

IN RE: **APPLICATION OF** :**No. 2007-01**
 ERIC GEMMILL :**Special Exception**

This Decision of the Peach Bottom Township Zoning Hearing Board (Board) is on an application by Eric Gemmill (Applicant)¹ seeking a special exception to operate a hog grow-out facility, which is a Concentrated Animal Feeding Operation (CAFO) as defined in the Peach Bottom Township Zoning Ordinance (Ordinance). Hearings were timely held². After hearing all the testimony and considering all of the evidence presented by all parties and witnesses, the Board makes the following:³

Dec.

5. Section 202.1 of the Ordinance permits a Concentrated Animal Feeding Operation (CAFO) as a use by right. Section 202.2 of the Ordinance requires a special exception for a large CAFO, as defined in §501 of the Ordinance. §§202.1, 202.2, and 501 of the Ordinance; N.T., February 5, 2008, p. 23; App. Ex. #29, 30.

6. Because there are over 2,500 pigs at the Facility, the proposed operation is a large CAFO as defined in §501 of the Ordinance (N.T., March 15, 2007, p. 72), and thus can only be permitted by special exception, per §202.2.16 of the Ordinance. As such, it must meet the criteria of §§202, 336, and 443 of the Ordinance.

7. Steven Gemmill, the brother of Applicant, was originally also an applicant in this matter, but, upon his request, and after questioning of him at a hearing, the Board permitted him to withdraw as an applicant. N.T., November 14, 2007, pp. 20-21. See fn. 1.

8. Applicant has an interest in the Property pursuant to a Lease Agreement from David and Martha Gemmill to Applicant, dated February 8, 2007 (after the start of the hearings on the application). The Lease Agreement leases certain land where the Facility will be built on the Property, and access to the Facility and other property used in operation of the Facility. App. Ex. #20.

9. The Gemmills also entered into a lease agreement on February 8, 2007 with Eric and Steven Gemmill, jointly and severally, leasing all real property currently or which may be owned and farmed by Dave and Martha Gemmill. App. Ex. #21.

10. Applicant, David Gemmill, and Steven Gemmill all signed applications submitted to the State Conservation Commission and the Pennsylvania Department of Environmental Protection (DEP) interchangeably, and as Belview Valley Farms. Each was authorized to do so on behalf of Applicant and/or David and Martha Gemmill. N.T., May 16, 2007, pp. 72-73.

11. Applicant is 23 years old, and has been farming for some years. N.T., May 16, 2007, p. 92.

12. Applicant has visited a number of similar facilities to research this type of operation. N.T., May 16, 2007, p. 93; N.T., December 18, 2007, p. 11.

13. Applicant has operated a 400-pig facility on the Property for a number of years. N.T., December 18, 2007, pp. 95-96.

14. That existing operation will be shut down if this CAFO is approved. N.T. May 16, 2007 at p. 96. See also N.T. August 23, 2007 at p. 54.

15. Eric and David Gemmill are applicants for the CAFO permit submitted to DEP. N.T., March 15, 2007, p. 115.

16. The Board granted party status in this matter to 35 neighbors or groups (not including Peach Bottom Township, which is automatically a party) (collectively and generally,

the "Opponents"). The list of those granted party status is attached as Attachment "A." Though not marked exhibits, the sign-up sheets for parties are part of the Board's record in this case.

17. The pigs will enter the Facility at approximately 10 to 14 days old, weighing approximately 13 pounds each, and will be cared for in the Facility for approximately six months. N.T., January 25, 2007, p. 70; App. Ex. 15.

18. When the pigs reach their mature weight of approximately 240 to 255 pounds after about 6 months, they will be removed from the Facility and replaced by another batch of newly weaned pigs weighing approximately 13 pounds. App. Ex. #15, 31; N.T., January 25, 2007, p. 70.

19. Applicant proposes to operate the Facility in a building in which all of the operations of the proposed use, except as specifically noted, will be contained. N.T., January 25, 2007, p. 71)

20. The Facility will be in the southwest corner of the Property. App. Ex. #7.

21. The Facility will be approximately 120 feet wide by 300 feet long. N.T., January 25, 2007, p. 71; App. Ex. #8.

22. The Facility will contain a 6-foot deep manure storage pit, which will be under the entire building. N.T., January 25, 2007, p. 71; App. Ex. #8.

23. The floor of the Facility (upon which the pigs and operators stand) will be grating that will allow pig manure and any wash water used in the Facility to fall into the manure storage pit. N.T., January 25, 2007, p. 73.

24. There will be a back-up electric generator in the Facility in case of a power outage. N.T., February 8, 2007, pp. 54-55.

25. The Facility is set back at least 200 feet from any adjoining property owners. N.T., February 22, 2007, p. 12; App. Ex. #8.

26. Based on Board (Bd.) Ex. #6, a Peach Bottom Township map that shows the wells and actual property uses, which has a scale of 1" = 1000', other than residences on the Property, the nearest two homes to the proposed Facility location are approximately 1,000 feet and 1,500 feet to the southeast. There are also a number of residences approximately 2500 feet south of the proposed location which are part of the Susquehanna Trails development. See also N.T., October 17, 2007, p. 18.

27. The final design and construction details of the Facility will be approved by DEP prior to the start of construction. The manure storage pit will be constructed of reinforced concrete. The exterior walls will be 8 inches thick, and have steel reinforcement every 10-12 inches. The floor of the manure storage pit will be a minimum 5 inches thick reinforced concrete, and will have

control joints to allow the concrete to naturally expand and contract, to help prevent cracking. N.T., February 22, 2007, p. 21; App. Ex. #10.

28. The Facility will be equipped with a perimeter drainage system consisting of a 4 inch perforated pipe placed along the perimeter of the Facility, slightly below grade., which is intended to direct storm water away from the Facility. N.T., February 22, 2007, pp. 23-24; App. Ex. #7.

29. The manure storage pit will rest on between 6 to 12 inches of compacted clay and 12 to 24 inches of gravel. (N.T., February 22, 2007, p. 25)

30. The manure storage pit will have a leak detection system, placed within the 12 to 24 inches of gravel beneath the manure storage pit. The pit leak detection system will consist of a number of perforated pipes underneath the manure storage pit. Each pipe will be graded to lead to a pit leak detection manhole, located outside of the Facility, which will allow Applicant to notice any leaks from the manure storage pit in the leak detection system manhole. (N.T., February 22, 2007, pp. 25-28; App. Ex. #7.

31. Applicant will observe the manure storage pit and the leak detection manhole on at least a weekly basis. If any manure is noted in the leak detection manhole, Applicant will pump the material back into the manure storage pit. Applicant will also contact DEP and the Township Zoning Officer within 24 hours after the discovery. N.T., January 25, 2007, p. 106.

32. DEP's typical procedure is to approve construction drawings only after a CAFO permit has been issued. N.T., February 22, 2007, p. 43.

