May 23, 2003

Anthony J. Sposaro, Esq.

Robert H. Oostdyk, Jr., Esq.

(via fax and regular mail)

Re: Gro-Rite, Inc./David Vande Vrede

Township of Pequannock, Morris County
Aggrieved Party: Township of Pequannock

Dear Messrs. Sposaro and Oostyk:

Enclosed please find a copy of the hearing report for the Gro-Rite, Inc., Right to Farm matter. At its May 22, 2003 meeting, the State Agriculture Development Committee (SADC) adopted this hearing report with one amendment, described below.

The hearing report concludes that based upon the New Jersey Supreme Court's decision in Township of Franklin v. den Hollander, 338 N.J. Super. 373 (App. Div. 2001), aff'd. 172 N.J. 147 (2002), the SADC is required to consider the Township's findings with respect to Mr. Vande Vrede's use of the current outdoor area for the display, sale, and storage of plants and landscape materials. As you are aware, the Township has not had an opportunity to review this use. The report concludes that the SADC cannot determine whether the Right to Farm Act (Act) preempts the Township's determinations until the Township has reviewed the use and issued findings.

The report also concludes that the Township should re-review Mr. Vande Vrede's request to display garden sheds, giving Mr. Vande Vrede the opportunity to demonstrate that this use, as well as the outdoor display/storage/sales area for plants, do not pose a threat to public health and safety.

After the Township issues its findings regarding both uses (outdoor display of garden sheds and outdoor display/sales/storage of plants and landscape supplies), the report recommends that the matter go back to the SADC for a determination as to whether the Act preempts the Township's findings.

The SADC adopted that conclusion, but amended the report's recommendations regarding the scope of the SADC's review. The report states that after the Township reviews the uses of outdoor areas as described above, the SADC should defer to the Township's determination as to whether these uses are a threat to public health and safety due to the area being in a floodplain.

The SADC amended that finding as follows:

The SADC will retain jurisdiction of all aspects of this matter and, after the Township reviews the outdoor sales/display/storage areas for plants, landscape materials, and garden sheds, it will decide whether the Right to Farm Act preempts the Township's decisions with respect to the uses. The SADC will not automatically defer to the Township's determinations as to whether the uses pose a threat to public health and safety, but will review all of the Township's conclusions with respect to these uses, as well as all issues contained in the complaint the Township filed with the Morris CADB.

The SADC adopted the report in all other respects, including the determination that Mr. Vande Vrede be in compliance with relevant State law, including soil erosion and sediment control regulations, to receive the protections of the Act.

The SADC is forwarding the report to the Morris County Agriculture Development Board (CADB), but recommends that the Morris CADB delay holding a public hearing pursuant to the Right to Farm Act, N.J.S.A. 4:1C-10.1c, until after the SADC reviews the Township's findings with respect to the outdoor uses and issues its determination.

If you have any questions, please contact Marci Green, Chief of Legal Affairs, at (609) 984-2504.

Sincerely,

Gregory Romano

Enclosure

c: Katherine Coyle

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State Agriculture Development Committee
Right to Farm Conflict Resolution

Hearing Report

Re: Gro-Rite, Inc./David Vande Vrede

Pequannock Township, Morris County

Aggrieved Party: Pequannock Township

Date of Hearing: April 4, 2003

I. Background

David Vande Vrede and his wife own and operate a landscape nursery business. The operation consists of 23 acres in Pequannock Township, Morris County and approximately 98 acres in White Township, Warren County. The parcels are operated as a single enterprise, Gro-Rite, Inc. (Exhibit 1).

According to Mr. Vande Vrede's 2003 farmland assessment application and certification to the SADC, the Pequannock parcel consists of a 1.98 acre greenhouse producing spring bedding plants, hanging baskets, perennials, fall garden mums and poinsettias. There are 1.97 acres of outdoor planting areas. (Exhibit 2).

