

## **Open Work Session**

### **Discussion on Text Amendment for Organic Liquid Fertilizer Storage Tanks**

**August 2, 2022**

Mr. Paul Wilber, County Attorney came before Council, and Ms. Lori Carter, Director of Planning, Zoning, and Community Development, joined Council via Zoom videoconference.

Mr. Mitchell said he sent out an outline to Council and he thinks everybody has gotten a lot of information from the various people who have an interest in this. He said he knows he has, and he thinks most of the emails he gets show that it went to everybody on the Council. He said Mr. Hastings and Mr. McCain have made specific recommendations, but the purpose of this outline was just to go through the various steps and things they should really think about. He said he apologizes as he knows the prohibition on the new storage tanks was something he raised, and if the Council is interested in pursuing that, he would like a chance to get more deeply involved in that and see if it is truly something that could be supported. He said there is information on both sides, and the Planning Commission came down on the no prohibition side, and he used the memo that was involved with them.

Mr. Mitchell said, assuming the tanks will be permitted in the County, they will see he went through a lot of different questions that came up, such as whether they can be limited to the end-user's land. He said it is a cost to the farmer, it is a cost to construct, and it is loss of tillable land for the tank, and there is time and expense to maintain it. He said the question is whether it benefits the County, and that is somewhat questionable because now they can have smaller tanks, but they are going to be in many different locations. He said the two existing tanks will continue and make it unlikely that a lot of farmers would build their own, so that may be a step that is of no real importance.

Mr. Mitchell said there is the question of whether it should be a permitted use in any zone, and he knows Mr. Hastings indicated that possibly a different type of tank would be permitted in an industrial zone, but no one has indicated that they think it should be just a straight permitted use where they go in and get their building permit and build, and that appears to be a consensus for no. He said the question then would be the best way, if they are going to have it, would be by special exception. He said they have to decide which zone, and they will see that he put some pluses and minuses on the industrial zone. He said he understands the argument that it is an industrial product, but it is clearly an agricultural use and the State uses it as an agricultural product. He said, if it is in an industrial zone, they are going to have issues in that, as he understands it, only one of the current industrial zones is not itself located either near other businesses or residences, so they would not be solving a lot of problems. He said the industrial zone also is going to require not just the delivery to, but delivery back out again, and he realizes they still may be taking product across the County, but a lot of the people using it would be nearby if it is in an agricultural zone.

Mr. Mitchell said, in the agricultural zone, the pro is that it is stored in the same zone it is used, it is closer to the users, and the State considers it an agricultural product. He said there is generally more acreage available, so if they put setbacks and things like that, they have some room to put them in there. He said the Council knows of a lot of the reasons against that because there are residential uses in a lot of the agricultural zones, but besides that, they have heavy traffic traveling on a lot of rural roads breaking the roads down and causing traffic issues. He said, if they look at a special exception, the good thing about a special exception is they have heard some discussion today about just making a good

argument and winning at the Board of Zoning Appeals, but that is not how it works. He said they have to have evidence, and they have to make a good argument based on the evidence presented. He said he has talked to Mr. Wilber about this and he thinks they agree that the best way to approach that would be to have important threshold regulations – setbacks, possibly screening if they think that is appropriate, maybe its relationship to traffic and better roads, and then some of the things that Mr. Hastings put in there, such as nearness to wetlands and rural legacy and things of that nature, such as the paleo channel. He said they would put them in the special exception so when the applicant comes to the Board of Zoning Appeals they have the burden of proving that they can meet that standard. He explained, a permitted use is just, if they meet the criteria, they are there, but a special exception is basically a statement by the County that they recognize that the use of the DAF tank is appropriate in an agricultural zone, but now it has to be proven that this particular place they want to put it is appropriate within that zone because some places in an agricultural zone would not be appropriate, and that is why it is a special exception instead of a permitted use. He said they could put these various things in, and they will see there were a whole lot of things that came out of the top of his head about the various criteria they could put on to qualify for the special exception. He said then he would recommend that, if they think of other issues that could be important that would not be very common, they could authorize the Board of Zoning Appeals that, if they find that certain condition, then they may apply additional requirements. He said that would make it so it was very specific to the site, and some of those things would not occur in each place that it is located. He said, just running through some of these things, setbacks, screening, whether it is lit at night and how that lighting affects neighbors, and how far it is from the road, depending on the type of neighborhood they could change some of these, so they could say no use near churches, schools, or residential areas, so they can have different conditions.

