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ZONING—PRODUCTION OF SYNTHETIC COMPOST AS FARMING

In the recent case of *Gaspari v. Muhlenberg Township Board of Adjustment*, 392 Pa. 7, 139 A.2d 544 (1958), the Pennsylvania Supreme Court, in construing a township zoning ordinance, held that the production of artificial manure, a synthetic compost used for growing mushrooms, was "farming in all its branches."

Arthur Gaspari and his brothers owned 17 acres of land in Berks County, Pennsylvania. Since 1929 the Gasparis had used the land for growing mushrooms. Prior to 1949 they had used horse manure as a growing medium for the mushrooms, but with the decline in the availability of horse manure, were forced to seek a substitute growing medium. In 1949 they began making synthetic compost, an artificial horse manure, for their own use in the growing of mushrooms, and in 1951 they began producing it for other mushroom growers. The artificial compost was produced by a fifteen day process in which cyanamid, potash, and gypsum were used to decompose the primary ingredients, hay and corncobs. In the years 1953-1955 the Gaspari's annual production averaged 700,000 square feet¹ of compost, with which they supplied thirty-four growers in and around Berks County.

The Gaspari's land is located entirely within an area zoned as an "F" Farm District by the Muhlenberg Township Zoning Ordinance, enacted June 4, 1943.² Article III, Section 301 of this ordinance allows, among other activities, "farming in all its branches." In August, 1955, the Township Building Inspector (Zoning Officer) issued a cease and desist order charging the Gasparis with violation of said Section 301, and ordered them to halt production of synthetic compost for sale to other growers. Upon appeal of the Gasparis to the Muhlenberg Town-

¹This was the only method of measurement used. The compost was not weighed. It is therefore difficult to picture the actual amount produced annually. However, from testimony taken before the Township Zoning Board of Adjustment it can be determined that the annual production average for the years 1953-55 would fill 1300 standard size dump trucks.

²"Section 300. In an 'F' Farm District the following regulations shall apply:

Section 301. A building may be erected, altered, or used, and a lot or premises may be used for any of the following purposes and for no other:

1. One-family detached dwellings and their accessory uses.
2. Two-family dwellings and their accessory uses.
3. Farming in all its branches, including the erection or alteration of the usual accessory farm buildings incidental to agriculture and animal husbandry.
4. Marketing or processing of farm products, where such use is accessory and incidental to the raising of said products.
5. Quarrying operations.
6. Educational, religious, or philanthropic use.
7. Hospital or sanitarium, correctional institutions.
8. Public and private recreational use.
9. Automobile graveyards, tourist cabins, and boarding and lodging houses, when authorized as special exceptions by the Board of Adjustment in accordance with Article XV of this Ordinance."

ship Board of Adjustment a hearing was held and sworn testimony taken of witnesses for the Gasparis and complaining citizens of the area in which they conducted their operations.

These nearby residents testified that the process gave off unbearable, noxious odors, strongest in the heat of the summer, giving them the choice of closing all windows in the house and suffering from the heat, or opening them and subjecting themselves to the odors. One property owner claimed that he became sick and lost sleep as a result of the odors. There was also testimony that the compost piles attracted and became a breeding place for flies and mosquitoes, and that nearby residents were unable to enjoy their porches in the heat of the summer. A further complaint was that a particular type of fly which bred in the piles was of a variety so small it could easily get through the door and window screens of the residents. Other witnesses testified that the water used to flush the compost piles often passed on to their land after it ran off the piles, killing the grass and all other plant life in its way, and that it polluted one neighbor's stream, killing the fish and leaving the stream with a foul odor, like "rotten material."³

The Township Board of Adjustment affirmed the order of the Building Inspector and decreed "That the appellants shall cease the manufacturer for sale of synthetic compost" The Gasparis filed an appeal with the Court of Common Pleas of Berks County. Shortly thereafter they requested and were granted permission to have the record remanded to the Board of Adjustment for the purpose of taking additional evidence on the theory that the activities of the Gasparis were an extension of a manufacturing non-conforming use which had existed prior to the adoption of the zoning ordinance in question. In a supplemental decision the Board of Adjustment concluded that the activities were not an extension of a prior nonconforming use. This decision was also appealed to the Court of Common Pleas, and both were tried together.

The final decision of the Common Pleas Court was delayed while the parties attempted to work out a plan whereby the Gasparis would move their business to another section of the township. Upon being advised that it was not feasible for the appellants to move, the court rendered its decision: the business of producing artificial compost was manufacturing and not farming, was an activity dissimilar to the use of horse manure, was not a valid extension of a prior nonconforming use, and was therefore in violation of the township zoning ordinance.⁴

³ Transcript of Record, pp. 52a-64a, *Gaspari v. Muhlenberg Township Board of Adjustment*, 392 Pa. 7, 139 A. 2d 544 (1958).

⁴ 50 Berks 48 (1957).