On April 25, 2002, Pequannock Township ("Township") issued three municipal summonses to Mr. Vande Vrede and a Notice to cease and desist all operations on Block 496, Lot 42. (Exhibit 3). After learning that the Morris County Agriculture Development Board (CADB) has jurisdiction over the issue pursuant to the Right to Farm Act, the Township dismissed the municipal complaints and filed a complaint with the Morris CADB. (Exhibit 4). The Morris CADB forwarded the Violation Notice to the SADC for a public hearing pursuant to N.J.S.A. 4:1C-10.1c, as the activities cited in the Violation Notice are not addressed by any agricultural management practices

promulgated by the SADC. (Exhibit 5). The SADC held a public hearing on April 4, 2003 pursuant to N.J.S.A. 4:1C-10.1c.

II. Qualification as a Commercial Farm

To receive the protections of the Right to Farm Act (Act), a farm must qualify as a "commercial farm." N.J.S.A. 4:1C-3. Commercial farm is defined as

> (1) a farm management unit of no less than five acres producing agricultural or horticultural products worth $2,500 or more annually, and satisfying the eligibility criteria for differential property taxation pursuant to the "Farmland Assessment Act of 1964" (citations omitted), or (2) a farm management unit less than five acres, producing agricultural or horticultural products worth $50,000 or more annually and otherwise satisfying the eligibility criteria for differential property taxation pursuant to the Farmland Assessment Act of 1964" (citations omitted). N.J.S.A. 4:1C-3

The Pequannock parcel did not qualify for farmland assessment, as the Township determined that the land area devoted to agricultural or horticultural uses is less than five acres. (Exhibit 2). Although the Pequannock parcel totals 23 acres, only 3.95 acres are devoted to agricultural or horticultural use. I conclude that the Pequannock parcel meets the definition of commercial farm because it appears that the farm "otherwise qualifies" for farmland assessment and because Mr. Vande Vrede certified that this parcel produces agricultural or horticultural products worth $50,000 or more annually.* (Exhibit 2).

III. Issues

The issues before the SADC are:

1. Whether the disputed activities are eligible for protection.

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* Although the Pequannock and White Township parcels comprise one "farm management unit," as they are operated as a single enterprise, the unit does not meet the definition of commercial farm. As it is greater than five acres, it must satisfy the criteria for farmland assessment. A reasonable interpretation of this requirement is that non-contiguous parcels comprising the unit must individually satisfy the criteria for farmland assessment. Given that the Pequannock parcel does not qualify for farmland assessment, the unit does not meet the definition of commercial farm.

2. Whether the disputed activities conform to generally accepted agricultural management practices.

3. Whether the Right to Farm Act preempts the Township's resolutions.

4. Whether Mr. Vande Vrede is in violation of relevant State law and if so, whether this precludes him from receiving the protections of the Right to Farm Act.

IV. Summary of Relevant Facts

A hearing was held at the New Jersey Department of Agriculture on April 4, 2003. The following people attended:

David Vande Vrede, Owner of Gro-Rite, Inc.
Robert Oostdyk, Esq., Township of Pequannock
Kevin F. Boyle, Manager, Township of Pequannock
Robert Grant, Construction Official, Township of Pequannock

David Kimmel, Right to Farm Program Specialist for the SADC was present, as well as Katherine Coyle and Diana Martinez from the Morris CADB.

1. Township Approvals

Mr. Vande Vrede has been in the landscape nursery business since 1973. His Pequannock property is located in an industrial zone, surrounded by industrial buildings, residential development, and an airport. Other greenhouse operations are in the immediate vicinity. In 1991, Mr. Vande Vrede received Township approval to construct a permanent greenhouse on Lots 40 and 41. The Township also approved an outdoor storage and display area immediately adjacent to the greenhouse on Lot 40. After receiving the permits, Mr. Vande Vrede constructed the greenhouse.

In 1996, Mr. Vande Vrede entered into a contract to purchase Lot 42, which is a 10-acre parcel adjacent to Lots 40 and 41 and the subject of this complaint. Lot 42 is

adjacent to a waterway called East Ditch, and according to the Township, lies within the flood hazard area of this waterway.

Mr. Vande Vrede applied to the Pequannock Township Board of Adjustment ("Board" or "Township") for use variances to construct a new permanent greenhouse (62,520 square feet) on Lot 42, together with an outdoor storage and sales area for landscape supplies, as well as a variance from the Township's floodplain ordinance. In two separate resolutions (Exhibits 4b and 4c, one dated February 28, 1996 and the other dated April 11, 1996) the Board granted the variances with a number of conditions. During the approval process, Mr. Vande Vrede acquired Lot 42.