33. Prior to the use of the Facility, the manure storage pit must be certified by a professional engineer. As-built drawings must be provided to and approved by DEP prior to construction. N.T., February 22, 2007, p. 44. A copy shall also be provided to the Township.

34. A National Pollutant Discharge Elimination System (NPDES) stormwater permit will be obtained from DEP prior to the construction of the Facility. N.T., February 22, 2007, p. 51.

35. An erosion and sediment control plan (E&S Plan) will be submitted to, and approved by, the York County Conservation District if required, prior to the start of construction on the Facility. N.T., February 22, 2007, p. 51.

36. A Preliminary E&S Plan was submitted to the Board. App. Ex. #13.

37. A Nutrient Management Plan (NMP) for the Facility was approved by the York County Conservation District. App. Ex. #12. Revisions to the NMP have been submitted to the State Conservation District, based on comments at the zoning hearings and in public hearings before the State Conservation Commission and DEP. App. Ex. #31.

38. Applicant will own only the Facility; the pigs and all other inputs, such as feed and medications, are owned by the pig supplier. Applicant testified that he intends to contract

with Hershey Ag for the supply of pigs, food, medicines, and other inputs. N.T., January 25, 2007, p. 94.

39. Applicant currently has no contractual relationship with Hershey Ag. N.T. May 16, 2007, p. 82.

40. Hershey Ag currently contracts with approximately 40 pig growers like Applicant in the Commonwealth of Pennsylvania, every one of which is operated by a single individual. None of these facilities have experience failures that have significantly affected the health and safety of their surrounding communities. N.T., January 25, 2007, p. 86; N.T., December 18, 2007, p. 22.

41. At the current time, Hershey Ag works with 4 pig producers who use substantially the same design as Applicant's proposal. N.T., January 25, 2007, p. 154.

42. Applicant's proposed design is similar to other newly built facilities within the Commonwealth. N.T., January 25, 2007, p.69-73; App. Ex. 4.

43. Brent Hershey of Hershey Ag testified that the mortality rate is approximately 4% at his other contracted facilities. N.T., January 25, 2007, p. 86-87, 89; App. Ex. #31. But see Raymond Ex. #7, which identifies a mortality rate closer to 10%.

44. Applicant presented a Fly Control Plan, which is simply a listing of available preventive measures, not an implementable plan. App. Ex. #6. Overall sanitation at the Facility is essential to fly control. N.T., January 25, 2007, p. 96.

45. Bio-security is of utmost importance to agricultural operations like the proposed use. As a result, Applicant may not come in contact with any other pig operations during the time he is operating the Facility. Representatives of Hershey Ag take special precautions to disinfect themselves before they leave a particular Facility. Any visitors, including any persons performing an inspection of the Facility, must use the same protocols as Hershey Ag representatives.

46. Brent Hershey of Hershey Ag testified that the CAFO would be operated by Eric and Steven Gemmill and they would have no employees. N.T. January 25, 2007 at p. 106-108. Steven Gemmill has now withdrawn as an operator. See fn. 1, Finding of Fact #7.

47. Applicant will be in charge of the entire operation. It was estimated that Applicant will spend approximately one-half of each day at the Facility. N.T., January 25, 2007, p. 110.

48. If Applicant is away from the Facility for an extended period, such as on vacation, Applicant will designate other qualified people to operate the Facility. In addition, the pig supplier will provide additional assistance and more frequent inspections during those times when Applicant is away from the Facility. N.T., January 25, 2007, p. 115.

49. When Applicant is away from the Facility, the Facility's computer will alert him by cell phone of any problems. N.T., January 25, 2007, P. 115.

50. David Gemmill will ensure Eric Gemmill complies with relevant laws. N.T., May 16, 2007, p. 29.

51. David and Martha Gemmill as the Property owners agree to comply with the Zoning Ordinance and have any penalties or actions by the Township enforced against them, pursuant to §336.1(j) of the Ordinance. N.T., January 25, 2007, pp. 20-21.

52. Mortalities will be composted in external composting bins in a small covered building (N.T., January 25, 2007, p. 88-89; App. Ex. #31), which shall meet the specific guidelines of DEP. N.T., March 15, 2007, p. 99; App. Ex. #31. All such mortalities and dead carcasses must be composted within 24 hours, as set out in 25 Pa. Code §243.11.

53. At the height of groundwater usage, the Facility could utilize up to 13,000 gallons of groundwater per day. This includes water consumed by the pigs and the water sprays for temperature and odor control. N.T., January 25, 2007, pp. 128-129.

54. Section 443(f) of the Ordinance provides that the Board can require that Applicant and the land owner enter into an agreement with the Township not to utilize more ground water on a daily basis in the operation of its facility than the groundwater recharge computed during drought conditions.

55. Under a drought conditions, defined as a 40% reduction in average rainfall, the average groundwater recharge on the Property is 48,000 gallons per day. N.T., January 25, 2007, p. 131.

56. Applicant's witnesses presented the preliminary site plan, various site drawings, drainage, and stormwater plans for the proposed CAFO. N.T. February 22, 2007, p. 11-44; App. Ex. 8, 9 and 10.

57. The Facility will contain large vents fans for ventilation and temperature control. The fans will form "tunnel flow" ventilation, drawing air through the building and out one end. The fans will be automatically adjusted to keep a constant temperature inside the building. At peak summer hours, the fans will turn over the air inside the building approximately once every 25 seconds to 2 minutes, depending on weather and temperature conditions. N.T., January 25, 2007, pp. 74, 79.

58. The pig feed system will be automated. The feed is delivered to feed bins on the Property, from which the feed is augured into a feed truss inside the building. N.T., January 25, 2007, p. 73.

59. An automated water system will provide drinking water for the pigs. N.T., January 25, 2007, p. 73.

60. The Facility will have an automatic temperature control, which will hold the temperature at 68° (75° F when new pigs are introduced into the Facility). Heaters will turn on when the temperature drops below a set point, and when the temperature exceeds approximately 85° F, a sprinkler system automatically cools the Facility. N.T., January 25, 2007, pp. 74-75.

61. Sprinklers come on every 20 minutes, for 15 seconds, to suppress dust and odors. N.T., January 25, 2007, pp. 75-76.

62. The proposed Facility will be highly automated. Computers will control the internal temperature, the fan operation, the feed operation, the mist water, etc. N.T., January 25, 2007, pp. 75-76.

63. If Applicant contracts with Hershey Ag, in the first year of operation representatives from Hershey Ag will provide a great deal of training to Applicant. A representative from Hershey Ag will help train Applicant on topics concerning pig care and health. N.T., December 18, 2007, pp. 18-19. Regardless of the provider, such training of Applicant is essential.