The Supreme Court of Pennsylvania reversed. Musmanno, J., speaking for the majority, held the process of the appellants to be "well within the ambit of 'farming in all its branches' " ⁵, and therefore not in violation of the township zoning ordinance. In distinguishing the process from that involved in other cases cited by appellees as being manufacturing, the court states that a requirement of manufacturing is that a new product be formed, and that the "newness must come about through the application of skill and labor, entirely or mostly apart from what is done by Nature herself." ⁶ "Nature" appears to be the key word. The court seemingly precludes the possibility of a process being manufacturing when a "natural", or chemical, action is responsible for the end product produced.

"An article which comes into being through human and mechanical manipulation of raw materials which in themselves are not *active partners* in the transforming and creative process can be said to be a manufactured article." ⁷
(Emphasis added.)

With regard to the making of synthetic compost the court continues, "In the process under discussion the hay and corncobs *participate* in the chemical and biological changes when water is poured over them and they are mixed, turned, and moved in the air" ⁸, and because of this participation the process is not manufacturing, but farming. (Emphasis added.) Although the hay, corncobs, and chemicals, when completely processed, end up as an obviously new product with a new use—artificial manure—the court concludes that: "the hay and corncobs, at the termination of the process, have not emerged as distinctly new articles. They are readily recognizable even in the final stage of the operation." ⁹

The conclusion that the process is farming and not manufacturing, merely because the hay and corncobs are visible and distinguishable in the finished product, seems illogical. A more reasonable approach is illustrated by the language of the Superior Court of Pennsylvania in its interpretation of a zoning ordinance in *Marple Township v. Lynam*:¹⁰

"Webster . . . defines "farm" as a piece of land held under lease for cultivation; hence, any tract of land . . . devoted to agricultural purposes, generally under the management of a tenant or owner; any parcel or group of parcels of land cultivated as a unit." In the Century Dictionary it is defined

⁵ *Gaspari v. Muhlenberg Township Board of Adjustment*, 392 Pa. 7, 16, 139 A. 2d 544, 548 (1958).

⁶ *Id.* at 12, 139 A. 2d at 546.

⁷ *Id.* at 14, 139 A. 2d at 548.

⁸ *Ibid.*

⁹ *Id.* at 15, 139 A. 2d 548.

¹⁰ 151 Pa. Super. 288, 291, 30 A. 2d 208, 210 (1943).

as "A tract of land devoted to general or special cultivation under a single control, whether that of its owner or of a tenant: as a small farm, a wheat-, fruit-, dairy-, or market farm." "Farming" is defined as "the commercial production of any plant (even horticultural) or annual which has economic value."

The production of synthetic compost does not seem to conform to this definition, nor does it fit the definitions of most other jurisdictions that have defined the word. For example, the Supreme Court of Massachusetts, in construing a zoning ordinance, has said that although the chief characteristic of "farming" is the cultivation of the soil, other closely related activities, such as grazing livestock, may be classed as "farming",¹¹ while Connecticut has held that the dominant and distinguishing characteristic of "farming" is the cultivation of the soil for the production of crops therefrom.¹²

It has been said that zoning regulations are the product of far sighted planning on the part of the drafters, and that they are calculated to promote the general welfare of the city and township at some future time.¹³ The primary purpose of zoning regulations is the promotion of the morals, safety, welfare and prosperity of the community for which they were adopted.¹⁴

Some courts, relying on the foregoing policy considerations, when considering a residential zone in which "farming" was a permissive use, have ruled that certain activities more closely related to "farming" than artificial compost processing were *not* "farming" and were excluded from the zone. The Supreme Court of Connecticut, in construing a zoning ordinance for a residential district in which farming was permitted, held as proper the refusal of a building permit for a new hen house, when the appellant planned to use the land exclusively for the raising of hens. The court said this was not farming.¹⁵ In interpreting a similar statute, the Supreme Court of Massachusetts held as proper the refusal of a building permit to the appellant for the construction of a building to house hogs. He planned to use his land exclusively for the raising of hogs.¹⁶ A lower New York court, in upholding the refusal of a permit for a building to house pigs, reasoned that the purpose of a zoning ordinance is important, and that a purpose of the ordinance before it was to keep odors and noise from the neighbors.¹⁷

¹¹ *Town of Lincoln v. Murphy*, 314 Mass. 16, 49 N.E. 2d 453 (1943).

¹² *Chudnov v. Board of Appeals of Town of Bloomfield*, 113 Conn. 49, 154 Atl. 161 (1931).

¹³ *Arverne Bay Construction Co. v. Thatcher*, 278 N.Y. 222, 15 N.E. 2d 587 (1938).

¹⁴ *Chudnov v. Board of Appeals of Town of Bloomfield*, 113 Conn. 49, 154 Atl. 161, 163 (1931).

¹⁵ *Id.* at 49, 154 Atl. at 161.

¹⁶ *Town of Lincoln v. Murphy*, 314 Mass. 16, 49 N.E. 2d 453 (1943).

¹⁷ *Johnson v. Debaun*, 135 N.Y.S. 2d 217, 206 Misc. 806 (1954).