A few years later, he applied to the Board for permission to revise the approved site plan and for an interpretation of the 1996 use variance. Among other things, he requested permission to display garden sheds outside. In March 1999, the Board granted approval of the amended major site plan. (Exhibit 4a). Specifically, it re-approved construction of the greenhouse, and approved an area designated for storage of landscape supplies conditioned upon the enclosure of this area by a six foot high chain link fence.

The Board's resolution explicitly prohibited materials to be stored outside the greenhouse except those specifically permitted in the outdoor storage area. It also stated that no clearing, soil movement, construction on or use of Lot 42 would be permitted until Mr. Vande Vrede entered into and complied with the terms of a developers agreement with the Township and secured all required governmental approvals.

The Board denied Mr. Vande Vrede's request for a shed display area, stating that all sheds had to be stored inside the proposed greenhouse.

2. Township's Complaint

At some point after 1999, Mr. Vande Vrede began site work on Lot 42 and deviated from his site plan and the Board's approvals. Specifically, he began storing, displaying and selling plants outdoors on the area that had been approved for the greenhouse. He also paved 9,000 square feet of pathways without entering into a developers agreement and began displaying garden sheds outdoors.

At the hearing, Mr. Vande Vrede explained that financial constraints prohibited him from constructing the greenhouse. He also explained that it is necessary to remove some plants from the greenhouse when it gets too hot inside. Mr. Vande Vrede provided photographs of his operation. (Exhibit 6).

In April 2002, the Township filed a complaint with the Morris CADB, citing the following violations:

a. The exterior storage of sheds, which was explicitly prohibited in the Township's 1999 resolution.

b. The exterior storage of plants, shrubs, trees, cement products and other material adjacent to the drainage ditch on Lot 42, which was explicitly prohibited in the Township's 1999 resolution.

c. Site work, specifically paving areas in plant display area, prior to entering into a developer's agreement as required in the 1999 resolution.

Throughout the hearing, Township representatives testified that the Township's main concern was that Mr. Vande Vrede deviated from the site plan that it had approved. The representatives stated that the Township did not necessarily oppose the change in plans, but that it needed to review a revised site plan showing the use of the greenhouse area as an outdoor storage/display/sales area.

The Township representatives also testified that many of their concerns are related to the fact that the property lies within the flood hazard area of this waterway. For example, they explained that the Board denied Mr. Vande Vrede's request to display sheds and plants outdoors partly because of the Township's concerns for health and safety. In the event the property flooded, the sheds and plants could be swept up by the water, posing a threat to public health and safety. The Township also testified that this denial was based on aesthetics.

3. Department of Environmental Protection and Soil Conservation District Approvals

a. Stream Encroachment Permit

The Township's 1996 Resolution required Mr. Vande Vrede to obtain a stream encroachment permit from the New Jersey Department of Environmental Protection. In 1997, Mr. Vande Vrede received a permit, which gave approval to construct a greenhouse, utility storage building, expand and pave parking lots and driveways, construct three detention basins and a sanitary sewer. (Exhibit 7).

The Township's 1999 revised site plan approval required Mr. Vande Vrede to secure approval from DEP for any changes to the original permit as required by the new resolution. At the hearing, Mr. Vande Vrede testified that he did not believe he needed a revised DEP permit for the site work that he performed because he already had approval to build a greenhouse, and was merely using the area designated for the greenhouse to store, display and sell plants. He testified that he installed three retention basins, as DEP had required.

After the hearing, the hearing officer was concerned that Mr. Vande Vrede may not have complied with the permit because he deviated from the site plans on which the permit was based. SADC staff reviewed Mr. Vande Vrede's file at DEP and discussed the permit with Pete Keledy, an Environmental Specialist in the Land Use Regulation

Program at DEP. Mr. Keledy stated that he did not believe Mr. Vande Vrede violated the 1997 stream encroachment permit. Although Mr. Vande Vrede never filed construction notices or a completion report, as is required in the permit, Mr. Keledy stated that most applicants fail to comply with that requirement and that DEP rarely follows up on the reports. He also stated that a DEP permit is violated if a permit holder does more than what is stated in the permit, or performs different work than that which is permitted, but not if an applicant performs less work than that covered by the permit.