64. When the final equipment and equipment manufacturers are selected, each manufacturer or its agent will train Applicant on the proper use and maintenance of each specific piece of equipment. The instructions and maintenance manuals for all equipment of the Facility will be grouped in a Facility maintenance manual, which will be stored in the Facility's control room. N.T., December 18, 2007, pp. 12-13.

65. Hershey Ag representatives will make a weekly inspection of the facilities. This inspection will note items such as pig health and Facility maintenance and housekeeping. N.T., January 25, 2007, p. 91; App. Ex. 3.

66. Applicant will become certified by the Pork Quality Assurance Board, which is a national board made up of pork producers. N. T. December 18, 2007, pp. 13-18; App. Ex. 26-28.

67. As part of the pork quality assurance certification, Applicant will be subject to outside audits to ensure the Facility is operated in accordance with best practices. N. T. December 18, 2007, pp. 13-18; App. Ex. 26-28.

68. Approximately twice a year, manure will be pumped out of the manure storage pit into a manure application truck, and will be applied to various farm fields (as detailed later) pursuant to Applicant's approved NMP. N.T., January 25, 2007, pp. 82-83; App. Ex. #15, 31.

69. When mature pigs are removed from the Facility, the entire Facility will be washed down. Typically, a separate water tanker truck is delivered and the Facility is washed down using high-pressure washers. All of this wash water falls into the manure storage pit, where it mixes with the existing pig manure. N.T., January 25, 2007, p. 118.

70. The manure will be removed from the manure storage pit as needed to supply nutrients to crops grown by Applicant or David Gemmill, as provided in the approved NMP.

Because of this, manure will typically be removed from the Facility in the spring and in the fall, prior to growing seasons. N.T., January 25, 2007, p. 118.

71. Peter Hughes was qualified and admitted on behalf of Applicant as an expert in nutrient management and general animal agricultural operations, and testified at a number of the hearings N.T., March 15, 2007, pp. 59, 68), and testified at a number of the hearings on the operation of the Facility.

72. In each 6-month cycle, the Facility will contain approximately 526.58 animal equivalent units (AEU), based on an average pig weight of 145 pounds. App. Ex. 31, p. 26.

73. If the acres of land to which manure is applied changes by more than 10%, a revised NMP must be submitted to and approved by the State Conservation Commission.

74. The proposed operation will have approximately 1.18 AEUs per acre, taking into account the 445.3 available acres to spread manure, in accordance with the Nutrient Management Act (NMA), 3 Pa.C.S.A. §501 et seq., and Applicant's most current NMP. App. Ex. #31, p. 26.

75. The amount of manure that can be applied to any field is determined by the phosphorous balance of the field. The NMP evaluates the amount of phosphorous currently in the field, the amount of phosphorous that will be removed from the field by the anticipated crop yield, and the amount of phosphorous in the manure to arrive in an application rate. Soil samples are taken for each 5 to 10 acres of fields on which manure is applied. N.T., March 15, 2007, pp. 78-80; App. Ex. #31.

76. Applicant will not export manure, which is defined in the NMA as sending manure to an operation that is not owned by or under the direct control of the manure producer. N.T., March 15, 2007, p. 81.

77. The NMP details the times when Applicant will apply manure, the farms to which Applicant will apply manure, and set backs from any property boundary, stream, sinkhole, or similar structure. App. Ex. 31; N.T., March 15 2007, p. 84.

78. The level of manure stored in the manure storage pit will remain at least 24 inches below the surface of the top of the manure storage pit. This provides for at least 6 inches of freeboard below the level of the pit fans. App. Ex. #31.

79. The Facility will have one or two pit fans, which will be located at the top of the manure storage pit, and will draw air from the manure storage pit and vent it outside of the Facility. N.T., January 25, 2007, p. 86.

80. The manure storage pit is not located within 400 feet of any zoning boundary. N.T., February 22, 2007, p. 58.

81. Applicant will apply for driveway permits, if necessary, prior to the construction of the Facility. N.T., February 22, 2007, p. 62.

82. The ground under the manure storage pit must be compacted as provided by current practices of DEP. N.T., February 22, 2007, p. 24.

83. David Gemmill has verbal agreements with a number of landowners that allow him to farm their ground. N.T., May 16, 2007, p. 15; App. Ex. #19. The verbal agreements are for one year, and David Gemmill renews each agreement verbally each spring. N.T., May 16, 2007, p. 15.

84. David Gemmill obtained from each landowner with whom he has a verbal agreement a document titled "Amendment to Lease Agreement" (App. Ex. #2), which incorrectly stated that the leased properties were subject to a written lease agreement, and many of which were not signed by both husband and wife when the land was jointly owned. N.T., May 16, 2007, p. 16.

85. He later obtained corrected Amendments to Lease Agreement from each landowner, which included the signatures of both husband and wife as landowners, that confirmed the existence of a verbal lease of land, and also confirmed the right of David Gemmill to spread manure from the Facility on the leased property. App. Ex. #19; N.T., May 16, 2007, pp. 16-18.

86. David Gemmill presented to each of the leased property owners a summary from the NMP, showing the amount of manure that could be applied to the leased properties, and explained that Applicant may spread manure from the Facility on these properties. N.T., May 16, 2007, pp. 19, 44; App. Ex. #23, 24. Each landowner acknowledged receipt of the NMP Summary. App. Ex. #23, 24.

87. Neither the verbal leases nor the Amendment to Leased Agreements prohibit the assignment of the leased interest from David Gemmill to Applicant. App. Ex. #19.

88. David and Martha Gemmill have entered into a lease agreement with Applicant to use their properties for farming and to spread manure from the Facility. App. Ex. #21.

89. David Gemmill has assigned his rights to farm leased properties and to apply manure from the Facility to Applicant. App. Ex. #22.

90. The Hershey Ag contracted facilities do not use antibiotics unless a pig gets sick. N.T. January 25, 2007 at p. 135.

91. No antibiotics will be used in this Facility, except to treat specific sicknesses. N.T., January 25, 2007, pp. 138-140; February 8, 2007, p. 31

92. To fill the barn with young piglets, approximately 4 tractor-trailer trucks supply the Facility. These trucks arrive at the Facility over a period of 10 to 14 days. N.T., January 25, 2007, pp. 96-97.

93. When the Facility is filled, feed is delivered to the Facility approximately two times per week. N.T., January 25, 2007, p. 97.

94. When the pigs are removed from the Facility every 6 months, it takes approximately 26 trucks over a 4-week period to remove pigs from the facilities. N.T., January 25, 2007, p. 97.

95. Residential roads are roads that go through residential communities such as Susquehanna Trails or Poplar View Estates. Roads such as State Route 851, that pass through the Township and take traffic from one place to another, are not residential roads. N.T., February 5, 2008, p. 20.

96. Although the State Conservation Commission has proposed odor management regulations pursuant to the mandate of the NMA, as amended, those regulations have not yet been adopted. N.T., March 15, 2007, p. 95.