Mr. Mitchell said Council has seen the things that have been presented by the Wicomico Environmental Trust, the Friends of the Nanticoke, the Lower Shore Land Trust, and those groups, and Council has heard talk about things that have come from Mr. Taylor and Mr. Burnett. He said one thing that he thinks they have to be very cautious about is they are going into an agricultural situation, and this is one of the reasons he did not pursue the ban any further. He said, if they start banning products or uses, keeping in mind that the State regulates the use and application of DAF and many other products, it is the County that is regulating the storage, and that, in essence, is regulating the tank, so if they begin to put very harsh regulations and possibly prohibitions, they may be affecting other uses that they do not intend. He said, when they regulate DAF as a liquid fertilizer produced by the DAF process, it is a short step to regulating some other type of agricultural product that is not DAF.

Mr. McCain said he is going to have to interrupt Mr. Mitchell because he could not disagree with that more. He said they are being very specific here as they are talking about DAF, not talking about grain tanks or manure sheds. Mr. Mitchell said he understands that. Mr. McCain said this is starting to sound a little bit like he is being sold on this, and he wants the Council to be able to discuss this, to which Mr. Mitchell responded, he understands that. He clarified, he is just saying that this would not be the first time that a group went to an attorney and said this is a whole lot like what they are having a problem with and maybe they can build off of that. He said that is just something he is pointing out.

Mr. Mitchell said the other issue is whether DAF is really going to be a problem in the future. He said they have two tanks, one is huge, and they know that Perdue is in the process of getting out of supplying this stuff, so how much of it is used? He said they heard from the Farm Bureau that it is not used by a lot of farmers, so it may not be an issue in the future, but that does not mean they should not deal with it

now. He said they can talk about the various possibilities of what Council might think should be regulated, and most of those are in here. He said Mr. Hastings had a bunch of those and they were all environmentally important. He said he thinks what Mr. McCain and Mr. Hastings said in their emails is looking at specific environmental issues, but there are a whole lot of other things to deal with, like traffic, screening, and whether they want a vegetative screen or berm, and hours of operation. He said the fact that the tank is a distance from some place does not make a big difference if at 5 a.m. they are rolling through neighborhoods and schools, and whether they can stage the vehicles on the highway or the road waiting to get in or coming out, and whether they can stack them up, odor control, and things of that nature, so there are a lot of issues to be looked at that affect how the tank affects the County.

Mr. Dodd said number 1B says the State considers this an agricultural product. He then asked, do they really, to which Mr. Wilber responded, they consider it a soil amendment. Mr. Dodd asked who is testing this? He said they have been talking about this for three years and he has not figured out who is testing this to see what is actually in the tanks, to which Mr. Wilber responded, he believes the State tests once a year, not frequent testing. Mr. Dodd said the one time they test it could be an agricultural product and the rest of the year it could be anything they put in there because it sounds like it is a waste product.

Mr. McCain said he would like to go right back to 1A where all this started, which is where Mr. Mitchell commented that the County does not have the authority to prohibit and references the memo, but they have also all been inundated with other opinions on that and the information seems to clearly state that is not the case. He said the County does have the authority to regulate storage of waste products. He said the State said they control the application of the product and the local authorities have control over the storage facilities, so the County certainly does have the authority to regulate if that is their choice.

Mr. Cannon asked, if they regulate it, would they say they are prohibiting storage tanks because that is the cat Mr. Mitchell was trying to skin. He clarified, would they prohibit storage tanks or DAF storage tanks, and can they isolate it to DAF storage tanks, to which Mr. McCain responded, as defined already in the Legislation, they would specifically prohibit dissolved air floatation open air storage tanks, so this would be specific to DAF, not storage tanks, but dissolved air flotation storage tanks.

Ms. Acle asked if they could go back to the question they ended the last meeting with because that is why they did not get a consensus or do anything at the last meeting because they were going to get more information on whether they were able to do this or not. She said she is looking at the opinion of why they cannot ban the storage of DAF, and she is not really sure where that is coming from. She then asked if there is a COMAR law? She said she sees here that the Eastern Shore Counties do not ban it, but then in Harford they cannot store it, so what is the basis for saying the County cannot ban the storage of DAF, to which Mr. Wilber responded, the idea behind that is that there are twelve weeks during the year that it cannot be applied, so that would certainly infer that there has to be storage somewhere. He said whether that is going to be on the site of the processing plant or whether that is going to be in a County that is not where the site of the processing plant is becomes the question. Ms. Acle said they are not saying people cannot spread it or they cannot use it or buy it to fertilize, the question she has is can they ban the storage of it, to which Mr. Wilber responded, there have been a couple of memos that have come out in the last couple of days, but he has not had a chance to read those cases yet, and he thinks he and Mr. Mitchell would like to look at them. He said one is about solar farms and the other is about pesticides, so they can look at the application of those cases to this organic liquid.