Based on the testimony at the hearing, it is not clear whether Mr. Vande Vrede did anything differently than that which was approved in the permit other than using the proposed greenhouse area for an outdoor storage/sales area.*

One condition of the stream encroachment permit was that "all activities authorized by the permit" be stabilized in accordance with the Standards for Soil Erosion and Sediment Control. The permit directed Mr. Vande Vrede to contact his local soil conservation district (SCD) office. Although the SCD approvals are a condition of the DEP permit, Mr. Keledy stated that enforcement of such approvals are solely within the SCD's jurisdiction.

b. Soil Erosion and Sediment Control Plan

Mr. Vande Vrede initially began site work in 1996 without receiving a certified Soil Erosion and Sediment Control Plan. The Morris SCD issued a stop work order, but then issued a conditional certified plan. (Exhibit 8). After a few weeks of working with Mr. Vande Vrede to bring him into compliance, the Morris SCD withdrew its stop work order. The certified plan expired in September 1999.

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* It should be noted, however, that the permit approved three detention basins but Mr. Vande Vrede testified at the Right to Farm hearing that he constructed retention basins. It is possible that the retention basins were not constructed as originally proposed and approved, but Mr. Keledy did not indicate this. According to the Township's 1999 resolution, DEP determined that "it did not want large water retention facilities in a flood zone" and approved three detention basins. (See Discussion below regarding Soil Erosion and Sediment Control Plan.)

Mr. Vande Vrede then changed the site plan upon which the Certified Soil Erosion and Sediment Control Plan was based. In 1998 he requested the Morris SCD to review the new plans. The SCD sent him a letter stating that the new plans constituted a major revision, and that he needed to submit a whole new application, including the fees for the review process. The SCD never received the requested information and fees and sent another letter in May 2001, stating that failure to send the "requested revisions" would result in denial of the plan. In July 2001, Mr. Vande Vrede submitted revised drawings and documentation to the SCD. In August 2001, the SCD requested that Mr. Vande Vrede send new certification fees for review of the major revisions. Mr. Vande Vrede never sent the payment to the SCD. (Exhibit 9).

According to Joe Dunn, Manager of the Morris SCD, the SCD requested Mr. Vande Vrede to provide data from an engineer regarding stormwater management for the proposed detention pond in 1996 and in 1998. The SCD had requested technical information regarding how the pond would contain stormwater. Mr. Vande Vrede never supplied this information. The SCD certified the plan in 1996 nonetheless.

The SCD recently concluded that Mr. Vande Vrede is not in compliance with soil erosion and sediment control regulations. The first area of noncompliance is related to the pond that Mr. Vande Vrede constructed after 1998. Mr. Dunn inspected the property and found that the pond is different than the one approved in the 1996 soil erosion and sediment control plan. He stated that it is essentially a hole in the ground with an earthen embankment and no stormwater management properties. Mr. Vande Vrede uses the pond water for irrigation. The SCD has advised Mr. Vande Vrede that the pond needs to be stabilized with topsoil, seed and mulch.

Mr. Dunn explained that the SCD is not concerned at this time that the pond does not manage stormwater, as water on the site currently flows towards Beaver Brook. The stormwater management requirements in 1996 and 1998 were based upon Mr. Vande Vrede's plans to construct a greenhouse on Lot 42. With a greenhouse, the water would

have to be diverted into the pond. Without the greenhouse, the natural course of the water in a 100-year storm is towards Beaver Brook, and thus does not need to be diverted into a pond.

The SCD also found noncompliance with respect to the original clearing of the property to construct a greenhouse on Lot 41. Mr. Vande Vrede cut and buried large-diameter trees on the property. The SCD has informed Mr. Vande Vrede that the trees must be removed and the area stabilized with macadam, stone or vegetation.

The SCD also informed Mr. Vande Vrede that if he decides to construct the greenhouse and parking lot, he will have to reapply for a new soil and erosion sediment control plan.

Mr. Dunn indicated that the paved pathways and hard-packed parking lot on Lot 42 do not constitute a violation of soil erosion and sediment control regulations.

