STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: December 7, 2016)

TOWN OF SCITUATE, a Municipal Corporation and Interveners, HOWARD FREDERICKSON, MAUREEN MCKENNA, BARBARA D'ALLESANDRO and GEORGE MCCORMICK	:	
V.	:	**C.A. No. PC 2012-2230**
FRANK A. MARTINELLI, ALIAS, PEEPTOAD 40-20, LLC, ALIAS, PEEPTOAD 40-86, LLC, ALIAS, PEEPTOAD ROAD ASSOCIATES, LLC, ALIAS	:	

DECISION

TAFT-CARTER, J. This case is before the Court for decision following a non-jury trial on a Complaint filed by the Plaintiffs (Town of Scituate and abutters) against the Defendants seeking judicial aid in enforcement of the Town of Scituate Zoning Ordinance (Ordinance) pursuant to G.L. 1956 § 45-24-62; injunctive relief for the abatement of a public nuisance pursuant to G.L. 1956 §10-1-1; and declaratory relief pursuant to G.L. 1956 § 9-30-1, relating to a pre-existing nonconforming use on real estate located on or near Peeptoad Road, Scituate, Rhode Island. Jurisdiction is pursuant to §§ 45-24-62, 10-1-1, 9-30-1, and Super. R. Civ. P. 52.

I

Facts and Travel

After reviewing the testimony and evidence presented at the preliminary hearings and trial, as well as considering the memoranda submitted by the parties, the Court makes the following findings of fact.

Defendant Peeptoad 40-20, LLC owns a parcel of land known as Assessors Plat No. 40, Lot 20, and Defendant Peeptoad 40-86, LLC owns a parcel of land known as Assessors Plat No. 40, Lot 86. Both parcels are located at 56 Peeptoad Road in the Village of North Scituate, Rhode Island (56 Peeptoad Road). (Joint Statement of Undisputed Facts at 1.)[1] Defendant Peeptoad Road Associates, LLC owns a separate, undeveloped parcel of land known as Assessors Plat 40, Lot 47 (AP 40, Lot 47). (Joint Statement of Undisputed Facts at 1-2; Complaint.)

The Village of North Scituate is located in the Town of Scituate (Town). The Town is a municipal corporation that enacted an Ordinance on December 30, 1965. (Joint Ex. A, Town of Scituate Zoning Ordinance). Peeptoad Road is located in an RS-120 zone and consists of several parcels of land containing buildings and comprising of approximately 11.96 acres of land. (Tr. 45, July 31, 2012; Joint Statement of Undisputed Facts at 1.)[2]

In July 1963, Pine Grove Stable, Inc. acquired 56 Peeptoad Road. (Joint Statement of Undisputed Facts at 3.) On November 18, 1965, Pine Grove Stable, Inc. conveyed the property to R.I. Incinerator Service, Inc., which subsequently conveyed the property to Hidden Wells Stables, Inc. in June 1969. Id. Pine Grove Stable reacquired the property in July 1972. Id.

[1] Peeptoad 40-85, LLC, which also owns a parcel of land at 56 Peeptoad Road, and is otherwise known as Assessors Plat No. 40, Lot 85, was not named as a party. However, in Defendants' Answer to the Complaint, Peeptoad 40-85, LLC joined in Defendants' Counterclaim. Consequently, it now is a party to the action pursuant to Super. R. Civ. P. 22, which states in pertinent part:

> "Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. . . . A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim." Super. R. Civ. P. 22 (emphasis added).

[2] The Ordinance describes the term "RS-120 Single-Family Residence" as a "district [that] is composed of certain quiet, low density residential areas of the town plus certain open areas where similar residential development appears likely to occur." (Ordinance, Art. I, § 4.)

On November 5, 1997, the Town issued a Zoning Certificate for 56 Peeptoad Road to Carlton Swedberg, President of Pine Grove Stable, Inc. (Joint Ex. D.) Said Zoning Certificate, signed by the Town's Zoning Inspector, certified that the "[r]aising and boarding [of] animals, including dogs; keeping animals, including horses, ponies, donkeys and mules, for all purposes including for sale[,]" was in conformance with the Town's Ordinance. (Joint Ex. D.) On the same day that the Zoning Certificate was issued, Mr. Swedberg, on behalf of Pine Grove Stable, Inc., conveyed two parcels of land located on Peeptoad Road to B&F Associates, LLC. (Joint Ex. B.)[3]

Defendant Frank A. Martinelli, Jr. (Mr. Martinelli) testified he is not a corporate member of the Defendant LLCs; rather, it is his wife who is the corporate member or officer. (Tr. 44, July 31, 2012.) He further testified his wife purchased the farm on behalf of the Defendant LLCs from Mr. Swedberg in 2000, after he and his wife had viewed the November 5, 1997 Zoning Certificate and consulted "with each other[.]" Id. at 44-45 and 56. According to Mr. Martinelli, his wife relied upon the Zoning Certificate in purchasing the property on behalf of the Defendant LLCs. Id. at 56.

The Defendants have been operating a farm at the real estate located at 56 Peeptoad Road since the time they purchased the property. The farm activities have included agricultural endeavors as well as the raising and keeping of farm animals. The animals kept on the farm include chickens, ducks, cows, horses, donkeys, pigs, and a variety of other animals.

Throughout these years, Mr. Martinelli had filed applications to the Town identifying himself as the "owner" of the farm. He has described himself as the individual who manages

[3] The warranty deed lists the mailing address for B&F Associates, LLC as 27 Peeptoad Road. (Joint Ex. B.) Mr. Martinelli testified that he and his wife, Barbara, had been living at 27 Peeptoad Road since 1982, and he acknowledged that the letters "B&F" stood for "Barbara and Frank." (Tr. 45 and 63, July 31, 2012.)

85% of the animal operations functions of the farm and "probably 95[%]" of the agrarian operations. Id. at 64. Mr. Martinelli testified that his wife and daughter manage roughly 15% of the animal operations, which primarily involves the equestrian aspect of the farm. Id. David E. Provonsil (Mr. Provonsil), in his capacity as the building official/zoning inspector for the Town, issued three separate Notices of Violation (NOV or notice) with respect to the Defendants' property. The notices dated September 24, 2009, March 30, 2011, and April 16, 2012 were sent to Mr. Martinelli.

The September 24, 2009 notice was precipitated by a complaint from a neighbor about a "significant odor" that was emanating from an area on the 56 Peeptoad Road property where the pigs were kept. (Tr. 3 and 6, July 13, 2012 (Tr. I).)[4] After receiving the complaint, Mr. Provonsil conducted an investigation of the property by researching its history, reexamining the 1997 Zoning Certificate, interviewing neighbors, and reviewing photographs that the complaining neighbor had submitted. Id. at 5-6.