In the *Gaspari* Case the Pennsylvania court has given a broad, all inclusive definition to the term "farming" while construing it with respect to a Farm zone in which residences were permitted. Such a liberal interpretation of the word should not be expected if the zone under consideration were a Residence zone with farming merely a permissive use, as seen in the foregoing Massachusetts and Connecticut decisions.¹⁸ Undoubtedly the Pennsylvania court, if faced with the *Gaspari* facts, but in a Residential zone with farming merely a permissive use, would strictly construe "farming" and hold that artificial compost processing is not included within that term.

Assuming the production of synthetic compost is not farming, can it be called manufacturing? It is the opinion of this writer that it can. The earliest definition of "manufacturing" set forth by the Pennsylvania Supreme Court was in *Norris Bros. v. Commonwealth*.¹⁹

"It is making. To *make* in the mechanical sense does not signify to create out of nothing; for that surpasses all human power. It does not often mean the production of a new article out of materials entirely raw. It generally consists in giving new shapes, new qualities, or new combinations to matter which has already gone through some other artificial process."

A federal court, in construing a tax statute, has said ". . . that *manufacture* means the creation or production of a product from raw materials or by combining two or more products to form a new and different one."²⁰ There are no Pennsylvania appellate decisions construing the term "manufacturing" with respect to zoning statutes, but several cases necessitated an interpretation of the term. In *Commonwealth v. Peerless Paper Specialty*²¹ the court held that the production of gummed paper by blending various glues and securing them to one side of the paper was manufacturing. In a recent case it was held that the designing, marking, selling, and erecting of cemetery monuments is manufacturing, the court basing its decision on the fact that a new and different product had been produced.²² The production of concrete by the mixture of sand, stone and water was deemed manufacturing in *Commonwealth v. McCrady-Rodgers Co.*²³ The court there declared that "a thing is a manufactured article when the product is a new and different article with a distinctive name, character, or use."²⁴ In *Commonwealth v. Snyder's Bakery*,²⁵

¹⁸ See notes 15 and 16, *supra*.

¹⁹ 27 Pa. 494, 496 (1856).

²⁰ *Charles Marchand Co. v. Higgins*, 36 F. Supp. 792, 795 (1940).

²¹ 344 Pa. 283, 25 A. 2d 323 (1942).

²² *Horgan v. City of Pittsburgh*, 178 Pa. Super. 558, 116 A. 2d 228 (1955).

²³ 316 Pa. 155, 174 Atl. 395 (1934).

²⁴ *Id.* at 158, 174 Atl. at 396.

²⁵ 348 Pa. 308, 35 A. 2d 260 (1944).

a raw material, potatoes, underwent a chemical, or natural change and the finished product—potato chips—was deemed to have been manufactured. The court said "This is not a case where there has been a mere chemical change in the article itself [The potato] is changed to a new, different, and useful article Chemically, too, there has been a complete change."²⁶

The mere fact that the processing of artificial compost requires a natural, or chemical, change in the materials does not preclude it from being manufacturing. The presence or absence of chemical action on the raw materials used in a process should have no bearing on the determination of whether or not the process is manufacturing. The Supreme Court of the United States has said, "Manufacture implies a change, but every change is not manufacturing, and yet every change in an article is the result of treatment, labor, and manipulation. But something more is necessary There must be transformation; a new and different article must emerge, 'having a distinctive name, character, or use.'"²⁷ The Gasparis mixed hay, corncobs and chemicals and produced a new and exceedingly different article—artificial horse manure—by a manufacturing process.

The common law recognized that certain harmful or offensive uses of land, called "nuisances", could be regulated and prohibited, long before local government officials began enacting zoning ordinances.²⁸ Although the *Gaspari* Case is not a "nuisance" action, the production of artificial compost on such a large scale, by creating noxious odors, drawing flies, and invading the land of neighbors with putrid liquids, could in fact be a "nuisance". In considering an activity similar to that of the Gasparis, the Supreme Court of Delaware, in *Cain v. Foggero*,²⁹ enjoined as a nuisance the actions of the defendant in storing manure and operating his mushroom houses in such a manner as to interfere with the comfort and well being of his neighbors.³⁰

It is difficult to conceive that the Muhlenberg Township Zoning Commission, in establishing this "F" Farm District for farms and single and double family dwellings, had in mind the later permissive use of the land in such a manner as it is now being used by the Gasparis.

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²⁶ *Id.* at 310, 35 A. 2d at 261.

²⁷ *Anheuser-Busch Brewing Ass'n v. United States*, 207 U.S. 556, 562 (1908).

²⁸ LIEBERMAN AND RABIN, *LAW OF ZONING IN PENNSYLVANIA*, p. 5, 1958.

²⁹ 28 Del. Ch. 131, 38 A. 2d 735 (1944).

³⁰ The defendant piled large amounts of horse manure on his land prior to using it in his mushroom houses. The resultant stench was "sickening and unbearable," and the piles proved a breeding place for flies.