4. SADC Site Inspection

Charles Roohr of the SADC staff inspected Mr. Vande Vrede's operation in January 2003. (Exhibit 10). He observed the outdoor sales/storage/display area on Lot 42, although there were no plants outside because it was winter. He noted that this area was unpaved, except for the walkways around and through the display area. Two areas on Lot 42 were also used for outdoor growth of cold hardy plants such as pansies and mums.

V. Whether Activities Are Eligible for Protection

The Right to Farm Act protects various agricultural activities as long as the farm and the agricultural activities meet the eligibility criteria of the Act. Protected activities include the production of agricultural and horticultural crops and operation of a farm market, as long as the construction of building and parking areas is in conformance with municipal standards. N.J.S.A. 4:1C-9a and c. The disputed activities in this matter fall

within the list of protected activities. Specifically, Mr. Vande Vrede produces and sells horticulture and related products.

Although he sells the products from an outdoor area, this area should be deemed a farm market pursuant to the Act. The Act defines "farm market" as

> A facility used for the wholesale or retail marketing of the agricultural output of a commercial farm, and products that contribute to farm income, except that if a farm market is used for retail marketing at least 51% of the annual gross sales of the retail farm market shall be generated from sales of agricultural output of the commercial farm, or at least 51% of the sales area shall be devoted to the sale of agricultural output of the commercial farm, and except that if a retail farm market is located on land less than five acres in area, the land on which the farm market is located shall produce annually agricultural or horticultural products worth at least $2,500. N.J.S.A. 4:1C-3.

Mr. Vande Vrede has indicated that at least 51 percent of the annual gross sales of his retail operation is generated from sales of agricultural output of the farm. Thus, he may be able to operate a retail market and sell other products, including garden sheds, if he meets the other criteria of the Act, as discussed below.

VI. Whether Activities Conform to Generally Accepted Agricultural Management Practices

SADC staff contacted Carl Nordstrom, Executive Director of the New Jersey Nursery and Landscape Association, for his opinion regarding whether Mr. Vande Vrede's activities conform with generally accepted agricultural management practices. Mr. Nordstrom advised that storing, displaying and selling plants outside is a very common and generally accepted use by garden and nursery centers. Plants are taken out of a greenhouse and brought outside when they reach a certain growth level at which they can handle being outside. This practice gives the plants the opportunity to acclimatize to

the outdoors. In addition, outdoor plants can take advantage of rain and require less irrigation.

Displaying and selling garden sheds is not common with all nursery operations. Mr. Nordstrom stated, however, that larger garden centers commonly sell garden-related products, such as furniture, sculptures and garden sheds.

Based upon Mr. Nordstrom's advice, I conclude that both the outdoor storage, display and sale of plants and the display and sale of garden sheds are generally accepted agricultural management practices.

VII. Whether Act Preempts Municipal Site Plan Approval

If agricultural activities are eligible for the protections of the Act, the farmer may conduct the activities despite municipal ordinances, resolutions, or regulations to the contrary. N.J.S.A. 4:1C-9. The New Jersey Supreme Court upheld the municipal preemption provisions of the Right to Farm Act in Township of Franklin v. den Hollander, 338 N.J. Super. 373 (App. Div. 2001), aff'd. 172 N.J. 147 (2002). To receive protection against municipal regulation of agricultural activities, however, the activities must not "pose a direct threat to public health and safety." N.J.S.A. 4:1C-9. In addition, the Supreme Court held that the SADC must consider and acknowledge municipal regulations in zoning disputes. den Hollander, 172 N.J. at 152.

At the hearing, the Township testified that its reasons for prohibiting outdoor storage were for health and safety concerns due to the fact that the area is in a floodplain, as well as for aesthetic reasons. The Township also testified, however, that Mr. Vande Vrede never requested approval of the current outdoor area for the sale, storage and display of plants – that the original plan was for a greenhouse on that area. It appeared at

the hearing that the Township is very amenable to reviewing another site plan for such an area.

I conclude that the Act should not preempt the Township's review of this issue, as well as a re-review of the proposal to display sheds, in light of the New Jersey Supreme Court's holding that the SADC is required to acknowledge and consider relevant municipal interests in zoning disputes. den Hollander, 172 N.J. at 152.