In the September 24, 2009 notice, Mr. Provonsil stated that although the 1997 Zoning Certificate established certain pre-existing uses with respect to the raising and boarding of animals at 56 Peeptoad Road, it did not specifically identify pigs, and that historically, the property only kept up to two pigs as pets up until the mid-1980's. (Joint Ex. F, NOV dated Sept. 24, 2009.) According to Mr. Provonsil, "[s]ince December 1965, 'piggeries' have been a prohibited use in the Town of Scituate, which use is defined as the keeping of more than ONE pig." Id. Mr. Provonsil then concluded that "your current use of keeping, raising and/or selling

[4] There are two transcripts from the July 13, 2012 hearing—a morning and afternoon session. The morning session is captioned "EXCERPT OF TESTIMONY," and the afternoon session is captioned "ARGUMENT." These transcripts hereinafter will be referred to as Tr. I and Tr. II, respectively.

PIGS is PROHIBITED and you shall CEASE and DESIST this activity and all related appurtenances no later than November 24, 2009." Id.

On March 30, 2011, Mr. Provonsil issued a second NOV on behalf of the Town. (Joint Ex. G, NOV dated Mar. 30, 2011.) The notice, which was addressed to Peeptoad 40-85, LLC, c/o Frank Martinelli, stated:

> "Notwithstanding the Town of Scituate Zoning Certificate dated November 5, 1997 and making reference to the April 19, 1970 aerial photograph attached herewith, the uses (as may have been purported by you) are NOT permitted on your property.
> "• The keeping or raising and/or selling of up to 100 ducks or ducklings;
> "• The keeping, raising and/or selling of up to 500 chickens;
> "• Piggeries, keeping and/or raising or processing pigs or hogs[;]
> "• The keeping, raising and/or slaughtering of cows, cattle and the like;
> "• The storage and/or stockpiling of manure or animal waste beyond the area adjacent to the original west side barn, nor the on-site burning of said materials." Id.

The notice further stated that "other than a horse farm, the pre-existing use(s) of the property were as occasional and/or incidental keeping of animals, of which fowl, geese and pigs are not included." Id.

On April 16, 2012, Mr. Provonsil notified Mr. Martinelli that "there were certain uses and activities on the [AP 40, Lot 47] property which would not be permitted . . . ." (Tr. I at 25.) Thereafter, on April 30, 2012, Mr. Provonsil notified Mr. Martinelli by certified mail that "[s]ubsequent to my April 16, 2012, Notice to you (and discussed in my office) that stockpiling manure [on AP 40, Lot 47] is not a permitted use; you proceeded to stockpile manure and/or animal waste on the premises between April 22 and April 25, 2012. (Joint Ex. H, NOV dated Apr. 30, 2012.) Accordingly, Mr. Provonsil assessed a fine "in the amount of $25 per day @ 4 days for a total of $100.00 . . . ." Id. Carbon copies of the letter were sent to counsel for

Defendants and the Scituate Police. Id. No appeals from the aforementioned NOVs ever were filed.

On May 1, 2012, the Town Solicitor filed a Complaint with the Superior Court on behalf of the Town. See Complaint. In its Complaint, the Town alleged various violations of its Ordinance at the 56 Peeptoad Road property, including the operation of a piggery; the keeping or raising and/or selling of up to 100 ducks or ducklings and up to 500 chickens; the keeping, raising and/or slaughtering of cows; and the construction of three barn or shed-like structures without permits or approval. Id. at 3-4. The Town further alleged there had been an illegal stockpiling of manure and/or animal waste at AP 40, Lot 47. Id. at 3.

Accordingly, the Town seeks (a) injunctive relief for abatement of a nuisance of noise and odor by requiring the Defendants to come into compliance with the Ordinance (Count I); (b) judicial aid in enforcement of the Ordinance, in particular the Ordinance's provision forbidding piggeries (Count II); and (c) a declaration as to the pre-existing, nonconforming uses in effect on Defendants' properties (Count III).

On June 11, 2012, the Court permitted abutters—Howard Frederickson, Maureen McKenna, Barbara D'Allesandro, and George McCormick—to intervene. Unlike the Complaint, which essentially challenges many of the farm's operations as constituting nonconforming uses, the abutters' main objection to the farm derived from the alleged odors emanating from the pigs. Hearings on the request for a preliminary injunction were held on June 27, 2012, July 13, 2012, and July 31, 2012. Testifying at the hearing were Mr. Provonsil, Louis D'Agostino (Mr. D'Agostino), Claudia Stewart (Ms. Stewart), Mr. Martinelli and David Flynn (Mr. Flynn). After hearing testimony and reviewing the record, the Court issued a preliminary injunction against all Defendants. See Order dated Aug. 10, 2012. The subsequent Order, assented to by all the

parties, ordered a reduction in the number of pigs on the farm to no more than eighteen, a prohibition in the expansion of the quantity or breed of the other animals, the removal of accumulating chicken manure, and the prohibition of large piles of manure on AP 40, Lot 47. See id.

A bench trial subsequently was conducted on September 1 and 2, 2015. At trial, the Plaintiffs incorporated the testimony presented at the preliminary injunction hearing. Additional testimony was elicited from Mr. Provonsil, and two additional witnesses, Howard Frederickson (Mr. Frederickson) and George McCormick (Mr. McCormick), testified in favor of Plaintiffs. The Defendants presented two witnesses at trial: Ronald Lewis (Mr. Lewis) of the USDA and Philip Price, Jr. (Mr. Price).

Having reviewed the evidence and testimony, the Court now will issue its Decision. Additional facts will be provided in the analysis portion of the Decision.

II

Standard of Review

Rule 52 of the Superior Court Rules of Civil Procedure governs non-jury trials and states that the Court must "find the facts specially and state separately its conclusions of law thereon." Super. R. Civ. P. 52(a). In a bench trial, the judge "sits as a trier of fact as well as of law." Parella v. Montalbano, 899 A.2d 1226, 1239 (R.I. 2006) (citing Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984)); In re Jermaine H., 9 A.3d 1227, 1232 (R.I. 2010). The judge must determine the credibility of witnesses and draw inferences from that testimony. Parella, 899 A.2d at 1239 (citing Walton v. Baird, 433 A.2d 963, 964 (R.I. 1981)); S. Cnty. Post & Beam, Inc. v. McMahon, 116 A.3d 204, 210 (R.I. 2015).

