



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

KATHLEEN G. KANE
ATTORNEY GENERAL

August 20, 2013

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

Via E-mail and First Class Mail

Eugene Orlando, Esquire
Orlando Law Offices
2901 St. Lawrence Avenue, Suite 202
Reading, PA 19606

RE: **ACRE Review of Maiden Creek Township Ordinance**
[REDACTED]

Dear Mr. Orlando:

As you requested, I am providing this letter to explain our position that [REDACTED] may utilize his private well water to irrigate his horticultural crops at his greenhouse/nursery operation located in Maiden Creek Township at [REDACTED]

By way of background, [REDACTED] purchased the property at issue in March 2004. The property consists of 4.26 acres in the Commercial Zoning District and it had been used as a greenhouse operation immediately prior to the purchase by [REDACTED]. There is a 12,000 square foot greenhouse and a 25,000 square foot outside area that are used to produce and propagate horticultural crops, such as mums, roses, vegetable plants, and perennials from liners. These horticultural crops are sold on the property and [REDACTED] has an anticipated yearly gross income of at least \$10,000 from the sale of the horticultural crops he grows on his operation. Accordingly, the nursery crop production operation engaged in by [REDACTED] on the property constitutes a normal agricultural operation as defined under the Right to Farm Act, 3 P.S. § 952.

Although [REDACTED]'s property is located in the Commercial Zone and the Township approved/viewed his use as solely a commercial activity, our Office, after careful review and consultation, has determined that the production and sale of the horticultural crops on the property is a normal agricultural operation implicating the protections under ACRE. The fact that the Township did not recognize that these activities are protected agricultural activities does not obviate our involvement pursuant to the authority under ACRE.

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As you are aware, [REDACTED] submitted an ACRE request to our Office for review of the Township's application of its Mandatory Public Water Connection ordinance ("Ordinance") to preclude the use of a well on the property to irrigate crops on his nursery operation. This issue arose when the Township required [REDACTED] to submit a land development plan to build an expansion on the existing greenhouse. The Township's position is that [REDACTED] must use public water to irrigate his horticultural crops in the greenhouse and outside growing areas because his property is located in an area subject to the Ordinance. For the following reasons, it is our position that [REDACTED] is entitled to use the well on the property to irrigate the horticultural crops on his nursery operation.

The Water Resources Planning Act (WRPA) provides that "no political subdivision shall have any power to allocate water resources or to regulate the location, amount, timing, terms or conditions of any water withdrawal by any person." 27 Pa. C.S. § 3136(b). Under the WRPA, a municipality retains authority to adopt and enforce ordinances to, *inter alia*, "regulate the use of land pursuant to the Pennsylvania Municipalities Planning Code [MPC]" and for "mandatory connection to and use of available public water supplies." *Id.* § 3136(c), (c)(1). With respect to the MPC, the *en banc* panel in Commonwealth v. Locust Township, 49 A.3d 502, 514 (Pa. Cmwlth. 2012) held that "[w]hile the MPC does provide municipalities with the authority to consider water supply in regulating land use, it does not authorize municipalities to impose water withdrawal and use requirements on agricultural uses." Therefore, we examine the extent of a municipality's authority to enforce a mandatory connection to public water supply ordinance.

The Township has authority under the Second Class Township Code to enact a mandatory public water connection ordinance. 53 P.S. § 67603(a). However, the Township's authority is limited in that "[t]hose industries and farms which have their own supply of water for uses other than human consumption may continue to use their own water for that purpose but are required to use the township water system to provide water for human consumption." *Id.* § 67603(c). It is our position that [REDACTED] use of the well water to irrigate his nursery crops falls within this exception. Our research has not uncovered any case law interpreting the exception under Section 67603(c); however, the case law interpreting a municipality's authority to require mandatory connection to public water holds only that a municipality can require mandatory connection of public water to an inhabitable building (i.e., home or other occupied structure) and does not preclude a property owner from using separate well water for non-human consumption purposes outside the home. Johnston v. Township of Plumcreek, 859 A.2d 7 (Pa. Commwlth. 2004) (holding that Township can require property owners to connect homes to public water supply and discontinue use of well water in homes); Citizens for Personal Water Rights v. Borough of Hughesville, 815 A.2d 15 (Pa. Commwlth. 2002) (affirming constitutionality of ordinance requiring residents to connect their homes to public water supply, but allowing private wells to be used for non-human consumption purposes, such as watering lawns, shrubbery and plants). The holdings in these cases are based on the authority of a municipality to protect health, safety and welfare of residents by providing a safe water supply for human consumption to their homes or other inhabited structures; thus it is not implicated

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when a resident seeks to use a separate private well water source for non-human consumption uses. The reasoning in these cases supports the application of the exception under Section 67603(c) to the use of a separate well water source by [REDACTED] to irrigate the horticultural crops on his nursery operation.

Moreover, there are no provisions in the Township's Ordinance that preclude the use of a separate private well water source for non-human consumption purposes outside of a habitable structure. The greenhouse and outside growing areas are not structures "intended for continuous or periodic habitation, occupancy or use by human beings or animals." Ordinance § 1.01. Thus, the application of the Ordinance to preclude [REDACTED] irrigation use is dubious at best.

Finally, the Township also mentioned that the prior property owner's recorded land development plan contained a general plan note at No. 6 stating that the "Development to utilize public sewer and public water." The Township contended that this plan note created an enforceable covenant that runs with the land to use only the public water supply. This contention is belied by the fact that this plan note is prefaced with the following language: "The following Notes are informational and/or explain current legislative restrictions and are not intended as restrictions to run with the land." For this reason, the prior property owner's land development plan did not create a covenant to use only the public water supply.

It is our understanding that the Township requested this letter so that the Supervisors may provide final approval of the [REDACTED] Addition Plan. We would appreciate a response from the Township confirming that it will permit [REDACTED] to utilize his private well water to irrigate his horticultural crops in the greenhouse and outside growing areas on the property. [REDACTED] must continue to use only the public water supply for any structures on the property that fall within the definition of "improved property" under the Ordinance.

We appreciate the Township's efforts and cooperation in resolving this ACRE review.

Sincerely,



SUSAN L. BUCKNUM
Senior Deputy Attorney General

SLB/

cc: *via email and first class mail:*
Terry Esbenshade