When the Township reviews the revised site plan, however, the SADC should defer to the Township's findings with respect to potential public health and safety concerns due to the property being in a floodplain. The Township has expertise in this area and can rely on the advice of its engineers. Mr. Vande Vrede should have the opportunity to provide engineering and environmental evidence to show that the outdoor display of sheds and the outdoor sales, display and storage of plants are not within the floodway line and that the activities do not present a public health and safety risk.

If the Township finds that the activities are not a threat to public health and safety but denies approval nonetheless, the SADC should have the opportunity to review the Township's decision. In accordance with the mandate of the New Jersey Supreme Court, the SADC shall consider the Township's reasons for denial and decide whether it should defer to the Township or find that the Act preempts the Township's decision. To preempt the Township's decision, Mr. Vande Vrede would have to establish a legitimate, agriculturally-based reason for needing the outdoor display, sales and storage areas. Ibid.

It should be noted that in 1996 the Township approved a "small portion of the outside area" to be used for the storage, display and sale of plant and landscaping material. In its finding, the Township concluded that

> [t]here is nothing about the nature of the applicants' business which will be injured by flood waters, nor is there anything about the applicants' business or the products or structures on the site which would cause damage to persons or property if there were a flood. February 28, 1996 Resolution, Page 7, Paragraph 5.

Although the current outdoor area is presumably larger than that which was approved in 1996, there remains the possibility that the current area does not present a health and safety risk.

With respect to the summons for beginning site work without entering into a developers agreement and posting performance guarantees, I conclude that the Act does not preempt this condition in the site plan approval. Specifically, the Resolution prohibits clearing, soil movement, construction on or use of Lot 42 prior to entering into a developers agreement with the Township and prior to securing all required governmental approvals. (1999 Resolution, Page 10, Paragraph 7). The reason for this requirement is to give the Township control over the site work and activities on the property to ensure that Mr. Vande Vrede is satisfying the conditions of its approval, including having secured all necessary permits. Given that many of the Township's conditions were based on health and safety concerns and to ensure compliance with State environmental and soil conservation laws, I conclude that the Right to Farm Act does not preempt this condition.

VIII. Compliance With Relevant State and Federal Law

The Act requires that an agricultural operation be in compliance with all relevant federal or State statutes, rules and regulations to be eligible for the Act's protections. N.J.S.A. 4:1C-9. As discussed above, Mr. Vande Vrede is currently not in compliance with the Soil Erosion and Sediment Control regulations. The Morris SCD has expressed a willingness to work with Mr. Vande Vrede to help bring him into compliance. Mr.

Dunn has spoken to him and advised him of the soil stabilization activities he needs to perform.

I conclude that to the extent Mr. Vande Vrede may be eligible for the protections of the Act as described above, he will not be entitled for the protections until the Morris SCD and DEP are satisfied that he is not in violation of their respective regulations.

IX. Conclusions

Mr. Vande Vrede's Pequannock operation meets the definition of commercial farm. The disputed activities (outdoor storage/sales/display area of plants and outdoor display of sheds) are eligible for the protections of the Act, as they are included in the list of protected activities, meet the Act's definition of farm market, and conform to generally accepted agricultural management practices.

In light of the New Jersey Supreme Court mandate that the SADC recognize and consider municipal interests, I conclude that the Township should review the outdoor area for display, storage and sale of plants and re-review the outdoor display of sheds. Mr. Vande Vrede should have the opportunity to prove to the Township that the activities are not a threat to public health and safety. If the Township finds that they are a threat to public health and safety due to the area being in a floodplain, then the Act should not preempt this determination. If the Township finds that they are not a threat to public health and safety, but denies the activities nonetheless, the SADC shall review the determination and decide whether the Act should preempt the Township's determination.

The Act does not preempt the Township's requirement that Mr. Vande Vrede enter into a developer's agreement prior to beginning site work. This requirement gives the Township the ability to ensure that Mr. Vande Vrede is complying with all conditions of its approval, many of which are related to environmental and public health and safety concerns.

If the matter returns to the SADC for a determination as to whether the Act preempts the Township's findings with respect to the outdoor storage, sales, display areas

for sheds and plants, Mr. Vande Vrede will not be entitled to the protections of the Act unless he is in compliance with all relevant state laws, including soil erosion and sediment control regulations and DEP regulations.

Date:

Marci D. Green
Public Hearing Officer
State Agriculture Development Committee