97. Peter Hughes drafted the odor control plan. He testified that odor is a major concern based upon his own experience and of his understanding of best applicable technology for odor management. N.T. March 15, 2007, pp. 90-91.

98. Peter Hughes also testified that there are additives that can be added to the manure in the pit to help control odor. N.T., March 15, 2007, p. 126.

99. Eric Conrad testified on behalf of objector Dan Raymond at the September 19, 2007 and October 17, 2007 hearings. He was qualified and admitted as an expert in environmental regulations and compliance, local zoning requirements and compliance, emergency planning and response, and farming operations, in particular the regulation of CAFOs in Pennsylvania. N.T., September 19, 2007, pp. 46, 50. Conrad is a Pennsylvania Registered Professional Geologist, with over 25 years experience working for DEP. Raymond Ex. #20.

100. Conrad testified about a number of deficiencies in the application and various parts of Applicant's submissions, documents, and plans. He also proposed a number of conditions that should be placed by the Board on an approval of the Facility. Raymond Ex. #21.

101. Although Conrad testified that it was his professional opinion that David Gemmill, Eric Gemmill, and Stephen Gemmill are not qualified to operate a sophisticated farming operation such as this proposed CAFO (N.T., October 17, 2007, p. 97; Raymond #21, p. 4), he also stated that he believed that taking continuing education courses or training would help Applicant be better suited to operating the proposed Facility. N.T., September 19, 2007, p. 71.

102. Conrad testified that bio-security operations to prevent the spread of disease is very important for the operation. N.T., September 19, 2007, p. 80. See Finding of Fact #46.

103. Conrad testified that the Preparedness, Prevention, and Contingency (PPC) Plan, that is part of the NMP, is only a guidance document pursuant to state law, and state law does not require that the PPC Plan be exercised. N.T., September 19, 2007, p. 82, 83.

104. Conrad testified about general concerns about odors produced by the proposed Facility, potential leaks from the manure storage Facility, and a potential impact on water quality in the area. N.T., September 19, 2007, pp. 97-99.

105. Conrad recommended that the Facility include a closure plan, although state law does not require one. N.T., September 19, 2007, p. 107.

106. Conrad recommended that Applicant obtain environmental insurance in case of ground water contamination from the Facility, but admitted that no state regulations require this type of insurance for the operation of a Facility. N.T., September 19, 2007, p. 108.

107. Conrad testified that there are between 250 and 500 or more pig grow out facilities in the Commonwealth. Of these, there are good plans and good operators that follow the rules and do not cause any environmental problems, and those that do not. N.T., October 17, 2007, pp. 83-84.

108. Conrad also testified that he never visited the Gemmill operation, spoke with Applicant or David Gemmill, or spoke with anyone in the community regarding the current Gemmill operation. N.T., October 17, 2007, pp. 97-98.

109. Conrad testified that ground water monitoring was necessary to determine if any contamination of ground water, but acknowledged that this potential concern applies to every agricultural operation in Peach Bottom Township. N.T., October 17, 2007, p. 121.

110. Conrad testified that there will always be a certain level of odor with any farming operation. To completely eliminate odors is an "unreasonable expectation." N.T., October 17, 2007, pp. 126-127.

111. Amy Sapkota, Ph.D., testified on behalf of objectors Laura Yanney and Peach Bottom Concerned Citizens on December 18, 2007. She was qualified and admitted as an expert in environmental microbiology and specifically CAFO swine odor control plans. N.T., December 18, 2007, pp. 64, 67; Yanney Ex. #1.

112. Sapkota is an assistant professor at the University of Maryland College Park, School of Public Health, with ten years' experience looking at community health and occupational health impacts associated with large scale agricultural activities. She has also developed odor control programs in collaboration with pork producers in the State of Oklahoma. N.T., December 18, 2007, p. 64-65.

113. Sapkota testified that the odor control plan does not include all of the best odor management practices available to swine producers. N.T., December 18, 2007, p. 68; Yanney Ex. #2.

114. Sapkota testified that cleaning the interior of the Facility and the exhaust fans, the use of misters or de-dusters to reduce airborne dust concentrations, and directing the exhaust fans away from nearby neighbors are best odor management practices, although she is not aware of the cost of those measures. N.T., December 18, 2007, pp. 71, 73, 75-76.

115. Sapkota recommended that this type of Facility should not be within two miles of residential areas. N.T., December 18, 2007, p. 85.

116. Sapkota testified that she does not think the manure storage pit needs to be completely emptied and inspected. N.T., December 18, 2007, p. 100.

117. There was much testimony on bio-filters, from experts, parties, and others, both pro and con. This is a matter that would best be addressed as a condition of approval of the application. Because the Board is denying the application, that issue is at present moot.

118. Raymond Kepner also testified on behalf of objector Dan Raymond on August 23, 2007. He was qualified and admitted as an expert in ecology and biological sciences. N.T., August 23, 2007, pp. 87, 89, 91.

119. To the extent that his testimony related to the dangers of field-applied manure, and the negative effects of CAFOs in general, the Board is preempted from considering the former by §519 of the NMA, 3 Pa.C.S.A. §519, and the Township Board of Supervisors has determined that CAFOs are a legitimate use in the A District, and are permitted as special exceptions.

120. Kepner reviewed an odor site assessment prepared by Penn State Cooperative Extension in York County that identified three sources of odor normally associated with swine farms: odors from above-ground storage facilities; odors from spreading manure; and odors from the building's exhaust fans. N.T., August 23, 2007, p. 113-114; Raymond Ex. #17.

121. The Penn State odor assessment recognized that odor complaints are normally associated with summertime, when neighbors engage in outdoor activities and routinely keep windows and doors open. N.T., August 23, 2007, p. 114; Raymond Ex. #17.

122. The Penn State odor assessment also recognized there is a wooded hollow buffer between the proposed CAFO and many of the homes located in the path of prevailing winds, yet those home occupants may experience some odors occasionally. Also, homes located to the west of the site are close enough to occasionally experience odors. N.T., August 23, 2007, p. 115-116; Raymond Ex. #17.

123. The Penn State odor assessment further recommends installing biofilters on the pit fans to reduce building odors. Raymond Ex. #17. But see Finding of Fact #118.

124. Other than that testimony, Kepner failed to show that this application posed any greater risk of these damages than any other similar application, or that any dangers caused by this application are unique to this Facility and are greater than any other type of similar operation. Kepner acknowledged that all agricultural operations within Peach Bottom Township are subject to the same concerns. N.T., August 23, 2007, p. 121.

125. David Gemmill was subject to a pollution incident in 1997 when an arsonist burned a building on his property containing chemicals. Gemmill informed the state of this incident, and DEP did not take any enforcement action as a result of the incident. N.T., May 16, p. 76.