The Declaratory Judgments Act provides that the Superior Court has the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Sec. 9-30-1; see also RICO Corp. v. Town of Exeter, 787 A.2d 1136, 1142 (R.I. 2001) (plaintiff in zoning case requested declaratory relief). "In an action for declaratory relief, a justice of the Superior Court has 'discretion to grant or deny declaratory relief under the Uniform Declaratory Judgments Act . . .'" Cigarrilha v. City of Providence, 64 A.3d 1208, 1212 (R.I. 2013) (citing Town of Barrington v. Williams, 972 A.2d 603, 608 (R.I. 2009)). "The purpose of declaratory judgment actions is to render disputes concerning the legal rights and duties of parties justiciable without proof of a wrong committed by one party against another, and thus facilitate the termination of controversies." Millett v. Hoisting Eng'rs' Licensing Div. of Dep't of Labor, 119 R.I. 285, 291, 377 A.2d 229, 233 (1977) (citing 1 Anderson, Actions for Declaratory Judgments § 4 (2d ed. 1951)). The power granted by the statute should be "broadly construed, to allow the trial justice to 'facilitate the termination of controversies.'" Bradford Assocs. v. R.I. Div. of Purchases, 772 A.2d 485, 489 (R.I. 2001) (citing Capital Props., Inc. v. State, 749 A.2d 1069, 1080 (R.I. 1999)).

In a proceeding instituted by its city or town solicitor, Rhode Island General Laws grants the Superior Court power to issue any extraordinary writ or to proceed according to the course of law or equity or both:

> "(1) To restrain the erection, alteration, or use of any building, structure, sign, or land erected, altered, or used in violation of the provisions of any zoning ordinance enacted under the authority of this chapter, and to order its removal or abatement as a nuisance;
> "(2) To compel compliance with the provisions of any zoning ordinance enacted under the authority of this chapter;
> "(3) To order the removal by the property owner of any building, structure, sign, or improvement existing in violation of any zoning ordinance enacted under the provisions of this chapter and to

> authorize some official of the city or town, in the default of the removal by the owner, to remove it at the expense of the owner;
> "(4) To order the reimbursement for any work or materials done or furnished by or at the cost of the city or town;
> "(5) To order restoration by the owner, where practicable; and/or
> "(6) To issue fines and other penalties." Sec. 45-24-62.

See Town of Coventry v. Hickory Ridge Campground, Inc., 111 R.I. 716, 721, 306 A.2d 824, 827 (1973).

III

Analysis

A

Preliminary Issues

(1)

Insufficient Notice

Defendants argue that the violation notices were defective because Mr. Martinelli was not the owner of the property.

The purpose of notice is '"to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."' Carroll v. Zoning Bd. of Review of City of Providence, 104 R.I. 676, 678, 248 A.2d 321, 323 (1968) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (internal quotation marks omitted)). In the zoning context, the purpose of notice is "affording those having an interest an opportunity to present facts which might shed light on the issue . . ." Id. (citing Perrier v. Bd. of Appeals, 86 R.I. 138, 144, 134 A.2d 141, 144 (1957)). However, even if a party does not receive proper notice, if he "appears before a zoning board of review and avails himself of the opportunity to present his position to the board, he thereby waives his right to object to any alleged deficiencies of notice." Zeilstra v. Barrington Zoning Bd. of Review, 417 A.2d 303, 307 (R.I. 1980) (citing

Champagne v. Zoning Bd. of Review of Smithfield, 99 R.I. 283, 288, 207 A.2d 50, 53 (1965) (internal quotation marks omitted)). The sufficiency of the NOVs was challenged throughout this trial based on improper service. The Defendants assert that it was the corporate owner that should have received notice, not Mr. Martinelli.

In making this assertion, however, the Defendants have failed to demonstrate that the lack of proper notice was prejudicial. Hirsch v. Zoning Bd. of Review of Pawtucket, 56 R.I. 463, 187 A. 844, 846 (1936) (even though notice might not have been sufficient, Plaintiff appeared at the hearing before the zoning board and on appeal did not show prejudice).

It is undisputed that Mr. Martinelli represented himself as the responsible individual for the care and prosperity of the property. Tr. 59-61, July 31, 2012. The credible evidence identifies the "owner" of the property on building permit applications as Mr. Martinelli. These applications were filed with the Town by Mr. Martinelli for various projects conducted on the property. See Ex. 17 (owner listed as "Frank Martinelli"); Ex. 20 (owner is listed as "Peeptoad 40-20 (Martinelli)"). Furthermore, Mr. Martinelli described himself as managing 85% of the functions of the farm as well as the decision maker with respect to the farm. Tr. 63-65, July 31, 2012.

Most importantly, it was Mr. Martinelli, individually, who responded to the Town, without objection, after receiving multiple NOVs. An objection to the NOVs was never logged; therefore, the right to object to the notice was waived at trial. See Zeilstra, 417 A.2d at 307; see also Ryan v. Zoning Bd. of Review of New Shoreham, 656 A.2d 612, 616 (R.I. 1995) (citing Zeilstra, 417 A.2d at 307 (finding generally that one who appears before a zoning board "waives the right to object to any alleged deficiency of notice")). Furthermore, the notices sent to Mr. Martinelli, who lives at the farm and manages the daily functions of the farm, fulfilled the

purposes of apprising the owner of the pending action. See Carroll, 104 R.I. at 678, 248 A.2d at 323; see also Ryan, 656 A.2d at 616 (citing R.I. Home Builders, Inc. v. Budlong Rose Co., 77 R.I. 147, 152-53, 74 A.2d 237, 239 (1950) (noting that notice can be waived by the party who does not receive due notice)).

(2)

Failure to Appeal

Having found that notice was sufficient, the Court will now consider whether the failure to appeal the NOVs is fatal to the defense. Joint Statement of Agreed Issues, ¶ 6. See Town of Coventry v. Baird Props., LLC., 13 A.3d 614, 619 (R.I. 2011) (reviewing a limited amount of briefed issues because "summarily listing issues for appellate review, 'without a meaningful discussion thereof or legal briefing of the issues . . . constitutes a waiver of that issue"') (internal citation omitted).

