

## **Open Work Session**

### **Progress Update on the Issuance of Building Permits for an Agricultural Storage Tank that will Store Dissolved Air Flotation (DAF) Washdown Water from a Rendering Process**

**January 21, 2020**

Mr. Wayne Strausburg, Director of Administration, Mr. Weston Young, Assistant Director of Administration, Ms. Lori Carter, Director of Planning & Zoning, and Mr. Keith Hall, Assistant Director of Planning & Zoning, came before Council. Mr. Young said they were kind of curious where Council was going with this Work Session in terms of whether they want an update on the moratorium language, or whether it is tied to an MDE letter that was received, or all of the above. He said, before he turns it over to Ms. Carter and Mr. Hall, he wants to say, as part of this issue, it comes down to the material in question, and he thinks regulating based on a storage facility is an issue because he could build everything saying it is for water. He clarified, he could say he has a 3-million-gallon tank for water, and he can go through the entire process to get it approved, but then fill it with something else. He said the material he fills it with is sometimes regulated, and a good example he gave to Council, but does not know if it got forwarded to Council, was in regards to the fuel tanks at the Royal Farms off White Lowe Road that are above ground because there are paleo channel issues. He explained, Planning & Zoning's Codes approve the fuel tanks that are out there, but Royal Farms could take the gasoline, which is handled by the Maryland Department of Environment (MDE) with the exceptions of weights and measures handled by the Maryland Department of Agriculture (MDA), and they could put diesel fuel, or they could put propane, but the County does not know because they do not regulate that material. He said, with the moratorium, if it were him, he would build a storage tank for some other material, and fill it with DAF afterwards. He said, if they are trying to go for the throat of the issue, they have to go to the State, who views the material as an approved soil amendment, and not having MDA here as part of this conversation he thinks is not helping. He said he also thinks DPI should come here, and they need to explain why this material exists to begin with, and what it means to the industry. He said they did that with CAFOs, and he thinks they found a fairly comprehensive solution. He said, again, he thinks if they want to go to the throat of the issue, they should go to MDA and try to get the State to not view this as an approved soil amendment because then they would not be able to put it on the fields. He concluded, it is as simple as that, and, that being said, Planning & Zoning has been working on a variety of initiatives and ways to go, and he is going to turn it over to them to elaborate further.

Ms. Carter said Mr. Hall has been working very judiciously on a lot of possibilities, so he is going to present those to Council today. Mr. Hall then suggested it would be of benefit if they just had a little bit of a recap as it has been since the early part of the fall when they were last in front of Council. He said they went over a lot of information at that meeting, and he thinks that Work Session alone was well over an hour to an hour and a half, so they will get caught up on where they have been, and then they will get to where they are at, and, ultimately, they will get to where they are going.

Mr. Hall said they talked about DAF, which is dissolved air flotation, and, as Mr. Young mentioned, DAF is a soil amendment and is not called a fertilizer because the nitrogen and the phosphorus content varies from batch to batch. He said MDA is approving this as part of a nutrient management plan, and it goes back to the Bay cleanup issue of trying to reduce nitrogen and phosphorus from entering their water bodies, and, ultimately, the Chesapeake Bay. He said they talked about the building process and the permit process that was used by the County, as well as some of the prerequisites, whether it was critical area or forest conservation, and they spent a lot of time on zoning specifically differentiating what is defined as agriculture versus what is defined as a farm-related business. He explained, a farm related

business kicks it into a special exception and a whole other public process, whereas with agriculture they meet the requirements of the permit, and they get the permit issued. He said an extensive amount of time was spent talking about authority, and Mr. Young briefly touched on that again. He said they understand that the tank is, as perceived by some, a compatibility issue with its surrounding residential uses; however, while the County has the authority to issue a building permit for a tank whether it is holding water or whether it is holding DAF, or some other concoction, it is outside their authority. He said they talked briefly about the revoking of a building permit, and there are three criteria; either it was issued in error; six months have passed since the applicant has been issued the building permit and they have not started any construction; or if something were to substantially change. He said, for example, if he came in for a garage, but all of a sudden that garage morphed into a home, that is going to more than likely cause the revocation of a building permit. He said, as it was left at the last meeting, Council gave them a little bit of takeaway. He clarified, Council was looking for how to maneuver something like this in a policy and regulatory environment without being overly restrictive on a tank that is an agricultural use in an agriculturally zoned part of the County. He said, from that, staff went back and looked at the Code extensively, and looked at other jurisdictions' codes, and they kind of just wanted to bring back some considerations for Council today without asking for any movement, yet hearing what Council's voices have to say about these considerations.

