

COPY

William Remaley and Barbara Remaley,
husband and wife)
vs.)
David Zook and Thelma Zook, husband and)
wife; and Leander Zook and Neila Zook,)
husband and wife)

IN THE COURT OF COMMON PLEAS
OF THE 17TH JUDICIAL DISTRICT
OF PENNSYLVANIA
SNYDER COUNTY BRANCH

CIVIL ACTION

No. CV-0580-2007

NOTICE OF ENTRY OF DECISION-NONJURY TRIAL

TO THE ABOVE PARTIES AND COUNSEL OF RECORD:

Notice is hereby given that on April 29, 2009, Decision and Order and Decree was entered by the Court (after non-jury trial) in the above action, as follows:

In favor of the Defendants and against the Plaintiffs, with each set of parties to pay their own costs.

(see attached copy of the Decision-NonJury Trial and Order and Decree)

Entered and Filed : Thursday, April 29,2009 @ 8:37 a.m.

TERESA J. BERGER
Prothonotary of Snyder County

Jan M. Fawcett, Deputy

Thursday, April 30, 2009
Date of Mailing Notice

FILED

2009 APR 29 AM 8:37


PROTHONOTARY
SNYDER CO., PA

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

ORDER AND DECREE

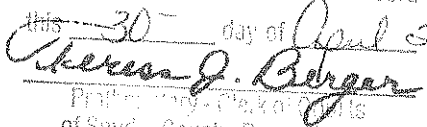
AND NOW April 29, 2009, for the reasons set forth in the Decision of the Court filed this same date, it is hereby ORDERED AND DECREED that judgment is entered in favor of Defendants and against Plaintiffs, with each set of parties to pay their own costs.

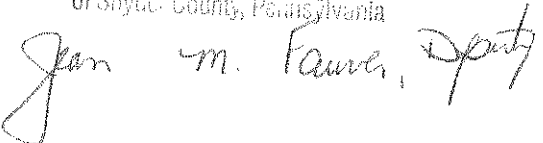
BY THE COURT:



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
Plaintiffs
Defendants

Certified and Extracted from the Record
this 30th day of April 2009


Theresa J. Berger
Prothonotary - Clerk of Courts
of Snyder County, Pennsylvania

Jan M. Fawcett, Deputy

FILED

2009 APR 29 AM 9:37

Nuisance: poultry farm

PROTHONOTARY
SNYDER CO., PA

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

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.

A nonjury trial was held over three days on March 23, 24, and 25, 2009, and included a view by the Court of the properties. Subsequent to the trial each side submitted comprehensive supplemental proposed findings of fact and conclusions of law. The Court has carefully reviewed the parties' submissions and its notes from the trial and provides the following Adjudication blending the parties' submissions with its own findings of fact and conclusions of law.

2. Findings of Fact.

Upon review of the pleadings and evidence of record as well as the parties' proposed findings of fact, supplemental findings of fact, conclusions of law, we make the following findings of fact:

1. Plaintiffs William Remaley and Barbara Remaley are the owners of approximately 26.4 acres of real property located at 1247 Kratzer Road, Middleburg, Middlecreek Township, Snyder County, Pennsylvania, 17842.
2. Plaintiffs began residing on the property in 1975.
3. The Plaintiffs' property consists of two (2) tracts. The personal residence is on a six (6) acre tract. To the west of the six (6) acre tract is a 20.4 acre tract that contains a vacant field. The two tracts have not been subdivided.
4. The Plaintiffs' property is well-maintained, and it is evident that they spend considerable time and energy on the property. (See, Plaintiffs Remaley's Exhibits Nos. 13-21 -- Photographs depicting 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' property¹ 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 herd 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) Caking 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.

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 actor (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.

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' experience 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. Patterson⁸ 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.