The Ordinance permits a NOV to be appealed to the Zoning Board "where it is alleged there is error in any order, requirement, decision, determination made by the zoning inspector or building inspector in the enforcement of this ordinance" and that an "[a]ppeal[] must be taken within thirty (30) days by filing with the officer from whom the appeal is taken. . . ." (Ordinance, Art. I, § 6(C)(1)). It is undisputed that the September 24, 2009 and March 30, 2011 notices were not appealed. (Tr. 48, June 27, 2012.) Mr. Martinelli testified that when he received the second notice, he considered it an opinion letter and discussed the issues directly with Mr. Provonsil. Tr. 83-84, July 31, 2012. During these discussions, Mr. Provonsil described the zoning certificate as a "catchall." Id. at 85-86. Mr. Martinelli concluded after the conversation that he was in compliance with the Ordinance's provisions. Id. Furthermore, the notices did not provide instructions with respect to the procedure to appeal. See Joint Ex. F,

Notice of Violation dated September 24, 2009; Joint Ex. G, Notice of Violation dated March 30, 2011; Joint Ex. H, Notice of Violation dated April 30, 2012. If Mr. Martinelli disputed the notices, the proper remedy was to appeal the Town's Zoning Board within thirty days. Mr. Martinelli failed to do so.[5]

Many courts have held that failure to appeal a NOV to the zoning board results in the violation being "unassailable" or unreviewable. See Twp. of Penn v. Seymour, 708 A.2d 861, 864-65 (Pa. Commw. Ct. 1998); Appeal of Newton Enters., 708 A.2d 914, 916 (Vt. 1998) (finding that plaintiff "cannot claim that its current uses conform to the zoning ordinance, and therefore are lawful, because it failed to take a timely appeal from either the notice of violation or the cease-and-desist order"). However, the case at bar is distinguishable. Appeal of Newton Enters., 708 A.2d at 916 n.1; Twp. of Penn, 708 A.2d at 864. Here, the notice provided to Mr. Martinelli was inadequate because it did not specify an appellate procedure. Therefore, Mr. Martinelli is not foreclosed from asserting his defense in the present case. As this case is properly before this Court, the Court now turns to the substantive issues of the case.

B

The Rhode Island Right to Farm Act

The Defendants assert that chapter 23 of title 2, entitled "The Rhode Island Right to Farm Act" (the Right to Farm Act) applies to the current action and, thus, prevents the Town from enforcing zoning ordinances against agricultural operations such as the one on Peeptoad Road. Plaintiffs counter that the Right to Farm Act does not apply because the challenged activities do not constitute legally nonconforming uses.

[5] Assuming, arguendo, that notice was improper, the Town still has the authority to seek judicial enforcement of its Ordinance via § 45-24-62 because it does not require a NOV be issued before filing a complaint with the Superior Court.

Under the Right to Farm Act, the General Assembly declared "that it is the policy of the state to promote an environment in which agricultural operations are safeguarded against nuisance actions arising out of conflicts between agricultural operations and urban land uses." Sec. 2-23-3. The term "agricultural operations" is defined to

> "include[] any commercial enterprise that has as its primary purpose horticulture, . . . stabling of horses, dairy farming, . . . or the raising of livestock, including for the production of fiber, furbearing animals, poultry, or bees, and all such other operations, uses, and activities as the director, in consultation with the chief of division of agriculture, may determine to be agriculture, or an agricultural activity, use or operation." Sec. 2-23-4.

Furthermore,

> "The mixed-use of farms and farmlands for other forms of enterprise including, but not limited to, the display of antique vehicles and equipment, retail sales, tours, classes, petting, feeding and viewing of animals, hay rides, crop mazes, festivals and other special events are hereby recognized as a valuable and viable means of contributing to the preservation of agriculture." Id.

Section 2-23-5(a) specifically states that agricultural operations, such as "[o]dor from livestock, manure, fertilizer, or feed, occasioned by generally accepted farming procedures[,]" are exempt from public or private nuisance actions. Sec. 2-23-5(a)(1).

Our Supreme Court has declared that the Right to Farm Act "is a statement of policy by the Legislature that farming activities and activities incidental to the right to farm ought not to be arbitrarily prohibited on the ground that the activity is objectionable on the ground of nuisance to either surrounding landowners or the municipality where the farm is located." Town of N. Kingstown v. Albert, 767 A.2d 659, 665 (R.I. 2001). Thus, considering that "the policy of this state [is] to encourage the continued viability of the state's remaining farming operations[,]" the Right to Farm Act, which was "designed to prevent the creation of nuisances, must be interpreted so as to not seriously infringe on ordinary farming operations within [a] town." Id. Basically,

the rationale underlying this policy is that "[p]eople may not move to an established agricultural area and then maintain an action for nuisance against farmers because their senses are offended by the ordinary smells and activities which accompany agricultural pursuits." Shatto v. McNulty, 509 N.E.2d 897, 900 (Ind. Ct. App. 1987). However, "[e]xceptions exist where there are changes in the activities, the activities were a nuisance in the first place without consideration of the changed conditions, and negligence." Id.

In construing similar statutes with different language but with the same purpose, other courts have found that the statute applies only to agricultural operations that are permitted under the local zoning ordinances and laws or that constitute a valid nonconforming use. See Jerome Twp. v. Melchi, 457 N.W.2d 52, 55 (Mich. Ct. App. 1990) (farming operation was not considered a nonconforming use; therefore, the Right to Farm Act was not applicable); Villari v. Zoning Bd. of Adjustment of Deptford, 649 A.2d 98, 103 (N.J. Super. Ct. App. Div. 1994) ("the Right to Farm Act . . . may be reasonably construed to apply only when commercial farming is a permitted or valid nonconforming use. Therefore, . . . [it] does not override the land use powers . . . confer[red] upon [a] municipal government").

In Durham v. Britt, 451 S.E.2d 1 (N.C. Ct. App. 1994), the defendant's property had continuously operated as a farm since the mid 1960's; however, a neighbor brought a nuisance action against defendant when he changed the nature of the operation from a turkey farm to a hog production facility. Although the defendant in that case argued that he was protected under the state's right to farm act, the court disagreed, finding that "we do not believe the legislature intended [the Right to Farm Act] to cover situations in which a party fundamentally changes the nature of the agricultural activity which had theretofore been covered under the statute." Id. at 3-4 (emphasis in original). The court explained that "a fundamental change could consist of a

significant change in the type of agricultural operation, or a significant change in the hours of the agricultural operation." Id. at 3; see also Laux v. Chopin Land Assocs., Inc., 550 N.E.2d 100, 102 (Ind. Ct. App. 1990) (concluding that the commencement of a hog raising operation constituted a significant change in the type of operation conducted by defendants). However, "merely increasing or decreasing the size or numbers of an operation will not serve to change the type of operation . . . [because] merely determining that numbers have increased is insufficient to support a conclusion that there has been a significant change in the type of an operation." Id. at 103.

Thus, although the Rhode Island Right to Farm Act may not exempt an agricultural operation from a nuisance action when it fundamentally changes in nature, it appears that the statute would exempt it from a nuisance action based upon an increase in size of an existing operation. In the instant matter, therefore, the Court first must determine whether there was a valid nonconforming use on the Defendants' property at the time the Ordinance was enacted and, if so, whether there has been a fundamental change in that nonconforming use such that it would constitute an illegal expansion.

