



COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF ATTORNEY GENERAL

LINDA L. KELLY  
ATTORNEY GENERAL

November 29, 2011

Litigation Section  
15<sup>th</sup> Floor, Strawberry Square  
Harrisburg, PA 17120



**Kathleen B. Campbell, Esquire**  
**MANKO, GOLD, KATCHER & FOX, LLP**  
401 City Avenue  
Suite 500  
Bala Cynwyd, PA 19004

**RE: ACRE Review Request**  
**Hilltown Township Zoning Ordinance**

**Dear Ms. Campbell:**

As we discussed, I am providing this letter to detail the legal problems with Ordinance Number 2010-1 and to propose changes to the Ordinance that would be acceptable to the Office of Attorney General to resolve this matter by agreement.

Section 160-23.A(2)(a) permits the sale of agricultural products at roadside stands, but subsection (i) limits those sales to "only products grown on the property upon which the Roadside Stand is located." Section 160-23.A(2)(b) states that the "sale of nursery products not grown on site" is not permitted as part of an "A2 Nursery Use." These limitations on agricultural sales are prohibited by the Right to Farm Law (RFL), which provides that:

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. Such direct sales shall be authorized without regard to the 50% limitation under circumstances of crop failure due to reasons beyond the control of the landowner.

3 P.S. § 953(b); See Commonwealth v. Richmond Township, 2 A.3d 678, 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").

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The legal problems with the restrictions on direct commercial sales of agricultural commodities can be corrected if the Township amends the Ordinance by repealing subsection (i) and replacing it with the language from the RFL under Section 953(b), and repealing the phrase "nursery products not grown on site, or" from subsection (b).

The Water Resources Planning Act (WRPA) precludes municipalities from allocating water resources and regulating "the location, amount, timing, terms or conditions of any water withdrawal by any person." 27 Pa. C.S. § 3136(b). The Department of Environmental Protection (DEP) regulates consumptive water use pursuant to the WRPA and accompanying Water Resources Planning regulations. 27 Pa. C.S. §§ 3118, 3131, 3133-34; 25 Pa. Code § 110, *et seq.* The DEP's Water Resources Planning regulations establish the framework for water withdrawal and use registration, monitoring, record-keeping and reporting requirements. 25 Pa. Code § 110.2. A person "whose total withdrawal from a point of withdrawal . . . within a watershed [which] exceeds an average rate of 10,000 gallon per day in any 30-day period" is required to register with the DEP and provide the information specified under Section 110.203 of the regulations. 25 Pa. Code § 110.201(3). DEP also requires registrants to submit annual reports regarding water withdrawal and use. 25 Pa. Code § 110.301-305.

Sections 160-23.A(2)(f)(i) and (iii) require a nursery use proposing a new well to submit a water impact study and include a meter to monitor water usage of the new well. Section 160-23.A(2)(f)(ii) imposes liability on a property owner for "any adverse effect" a new well may have on "any residential domestic water supply well." These ordinance provisions are preempted by the WRPA and DEP's accompanying regulatory scheme. Hilltown Township may amend Section 160-23.A(2)(f) to require only that an applicant for a new well as part of a nursery use provide the Township with proof of whether or not the applicant is required to register with the DEP, and, if so, to also provide copies of registration papers and any reports submitted to the DEP.

I look forward to Hilltown Township's prompt response to our proposal to resolve this matter through amending the ordinance.

Sincerely,



**SUSAN L. BUCKNUM**  
**Senior Deputy Attorney General**

SLB/lls

cc:

  
**Scot Semisch, Esquire**