Mr. Cannon said part of what Mr. Grout said earlier tonight is the County in using this process, but the storage was not in Wicomico County in the last 20 to 30 years, it was coming from other areas, so storage was not an incremental part of that industry until they put one here a few years ago. He said there are alternatives and he does not think they can say that banning is going to compromise that whole process 100 percent because they had a different process not too long ago.

Mr. Wilber said obviously, before there were tanks, if that product was available, it came in probably in tanker trucks and was delivered to the farms. Mr. McCain said they cannot do anything about that, but they can do something about storage tanks.

Mr. Cannon said there are going to be a couple of different options, but the first question for the Council will be whether or not the Council would like to take the measures to prohibit DAF storage tanks or not. He said he thinks that is the first thing they need to decide first of all because there is no sense in really going through all of this minutiae of details if they are going to not be in favor of it. He said, that being the case, the second issue might be deciding whether or not they want it in an agricultural district or an industrial district, and the third part would be what type of special exceptions they would like to see and what amendments they would want implemented should they choose to continue with that process.

Mrs. Hurley said it was mentioned about banning the DAF storage tank, but she recalls the Zoning Administrator mentioning, and she thinks it was also discussed during public comments this evening, that if that process is changed just slightly or the whole composition of the material is changed, would it still be filled with some kind of liquid fertilizer. She said that would be her concern, and she just wants to mention that. Mr. Mitchell said that was Clark Meadows who said that.

Mr. McCain clarified, they are not talking about fertilizer, they are talking about, once again, dissolved air flotation waste material and open storage tanks. He said, if someone comes along with an anaerobic digester proposal, this does not affect that, it would go to the regular zoning code as that is a closed system. He said actually right now that is permitted in the I-2, he thinks, but Mr. Meadows is not here to answer that.

Mr. Holloway said, if they use the terminology DAF, he thinks it was Nixon who put in price controls on grocery stores, so the meat companies just changed the name of the cuts so they could raise the price of meat, so at some point in time some scientist could come along and rename this product. He said, if they say they are not going to allow DAF, at some point in time somebody is going to say they are going to build a storage tank for whatever product, so do they go through all of this again?

Mr. McCain said that is where Mr. Mitchell and Mr. Wilber earn their money in terms of the language. He clarified, he thinks it needs to say something to the affect of dissolved air flotation waste type products or similar language that tries to address that issue, and it has to be open air. He said, if somebody is doing closed, that is different.

Mr. Mitchell said he knows this is somebody who has an agenda, but the Chicken Association, to answer Mr. Dodd's question, cites the Maryland Department of Agriculture that it is a registered soil amendment, so it is agricultural. Mr. Dodd said that is creative terminology. Mr. Mitchell said they refer to it not as waste but as residuals. Mr. McCain said he will help them out there; residual from a manufacturing processing plant is waste.

Mr. Cannon said banning is a pretty broad brush. He said there are some smaller farmers who have tanks, and he does not really know this for sure, but he heard that there are smaller farmers who have smaller DAF tanks that are maybe 1,000 gallons. He then asked, if they decide to go this route, do they need to make sure that they put some type of mention in there as far as the size of the tank if that is going to be a regulating measure, to which Mr. Mitchell responded, one of the things is not only a maximum but they may put exempt under a certain amount, which is what Mr. Cannon is talking about. Mr. Cannon asked what that number would be, to which Mr. Dodd responded, zero.

Mrs. Hurley said they have their Director of the Department of Planning and Zoning on Zoom if anybody would like to consult with her on any discussion points.

Mr. Cannon addressed Ms. Carter and said the question that came up was, if the decision was made as far as a prohibition of DAF tanks, should there be some type of restriction on size in the Legislation so they were not squeezing out a small farmer who had a 1,000 gallon tank. He said they have no idea whether 10 million or 2 million is a lot or not enough. Ms. Carter responded, that is a good question. She said she thinks that, from the standpoint whether or not they think that anything up to 150,000, they just would need to decide what that number would be. She said it is like one of the times that they probably presented where she thinks that they had something in the Legislation as a draft for up to 150,000, so that would actually be an actual consideration.