C

Nonconforming Use

(1)

Establishment of Nonconforming Use

As previously stated, on December 30, 1965, the Town first enacted its Ordinance. In doing so, the disputed property became zoned as residential. Currently, the Ordinance classifies the property as RS-120, for a single-family residence. (Joint Statement of Facts at ¶ 8.)

Article II of the Ordinance allows for the keeping of animals for personal use as a permitted use in residential zones with a special use permit. (Ordinance at Art. II, § 1(1-2).) The keeping of horses, ponies, donkeys and mules also requires a special use permit. Id. at § 1(6). Raising crops is a permitted use; however, the selling of crops requires a special use permit. Id. at § 1(3, 5). Article X sets forth prohibited uses, including the operation of piggeries. Id. at Art. X; Joint Statement of Facts at ¶ 9. Unless Defendants can show that the subject agricultural activities were being conducted at the time the Ordinance was enacted, and thus became a nonconforming use, they would be both prohibited from raising pigs and required to seek special use permits to raise other animals and/or to sell crops.[6] It is undisputed that Defendants have never sought any such special use permits.

The Rhode Island General Laws and the Ordinance define a nonconformance as follows:

> "[a] building, structure, or parcel of land, or use thereof, lawfully existing at the time of the adoption or amendment of a zoning ordinance and not in conformity with the provisions of that ordinance or amendment. . . . (i) Nonconforming by use: a lawfully established use of land, building, or structure that is not a permitted use in that zoning district. A building or structure containing more dwelling units than are permitted by the use regulations of a zoning ordinance is nonconformity by use." Sec. 45-24-31(52); Ordinance, Art. IX - Definitions, (49).

In other words, "[a] nonconforming use is a particular use of property that does not conform to the zoning restrictions applicable to that property but which use is protected because it existed lawfully before the effective date of the enactment of the zoning restrictions and has continued unabated since then." RICO Corp., 787 A.2d at 1144 (citing Town of Scituate v. O'Rourke, 103 R.I. 499, 503, 239 A.2d 176, 179 (1968)). Consequently, the nonconforming use

[6] The term "piggeries" is not defined in the Ordinance and has been interpreted by Mr. Provonsil to mean "when pigs are kept more than one at a time." (Tr. 12, June 27, 2012). However, at issue in this case is whether there exists a pre-existing, legal nonconforming use that includes the raising of pigs. Thus, developing a definition of piggery is not relevant to this Court's determining the existence of the nonconforming use.

must be lawful prior to the enactment of the zoning ordinance prohibiting such use. Id.; 62 Am. Jur. Trials 1 (1997) ("First, the use must have been in existence prior to the enactment of the prohibitory zoning regulation. Further, in order to qualify as a nonconforming use, the use in question must have been 'lawful' when commenced."). Thus, for a use to be nonconforming, it must have been legally pre-existing at the time that the zoning ordinance was enacted.

In the Town, a pre-existing use is "any use of land or of any structure which was in lawful use at the time of passage of this ordinance, but which is not in conformity with the provisions of this ordinance." Ordinance, Art. IV, Special Regulations, § 1.A. The owner is allowed to continue to use the land for the nonconforming use after the zoning statute has been amended until "such use is discontinued, destroyed, demolished or changed to another use." Id. at § 1.B. If the owner discontinues the nonconforming use for one year, the owner abandons the nonconforming use unless he can prove that he did not intend to abandon the use. Id. at § 1.C. If the owner wants to expand the nonconforming use beyond its existing operations, then the owner must apply to the zoning board and request a special use permit. Id. at § 1.F. The owner may repair and maintain the present operations. Id. at § 1.D.

It is well settled that the Court must "strictly construe the scope of nonconforming uses because [the Court] view[s] them as detrimental to a zoning scheme, and the overriding public policy of zoning * * * is aimed at their reasonable restriction and eventual elimination." Town of Richmond v. Wawaloam Reservation, 850 A.2d 924, 934-35 (R.I. 2004) (quoting RICO Corp., 787 A.2d at 1144-45 (internal quotation marks omitted)). "It is the burden of the party claiming the existence of a nonconforming use to establish both its existence and legality before the enactment of the ordinance at issue." 62 Am. Jur. Trials 1 (1997).

A person asserting a legal nonconforming use has the burden of proving "that the use lawfully was established before the zoning restrictions were placed upon the land" by clear and convincing evidence. RICO Corp., 787 A.2d at 1144. Our Supreme Court has declared that:

> "The phrase 'clear and convincing evidence' is more than a mere exercise in semantics. It is a degree of proof different from a satisfaction by a 'preponderance of the evidence' which is the recognized burden in civil actions and from proof 'beyond a reasonable doubt' which is the required burden in criminal suits. If we could erect a graduated scale which measured the comparative degrees of proof, the 'preponderance' burden would be at the lowest extreme of our scale; 'beyond a reasonable doubt' would be situated at the highest point; and somewhere in between the two extremes would be 'clear and convincing evidence.'" Parker v. Parker, 103 R.I. 435, 442, 238 A.2d 57, 60–61 (1968).

Use of the higher "clear and convincing" standard is due to the fact that nonconforming uses are "a thorn in the side of proper zoning," and therefore, the nonconforming use should not be perpetuated longer than necessary. RICO Corp., 787 A.2d at 1145 (citing Inhabitants of Windham v. Sprague, 219 A.2d 548, 552-53 (Me. 1966)). Once a nonconforming use has been established, it "may be conveyed with the land and continued by subsequent purchasers. The right to a nonconforming use runs with the land and continues despite changes in ownership or tenancy." 62 Am. Jur. Trials 1 (1997).

In this case, it is undisputed that a zoning certificate was obtained for the property before it was purchased in 1997. Although not binding, a zoning certificate provides "guidance or clarification" with respect to zoning issues. Sec. 45-24-54; Parker v. Byrne, 996 A.2d 627, 633 (R.I. 2010). The zoning certificate is not, however, determinative of whether the activities on the farm should be considered a nonconforming use.

Defendants described the zoning certificate as a "catchall" because the language set no numerical limits on the nonconforming use. Mr. Provonsil bolstered Defendants' position by opining that the use of the word "including" was not a limiting term. (Tr. 64-65, June 27,

2012.) Notwithstanding, he opined that although the 1997 Zoning Certificate did not define the number of types of animals that were nonconforming, Defendants' ability to raise animals is not unlimited because all that is grandfathered in as a nonconforming use is what existed on the farm in 1965. Id. at 71-74 ("the raising and boarding of animals is not unlimited to any animal known to mankind and anywhere on that property"); Joint Ex. D, 1997 Zoning Certificate.