Mr. Hall reported, ultimately, from a Departmental standpoint, there is concurrence with Mr. Young that they can regulate a tank, they can regulate a lagoon, but until there is a regulatory action or some type of corrective action with the soil amendment itself, DAF is still going to be applied in Wicomico County, and that is a tough one. He explained, that is a really tough one because it is outside their lane and gets into the Maryland Department of Agriculture. Mr. Dodd asked if it is being applied in other Counties, to which Mr. Hall responded, yes, it is being applied in other Counties. Mr. Dodd asked if it is being applied in Dorchester, to which Mr. Hall responded, he cannot say with being positive, but what he can say is they do not have a storage tank in Dorchester.

Mr. McCain said Mr. Hall just made the comment that it is an agricultural use in an agricultural district, but all not Counties have determined it is an agriculture use. He said Dorchester says it is an industrial use, and that is why they did not approve the tanks. He clarified, Dorchester said it is storage of this material, which is an industrial waste product, to which Mr. Hall responded, that was part of their letter, and he thinks it comes down to interpretation. He said his interpretation, after talking with staff in Dorchester, is they felt the applicant was going to be selling, which kicked it into a farm related business, and the farm related business kicked it into a special exception by the Board of Appeals, and, ultimately, the applicant pulled the request. Mr. McCain said that circles back around to the application. He clarified, as Mr. Hall said earlier, it is not considered a fertilizer, it is basically, once again, a soil amendment, but it is actually a waste product, and if they call it a waste product that does not sound good, so they decided they will call it an amendment. He said then they have the issue he heard a little bit about during public comments where if they go to MDA they say that MDE says they can do this, but if they go to MDE, they say MDA can do this, and then they go back to MDA and they say, well, the County approved it. He said now the County is saying they cannot do anything because of MDA, so everybody is passing this around, and he thinks the buck stops somewhere, to which Mr. Hall responded, absolutely. He said, not taking this lightly, it is a game of a little bit of a hot potato issue. He said the County can do something, but the County's authority is limited to a storage tank, and that is all he is saying. He clarified, it is not that the County's arms or hands are tied, so they looked at what other Counties are doing as this is not just happening in their County, it is the nature of the beast being in an agricultural community, which they are very thankful for.

Mr. Hall said he thinks one of the Counties that had the most similarities with Wicomico was Queen Anne's County. He said they are slightly metropolitan, a close bedroom community to the D.C. and Baltimore suburbs with urbanized areas, but with a lot of farmland available. He said, in looking at their code, they had some different metrics Wicomico did not have, and that goes back to where their conversation with Council left off, looking at setbacks, looking at separation, and potentially looking at a vegetative buffer, and he thinks that is kind of where they left it at that point. Mr. Hastings said, to be clear, that is for the tank itself, to which Mr. Hall responded, that would be specifically for the tank.

Mr. Hastings said, theoretically, somebody could bring this junk in from another County and spread it on their fields as long as it fits within the nutrient management plan and has "X" amount of phosphorus and nitrogen. He said they could dump it, which still does not get rid of the issue with the flies, to which Mr. Hall responded, that is correct, and they would not necessarily need a tank. Mr. Hastings clarified, theoretically, transport could be an issue, to which Mr. Hall responded, transport, storage, and all of that become logistical issues. Mr. Cannon said, based on the guidelines, they are talking about the tank only, to which Mr. Hall responded, yes. Mr. Cannon said, just to play devil's advocate, what comes into play if they are going to put plutonium in this tank? He said they have to take something under consideration besides just the fact that it is a tank, to which Mr. Hall responded, there are regulatory authorities that would exercise control over a product such as that, a hazardous material, or a biowaste. He said also the building code takes into consideration different requirements that would be needed for necessarily having hazardous materials. Mr. Cannon asked if they review just the fact that it is a tank, or do they have to review what is going to be introduced into the tank, to which Mr. Hall responded, that is a good question, and they review it from a building standards code that an engineer has stated. He explained, an engineer knows what is going to go in the tank, presumably, because that is what they have to design it for, so there are engineers behind the scenes going through that evaluation. Mr. Cannon asked what the hiccup was with the ten acres either through MDE or MDA, to which Mr. Hall responded, that had to do with two of the prerequisites, one being stormwater management, and one being sediment and erosion control. He explained, if someone is in an ag zoned area of the County and they disturb over one acre, they are not exempt from those prerequisites, meaning they would have to do a stormwater management plan, and they would have to do a sediment erosion control plan. He said, as the applicant originally submitted, it was estimated that around 40,000 square feet was going to be disturbed, or subsequently less. He said then MDE and MDA went out after some tree cutting took place, and they made a determination that it was slightly over an acre; therefore, the applicant went ahead and met those two requirements by submitting his plans, which have been approved. He clarified, during that time there was never a stop work order, nor did the State ever request the County issue a stop work order. He said it is not uncommon when doing development plans that things they have supplied the building permit review office might change when they get out in the field. He said, subsequently, there was a minor change, or a change, to the area of disturbance, and that necessitated those prerequisites being met. Mr. Cannon asked if that changes whether or not the County's permit is valid or not, to which Mr. Hall responded, not at all because there was no substantial difference with the structure. He said it was always a structure, it was always 3-million gallons, and this just happened to be one of the prerequisites. He said they still stand behind their position that the building permit was issued correctly and not in error, even with the two instances they are talking about as those were not anything major, and the applicant has complied with them.

