

CAUSE NO. : 05-47

NAME: Miller Poultry

ADMINISTRATIVE LAW JUDGE: William K. Teegarden

DATE: April 3, 2006

COMMISSION ACTION: The Commission voided this Nonfinal Order and found that Summary Judgment was not the appropriate way to proceed and remanded for a fact finding hearing.

FINDINGS OF FACT

1. The Division of Fire and Building Services of the Indiana Department of Homeland Security is an agency within the meaning of IC 4-21.5.
2. IC 4-21.5 and IC 22-12 apply to this proceeding.
3. The Fire Prevention and Building Safety Commission (“Commission”) is the ultimate authority within the meaning of IC 4-21.5 over reviewable decisions of the Agency.
4. At all times relevant to this decision, Miller Poultry operated a large chicken farm and processing plant in Steuben County, Indiana.
5. In 2005, Miller Poultry decided to construct the Building as an addition to its business activities.
6. A major dispute over occupancy classification of the Building has led to this administrative review in which the Building now asserts the Agency has no jurisdiction to regulate construction of the Building and that the CDR issued in this matter is void.
7. The basic principles of law in this dispute are very simple; their application is not.
8. IC 22-15-3 requires a CDR be issued by the Agency for the construction of any Class I structure.
9. IC 22-15-3-7 provides a penalty for commencing construction of a Class 1 structure without a CDR.
10. IC 22-12-1-4 defines a “Class 1 structure” as “A building . . . that is intended to be or is occupied . . . by any of the following . . .

(c) One (1) or more persons who act as employees of another”.

11. However IC 22-12-1-4(c) goes on to say “[Class 1 structure] does not include a building of structure that:
 - (1) Is intended to be or is used solely for agricultural purposes on the land when it is located; and
 - (2) Is not used for retail trade . . . for eight (8) or less consecutive months in a calendar year.”
12. IC 12-1-2 defines “Agricultural purpose” as “. . . farming, dairying, pasturage, apiculture, horticulture, floriculture, vita culture [viticulture], olericulture, pomiculture, animal husbandry, and poultry husbandry.”

13. The parties agree that employees of Miller Poultry will work in the Building.
14. The parties also agree the business which will be conducted in the Building is the slaughter, preparation, packaging and storage of chickens which are ultimately sold to grocery stores for resale to the public.
15. No cooking takes place on-site and the processing is regulated by the Department of Health and the FDA.
16. No portion of the Building is open to the public at large, i.e., no retail sales, showrooms, etc.
17. The Agency raises a preliminary issue which must be resolved before proceeding to the “agricultural exemption” issue.
18. The information about the site provided by the Engineer for the Building is in a written, non-notarized statement.
19. The Agency contends the factual information provided by the Engineer is hearsay and as such, cannot be relied upon to provide a factual basis for a decision.
20. The statements of fact provided by the Engineer are unsworn, out of court statements.
21. The reason the English Common law prohibited such statements for evidence is fairly obvious; for a fee, there are people who would say anything about anybody and if not under oath and/or available for cross examination, the information is not reliable and should not be used.
22. Immediately upon creating the hearsay rule, the English judges created numerous exceptions, all of which involved oral or written statements which would have a higher degree of reliability. Examples are “excited utterances” (maker of statement did not have time to concoct a story), medical reports, business records, statements such as births, deaths, etc. duly recorded in a family bible passed down through generations, market reports and other such information which has a certain degree of reliability to it.
23. The old English rules on hearsay evidence are still with us today having been codified into “Rules of Procedure”.
24. The Federal Rules of Procedure recognize the “Residual Exception” in Rule 807.
25. That rule requires the focus of admissibility or non-admissibility of the out of court statements not subject to cross-examination to be on the reliability of the statements.
26. The trier of fact agrees with the Agency position to the extent that a decision cannot be based on such statements if there exists contradictory evidence in the record.
27. In fact, if the Agency had specifically opposed any relevant or material allegation of fact in the Building’s filings, this matter would have to be set for hearing to resolve those differences.
28. The Agency has inspectors in all parts of the State and was not blindsided by the factual claims. The Agency had more than sufficient time to check out the statements.
29. Nowhere in its filings or arguments has the Agency said the facts as stated by the Building’s Engineer are wrong or misleading and will be contradicted by an Agency witness.
30. Further, in this particular set of circumstances, the absence of a statement showing the document was “signed under penalty of perjury” is not nearly as important as it might

