



COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF ATTORNEY GENERAL

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November 5, 2015

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Newlin Township Board of Supervisors  
P. O. Box 447  
Unionville, PA 19375

**RE: ACRE Review Request  
Newlin Township, Adams County**

**Dear Board of Supervisors:**

As you know, the Office of the Attorney General received a request from [REDACTED] to review Ordinance No. 2014-01 that amended the Newlin Township zoning ordinance provisions regulating equine operations. Subsequently, we received similar requests from several other owners of equine operations in Newlin Township also seeking our review of Ordinance No. 2014-01. We have completed our review and it appears that the Township's Ordinance No. 2014-01 unlawfully prohibits or limits normal agricultural operations in violation of ACRE.

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.*

We are prepared to bring legal action against the Township pursuant to Section 315 of ACRE to invalidate or enjoin the enforcement of the Ordinance provisions. Before doing so, however, we write to offer the Township an opportunity to provide relevant information or materials and to meet with us to discuss the matter.

In an effort to start negotiations to resolve this matter, we will detail the legal problems with the Township's Ordinance provisions. We will propose changes to the Ordinance that would be acceptable to the Office of Attorney General to resolve this matter by agreement. We begin with an overview of the State laws that regulate agricultural operations and then address the Ordinance provisions.

## **I. EQUINE OPERATIONS ARE NORMAL AGRICULTURAL OPERATIONS**

Equine operations are recognized as normal agricultural operations under various State laws, regulations, and court decisions. See, e.g., 3 P.S. 903; 3 Pa. C.S. § 952; Samsel v. Jefferson Township, 10 A.3d 412 (Pa. Cmwlth. 2010) (holding that stables used to house race horses are agricultural buildings); Barnhart v. Nottingham Township, 411 A.2d 1266 (Pa. Cmwlth. 1980) (holding a property used for boarding horses is an agricultural use notwithstanding its commercial aspects); 25 Pa. Code § 92a.2, 83.201; 7 Pa. Code § 137b.12. The Agricultural Area Security Law defines "commercial equine activity" as follows:

The term includes the following activities where a fee is collected:

- (1) The boarding of equines.
- (2) The training of equines.
- (3) The instruction of people in handling, driving or riding equines.
- (4) The use of equines for riding or driving purposes.
- (5) The pasturing of equines.

3 P.S. § 903.

In addition, the experts we consulted at Penn State University College of Agricultural Sciences (PSU) and the Pennsylvania Department of Agriculture (PDA) have advised us that equine operations boarding, training, and providing lessons are engaged in production agriculture.

## **II. STATE LAWS AND REGULATORY REQUIREMENTS FOR ANIMAL AGRICULTURAL OPERATIONS**

Under Pennsylvania law, all animal agricultural operations are regulated and defined to fall into one of the three following categories:

- animal agricultural operations too small to be a CAO/CAFO, i.e., non-CAOs/CAFOs, which are subject to the Clean Streams Law regulatory scheme (i.e., smaller animal operations). See 25 Pa. Code § 91.36, discussed below.
- concentrated animal operations (CAO), which are subject to the Nutrient and Odor Management Act and the Clean Streams Law

regulatory schemes. See 25 Pa. Code § 83.201, 82.701, and 91.36, discussed below.

- concentrated animal feeding operations (CAFO), which are subject to the Nutrient and Odor Management Act and the Clean Streams Law regulatory schemes. See 25 Pa. Code § 83.201, 82.701, 91.36, and 92a.1, discussed below.

#### **A. CLEAN STREAMS LAW AND DEP REGULATIONS**

Pursuant to its authority under the Clean Streams Law, 35 P.S. § 691.1, *et seq.*, the Department of Environmental Protection (DEP) regulates all agricultural operations that use or produce manure whether or not such operations are a CAO or CAFO. 25 Pa. Code § 91.36. All smaller animal operations (or operations that use manure) are required to have a written manure management plan that complies with DEP's Manure Management Manual (MMM). 25 Pa. Code 91.36(b)(1)(i). The manure management plan accounts for all manure produced on the operation and plans for how it will be utilized and managed using best management practices set forth in the MMM. The DEP's regulatory program requiring the management of nutrients is to protect the quality of ground and water resources.

A manure management plan must identify all pastures on a farming operation and detail the plan for managing those pastures. Equine operations utilizing pastures for horses must include the plan for pasture management in the manure management plan. With respect to pasture planning, the DEP's MMM requires the following information to be set forth in a manure management plan:

All pastures on the farm must be listed in the Manure Management Plan and identified on the farm map. Farms have several choices for managing pastures:

1. The farm can develop a grazing plan meeting the requirements of the [USDA Natural Resources Conservation Service's (NRCS)] Pennsylvania Technical Guide Standard 528 for prescribed grazing, or
2. Farmers can manage pastures by assuring that there is dense vegetation in the pasture throughout the growing season. Dense vegetation means that the pasture is managed to minimize bare spots and to maintain an average vegetation height across the pasture during the growing season at least 3 inches high.