Mr. Strausburg said, listening to the discussion this morning, he felt two really important suggestions were made; first, and this goes back to the first discussion they had about this, from a zoning standpoint he does not know that they necessarily have to change zoning, but they certainly could, and he thinks should consider a special exception process for this type of a structure, and that gets to the same things

they got to with the CAFOs with setbacks, buffers, and that type of thing. He the second, and he thinks the more important, issue is going to the State to talk about the application of this product on fields because it is the application of the product that is causing most of the problems. He said, to Mr. Cannon's point about plutonium, the Federal Government has purview over radioactive material, the State has purview over the application of this product, and if they as a County believe that the application of that product is detrimental to their quality of life, health, or whatever, then he thinks they should have that discussion with the appropriate State agencies. Mr. Cannon said Mr. Strausburg hit the nail on the head. He explained, when they went through the whole poultry issue, 70 percent of the complaints about poultry houses was really actually manure when they really drilled down about what it was. He said he thinks that is the case here, and he thinks Mr. Strausburg is right that they have to look at how they might regulate the application process.

Mr. Cannon said his only concern about the storage tanks themselves is the fact they are open, and they get a lot of complaints about the fact that it draws a lot of flies, and it draws a lot of insects, or whatever it might be. He clarified, he has not been there to experience that, but that is what they are being told, and that is why they have public hearings, and that in itself may be an issue to consider with the DAF tanks themselves, in addition to the buffers and whatever else they might want to do. Mr. Hall said he thinks when they go back to the closure of a tank, it is a similar comparison to closing a mulch shed. He explained, mulch builds up a lot of gases as it is breaking down, so, essentially, they could be creating a situation where too much pressure is occurring in a tank and there is no way to release it. He said he thinks it was probably designed in a way, whether they agree with it or not, that is probably most conducive for its use. He said it is also their understanding, not becoming a DAF expert by any means, that this is supposed to create a head or a crust that, until it is disturbed, should contain that smell. Mr. McCain said, actually, the science of it requires it to be open. He clarified, he is not defending it, but the science requires it because it actually breaks it down and so forth, to which Mr. Hall responded, it is an aerobic process. Mr. McCain said he thinks they are all saying the same thing from the standpoint of one commonality being the State needs to be part of this, which they have repeated, and he thinks their State Legislators right now need to be part of this. He said they have two issues here, and the tank is one issue, and he thinks they can deal with that either by creating buffers and setback requirements either within their zoning code or via special exception. He said that is one thing, but then the other half of this is the application process, and that definitely has to be something they have to do hand in hand with the State, so they have to deal with the two separate issues.

Mr. Dodd said he thinks it is important and imperative that they talk to the State agencies. He then asked who they contact to come here and meet with Council, to which Mr. Young responded, he can get Council the contact. He said he sent an email earlier that had an MDE and MDA contact, or it could be somebody from the Extension Office, or somebody from the Department of AG, but he is not certain. He said they can query them, to which Mr. Dodd responded, it should be somebody knowledgeable. Mr. Young said they have had people down here, to which Mr. Dodd responded, and they passed the buck.