126. David Gemmill was subject to another pollution incident in 2003. A truck in which he collected used motor oil hit a hole in the road and cracked the storage tank. Although Gemmill

testified that he called 911 and Peach Bottom Township to inform them of the incident (N.T., May 16, p. 78), the Township's Zoning Officer offered differing testimony which disputed his version of his actions. N.T., January 16, 2008, pp. 122, 136.

127. Numerous other individuals presented testimony, evidence, exhibits, and comments to the Board both in support and in opposition to the Application, including a number of objectors. Some objectors submitted into evidence a number of articles from various sources. (See Raymond Ex. #16, 18, 22 through 31; Yanney Ex. #6, 7; Bredlow Ex. #1 through 10; Cromwell Ex. #2; Payan Ex. #1 through 10) In general, these articles dealt with concerns that are general to all CAFOs and agricultural operations in general.

128. Objectors Mark and Diane Thomas presented photographs and testimony that showed uncovered pig carcasses from the Gemmills' current pig grow out Facility. Raymond Ex. #9-13; N.T., August 23, 2007. DEP investigated, and no evidence was provided that established that Eric or David Gemmill were cited for any violation on account of the pig carcass, although a letter was sent to them from DEP reminding them of the requirement to dispose of dead animal carcasses within 24 hours. Raymond Ex. #10.

129. Steven Gemmill, one of the original applicants (see fn. 1 and Finding of Fact #7), and Applicant's brother, confirmed there were remains of a dead pig on his brother's hog farm on or about August 16, 2007. N.T., November 14, 2007, pp. 31-34.

130. The Thomas family lives next door to the existing 400 pig farm operated by Eric Gemmill. N.T., August 23, 2007, p. 46. Mr. Thomas testified that he observed improper disposal of dead pigs next door. N.T., August 23, 2007, p. 48; Raymond Ex. #11, 12, and 13.

131. Mr. Thomas described the adverse impact on his family's quality of life when there are malodors associated with the neighboring pig farm. N.T., August 23, 2007, pp. 53-54.

132. Mr. Raymond testified about his concerns with the proposed CAFO and the potential impact on his family and their quality of life. N.T., November 14, 2007, pp. 89-100.

133. Other witnesses testified about their concerns about the impact of this CAFO and CAFOs in general on their lifestyles and health. See i.e., N.T., September 19, 2007, pp. 31-32; N.T., November 14, 2007, pp. 67-68.

134. As is the Board's usual practice, the Township Zoning Officer, Michelle Soder, provided testimony to the Board at the request of both the Board and the Peach Bottom Township Planning Commission (Planning Commission).

135. Soder provided the Board with maps identifying the zoning districts, the location of homes, and the locations of the properties on which manure will be spread. Board Ex. #5, 6 and 7; N.T., October 17, 2007, p. 14-21.

136. At the January 16, 2008 hearing, Soder presented a letter from the Planning Commission informing the Board of changes in Applicant's requests between the December 21,

2006 and January 18, 2007 Planning Commission meetings and the testimony that was presented to the Board later. N.T., January 16, 2008, p. 106.

137. Specifically, before the Planning Commission, Applicant agreed to permit bi-monthly monitoring of the Facility's leak detection system by the Township, at Applicant's expense. Board Ex. #12.

138. Applicant later advised the Board that he would no longer agree to that condition. N.T., February 5, 2008, p. 13.

139. Notwithstanding Applicant's concerns about inspections, the only way for the Township to insure compliance with the terms or conditions of any application is for Township officials, especially its Zoning Officer, to have the ability to inspect the facility, and reasonable inspections are a condition, whether implied or explicit, of every zoning approval. Where, as here, there may be special concerns, proper protocols for inspections can be put in place.

140. At the February 5, 2008 hearing, the Planning Commission, through its chair, Sam McConnell, advised the Board that it had revised its conditional approval to now provide that the Planning Commission recommended approval of the application on the condition that Applicant agree to bi-monthly inspections of the leak detection pit to be performed by the Township, the cost of which would be borne by the Township. N.T., February 5, 2008, pp. 38-39.

141. The recommendations of the Planning Commission are recommendations only. Although, as in this case, the Board always considers their recommendations in approving or denying a use or attaching necessary conditions to approval of the use, it is not bound by them.

142. Soder further testified that, in her opinion, §202.2 of the Ordinance requires that the operation must be located on land of low quality for agricultural use as defined in Section 202.9(e) of the Ordinance. N.T., January 16, 2008. p. 123; Bd. Ex. #13, 17.

143. Section 202.2 of the Ordinance, which permits CAFOs by special exception, has an introductory paragraph which states in relevant part:

"The following principal uses shall be permitted as special exceptions . . . provided, however, all such uses shall be located on land of low quality for agricultural use as defined in (see Section 202.9(e)) [sic] of this Ordinance."

144. Section 202.9(e) identifies three ways that land is considered of low quality for agricultural use:

a. the land is in Soil Capacity Units IVE-5 through VIIs-2 as classified by the Soil Survey of York County, Pennsylvania, series 1959, No. 23 issued May, 1963; or

b. the land cannot be feasibly farmed due to existing features of the site such as rock too close to the surface to permit plowing, swamps, heavily wooded areas, or the slope exceeds 15%; or

c. the land cannot feasibly be farmed due to the fact that the size or shape of the area suitable for farming is insufficient to permit efficient use of farm machinery.

145. The Zoning Officer testified, which testimony the Board accepts as credible and as fact, and which testimony Applicant did not dispute, that the soils at the location proposed for the Facility are not in any of the above classifications, and are in fact good quality soil, and that none of the other conditions that would make the proposed site land of low quality for agricultural use exist.

146. Board Exhibit #17, presented by the Zoning Officer,⁴ includes a copy of a section of the Soil Survey of York County, Pennsylvania, series 1959, No. 23 issued May, 1963 that covers the Property, with the approximate location of the Facility marked on the exhibit by an “*”.

147. The soil in that location is EkB2, which, according to the text at pp. 10 and 100 of the Soil Survey attached as part of Board Ex. #17, is Elioak silt loam, 3 to 8 percent slopes, which is Capability Unit Iie-2.

148. The proposed location of the Facility is currently farmed.

149. Thus, Applicant has failed to meet his burden of proving that he meets the criteria of §202.2 of the Ordinance regarding the quality of the soil, as defined in §202.9(e). Therefore, the Board is compelled to deny his special exception application on that basis.

II.

CONCLUSIONS OF LAW

1. CAFOs are uses permitted by right, and large CAFOs are uses permitted by special exception, in the A District.

2. The proposed use is a large CAFO, because it proposes more than 2500 hogs.

3. By permitting large CAFOs as a special exception in the A District, the Township's Board of Supervisors has made a determination that large CAFOs as a general use are lawful and permitted in the A District, subject only to applicants proving that, for their specific applications, they meet the both the specific and general special exception requirements of the Ordinance for a large CAFO.

4. The Board is preempted by §519 of the Nutrient Management Act (NMA), 3 Pa.C.S.A. §519, from regulating most aspects of the storage and land application of animal manure from CAFOs.

