



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

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ATTORNEY GENERAL

May 4, 2015

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

Susan J. Smith, Esquire
The Law Office of Susan J. Smith
2807 Market Street
Camp Hill, PA 17011

RE: ACRE Review Request
Mount Joy Township, Adams County

Dear Ms. Smith:

This letter will detail the legal problems with Mount Joy Township's Zoning Ordinance provisions regulating agricultural operations, as well as the Township's interpretation and application of its zoning ordinance to preclude the [REDACTED] from engaging in the slaughtering and sale of poultry products produced from the poultry raised on their normal agricultural operation. We will provide proposed changes to the Ordinance that would be acceptable to the Office of Attorney General to resolve this matter by agreement through ordinance amendment and address the remedy for the Ramsburgs' proposed poultry operation.

I. STATE LAWS PROTECTING AGRICULTURAL OPERATIONS

The Agriculture Communities and Rural Environment (ACRE) law requires municipalities to comply with State law in imposing requirements on normal agricultural operations. Pennsylvania law provides State agencies with strong and broad regulatory and enforcement power over all agricultural operations and prohibits inconsistent regulation by municipalities. 3 Pa. C.S. § 312, *et seq.*

The Right to Farm Act (RTFA) defines a "normal agricultural operation" to include the "activities, practices, equipment and procedures that farmers adopt, use or engage in the production and preparation for market of poultry, livestock and their products and in the production, harvesting and preparation for market or use of agricultural, agronomic,

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horticultural, silvicultural and aquacultural crops and commodities.” 3 P.S. § 952. This definition for normal agricultural operation is incorporated into the ACRE law. 3 Pa. C.S. § 312. To be sure, the definition explicitly encompasses the practices used in the production and preparation for market of poultry and their products. Our experts at Penn State College of Agricultural Sciences and the Pennsylvania Department of Agriculture (PDA) have advised us that slaughtering poultry on a farm operation is part and parcel of preparing poultry and their products for market. In fact, the PDA and USDA Food Safety Inspection Service (FSIS) inspect and regulate animal agricultural operations engaging in on-site slaughtering. 3 Pa. C.S. § 2361; 31 P.S. § 483.1; 7 Pa. Code § 13; 9 C.F.R. § 381.10.

Moreover, the RTFA defines “agricultural commodity” to include the products of poultry and “[a]ny products raised or produced on farms intended for human consumption and the processed or manufactured products of such products intended for human consumption.” 3 P.S. § 952.

The RTFA protects a farmer’s right to engage in direct commercial sales of agricultural commodities as follows: “Direct commercial sales of agricultural commodities upon property owned and operated by a landowner who produces not less than 50% of the commodities sold shall be authorized, **notwithstanding municipal ordinance, public nuisance or zoning prohibitions.**” 3 P.S. § 953(b) (emphasis added).

The Municipalities Planning Code (MPC) precludes a municipality from enacting a zoning ordinance that regulates activities related to commercial agricultural production if it exceeds the requirements imposed under the RTFA. 53 P.S. § 10603(b) (emphasis added); Locust Township, 49 A.3d at 517 (holding that a municipality exceeded its authority under the MPC by imposing requirement that smaller animal operations comply with the Nutrient and Odor Management Act (NOMA)). The MPC also provides that no public health or safety issues shall require a municipality to adopt a zoning ordinance that violates or exceeds the provisions of the RTFA. 53 P.S. § 10603(h); Richmond Township, 2 A.3d at 687 & n.11 (explaining that section 603(h) of the MPC “indicates that, as a matter of law, an agricultural operation complying with the NMA, AASL and the RFL does not constitute an operation that has a direct adverse effect on the public health and safety”).

Moreover, it is well-settled that “[a] local government unit has no authority to adopt an ordinance that is arbitrary, vague or unreasonable or inviting of discriminatory enforcement.” Richmond Township, 2 A.3d at 681; Exton Quarries, Inc. v. Zoning Bd. of Adjustment, 228 A.2d 169, 178 (Pa. 1967). “[T]he power to . . . regulate does not extend to an arbitrary, unnecessary, or unreasonable intermeddling with the private ownership of property.” Eller v. Bd. of Adjustment, 414 Pa. 1, 6, 198 A.2d 863, 865-66 (1964); Van Sciver v. Zoning Bd. of Adjustment, 152 A.2d 717, 724 (Pa. 1959) (same); Schmalz v. Buckingham Twp. Zoning Board, 132 A.2d 233, 235 (Pa. 1957) (same).

Furthermore, the Agricultural Area Security Law (AASL) precludes a municipality from enacting ordinances which would unreasonably restrict farm structures or farm practices within the area. 3 P.S. § 911.