- be in other cases.
31. The signer of the document is the project engineer licensed by the State to engage in the designing of structures.
 32. The signer clearly has personal knowledge of the site.
 33. The signer has signed in his capacity as a professional engineer and the filings are written on Progressive Engineering, Inc. stationary.
 34. If a licensed professional engineer, acting in the scope of his employment, makes knowingly false or misleading statements, he is subject to sanctions by his licensing board.
 35. Further, false or misleading statements made to the Commission would damage the design professional's credibility in future matters before the Commission.
 36. Accordingly, the trier of facts now holds that a written statement of facts filed by a licensed design professional speaking of facts within his personal knowledge and the facts in question are not specifically contradicted by an opposing party has sufficient reliability to be considered in reaching a decision in an administrative case.
 37. Miller Amish Poultry is a large business.
 38. Miller purchases eggs; it does not maintain an egg laying operation as part of the business.
 39. Miller then hatches the eggs.
 40. At this point, Miller releases possession (but not title) of the chicks and transports them to area farms who raise the chickens under contract.
 41. Miller supplies feed for the chicks.
 42. Once grown, Miller then sends people to the site to catch the chickens and returns them (in Miller trucks) to the slaughter house.
 43. A casual reading of the facts could easily lead a person to believe the slaughter house is more like a factory than part of an agricultural operation in which case the Agency is correct and the Building is regulated as a Class 1 structure.
 44. In general, the trier of facts agrees with the Agency's contention that the mandate of the Commission and the Agency should be liberally construed since public safety is involved.
 45. However, the Indiana Court of Appeals, in a published decision, applied the agricultural exemption very broadly.

 46. The one and only published decision construing "agricultural exemption": is the Indiana Fire Prevention and Building Safety Commission, et al. v. Rose Acre Farms, Inc. 530 N.E.2d 131 (In. App. 1988)¹
 47. Rose Acre Farms was (and is) a huge egg producing operation.
 48. The State Building Commissioner and the Commission agreed that the egg laying and collecting portion of the Farm operation was covered by the agriculture operation.
 49. The regulators, however, refused to acknowledge the exemption for 3 separate buildings owned by Rose Acre Farms.
 50. Two of the Rose Acre Buildings were on egg farm property. They were a storage

¹ IC 22-12-1-4 has been modified somewhat over the last 20 years but the portions of it which are relevant to agricultural exemptions are still the same.

- shed and a grader building.²
51. The third building was a repair garage which was owned by Rose Acre but not physically located on or adjacent to any of the egg farms.
 52. Rose Acres contended, as does Miller, that the buildings were farm service buildings and thus exempt from Commission regulation.
 53. In Rose Acres, the Commission held the 3 buildings in question were not directly part of the farming operation and not used for agricultural purposes and since the law requiring design filings and releases involves public welfare; it should be liberally construed to require filing.
 54. The Court of Appeals held that as a matter of law (as opposed to Commission interpretation), the buildings were an integral part of the egg production process and therefore were farm service building.
 55. It also held that the size and nature of a farming operation does not remove it from exemptions granted to an agricultural enterprise and if the SBC or the Commission are unhappy with this statute, they need to present their issues to the legislature.³
 56. In short, in the Rose Acres case, the Court of Appeals found in that egg production is an agricultural operation, buildings used to further the farm operation must be considered as farm service buildings, and therefore the exemption to design filing and release applies.
 57. In the Miller case, we have a business which raises, slaughters, and packages poultry and then ships the chickens to retailers.
 58. IC 22-12-1-2 includes poultry husbandry in the definition of “Agricultural Purpose.”
 59. Raising and slaughtering chickens is just as much an agricultural purpose as egg production and grading. Both would appear to fall under the heading of “poultry husbandry”.
 60. IC 22-12-1-4(c)(1) exempts buildings used for agricultural purposes from regulation by the Commission as a Class 1 structure.
 61. The Rose Acre decision also exempts any auxiliary building which is an integral part of the farming operation.
 62. The Building in question clearly is an important part of the chicken farm.
 63. The trier of fact, then, sees no measurable difference between the Miller issue and the Rose Acres issue and, somewhat reluctantly, concludes the slaughterhouse is exempted by statute as a Class 1 structure.

IV. NONFINAL ORDER

Construction Design Release 302579 is void for the reason that the structure in question is an integral part of a poultry husbandry agricultural operation.

² The grader building is the place where eggs were washed, inspected, sorted, and placed in cartons after which they would be transported to customers. It contained employees but no retail sales were conducted there.

³ The Agency asked that State Supreme Court for transfer which was denied in September of 1989.