⁴ The exhibits presented by the Zoning Officer were all marked as Board exhibits for convenience only. Their designation as Board exhibits does not afford them, nor did the Board give them, any more weight than any other exhibit presented by any party or participant. The Board considered all exhibits equally, and determined their weight based on the merits, as seen by the Board, of each exhibit.

5. In this case, Applicant has failed to meet his burden that he meets all of the requirements for a special exception for a large CAFO in the A District, specifically, §202.2 of the Ordinance, because the location proposed by Applicant for the CAFO facility is not on land of low quality for agricultural purposes as defined in §202.9(e) of the Ordinance.

III.

DISCUSSION

The Courts have held that a special exception is not an exception to a zoning ordinance, but rather is a conditionally permitted use if specifically identified standards are met. Once an applicant meets his initial burden of showing compliance with all of the requirements of a special exception set out in a zoning ordinance, then the proposed use is presumed to be consistent with the promotion of local concerns relating to general health, safety, and welfare, and the burden then shifts to objectors to prove that the use as proposed is detrimental to the health, safety, and general welfare of a community. *Elizabethtown/ Mt. Joy Associates, L.P. v. Mt. Joy Township ZHB*, 934 A.2d 759 (Pa. Cmwlth. 2007). However, for the objectors to carry their burden, they must establish a high degree of probability that the proposed use will adversely impact on the public interests in a way not normally expected for the type of the proposed use. The mere speculation of possible harm resulting from the proposed use fails to satisfy that burden. *Mehring v. ZHB of Manchester Township*, 767 A.2d 1137 (Pa. Cmwlth. 2000).

The Board has carefully listened to all of the testimony, reviewed all of the evidence, and considered all of the information provided to it in rendering this decision. It has attempted to balance Applicant's presumptive right to a CAFO under the rules for special exceptions against the concerns of a significant number of residents as to how this particular CAFO would affect their health, safety, and welfare. Any such analysis must start with the well-established rule that Applicant bears the burden of proving that he meets all of the general and specific criteria for a special exception, which he has failed to do, as to land of low quality for agricultural use as required by §202.2, as that term is defined in §202.9(e) of the Ordinance.

Applicant made a number of arguments as to why §202.9(e) of the Ordinance does not apply in this case. The Board finds those arguments to be without merit, and finds that section applies to and is binding on this application. Clearly, the plain language of §202.2's introductory paragraph requires that all special exceptions be located on land of low quality for agricultural use *as defined in* §202.9(e). Therefore, for these purposes, it is irrelevant that §202.9(e) refers to dwelling units; §202.2 refers to that section to provide *a definition for* land of low quality for agricultural use, but the prohibition is found in §202.2.

To adopt Applicant's argument that §202.9 of the Ordinance only applies to dwellings would strip the relevant portion of §202.2 of any meaning. As discussed above, the introductory paragraph of §202.2 of the Ordinance, referring to special exceptions permitted by that section, clearly states that *all* those permitted special exceptions shall be located on land of low quality for agricultural use. There is no basis for, or logic in, applying that provision and its reference to

§202.9(e) only to dwellings, because dwellings are not permitted in the A District by §202.2, which applies to special exceptions. They are conditionally permitted in the A District by right in §202.9.

Applicant also argues that, if the relevant language of §202.2 of the Ordinance is applied as written, then there is nowhere in the Township on which a CAFO can be built, because all of the soil in the Township defined in §202.9(e) as low quality for agricultural use is in steep slopes, based on the testimony of Peter Hughes. If the Board were to accept that argument, the same would be true of virtually all of the special exception uses permitted in §202.2, which would have the practical effect of voiding much, if not all, of §202.2. This the Board will not, and cannot, do. The Board must presume that the Board of Supervisors in adopting §202.2 considered these arguments, and made a legislative determination that the language of §202.2 as adopted was appropriate. This Board cannot second guess the legislative determination and exclusive prerogative of the Board of Supervisors in adopting and maintaining the language of §202.2. That argument must be addressed to the Board of Supervisors, which, as the body responsible for the content of the Ordinance, can address this issue.

This Board is obligated to apply the Ordinance as it is written.⁵ This case involves only a special exception application, so the Board has no authority to rule on the validity of a provision of the Ordinance, and to do so in this context would violate the principles of due process, as no one, least of all the Township Board of Supervisors, has been given the opportunity to defend the validity of the Ordinance.

The Board is aware that, since the conclusion of the hearings in this case, the Township Board of Supervisors has directed the Planning Commission to study and make a recommendation on whether or not to enact changes to §202.2 of the Ordinance in the near future to eliminate the contested provision for agricultural uses. If that action were taken, then the reason for this denial would disappear. The Board is even aware that an ordinance amending the Zoning Ordinance is being drafted. However, as stated, this Board is legally obligated to decide this case on the basis of the Ordinance as it existed both at the time of application and at the close of testimony.

A search of the Board's past decisions reveals a precedent for this denial. In the case of *Fawn Grove Congregation of Jehovah's Witnesses*, Case No. 1991-2, this Board, in a decision dated December 12, 1991, denied that applicant's special exception request for the same reason, citing the same sections of the Ordinance, §§202.2 and 202.9(e). A copy of that decision is attached as Attachment "B". There, the Board made the following relevant Findings of Fact, which are remarkably similar to this case:

"4. A. The land on which the proposed House of Worship would be located is not land of low quality for agricultural purposes as defined in Z.O. 202.9,e,1. [sic]:

⁵ A substantive challenge to the validity of a provision of the Ordinance could be filed with either the Zoning Hearing Board or the Township Board of Supervisors, per §§909.1 and 916.1(a)(2) of the MPC, 53 P.S. §§10909.1 and 10916.1(a)(2). That is not what is before the Board in this case.

i. It falls within Soil Capability Unit II, and it does not fall within Soil Capability Units IVE-5 through VIIs-2, as classified by the Soil Survey of York County, Pennsylvania, Series 1959, No. 23 issued May, 1963.

ii. It can be feasibly farmed and, in fact, is now being farmed to within a point 20 feet east of the existing wall which is shown on Exhibit #3. This includes the entire area where the proposed improvements would be located."

The Board in that decision then made the following relevant Conclusion:

"In view of Finding of Fact 4., above, that the land is not of low quality for agricultural purposes as so defined, this Board lacks the power to grant the requested Special Exception."

Thus, there is established precedent for this Board to deny this special exception application, and, with facts that are so remarkably similar, this Board feels compelled to make the same decision to deny this special exception, because Applicant has also failed to meet that criterion for a special exception. The Board notes that, although the decision in the *Fawn Grove Congregation of Jehovah's Witnesses* case was made nearly 16½ years ago, the Township's Board of Supervisors has never changed that provision of the Ordinance, and it remains today the same as it was then.