II. TOWNSHIP'S APPLICATION OF ITS ORDINANCE TO THE RAMSBURGS' PROPOSED POULTRY OPERATION

The [REDACTED] own a 38 acre farm at [REDACTED] in Mount Joy Township's Rural Residential (RR) District, which is described in the zoning ordinance as primarily an agricultural and residential district with important agricultural resources. Ordinance §§ 110-21(D)(2)(a); 110 Attachment 4. The [REDACTED] sought to start an operation on the farm in which they would raise poultry, slaughter it on-site, and offer the prepared poultry products for sale at a retail store on their farm. In October 2013, the [REDACTED] requested that the zoning officer assess their proposed use for a zoning determination on applicable zoning requirements.

On November 5, 2013, the zoning officer provided a written zoning determination and opined that although the [REDACTED] proposal to raise less than 20,000 poultry per year was a permitted use in the RR District, the slaughtering and retail sales on-site were not permitted under the ordinance for agricultural operations engaged in raising poultry. (See 11/5/2013 Letter from Zoning Officer to [REDACTED])

In so concluding, the zoning officer noted that Section 110-20 defines "livestock or poultry, raising of" by "referenc[ing] livestock and poultry as two distinct animal types." She explained that Section 110-96(A) permits the retail sale of agricultural products and provides that the "use shall be an accessory use incidental to a crop farming, greenhouse, plant nursery, orchard, winery or raising of livestock use." The zoning officer opined that the exclusion of the phrase "raising of poultry" under Section 110-96(A) means that retail sales can be an accessory use to the raising of livestock, but not for the "raising of poultry" based on the distinction in the definition under Section 110-20. Therefore, according to the zoning officer, a farmer raising poultry cannot engage in retail sales of agricultural products as an accessory use, but a farmer raising livestock can.

Furthermore, the zoning officer summarily concluded that a slaughter house was not a permitted use in the RR District. However, the zoning officer never mentioned Section 110-101(I)(14), which permits "custom butchering, not including a commercial slaughterhouse or stockyard" as an accessory farm-related business in the RR District. The zoning officer did not explain in her determination why Section 110-101(I)(14) did not apply to allow the [REDACTED] to engage in butchering poultry on their operation. The ordinance does not define "custom butchering," but does define "slaughter house." The zoning officer did not explain how these terms differ in interpreting the ordinance.

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The Township's application of the ordinance violates the RTFA, ACRE, MPC, and AASL. The Township is prohibited by the MPC from regulating agricultural operations with provisions that exceed or violate the RTFA. 53 P.S. § 10603(b), (h); Locust Township, 49 A.3d at 517; Richmond Township, 2 A.3d at 687 & n.11. As explained above, the RTFA defines a normal agricultural operation to include the practice of slaughtering poultry to prepare it for market. Thus, the Township cannot exclude a poultry farmer from engaging in the slaughter of poultry on the farm. 3 Pa. C.S. § 312. The Township also cannot preclude a poultry farmer from conducting retail sales of poultry products on the farm regardless of the terms of the ordinance. 3 P.S. § 953(b). Therefore, the Township exceeded its authority in its application of the ordinance to the [REDACTED] proposed poultry operation.

In the same vein, the Township does not have authority to regulate the operational aspects of an agricultural operation. The Township cannot differentiate between agricultural products that may be sold on a farm based on the type of animal being raised on the farm (i.e., livestock versus poultry). The provisions of the ordinance are arbitrary, unreasonable, irrational, and discriminatory, as well as an improper attempt to regulate the details of the business on an agricultural operation and not land use.

In Appeal of Sawdey, our Supreme Court explained that:

Zoning ordinances, interfering as they do with free use of property, depend for their validity on a reasonable relation to the police power. An ordinance for example if it permitted a butcher shop to be located in an area but prohibited its sale of pork, or a drugstore but prohibited its sale of candy, or a grocery store but prohibited its sale of bread, would surely be regarded a[n] unreasonable legislation on details of a business not a matter of public concern. If it may prohibit a hotel from dispensing liquor, it can well forbid it selling meals, or cigars or candy, or newspapers. Zoning ordinances may not be used for such purposes.

85 A.2d 28, 32 (Pa. 1951) (citations omitted); In re Thompson, 896 A.2d 659, (Pa. Cmwlth. 2006) (explaining that “[z]oning only regulates the *use* of land and not the particulars of development and construction.”).