Mr. D'Agostino credibly testified that beginning in 1963, when he was sixteen years old, his father used to buy two pigs every year from the farm. (Tr. 2-4, July 31, 2012.) He stated that these annual trips lasted until 1976 when his father had a heart attack, and that the number of pigs, chickens and horses that he observed remained consistent throughout this period. Id. at 5. With respect to the quantities of these animals that he observed on such trips, he replied: "There were at least 25 or 30 pigs, 10, 15 horses, there were cows, hundreds of chickens." Id. at 4. He also observed about ten ducks and five or six sheep. Id. at 6.

Mr. Price credibly testified that he regularly used to visit the farm in the 1960's as a teenager with his uncle. (Tr. 49-50, Sept. 2, 2015.) He stated that between 1963 and 1970, he would have visited the property four to five times per year, and he recalled observing animals on the farm, including donkeys, pigs, goats, chickens, peacocks, and cows. Id. at 50-51 and 57-61. Specifically, he observed about thirty pigs, hundreds of chickens, about thirty ducks, and a couple of geese. Id. at 50-52.

Based upon this credible and compelling testimony, the Court finds by clear and convincing evidence that prior to 1965 there existed an agricultural operation on the property containing various animals including, but not limited to, horses, pigs, cows and chickens. While it may not be possible to determine the exact numbers of each type of animal, it appears that there were approximately thirty pigs, several cows, hundreds of chickens and over ten horses on

the property at the time the Ordinance was enacted. Thus, the Court declares that Defendants have satisfied their burden of proving by clear and convincing evidence that there existed a valid, pre-existing nonconforming use on the property when it became zoned as residential.

(2)

Continuity

Plaintiffs have suggested that the farm abandoned its nonconforming use when it was owned by R.I. Incinerator Service, Inc.; thus, even if there was a valid nonconforming use in 1965, said use no longer is valid. However, the Court finds there is no credible evidence to support that suggestion. See Washington Arcade Assocs. v. Zoning Bd. of Review of N. Providence, 528 A.2d 736, 738 (R.I. 1987) (abandonment requires proof of an intent to abandon and some overt act tending to show abandonment). See Ordinance, Art. IV, Special Regulations, § 1.C.; Town of Coventry v. Glickman, 429 A.2d 440, 442 (R.I. 1981).

The credible evidence already has established that the agricultural operations on the property constitute a valid nonconforming use. Mr. D'Agostino, Mr. Price, and Ms. Stewart credibly testified about their observations of the farm prior to 1965 through the present. See Tr. 24-27, July 31, 2012 (Mr. D'Agostino); Tr. 61-62, Sept. 2, 2015 (Mr. Price); Tr. 32-34, July 31, 2012 (Ms. Stewart). Each confirmed the existence of the farm, as well as the number of animals on the farm, and they also confirmed that such agricultural operations have been continual since 1965

Mr. D'Agostino testified that when he visited the farm with his father he observed some conditions of the farm had changed; however, the number of pigs, chickens, and horses appeared to remain consistent from year to year. (Tr. 2-3 and 5-8, July 31, 2012.) Specifically, Mr. D'Agostino observed "at least 25 or 30 pigs, 10, 15 horses, there were [only a few] cows,

hundreds of chickens" as well as ten ducks and five to six sheep. Id. at 4; 6-7. In 2002, he returned to the farm and noted that the species and number of animals remained the same. Id. at 7-8.

Mr. D'Agostino's testimony was highly credible and given great weight. He testified candidly, openly, with great precision, and certainty about the observations he made over the years. Mr. D'Agostino firmly maintained on cross-examination that his memory was accurate and that he never second guessed his recollection. The uncontroverted testimony of Mr. D'Agostino was that prior to 1965 a farm operated on the property. He clearly recalled that at age sixteen he was able to drive, and prior to that he traveled to the farm with his father to get two pigs. Id. at 3-5. His clear and articulate observations were all given great weight by this Court. He affirmed no less than thirteen times during his testimony that he was at the farm to help his father buy two pigs in the spring of every year, and during this time he observed a variety of animals.

Ms. Stewart also testified credibly about her observations of 56 Peeptoad Road over many years. Ms. Stewart, who lived on Peeptoad Road during this time and visited the farm often, began her observation of the farm in 1968. Id. at 32-34. Specifically, she recalls horses, birds, peacocks, guinea hens, ducks, "the funky chickens with the long fur," donkeys, goats, sheep, dogs, and cats. Id. at 33-34. Ms. Stewart visited the property again in 1988 and specifically recalled seeing birds, goats, sheep, and pigs, which included five to ten pigs for meat and at least one mother potbelly pig with many babies. Id. at 40. She also observed chickens, ducks, horses, cows, donkeys, sheep, goats, and lots of peacocks. Id. at 42. Finally, Ms. Stewart testified that in 2003 she observed chickens, horses, dogs, cows, but did not remember seeing pigs at the farm. Id. at 43.

Mr. Price testified that he visited the farm with his uncle in the 1960's. (Tr. 49-50, Sept. 2, 2015.) While at the farm, he recalled seeing donkeys, pigs, goats, chickens, peacocks, and cows. Id. at 50-51. Mr. Price observed about thirty pigs located in an area behind the barn with an electric fence, as well as a twenty-by-sixty-foot wire enclosure attached to the front of the barn, which had hundreds of chickens, thirty ducks, a few geese, and peacocks. Id. at 50-52. Mr. Price recalled visiting the farm yearly; however, on cross-examination, when questioned about the precision of the dates on which he visited the farm, Mr. Price explained he was unsure. Id. at 67-68. Further, Mr. Price could not recall if the same number and same species of animals were present in 1963 as today. Id. at 68. Nevertheless, his observations concerning the species of animals and number of pigs, chickens, ducks, geese, and peacocks is given weight, and the Court finds it to be credible. See Parella, 899 A.2d at 1239 (in a non-jury trial, the judge determines the credibility of the witnesses and draws inferences therefrom).

The credible testimony in this case demonstrates that agricultural operations were conducted on the property before, during, and after the time that it was owned by R.I. Incinerator, Inc. Accordingly, this Court is satisfied by clear and convincing evidence that the farm continuously has maintained pigs, ducks, chickens, and cows, as well as other animals, since prior to the enactment of the Ordinance. As such, the Court declares that the property continuously has operated as a farm since 1965 and that its nonconforming use never has been abandoned

(3)

Expansion

The Plaintiffs next assert that even if Defendants establish the existence of a nonconforming use, the farm as it is now operated constitutes an expansion of that use. Plaintiffs

also contend that a farm stand on the property is not allowed under the current Ordinance and that it also constitutes an expansion of a nonconforming use.