The argument that the proposed use is agricultural in nature, and therefore the restriction in §202.2 of the Ordinance should not apply to that type of use, is likewise without merit, because the purpose of protecting prime agricultural land is so that it will be available for growing crops. Therefore, any building, whether for agricultural use or not, makes the land unavailable for crops. The presumed purpose for the provision, to preserve prime agricultural land for crop production, can only be carried out if the land is kept free of all buildings or structures, regardless of their relationship to agriculture.

Further, the provision in §202.2 of the Ordinance is consistent with §603(g)(1) of the MPC, 53 P.S. §10603(g)(1), which mandates: "Zoning ordinances *shall* protect prime agricultural land . . ." [Emphasis supplied.] Prime agricultural land is defined in §107(a) of the MPC, 53 P.S. §10107(a), as "land used for agricultural purposes that contains soil of the first, second, or third class as defined by the United States Department of Agriculture Natural Resource and Conservation Services County Soil Survey." As stated above, the soil on which the proposed use would be located is of the second class, specifically classification IIe-2.

Objector Raymond's counsel argued that the Board should also deny the application under §443(d) of the Ordinance. Section 443 sets out the general standards for special exceptions, and subsection (d) prohibits commercial or industrial traffic from using residential streets. Raymond's Counsel argues that the feed trucks and the hog delivery and removal trucks constitute commercial traffic, and that Aubel and Gemmill Roads, over which some or all of that traffic would travel, are residential streets. The Board finds that argument to be without merit. Although the Ordinance

does not define the term "residential streets", the Board does not have to analyze that term. Although the Board recognizes that all agricultural operations are commercial in nature, the Ordinance treats agricultural uses separately and distinctly from other commercial uses, and has separate standards for agricultural uses, as evidenced by the fact that the Ordinance has separate commercial, industrial, and agricultural districts. Therefore, the Board does not believe that either the language or the intent of §443(d) applies to traffic directly related to agricultural uses, and is limited to other, non-agricultural, types of commercial and industrial uses.

Because the Board is denying the application based on a narrow provision of the Ordinance, it feels compelled to discuss the overall application, testimony, and evidence presented by all sides of the application. Given the intense nature of this CAFO, and its proximity to a very large residential community, the Susquehanna Trails, the Board is very sensitive to balancing Applicant's rights under the Ordinance and the health, safety, and welfare of the general public. The Board was particularly struck by two aspects of Applicant's case. First, representatives of Hershey Ag and Red Barn Consulting have demonstrated a very detailed and complete knowledge of the design, construction, and operation of hog-growing CAFO operations. The Board has a high comfort level that a CAFO operation overseen by Hershey Ag would be well operated. However, Hershey Ag is not an applicant, and the fact is that, if the Board approved this application, either Hershey Ag or Applicant could immediately, or at any time in the future, sever their relationship.

Therefore, the Board must look to the testimony and evidence to determine whether Applicant, standing alone, would have the ability and expertise necessary to operate the proposed CAFO responsibly. In this area, the Board has some concerns. The applicant exhibited little knowledge and concern for the details of operating the proposed CAFO, and was not very forthcoming in his answers to direct questions. At times his answers were disrespectful to the Board. But, he did testify that he has visited other CAFOs with Hershey Ag representatives to learn about the operation of swine CAFOs. He also provided to the Board a copy of his Commercial Manure Broker's certificate. Obviously, the impact of the proposed CAFO on the surrounding community is going to be directly affected by the competency and diligence of Applicant as the operator, and his parents, David and Martha Gemmill, who, pursuant to §336.1(j) of the Ordinance, are also responsible for compliance. To that end, the Board was also troubled by testimony concerning indifference to various rules exhibited by David Gemmill in the past, and the Board believes that past performance may be a reflection of future performance.

Nevertheless, given the fact that the Township's Board of Supervisors has recognized the legality and legitimacy of CAFOs by permitting them by special exception in the A District, the Board is satisfied that a properly designed, constructed, operated, and maintained CAFO would meet all the specific and general requirements of the Ordinance for a special exception, and would minimize negative impacts on the health, safety, and welfare of Township residents. To that end, if it were not for the provisions of §§202.2 and 202.9(e), discussed above, on which basis the Board has denied the application, the Board believes that properly crafted, detailed conditions could be placed on the proposed CAFO, Applicant, and the owners of the property to minimize any dangers of the operation of the facility. Thus, in the event that there is a change to the operative soil language in the introductory paragraph of §202.2 of the Ordinance, or there is a successful challenge to that section or this Decision, the Board believes that detailed, specific, and appropriate conditions

would need to be placed on any approval of the proposed CAFO, and the Board was prepared to impose such conditions, if it had reached that issue.

IV.

DECISION

By majority vote of the Peach Bottom Township Zoning Hearing Board (2-1),⁶ Applicant's application for a special exception to construct and operate a large hog grow-out Concentrated Animal Feeding Operation, or CAFO, is denied, because he cannot meet the requirements of §202.2 of the Ordinance, that the special exception use be placed on land of low quality for agricultural use as defined in §202.9(e) of the Ordinance.

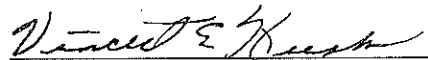
PEACH BOTTOM TOWNSHIP ZONING HEARING BOARD

Date: May 9, 2008


Mark R. Hall, Acting Chairman


Christopher R. Neumann

I dissent from this decision.


Vincent E. Hushon

⁶ Because the Chairman of the Board was unable to attend and participate in the first hearing, the duly appointed alternate, Christopher R. Neumann, was seated for the duration of the hearings with full power to act as a qualified member of the Board, as authorized by §906(b) of the MPC.

**LIST OF PEOPLE OR ORGANIZATIONS THAT SOUGHT AND WERE GRANTED PARTY STATUS
(EXCLUDING APPLICANT AND PEACH BOTTOM TOWNSHIP)**

Martin Miller
93 West Richardson Road
Airville, PA 17302

Dan Raymond
506 Burns Road
Delta, PA 17314

Anna Almony
302 Gemmill Road
Delta, PA 17314

Wes and Lisa Carter
58 Bluebird Trail
Delta, PA 17314

Peach Bottom Concerned Citizens
c/o Joe Watkins, Jr.
13 Hemlock Hollow Road
Delta, PA 17314

