



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

KATHLEEN G. KANE
ATTORNEY GENERAL

April 9, 2013

Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120

[REDACTED]

Via E-mail and First Class Mail

William H. R. Casey, Esquire
Attorney at Law
99 East Court Street
Doylestown, PA 188901

RE: ACRE Review Request
Warrington Township Zoning Ordinance

Dear Mr. Casey:

This letter will respond to your letters dated July 25, 2012, and November 12, 2012, presenting Warrington Township's position on the use of the grinder at [REDACTED] nursery operation to make potting soil and mulch for use on the nursery. As set forth in your letters, the Township contends that [REDACTED] use of the grinder is an industrial use and not an agricultural use, thus it is not permitted in the Residential Agricultural District. For the reasons set forth below, it is our position that [REDACTED] use of the grinder is a normal agricultural operation and the Township's application of its ordinance to preclude this operation is a violation of ACRE.

By way of background, [REDACTED] nursery is located on 48 acres at [REDACTED] in Warrington Township, Bucks County. [REDACTED] is primarily a growing facility with three large growing greenhouses and outside growing areas for cool weather annuals, cabbage and kale, mums, perennials, and container trees and shrubs. For many years, [REDACTED] made potting soil for the nursery using a soil mixer and peat moss. However, due to a shortage in available peat moss, [REDACTED] obtained a grinder machine and receives decayed leaf waste from local municipalities, as well as tree trimmings from local tree trimming businesses, which it uses to make both potting soil and mulch for the nursery operation. The leaf waste used by [REDACTED] is kept by a municipality for a year and turned, so that when [REDACTED] receive the waste it is actually an organic humus material. The [REDACTED] add other materials in the grinder with the humus to make either potting soil or mulch depending on what materials are added to the humus. The potting soil and mulch are predominately used on the property to grow the nursery crops. [REDACTED] also offers some potting soil and mulch for sale on the property.

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Pursuant to ACRE, we have consulted with both Penn State College of Agricultural Sciences (PSU) and the Pennsylvania Department of Agriculture (PDA). Both PSU and PDA opine that [REDACTED] use of the grinder to produce potting soil and mulch and the resulting use in the nursery operations, as set forth above, are normal agricultural operations as defined by the Right to Farm Act, 3 P.S. § 952 (RTFA).

None of the case law that you provided to me supports the Township's position that [REDACTED] use of the grinder machine to produce potting soil and mulch is an industrial, rather than an agricultural use because [REDACTED] utilizes the resulting potting soil and mulch to grow the nursery crops on the property. Unlike [REDACTED] operation, the case law you cited involved companies bringing all materials onto a property to make mulch and then transporting the final mulch product off-site for resale. See Clout, Inc. v. Clinton County ZHB and HEJ Partnership, 657 A.2d 111, 113-15 (Pa. Cmwlth. 1995) (rejecting argument that mulch production was an agricultural use because all materials were brought onto the site to be composted and then taken off the site for resale, thus there was no connection to the land); Lower Mount Bethel Township v. Stine, 686 A.2d 426, 428, 430 (Pa. Cmwlth. 1996) (holding that hauling large amounts of tree stumps and construction/demolition wastes onto a site to be ground into a mulch product for sale off-site was not an agricultural use and had no connection to the separate agricultural use on the property); Stine Farms and Recycling, Inc., Clayton Stine, Jr., and Michael Stine v. DEP, EHB Docket No. 99-228-L (EHB Sept. 4, 2001) (challenge to DEP's enforcement of violations and EHB holding that the hauling of tree stumps and construction/demolition wastes onto a site to be ground into a mulch product for sale off-site was not a normal agricultural operation under the RTFA and had no connection to the separate agricultural use on the property (directly related to Lower Mount Bethel case, *supra*)); Tinicum Township v. Allan J. Nowicki and River Road Quarry, LLC, Docket No. 2012-01750 (CCP Bucks County 2012) (holding that owner of a 3 acre parcel was not engaged in a normal agricultural operation as defined under the RTFA because all the tree debris was hauled to the site to be processed into mulch that is transported to buyers off-site and none of the resulting mulch is used for further cultivation of the land).

Furthermore, contrary to your assertions, the court in HEJ Partnership v. Clinton County Comm'rs, 657 A.2d 116 (Pa. Cmwlth. 1995) never addressed whether the composting facility was an agricultural or industrial use because the issue presented was solely whether the zoning ordinance was exclusionary. Moreover, the HEJ Partnership case is the companion case to Clout, which as explained, dealt with an operation that did not utilize the mulch produced on the property.

The production and use of potting soil and mulch on [REDACTED] nursery is analogous to the situation discussed by the Pennsylvania Supreme Court in Gaspari v. Township of Muhlenberg, 392 Pa. 7, 139 A.2d 544 (1958). In Gaspari, a long-time mushroom farmer began to make a synthetic compost as the medium to grow mushrooms because there was a shortage of horse manure that was typically used as the growing medium. Gaspari, 392 Pa. at 9-10, 139 A.2d at 545-46. The synthetic compost was made from hay and crushed corn that were brought onto the farm and put through a composting process. Id. at 11, 139 A.2d at 546. The township

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issued a cease and desist order to the mushroom farmer on the basis that the production of the synthetic compost was not a farming use, but rather a manufacturing process not permitted by the zoning ordinance. Id. at 10-11, 139 A.2d at 545-46. The mushroom farmer appealed this order.

On appeal, the court discussed the testimony from a mushroom expert from Pennsylvania State University that explained that making a synthetic compost to grow mushrooms is an agricultural activity. Id. at 8-9, 12-13, 139 A.2d at 545, 547. The court reversed the order and held that a mushroom farmer's production of a synthetic compost to grow mushrooms was an agricultural use and not a manufacturing use. Id. at 15, 139 A.2d at 548.

The Gaspari decision sits on all fours with the situation at [REDACTED] nursery operation. Our experts have advised us that the [REDACTED] production of potting soil and mulch is no different than, *inter alia*, a farmer bringing in manure or biosolids from outside sources to fertilize farm fields; using a grinder to make feed or bedding from materials brought onto the farm; or making substrate to grow mushrooms from materials brought onto the farm. See, e.g., Hempfield Township v. Hapchuk, 620 A.2d 668, 672 (Pa. Cmwith. 1993) (holding the farmer's use of sewage sludge brought onto the farm to fertilize farm fields is "farming and agricultural in nature").

For these reasons, we are prepared to bring legal action against Warrington Township pursuant to Section 315 of ACRE to invalidate or enjoin the enforcement of the Ordinance provisions. However, as we discussed today, I will make arrangements for myself and our PSU expert to tour the [REDACTED] nursery operation, along with you, the Township supervisors, and a representative from Legacy Oaks housing development. This tour will permit our PSU expert to explain the reasons why the [REDACTED] production of potting soil and mulch is a normal agricultural operation and answer any further questions by the Township with the expectation that we can resolve this ACRE matter without resorting to litigation.

Sincerely,


SUSAN L. BUCKNUM
Senior Deputy Attorney General

SLB/kmag

cc: [REDACTED]