“A zoning ordinance that permits a use but excludes or regulates the normal activities involved in the use shifts away from the type of land use regulation that is the function of zoning.” ROBERT S. RYAN, 1 PENNSYLVANIA ZONING LAW AND PRACTICE § 3.4.4 (George T. Bisel Company, Inc. 2001). “Zoning is a regulation of uses, not a means of regulating the manner in which business is conducted.” Id. § 3.3.14A.

For all of these reasons, the [REDACTED] proposal to raise poultry, slaughter it on his farm, and offer the resulting poultry products for sale on the farm are all activities encompassed in a normal agricultural operation and protected by the RTF, ACRE, MPC, and AASL. As stated, the Township went beyond its MPC authority in precluding the [REDACTED] from engaging

in these proposed agricultural activities in an agricultural zoning district. The Township's denial of the Ramsburgs' request to engage in this proposed use is also an unreasonable restriction on farm practices in violation of the AASL and the MPC.

III. PROPOSED AMENDMENTS TO MOUNT JOY TOWNSHIP'S ZONING ORDINANCE

In order to resolve the above-stated issues, the Township must recognize that [REDACTED] proposed poultry operation is a normal agricultural operation. This can be accomplished by amending the following ordinance provisions.

The definition for "Livestock or poultry, raising of" under Section 110-20 should be amended to delete the second sentence that states: "Raising of livestock shall not include a slaughterhouse nor a stockyard used for the housing of animals awaiting slaughter." This restriction violates the RTFA, AASL, and MPC.

Section 110-96(A) should be amended to state: "The use shall be an accessory use incidental to a normal agricultural operation engaged in the production of agricultural commodities."

Section 110-101 should be amended to remove the 50 acre minimum requirement for a farm-related business. The RTFA defines a normal agricultural operation to require only a 10 acre lot size when not based on anticipated yearly gross income. 3 Pa. C.S. § 952. Therefore, the Township, again, is without authority to impose this blanket acreage requirement. In addition, subsection 110-101(I)(14) should be amended to state: "Custom butchering or On-Farm slaughtering operations." The PDA and USDA FSIS permit both custom butchering and on-farm slaughtering on poultry operations subject to regulatory requirements. (See PSU Cooperative Extension Publication — Marketing Poultry Slaughtered Under USDA Exemption.)

Finally, the [REDACTED] are permitted to raise poultry and engage in direct commercial sales on their farm as a permitted use in the RR District. We note that a "farm-related business" is listed as a use by special exception. We request that the Township suspend its enforcement/interpretation of the ordinance provisions at issue pending resolution through ordinance amendment. If the [REDACTED] are required to obtain a special exception for the slaughtering aspect of the operation, then we request that the Ramsburgs be permitted to move forward with that requirement immediately and the zoning hearing board be advised that the prior interpretation of the ordinance is suspended and the proposed use should be granted the special exception.

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IV. CONCLUSION

As evident from the discussion above, local ordinances that attempt to regulate the how, when, and where of activities already subject to State uniform regulatory schemes “have not fared well under preemption challenges.” Commonwealth v. East Brunswick Township, 980 A.2d 720, 730 (Pa. Cmwlth 2009); Richmond Township, 2 A.3d at 684-88. The municipalities do not have authority to establish their own regulatory scheme for types of animals that may or may not be slaughtered and sold on agricultural operations.

I look forward to the Township’s response to our proposal to resolve this matter through amending the Ordinance and allowing the [REDACTED] to move forward with their proposed poultry operation.

Sincerely,



SUSAN L. BUCKNUM
Attorney-in-Charge — ACRE Program
Senior Deputy Attorney General

SJF/slb

cc: Edward G. Puhl, Esquire (w/encl.)

Penn State Extension

Marketing Poultry Slaughtered Under USDA Exemption

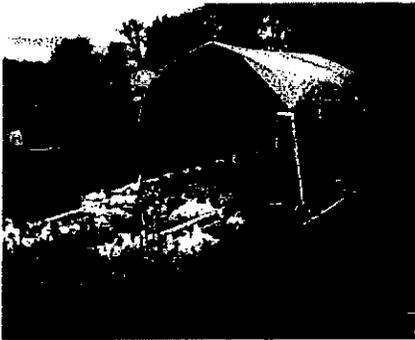
Producer/ Grower 20,000 Bird Exemption

Producers who raise and slaughter no more than 20,000 poultry on their premises in a calendar year may, under PDA inspection, sell within Pennsylvania to customers through the following venues:

- farmers markets
- farm stands
- CSA members
- buying clubs
- hotels and restaurants
- schools
- hospitals
- wholesale distributors (sales within the state) retail stores