Pursuant to the Ordinance, in order to expand a nonconforming use, a special use permit must be applied for and granted.[7] Ordinance, Art. IV, § 1.F. There is a presumption against establishing nonconforming uses because nonconforming uses do not fit in with the Town's zoning plans. RICO Corp., 787 A.2d at 1144. Furthermore, '"the right to continue a nonconforming use does not * * * include the right to expand or intensify that use . . . "' Wawaloam Reservation, Inc., 850 A.2d at 934 (quoting Town of W. Greenwich v. A. Cardi Realty Assocs., 786 A.2d 354, 362 (R.I. 2001)). The Defendants have the burden of establishing that the farm has not been expanded beyond what existed in 1965. See 62 Am. Jur. Trials § 1 ("The burden of proving the extent or existence of a nonconforming use rests on the property owner claiming the benefit of the rights accorded property with that status.").

In the instant matter, Mr. Martinelli credibly testified that the farm contains approximately two hundred chickens, forty ducks, ten geese, eight cows, fifteen or sixteen horses, no goats presently, twelve sheep, four of which are pregnant, and fifty turkeys. (Tr. 52-53, July 31, 2012.) Although Mr. Martinelli did not discuss how many pigs he currently has on the farm, Mr. Provonsil credibly testified that he observed twenty-eight to thirty pigs present on the farm in the spring of 2012. (Tr. 21, June 27, 2012.)

Mr. D'Agostino testified to the numbers of animals that he observed in the 1960's, and this Court finds that his testimony was the most credible out of all the eyewitnesses from 1965. See Parella, 899 A.2d at 1239. Further, Mr. D'Agostino's testimony of animals being

[7] To grant a special use permit, the Zoning Board must find the following facts: "A. It will be compatible with the neighboring land uses. B. It will not create a nuisance in the neighborhood. C. It will not hinder the future development of the town. D. It will be in conformance with the purposes and intent of the comprehensive plan and the zoning ordinance." Ordinance, Art. I, § 6(c)(10).

present on the farm in 1965 was corroborated by Ms. Stewart and Mr. Price's testimony. Based on the testimony of Mr. D'Agostino, Ms. Stewart, and Mr. Price, in addition to the aerial photographs, the Court is satisfied that in 1965 the farm contained approximately thirty pigs, fifteen horses, two cows, two hundred chickens, ten ducks, and six sheep. In view of the foregoing, the Court finds that with respect to the quantities and types of animals, there has been no fundamental change in the nonconforming use such that it would constitute an illegal expansion.

However, a landowner asserting a nonconforming use also has the burden of proving where on the land his or her nonconforming use existed. See 62 Am. Jur. Trials 1 (1997); A. Cardi Realty Assocs., 786 A.2d at 364 (remanded for the court to determine the acreage of the nonconforming use). Thus, Defendants, in proving the scope of their nonconforming use, must demonstrate that the locations of the animals have not expanded. Norton Shores v. Carr, 265 N.W.2d 802, 805 (Mich. Ct. App. 1978) ("restricting the use of the eastern 200 feet of defendants' land"); Baxter v. City of Preston, 768 P.2d 1340, 1341 (Idaho 1989) (appellate court affirmed the trial court's holding that the farmer had to limit his farm to "20 head of cattle to forage on the eastern parcel in the summer; that after harvesting, the 20 cattle can forage on both the east and west parcels; that once snowfall makes grazing unfeasible, the livestock must be removed").

With respect to the location of the animals on the farm, the credible testimony established that the animals were not contained when the nonconforming use was established. Mr. D'Agostino testified that he observed the animals "were running free" and not corralled in 1965. (Tr. 6 and 9, July 31, 2012.) Later, when asked how the animals are kept currently, Mr. D'Agostino testified that he went to the farm in 2002 and observed that the horses and pigs were

separated by fencing, the ducks were by the pond, and the chickens were in an enclosure to the left of the farm when he was driving onto the property. Id. at 13-14. Further, he recalled chickens running free, but the pigs and horses were enclosed, and he did not recollect seeing cows or sheep. Id. at 14.

Similarly, Ms. Stewart remembered the horses being in the barn; however, she noted the donkeys, sheep and goats were outside roaming or behind fences. Id. at 35-36. She recalled chickens and other fowl on the property, which were sometimes kept in a lean-to behind the barn, but also ran free on the property. Id. at 36-37. Ms. Stewart also testified that there was a cool-down ring for the horses with tethers, which looks like a carousel, at the end of the barn. Id. at 38.

Mr. Price recollected the pigs being located behind the barn, maybe behind an electric fence, and also running loose. Tr. 51-52, Sept. 1, 2015. He observed that the chickens were kept along with ducks, geese, and peacocks, in a twenty-by-sixty-foot wire enclosure that was attached to the front of the barn. Id. at 52. As he described the changes to the farm that he observed over the years, he commented that some animals were contained and others were running around. Id. at 53. He specifically remembered that the ducks were in an enclosure made of chicken wire in front of the barn; the geese were both kept in the enclosure and loose; the chickens were in the same enclosure; pigs were in the back of the barn and inside the barn; and horses were located inside the barn Id. at 63-64. He also recalled turkeys, peacocks, and pheasants sometimes being in the enclosure as well. Id. at 77.

Thus, all three witnesses similarly testified that many of the animals wandered free on the property. In view of this testimony, the Court is satisfied by clear and convincing evidence that Defendants did not expand the scope of their nonconforming use beyond locations not used in

1965. See A. Cardi Realty Assocs., 786 A.2d at 364 (case remanded for the trial justice to determine what areas and the acreage of the nonconforming use); Norton Shores, 265 N.W.2d at 805 (court determined owner increased nonconforming use size).

With respect to the structures within which Defendants now shelter the animals, assuming that these structures have the proper permits—and there is no evidence in the record to suggest otherwise—the Court declares that the use of these buildings for the current agricultural operations is permissible and does not constitute an illegal expansion of a nonconforming use. Thus, the Court declares that there is no evidence that Defendants have expanded or fundamentally changed the nature of their agricultural operations since 1965.

The Court also was asked to determine whether a farm stand on the property is a legal nonconforming use. Joint Statement of Agreed Issues, ¶ 5. Plaintiffs contend that the farm stand is not allowed under the current Ordinance and that it is an expansion of a nonconforming use. See Ordinance at Art. II, § 1(5) (the keeping of animals for sale is not allowed at all in an RS-120 zone, while crops raised on the premises can be sold with a special use permit). In an RS-120 zoned parcel of land, raising crops is a permitted use; therefore, Defendants' crops are permissible under the present Ordinance. Id. at § 1(3). However, the sale of produce raised on the premises requires a special use permit. Id. at § 1(5).