Mr. Holloway suggested, before they go to that extent, why not meet with the people who are producing this? He said he talked to Bill Massey from Mountaire a few weeks ago when they had complaints on Dagsboro road, and Mr. Massey said they are working on a process for this stuff, but it is not finalized, and he does not know when or if it will be, but it would be about the application process and getting the odor out of it. He said he would like to talk with representatives from DPI and the poultry industry first to see if they have any solutions before they get the State involved because they are the ones producing it, and they are the ones who need to put it out there. Mr. Dodd said he thinks they can meet with them first. Mr. McCain said they need to keep in mind that this is not just poultry

product as some of this stuff comes from restaurants, and some of this stuff comes from rendering plants, so it is primarily poultry, but it is not just poultry, to which Mr. Hall responded, the stuff that is going into DAF is strictly from the rendering process, and it is not spent grease. Mr. McCain said the rendering plants render other stuff, to which Mr. Hall responded, that is true, but they are separate.

Mr. Taylor said he would like to offer a couple of thoughts. He said, as far as the spreading of it, and he thinks that is probably the larger problem, he thinks they might be able to regulate that through zoning. He said the last time they had that long discussion that was just mentioned, he asked the question of whether they know if the State regulations preempt County regulations, and nobody knew the answer. He said he does not know the answer, he did not know it then, and he has not looked into it, but he is not aware of anything that says it is preempted. He said, if it is not preempted, then he thinks the County has the ability, even in an agricultural zone, and even though it is conceivably an agricultural use, to further regulate it. He said, as far as the tank is concerned, as they probably know because he sent a memo on this, there is a pending case, but that case may not decide the issue as to whether that tank is proper or not. He explained, right now it is an administrative appeal from a Board of Zoning Appeals denial that was made summarily without even going to the Board, unusual in his experience, but he is not saying it is improper, he is just saying it is unusual. He said, if that is the case and it cannot be handled administratively in that appeal, he thinks the protestants can probably bring a case, and if they are correct that the building permit has been improperly issued and it is not permitted in that zone, the building permit would be deemed to be void and they could probably get an injunction against the County to cancel it. He clarified, he is not saying that is going to happen, but he is saying, if they are right on their arguments that it is not permitted in that district, then that permit can be challenged and cancelled, he believes, and there is Maryland case authority, which he mentioned in his memorandum. He said that may play out, so they will have to see how that is going to go, but there are still some balls in the air here. He said, getting back to the spreading, he thinks that can be regulated if it is not preempted by the State Legislation because the spreading is really the problem, he thinks. He clarified, do not get him wrong, there are a few people who are concerned about the tank, but the much larger group, such as the one around the State Police Barracks that was mentioned, and all up and down Log Cabin Road, etc., are concerned about the spreading of it.

Mr. Holloway said the reason he brought up meeting with the poultry industry first is because he thinks some of the folks on the west side and on Dagsboro Road have already met with some of the State agencies and have not gotten anywhere. He said they would probably go through that process to begin with, and that would probably be something they would have to deal with, so he thinks they should go to the root of the problem to begin with and see if they can get there first without going to the State. He clarified, do not get him wrong, he is not trying to protect anybody from the State, and he does not want anybody to think that, to which Mr. Strausburg responded, he thinks Mr. Holloway's point is well taken. He said, again, going back to the whole CAFO issue, DPI engaged on that and through that engagement he thinks they arrived at a fairly good conclusion. He said he thinks this is important enough to the community on one side, but to the poultry industry on the other side, to sit down and engage them and say they have been told by people in the poultry industry that the disposal of that waste product is a critical component. He said he does not know, but he would like to hear from the Perdues and Mountaires of the world, and ask if it is critical, and, if so, how do they mitigate the issues that are being caused. He said he has heard the same thing, that there is an amendment to the soil amendment that will render it non-odorous. He said, if so, they need to put the jets on that and get that done. He said he has also heard concerns that actually the application of that amendment to the soil could in fact in the long run be detrimental to the soil, so, again, they have to go to the people who have expertise in this area who can guide them. He said he certainly would be very unhappy if his home was proximate to

where this product was being spread, and he understands that, and thinks they need to take a very hard look at that. He said he has a CAFO near him but he has never had any issues because they did it right.

Mr. Hall said the goal is science takes care of the smell, and science takes care of the flies. He said, as far as the visual sighting of it, that goes back to what Mr. McCain mentioned with setbacks, separations, and vegetative buffers, and that will help reduce all of that; however, it is a leap of faith that they are asking the citizens to take, and they are experiencing this right now.