Mr. Mitchell said he does not think that is what Mr. Cannon is asking, he is asking about the small farmer, and he thinks they would do at the top end no bigger than, but then say, if less than a certain amount, some of these regulations do not apply.

Mr. Hastings said he thinks if they go down that route that the thing to say is obviously this is about the open tanks. He said theoretically in this case, to answer the question, a farm could still have an anaerobic digester or digester type product, which most dairy operations throughout Pennsylvania have these systems, which are giant bags, essentially, that are very thick, so those would be on-farm use and those systems are typically closed systems. He said they do not have the negative effects they have experienced here, and they are kind of a reverse system or anaerobic as opposed to an oxygen system like DAF, which then opens it up and is arable and able to go and spread over a large area. He said, if they did go down that route then they would want to make sure that they say open air tank or any kind of open tank as opposed to a closed system, which could still happen.

Mr. McCain said usually DAF is all about quantity. He said he is not aware of farmers who have small tanks. He said somebody in the audience might know how many gallons the Valley Protein tanker trucks are, to which someone in the audience responded, 6,000 gallons. Mr. McCain said they are not going to have a tanker going to a farm that has a small tank, so that puts it into some kind of perspective.

Ms. Carter said she looked back in her notes and the previous Legislation was less than 150,000 by right. She said anything greater than that would have to go before the Board of Appeals.

Mr. Cannon said he thinks what they might do to simplify this is just make a decision as to whether or not they want to prohibit it or not, period. Mr. McCain said that is a good place to start. Mr. Cannon said, if there is any feedback from the public as to whether or not there should be any exceptions to that, they could certainly entertain that.

Mr. Holloway asked, before they make that decision, are they allowed to prohibit it or not, to which Mr. Wilber responded, he thinks they want to look at that more deeply. Mr. Holloway asked if they should wait for that decision, to which Mr. Cannon responded, no, they will make a decision right now. Mr. Dodd asked if they will make a decision or get a consensus? Mr. Cannon said this is a work session.

Mr. Mitchell said he thinks Council is asking them to look it up and come back, to which Mr. Cannon responded, he wants the Council to make a decision now, and legal can review it and if they are wrong they can tell the Council later. He said he just wants to move forward, so he would say they take a consensus on whether or not the Council would like to entertain the prohibition of storage tanks. He said he will start with Ms. Acle, who responded, yes. Mr. Hastings said he is fine with that with open systems. Mr. McCain said he is in favor of a ban. Mr. Davis said yes, and Mr. Holloway said no. Mr. Dodd said yes, and Mr. Cannon said yes.

Mr. Cannon said they do have a six to one where they would like to see a prohibition, and they will leave it up to legal to try to figure out the details of it.

Mr. Cannon said he would like to spend a couple of minutes to try to just nail down one more thing. He then asked, if it turns out they have to move forward and they do not have the authority to ban, would they want to see it in an agricultural district or industrial? He said they should knock that out. He said they have heard pros and cons of both. Mr. McCain asked if they want to go down this path, to which Mr. Cannon responded, he just wants to know because personally he does not think putting it in the industrial zone will work in Wicomico County. He said he thinks, as was noted before, their industrial zone just happens to be too close to commercial and residential areas to begin with, and they are only going to initiate more traffic back and forth and it is going to be more cost to a smaller farmer who might want a smaller DAF tank if they accept having to buy more land to put it in an industrial zone instead of using their own land to build the tank.

Mr. McCain said he totally disagrees with that. He said that is the reason it is in the industrial zone, and he is talking about I-2, which by purpose is a smaller amount of area of their County because it is heavy industrial use, and that is what it is designed for. He said it is designed for heavy traffic, that is why they have a landfill out on Brick Kiln Road, and they still have land in those areas. He said the whole idea behind it is less amount of land. He said, if they say they are still going to allow it in A-1, he thinks 73 percent of their County is in the A-1 district. He said it might be A-1 by special exception, but, just to be frank, special exception really just means they are going to make it harder for people to do it, but if they can check all of those boxes, they cannot stop it and they are still going to get DAF in their County. He said they are basically saying that 73 percent of their County is eligible, so if for some reason they cannot do the ban that they just got the consensus on, then he would say definitely I-2 with the laundry list of restrictions.