How may my poultry be processed?	Slaughtering Options		
	On-Farm	Custom	USDA
Selling Method			
Farmers Markets	Yes	Yes	Yes
On-Farm Sales	Yes	Yes	Yes
CSA Operations	Yes	Yes	Yes
Buying clubs	Yes	Yes	Yes
Restaurants	Yes	No	Yes
Retail Stores	Yes	No	Yes
Schools & Hospitals	Yes	No	Yes
Distributors/Wholesalers	Yes	No	Yes
Out of State	No	No	Yes

Assumes 20,000 or fewer birds sold per year
 * Unless also USDA inspected
 ** All birds must be pre-sold before slaughter



What are the regulatory requirements?	PDA Sanitation Inspection	USDA Sanitation Inspection	PDA Warehouse Registration	Specified Labeling
Facilities				
On-Farm Processor	Yes*	Optional	Yes**	Yes
Custom Processor	Yes	No	No	Yes
USDA Processor	No	Yes	Yes**	Yes
Farm (not doing processing)	No	No	Yes**	n/a***

* Unless USDA inspected
 ** Assumes product held overnight at farm
 *** Except as required by FDA for marketing purposes
 Note: farmers selling through farm stands and farmers markets must also maintain the appropriate license for doing so.

Frequently Asked Questions:

"Can I sell poultry that I raised and processed on my farm using a rented mobile processing unit?"

Yes. According to the USDA Food Safety Inspection Service (FSIS), "FSIS has determined that when a grower producing poultry under the Producer/Grower Exemption rents slaughtering or processing equipment and operates such equipment on his or her premises, he or she is NOT disqualified for the Producer/Grower Exemption." The Producer/Grower must follow basic sanitary standards for on-farm slaughter of poultry and be under inspection by PDA.

"Can I sell poultry that I raised but have processed by a custom butcher?"

Birds that will be processed off farm by a licensed custom processor need to be sold to the end user before the birds are slaughtered. Otherwise, such poultry can only be used for personal consumption by the producer for

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whom the birds were slaughtered, including that individual's family and/or farm workers. After being processed by a custom processor, poultry may not enter into commerce of any kind. Producers may sell poultry (before slaughtering) to individual customers, providing them with a written receipt for the sale of the birds. The producer (the seller) may arrange the service of processing and delivery of finished product to the buyer. These transactions may occur at a farmers market, but both producer and buyer are responsible for maintaining records and receipts sufficient to support the aforementioned arrangements.

"Does the poultry that I raise, slaughter and sell at farmers markets, restaurants, etc., need to be labeled?"

Yes, all exempted poultry must be labeled. The label and/or shipping container must include:

· Producer's name · Producer's address · The statement, Exempt P.L. 90-492

"If I am selling my poultry at farmers markets, does it have to be frozen?"

No. Poultry may be sold fresh or frozen. Whether you are selling fresh or frozen poultry, proper temperatures must be maintained and monitored according to PDA requirements. Cold products need to be stored at 41F degrees or lower and frozen products need to be stored frozen to the touch.

"Do I need to have my poultry processing area inspected and registered with PDA?"

Yes. The Pennsylvania Department of Agriculture inspects for sanitation. Contact the PDA, Bureau of Food Safety & Laboratory Services (717) 787-4315 <http://tinyurl.com/cuqgjk>

"Can I sell exempt poultry that I raised and processed on my farm across state lines?"

No. Poultry raised and slaughtered under the USDA FSIS Poultry Exemptions can only be sold intra-state (within state lines). For poultry to be sold out of state, it must be processed under USDA inspection.

Questions? Contact:



Pennsylvania
Association for
Sustainable Agriculture

PO Box 419 • Millheim, PA 16854 • (814) 349-9856

www.pasafarming.org

PDA Bureau of Food Safety & Lab. Services – (717) 787-4315

Penn State Extension

Lehigh County Agricultural Center, 610-391-9840

For details on meeting the exemption criteria as well as criteria for all the poultry exemptions, go to:

http://www.fsis.usda.gov/OPPDE/rdad/FSISNotices/Poultry_Slaughter_Exemption_0406.pdf

<http://agmarketing.extension.psu.edu/Processing/PDFs/FarmerGuide.pdf>

Guidelines for on-farm poultry processing: <http://smallfarms.cornell.edu/resources/>

Contact info for USDA FSIS: http://www.fsis.usda.gov/contact_us/Office_Locations_&__Phone_Numbers/index.asp#of

extension.psu.edu

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Penn State College of Agricultural Sciences research and extension programs are funded in part by Pennsylvania counties, the Commonwealth of Pennsylvania, and the U.S. Department of Agriculture.

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