Mr. D'Agostino testified that in 1965 there was a tack shop on the right hand side of the driveway, but he never went into the tack shop with his father. (Tr. 20-21, July 31, 2012.) Also, Ms. Stewart recalled buying feed and tack there in the 1980's. Id. at 40. Mr. Price knew the people who worked in the tack shop back in 1965, but did not remember their names. (Tr. 76, Sept. 2, 2015.) Mr. Martinelli testified that he recalled visiting the tack shop in the 1980's and

that in it Mr. Swedberg sold all types of farm products, including hay, grain, shavings, carriages, feed, tack, nuts, bolts, and various other things. (Tr. at 49-50, July 31, 2012.)

In light of the foregoing, this Court finds that Defendants have demonstrated by clear and convincing evidence that a retail stand has been operating continuously on the property since before the enactment of the Ordinance. See A. Cardi Realty Assocs., 786 A.2d at 363 (landowner has the burden of proving his or her nonconforming use). Accordingly, this Court finds and declares that the farm stand is a valid, pre-existing nonconforming use.[8]

D

Public Nuisance

The Plaintiffs have alleged that the farm is a public nuisance pursuant to § 10-1-1. That provision allows the attorney general or any citizen to bring a suit to enjoin or abate a nuisance.

Generally, a nuisance involves "interference with the interests of the community at large—interests that were recognized as rights of the general public entitled to protection." State v. Lead Indus., Ass'n, Inc., 951 A.2d 428, 444 (R.I. 2008) (quoting 4 Restatement (Second) Torts § 821B, cmt. b at 40 (1979)). Rhode Island has a long history of allowing nuisance actions. See Aldrich v. Howard, 7 R.I. 199, 213 (1862). In Rhode Island, a public nuisance is defined as "an unreasonable interference with a right common to the general public" or "an act or omission which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all." Lead Indus., Ass'n, Inc., 951 A.2d at 446 (citing Citizens for Preservation of Waterman Lake v. Davis, 420 A.2d 53, 59 (R.I. 1980) and Iafrate v. Ramsden, 96 R.I. 216, 222, 190 A.2d 473, 476 (1963)).

[8] Indeed, even if the farm stand did not constitute a valid pre-existing use, it would appear that it would be permissible under the Right to Farm Act as a valid activity incidental to the right to farm. See § 2-23-4 ("The mixed-use of farms and farmland for other forms of enterprise including, but not limited to, . . . retail sales . . . are hereby recognized as a valuable and viable means of contributing to the preservation of agriculture.").

Our Supreme Court recently adopted the following elements for a public nuisance claim:

> "(1) an unreasonable interference; (2) with a right common to the general public; (3) by a person or people with control over the instrumentality alleged to have created the nuisance when the damage occurred. After establishing the presence of the three elements of public nuisance, one must then determine whether the defendant caused the public nuisance." Id. at 446-47.

With respect to unreasonableness, activities that are in violation of a local ordinance can be considered unreasonable if they interfere with a public right. Lead Indus., Ass'n, Inc., 951 A.2d at 447; see e.g. Lapre v. Kane, 69 R.I. 504, 512, 36 A.2d 92, 96 (1944) (affirming the denial of a zoning application to keep swine on a property because of the "extremely foul odor" and health concerns). The burden is on the plaintiff to prove unreasonableness. Lead Indus., Ass'n, Inc., 951 A.2d at 447

In the present case, Plaintiffs contend that the zoning violations, the loud noises emanating from the farm, and/or the foul odors constitute a public nuisance. Compl. at ¶¶ 12-14. However, considering that this Court already has declared that agricultural operations on Defendants' property constitute a valid nonconforming use, any alleged violations of the Ordinance for conducting these pre-existing agricultural operations must fail.

With respect to the allegations of odors and/or loud noise, Plaintiffs failed to provide relevant evidence at trial concerning the extent, if any, of the odor and/or loud noise emanating from the property, and they failed to set forth any argument in their memoranda as to how these alleged odors and/or loud noise constitute a nuisance. Without any evidence of the extent of the odors and/or loud noise, this Court cannot find that the farm unreasonably interferes with a public right. See Lead Indus., Ass'n, Inc., 951 A.2d at 446-47. Indeed, as Plaintiffs neither briefed nor argued the issue, the Court need not address this issue. See Ferreira v. Culhane, 736 A.2d 96, 97 (R.I. 1999) ("Issues that are neither briefed nor argued are considered waived.").

Even assuming that Plaintiffs had provided evidence of odors and/or loud noise, the nuisance action nevertheless may have been precluded under the Right to Farm Act, which specifically exempts nuisance actions against agricultural operations based upon "[o]dor from livestock, manure, fertilizer, or feed, occasioned by generally accepted farming procedures[.]" Sec. 2-23-5(a)(1). It would appear from this language that Plaintiffs not only would have had the burden of demonstrating the existence of odors and/or loud noise, but they also would have had to prove that the alleged odors and/or loud noise were not "occasioned by generally accepted farming procedures[.]" Id. However, given Plaintiffs' failure to present any relevant evidence on their nuisance claim, the Court need not determine the applicability, if any, of the Right to Farm Act on the nuisance claim.

Considering that the agricultural operations conducted on Defendants' property is a legally valid nonconforming use, the farm cannot be considered a public nuisance based on the violation of the Ordinance. Considering further that Plaintiffs failed to provide any relevant evidence or argument to demonstrate the existence of a public nuisance on the property, the Court concludes that Plaintiffs' request for injunctive relief for the abatement of a public nuisance must fail.

IV

Conclusion

Based on the findings and conclusions of this Court as stated herein, this Court declares that the Defendants' property is a legal nonconforming use because it has been in operation continuously since the enactment in 1965 of the Ordinance. The Court further declares that Defendants have not expanded or substantially changed the nature of the agricultural operations

conducted on the property since that time. In addition, the Plaintiffs' claim for injunctive relief for abatement of a public nuisance is denied and dismissed.

Counsel shall present the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Town of Scituate, et al. v. Frank A. Martinelli, et al.**
CASE NO:	**PC 2012-2230**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**December 7, 2016**
JUSTICE/MAGISTRATE:	**Taft-Carter, J.**
ATTORNEYS:	
For Plaintiff:	**David M. D'Agostino, Esq.** **Sarah F. Malley, Esq.**
For Defendant:	**Paul J. DiMaio, Esq.** **Timothy J. Dodd, Esq.** **John J. Bevilacqua, Esq.**