Mr. Holloway said 73 percent might be in the agricultural district, but that includes a lot of marshland and woodlands, so if they narrow it down there is probably only 30-40 percent that would actually be farmland. Mr. McCain said, but they also have tons of major subdivisions in their A-1 district, so they could have a 3-million gallon DAF tank right next to a subdivision, to which Mr. Holloway responded, not if they put restrictions on them with setbacks. Mr. McCain said they would have to put a mile and a half setback, which will not happen, and that is the whole reason I-2 is designed for that purpose.

Mr. Cannon said they are going to make a decision tonight on whether they choose to use agricultural or industrial because they have been dealing with this for three years.

Mr. Hastings said he put together some thoughts just on what folks submitted from various groups and tried to concisely put that together. He said, if they go down that route, obviously it can be troublesome. He said there is farmland behind Deer Harbor and those kinds of areas, and that could theoretically easily have a tank in a place like that or others, so they have to be very careful if they are relegated to go down that route to then make sure that it does cover enough of the pieces. He said Mr. Mitchell has talked about what he had heard from enough folks and what people had brought to the previous meetings, and that could be a 1,000 foot setback at least. He said obviously they are talking about the open air tank being an issue that folks are smelling it two miles away or more, and they wrote down a mile and a quarter, but honestly they have heard from folks who claim to have smelled it even from five miles away, and he does not know how they regulate that.

Mr. Cannon said at first he was in favor of putting it in industrial until Planning and Zoning told them what the industrial was. He said he would love to put it in industrial, he just does not think it fits for Wicomico County. He said that is why he thinks agricultural with major exceptions would have to be done. He clarified, he is not in favor of it, but he just thinks it is a better option of the two, unfortunately, with the circumstances they have.

Mr. Cannon said he will ask who is in favor of putting it in an industrial zone starting with Mr. Dodd, to which Mr. Dodd responded, industrial. Mr. Holloway said no, and Mr. Davis said yes. Ms. Acle said she is still stuck on eliminating the tanks altogether. She said she feels like they just need to eliminate them altogether, and that was her question at the last meeting, and that is her question at this meeting. Mr. Cannon asked, if it were not legal to ban it, where would Ms. Acle put them, to which Ms. Acle responded, she just passes. Mr. Hastings said what he had sent before allows it in both and is highly regulated as far as where that could potentially be. Mr. Cannon clarified, agricultural with a two and a half mile limit, to which Mr. Hastings responded, he did not put that in his comments, but honestly what he submitted before actually includes both. He said personally he thinks, for what it is at this level and at this scale, that is something that fits I-2 districts, and that is really where it probably should be. He clarified, that being said, he also wants to point out that some of their I-2 districts actually do abut farmland and other area, and looking at the map, it is not that clear cut. He said their County has allowed the growth to happen and their zoning, basically, is not very clear like other counties, in which case no matter what they do they are going to be in rough shape if it is an open tank. Mr. Holloway said there has just been an application put in to build apartments in the I-1 district, so they are going to have issues there in the future. Mr. McCain said he votes for I-2. Mr. Cannon said he would say agricultural.

Mr. Cannon said they have a four to two consensus to put it in industrial. He said at this time they could go into the details, but he would like to thank everybody who sent the Council so much information as far as their input regarding the restrictions they would like to see. He said they have so many people even here tonight who helped with that, and so many organizations, and he knows that, together with Mr. Mitchell and Mr. Wilber, they got a lot of input. He said he thinks Mr. Hastings did put together a very concise list of items. He said a lot of work has gone into this behind the scenes for people to try to sort through all of this. He said they are not going to get into this tonight. He said he would love to, but he just really thinks it is going to drag it on and it may be totally unnecessary if they find out that legally they can move forward with the initial request to prohibit the tanks, so they will leave that tonight and

certainly be prepared for another meeting where they might have to discuss some of the other details and specifics as provided to them on restrictions if necessary. He clarified, please do not just drop the ball, but keep this fresh in their minds on where they are with everything. He said that is somewhat anticlimactic, but he thinks they made a decision tonight.

There was no further discussion.



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John T. Cannon, President, At-Large



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Ernest F. Davis, Vice President, District 1

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William R. McCain, At-Large



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Nicole Acle, District 2



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Larry W. Dodd, District 3



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Josh Hastings, District 4



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Joe Holloway, District 5



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Laura Hurley, Council Administrator