feet of existing structures as of 2022 (prior to high tunnel #1 being installed), they would be permitted to install a 4,000 square foot high tunnel. This would then increase the threshold on the property from 20,000 to 24,000 square feet (with the addition of the 4,000 square foot high tunnel). In 2023, they would then be permitted to install high tunnel #2 at 6,000 square feet in size (being 25% of 24,000 square feet). In 2024, the property would then have 30,000 square feet of impervious coverage floor, which would result in high tunnel 3 being permitted to be 7,500 square feet. The percentage limits on high tunnels therefore would not be a limitation, but an exponential multiplier on future structures/high tunnels – contra the concept in the legislation that high tunnels would be permitted, provided they meet certain restrictions/requirements. Doing so would render the 25% limitation in the legislation meaningless.

Alternatively, to continue the exercise as it relates to a property with 20,000 square feet of existing structures, treating high tunnels individually would allow an individual to install four (4), 4,000 square foot high tunnels (thus, generating 16,000 square feet of impervious area) as no single high tunnel would exceed the 25% of the existing impervious structure coverage. However, per the parameters, such an individual would not be permitted to install one 6,000 square foot high tunnel (generating less than 16,000 square feet of impervious area). The result of such an application of the exemption would be absurd and inconsistent with the General Assembly's intention in adopting Section 680.11 under Act 15.

Further, the Township's interpretation of Section 680.11(c) is entitled to deference. "When statutory language is not explicit, courts should give great weight and deference to the interpretation of a statutory or regulatory provision by the administrative or adjudicatory body that is charged with the duty to execute and apply the provision at issue." *In re Thompson*, 896 A.2d 659, 669 (Pa. Cmwlth. 2006) (citing *Johnston v. Upper Macungie Twp.*, 638 A.2d 408 (Pa.

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Cmwlth. 1994). Per Section 39-22 of the Township Stormwater Management Ordinance, the Township has the authority to regulate activities that affect stormwater management within the municipality. *See* Ord. No. 2014-1, § 1(104). With this regulatory authority, the Township is charged with interpreting and applying the stormwater management plan exemption set forth in Section 680.11(c). Thus, the Township's interpretation that the 25% exemption set forth in Section 680.11(c) limits the surface area of the total number of high tunnels on the property is entitled to deference and should govern.

It is noteworthy that the Pennsylvania Department of Environmental Protection issued guidance on its interpretation of the 2018 Stormwater Management Act amendments through its issuance of D.E.P. No. 383-4200-001, Water Management for Agricultural High Tunnels. In it, PA DEP notes that high tunnels are recognized as an enhancement to agricultural activities or alternative agriculture storage, but ones that remain under potential regulation. PA DEP specifically noted that the Stormwater Management Act "affects all structures constructed within the Commonwealth, including high tunnel systems on agricultural land." *See* page 1. However, unfortunately, Pa DEP did not provide specific guidance for the particular issue of interpretation raised in this matter.

Lastly, we note that the issues raised by [REDACTED] appear to mirror those raised in an ACRE complaint submitted to your office in March of 2022 vis-à-vis Lower Chanceford Township. In it, the applicant appears to raise the same issue for interpretation (coupled with a few additional arguments not applicable here). The Attorney General's website lists the March 2022 complaint as having been denied.

In conclusion, because [REDACTED] interpretation of Section 680.11(c) of the Stormwater Management Act generates an unreasonable result, inconsistent with the language of the Act, the Township respectfully requests that the interpretation/relief requested in the Fishers be denied.

Very truly yours,

[REDACTED]

cc: [REDACTED], Esquire
 East Donegal Township
 [REDACTED] Esquire

EXHIBIT A

House of Representatives

Session of 2017 - 2018 Regular Session

MEMORANDUM


Posted: May 1, 2017 10:28 AM
From: Representative David H. Zimmerman
To: All House members
Subject: Agriculture High Tunnel Exemption - Storm Water Management Act

Since the passage of the Storm Water Management Act (Act 167 of 1978), counties and municipalities across the Commonwealth have invested significant resources in managing rain water runoff. Likewise, we have made significant strides in reducing flooding, pollution, and erosion related to storm water.

Under Act 167, local governments must manage runoff from nonporous surfaces, relying upon management plans and storm water ordinances to provide structure to their programs. However, this has created some confusion in the agricultural community as many farmers use affordable "high tunnels" for storage or to grow agricultural commodities that help extend the growing season. "High tunnels" are generally covered during the growing season only (spring to fall), and most erosion can take place during winter months. As these moveable structures do not constitute typical impervious surfaces, some municipalities do not regulate them. Other municipalities may consider high tunnels as more common buildings and subject them to burdensome yet misplaced storm water requirements.

Accordingly, in the near future, I will introduce legislation exempting "high tunnels" that meet certain parameters from any requirements under Act 167 and directing local governments to amend their plans, ordinances, or regulations to reflect this change.

Please join me in sponsoring this important piece of legislation.

 Introduced as HB1486