Mr. Hastings said the best quote he heard all day was from a story where it was mentioned this is not a farm practice as much as it is a way to get rid of waste. He said he is from a proud farm family, and there are a lot of different things they can do, from chemical fertilizers, to all sorts of application rules, etc. He said he wants to be very clear to the public that the folks sitting up here are very much pro agriculture in Wicomico County, but they want to find a way to do it the right way, and he does not want anybody to take that in any kind of a different avenue. He said, if they bring together the right amount of folks who actually know what they can do, he thinks they can come up with better regulations. He said he thinks what happened with the CAFOs was a prime example, and the rest of the State paid attention. He said he heard folks talking in Cecil County about what they were doing in Wicomico County, so he thinks this is another avenue where they can bring folks together and actually pull in MDA. He said John Sullivan actually reached out and said he wanted to come and talk with Council. He said, if they can get some of those folks in here and then actually have DPI, he thinks they could come out with a better scenario, but they are definitely going to have to pull in the folks from Annapolis as this is an issue that goes across many communities. He said this is something a lot of folks have really reached out about for a very long time, and this is really important to them, so as much as they can do and move on quickly, the better.

Mr. Hall said he thinks what was imperative about the chicken houses, using that as a comparison, was that DPI had already done a lot of the leg work with the Good Neighbor Policy, and, essentially, Council ended up adopting a variation of that, therefore, they have that coverage as they are an agricultural County. He said they try to balance agricultural and nonagricultural interests; however, it is imperative they have the voices here who know the science better than them. He clarified, they know zoning, and when the discussions get to that point, they know what to research, what good practices are, and what they can bring forward, but as far as what the industry's needs are, they are kind of in the dark on that.


Mr. Cannon said he thinks this could be a real easy fix in reference to the application because there is already State law right now that restricts the timeframe as to when they can apply this to the soil. He suggested, they can simply look at whatever that Legislation is, and propose an amendment through the State of how that application is done instead of just the spike method. He said Mr. Holloway mentioned earlier about the turning of the soil, to which Mr. Holloway responded, it is the old type of plowing where they roll the soil and cover it up, but it is going to cost them more money to do it. Mr. Cannon said they may want to consider that option as far as an amendment on the State level to amend whatever that statute is to require this type of covering up on the application. He said the good thing, as far as talking about meeting with the integrators and all of the other parties involved, is that those are the first people they are going to want to hear testimony from when they try to put that amendment through their Committees, so it would be good for Council to run this by them as far as whether they would be in favor of adjusting the application process, and that may be step one. Mr. Holloway said that will come through the meeting with DPI, to which Mr. Cannon responded, and they may not want to, but he thinks they have to sit down sometime and find out. Mr. Dodd asked who would enforce the regulations that dictate when this can be applied, to which Mr. Hall responded, the Maryland Department of Agriculture. He explained, it is not supposed to be applied between December 15 and

March 1. Mr. Dodd asked if that is because that is when the ground is solid, to which Mr. Hall responded, for a variety of reasons, including the ground being solid, and perched water table. Mr. Holloway said that would be the best time to apply it because then nobody would be outside, to which Mr. Young added, and the flies could not grow. Mr. Strausburg said it is applied in August when it is 80 percent humidity and 95 degrees. Mr. Holloway said, on Dagsboro Road, they did it in October, and the temperature was in the 70s and 80s. Mr. Hall said some farmers are arguing for that season to actually be part of when they can put that application down; however, again, that goes back to DPI, and getting the people at the table who do this for a living. Mr. Holloway said the best time to apply fertilizer is on snow because it will melt down. Mr. Cannon said they could probably also include some type of a temperature minimum restriction that it has to be less than 40 degrees, or something to that affect, not just a broad timeframe. Mr. Hall said, whatever it is, the State is going to be looking for solutions, not problems, and he thinks that is what Mr. Cannon is getting at, trying to come up with solutions.

Mr. Hall said, again, they could get into details about planting numbers and setbacks, but at this point, if Council is okay, he thinks they should defer those conversations until those other conversations with the industry take place. Mr. Dodd said they can just go ahead and keep the information they have for future use. Mr. Hall said, just for edification, there have been no permits issued by the Department since the original one back in May, and there have been no applications for a permit either, so nothing has changed on that front. There was no further discussion.

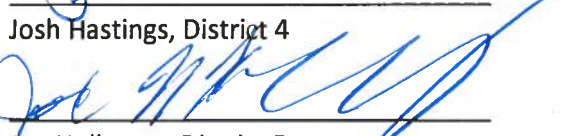
  
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Larry W. Dodd, President, District 3

  
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John T. Cannon, Vice President, At-Large


  
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Ernest F. Davis, District 1

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Nicole Acle, District 2

  
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Josh Hastings, District 4

  
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Joe Holloway, District 5

  
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Laura Hurley, Council Administrator