Kevin Roach
132 Neill Run Road
Delta, PA 17314

Gloria Patterson
78 North Oak Heights Trail
Delta, PA 17314

Travis Paup
101 Craig Road
Airville, PA 17302

Don and Kat Eckart
83 Hilltop Road
Delta, PA 17314

Richard E. Ammons
295 Black Oak Trail
Delta, PA 17314

Catherine M. Bilger
183 Gemmill Road
Delta, PA 17314

Julie and Clifford White
56 Juniper Road
Delta, PA 17314

Bernie Simmons
157 Hushon Road
Delta, PA 17314

Laura Yanney
13 Wise Road
Delta, PA 17314

Georgia Watkins
1055 Atom Road
Delta, PA 17314

Brian Nalls
33 Jasmine Road
Delta, PA 17314

Donald Bredlow
64 Forest Trail
Delta, PA 17314

William Woods
56 Magnolia Trail
Delta, PA 17314

Salvatore Ferranti
527 Falls Road
Delta, PA 17314

Jon Ziegenhorn
59 Pine Hill Lane
Delta, PA 17314

Harry Keen, Jr.
527 Miller Road
Delta, PA 17314

Jason Newlon
64 Ivy Hill Lane
Delta, PA 17314

Nancy Hutchison
196 Neill Run Road
Delta, PA 17314

Krista Magnifico
Joe B. McCollum
596 Cook Road
Delta, PA 17314

Christina Chappell
123 Cardinal Trail
Delta, PA 17314

Gordon Berry
49 Cedar Trail
Delta, PA 17314

Florence Wurzbacher
c/o John Wurzbacher, POA
305 Larkin Drive
Red Lion, PA 17356

Karen Duszyuski
564 Murphy Road
Airville, PA 17302

Maria Payan
9 Aubel Road
Delta, PA 17314

Diane Thomas
Mark Thomas
543 Miller Road
Delta, PA 17314

Jane Conly
338 Winston Avenue
Baltimore, MD 21212

Gwyn Cox
Mary Cox
118 Gemmill Road
Delta, PA 17314

Bill Studley
23 Forest Trail
Delta, PA 17314

BEFORE THE ZONING HEARING BOARD OF PEACH BOTTOM TOWNSHIP
YORK COUNTY, PENNSYLVANIA

RE: :
 :
FAWN GROVE CONGREGATION OF : NO. 1991-2
JEHOVAH'S WITNESSES, :
FOR A SPECIAL EXCEPTION :

NATURE OF APPLICATION

This is an Application by Fawn Grove Congregation of Jehovah's Witnesses for a Special Exception to use a triangular-shaped 2.3 acre piece of property located in the Agricultural Zone and situate between the intersections of Route 851 and Cook Road [T-951] for a House of Worship.

HEARING

A hearing was held by the Board at the Peach Bottom Township Building, on September 4, 1991, and at the request of the Applicant the hearing was continued to October 30, 1991, to allow them to investigate as to the quality of the soil. All Zoning Hearing Board members were present at both hearings, as well as the Zoning Officer, Charles Buckingham, and the Board Solicitor, Harry L. McNeal, Jr. The Applicant's main spokesman was Jim Wagner, a Registered Surveyor, of Mifflintown, Pennsylvania. The testimony was stenographically recorded by York Stenographic Services, a Court Reporter. The Peach Bottom Township Planning Commission considered the matter and made the following recommendation:

"The Peach Bottom Township Planning Commission has reviewed the sale of property on the corner of Cook Road and State Route 851 by Earl Gross to the Kingdom Hall of the Jehovah's Witness Church. We recommend approval of this subdivision contingent upon the following conditions:

1. Mr. Gross [the current owner of the land] must relinquish two (2) dwelling rights due to the fact that some good quality farm ground is involved.
2. The triangular shape of the property, to be sold, allows the least disruption to the continued farming of the remainder of the property.
3. No more dwelling rights exist on the remaining piece of property. In order for Mr. Gross to sell any or all of the remainder, he must first transfer a dwelling right from another parcel of property he owns in Peach Bottom Township or it must be sold to another property owner for agricultural purposes only. In the event of the latter the new owner must join this property to his existing property."

DISCUSSIONS OF LAW

1. Z.O. 202.2, 1., authorizes the Zoning Hearing Board to allow the use of land in the Agricultural Zoning District for a House of Worship by Special Exception. However, the section goes on to provide that the land on which such use may be located must be of low quality for agricultural use as defined in Section 202.9, (e), of the Ordinance.

2. Section 202.9, (e), specifies that land shall be considered of low quality for agriculture use, if:

- "1. The land is in Soil Capability Units IVE-5 through VII-2 as classified by the Soil Survey of York County, Pennsylvania, Series 1959, No. 23 issued May, 1963; or
2. The land cannot feasibly be farmed:
 - a) Due to the existing features of the site such as rock too close to the surface to permit plowing, swamps, the fact that the area is heavily wooded, or the fact that the slope of the area exceeds fifteen percent (15%); or
 - b) Due to the fact that the size or shape of the area suitable for farming is insufficient to permit efficient use of farm machinery (for purposes of the application of this subsection the land to be contained in the lot shall be considered as part of the original tract).

Such additional lots must meet all the requirements of this Ordinance, the Township Subdivision and Land Development Ordinance and all the requirements of the Pennsylvania Department of Environmental Resources.

The number of dwelling lots permitted by this section shall not be such as to permit them to be on any tract of land more than twice the number of dwelling units permitted on that tract of land by subsection (a) of this section."

FINDINGS OF FACT

The Board makes the following findings of fact:

1. A. The Sketch Plan which is marked Applicant's Exhibit #3 shows both the subject 2.3 acre tract which the Applicant proposes to use for a House of Worship, as well as the layout of the facilities proposed by Applicant.

B. The tract is a part of lands owned by Earl R. Gross and Nancy M. Gross; the entire tract and how the subject tract fits into it are also shown on Exhibit #3.

2. The tract is located within the Agricultural Zone.

3. The Applicant proposes to construct a House of Worship on the subject 2.3 acre tract, as well as numerous parking spaces, all as shown on Applicant's Exhibit #3.

4. A. The land on which the proposed House of Worship would be located is not land of low quality for agricultural purposes as defined in Z.O. 202.9, e., 1.:

i. It falls within Soil Capability Unit II, and it does not fall within Soil Capability Units IVE-5 through VIIs-2, as classified by the Soil Survey of York County, Pennsylvania, Series 1959, No. 23 issued May, 1963.

ii. It can be feasibly farmed and, in fact, is now being farmed to within a point 20 feet east of the existing wall which is shown on Exhibit #3. This includes the entire area where the proposed improvements would be located.

CONCLUSIONS

The Board arrives at the following conclusions:

1. This Board is authorized by Section 202.2, 1., to grant a Special Exception for a House of Worship only if it is to be located on land of low quality for agricultural use as defined in Section 202.9, (3).

2. In view of Finding of Fact 4., above, that the land is not of low quality for agricultural purposes as so defined, this Board lacks the power to grant the requested Special Exception.

BOARD ACTION

The requested Special Exception is denied.

PEACH BOTTOM TOWNSHIP ZONING HEARING
BOARD:

DATE: 7:03 P.M.
12/12/91

By: Marlyn G. Flaherty
MARLYN G. FLAHARTY

George M. Manhart
GEORGE M. MANHART

Christopher R. Neumann
CHRIS NEUMANN