Grazed fields that do not have an NRCS grazing plan which are overgrazed (as defined as not meeting the management requirements described above in bullet "2") need either to be managed to restore dense vegetation or these areas will be

defined as ACAs [Animal Concentration Areas] and will need to meet the requirements of Section 7 of this manual.

DEP's Manure Management Manual, Land Application of Manure Supplement at Section 6.

A manure management plan also includes planning for environmentally sensitive areas, including water sources and water wells. Id. § 2. The setback distance required for areas where manure may be deposited on the ground, such as pastures, ranges from 100 to 35 feet depending upon the conditions of the area around these environmentally sensitive areas. Id.

#### **B. Nutrient and Odor Management Act and Regulations**

The State Conservation Commission (SCC), pursuant to its authority under the Nutrient and Odor Management Act (NOMA), 3. P.S. § 501 *et seq.*, and accompanying regulations, 25 Pa. Code § 83.201, *et seq.*, comprehensively regulates nutrient and odor management on CAOs and CAFOs. The DEP also regulates CAOs and CAFOs. 25 Pa. Code §§ 91.36(b)(1)(ii)-(iii), 92a.29(e)(1). A CAO or CAFO is required to have a certified nutrient management specialist develop a site-specific nutrient management plan for the operation. 25 Pa. Code § 83.261(7), (8). The nutrient management plan must be approved by a County Conservation District. The nutrient management plan is similar to a manure management plan in that it accounts for pasture management and imposes setbacks from water sources. 25 Pa. Code § 83.281(a)(5), (b)(5); .294(f), (j); 91.36(b)(2). One of the purposes of the nutrient management regulations is to protect the quality of surface and groundwater. 25 Pa. Code § 83.203.

### **III. ADDITIONAL STATE LAWS PROHIBITING CERTAIN LOCAL REGULATION OF AGRICULTURAL OPERATIONS**

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, 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. As set forth above, equine operations are recognized and regulated as normal agricultural operations. The RTFA precludes municipalities from regulating the practices of normal agricultural operations as a nuisance.

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. The Air Pollution Control Act (APCA) excludes operations engaged in the "production of agricultural commodities" from State air contaminant and air pollution regulations. 35 P.S. § 4004.1. The "production of agricultural commodities" includes "the commercial propagation . . . [of] livestock and livestock products, including . . . horses." Id. § 4004.1(b)(1)(v).

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 NOMA, RTFA or AASL. 53 P.S. § 10603(b); Commonwealth v. Locust Township, 49 A.3d 502, 517 (Pa. Cmwlth. 2012) (*en banc*) (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 NOMA, RTFA or AASL. 53 P.S. § 10603(h); Commonwealth v. Richmond Township, 2 A.3d at 687 & n.11 (Pa. Cmwlth 2010) (explaining that section 603(h) of the MPC “indicates that, as a matter of law, an agricultural operation complying with the N[O]MA, 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, irrational, 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) (explaining that a zoning regulation must not arise “from an arbitrary desire to resist the natural operation of economic laws or for purely aesthetic considerations”).

#### IV. LEGAL PROBLEMS WITH ZONING ORDINANCE

##### A. Horse Stocking Rate and Pasture Requirements

We have identified legal problems with the horse stocking rate and pasture requirements in the ordinance. The following is an explanation of those problems and the suggested ordinance amendments to resolve them.

Sections 527(A) and 625(A) limit the number of horses that an equine operation can board based on available acreage as follows:

Not less than three (3) acres shall be provided for the first horse and not less than two (2) acres shall be provided for each additional horse, including those boarded and those owned by the landowner.

Sections 527(B) and 625(B) require that “sufficient satisfactory pasture area to support the number of horses to be boarded on the property.”

These provisions prohibit and limit equine operations and the Township does not have authority to regulate the operational aspects of an agricultural operation. The Township cannot

permit agriculture as a use in a zone and then limit the amount of animals an operator can have based on acreage because that is not a valid zoning purpose and the State regulates animal density levels through nutrient management requirements. Thus, the provisions 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.<sup>1</sup> "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.

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.").

By way of further explanation, these acreage and pasture requirements are an unreasonable infringement on an equine operator's decision about pasture management and horse stocking rates and are beyond the scope of the Township's zoning planning authority. Our PSU experts have advised that the amount of pasture needed for horses varies depending on many factors on each specific operation. These factors include: the type, size, age, and use of a horse; amount of time a horse may or may not be pastured; plans to meet an individual horse's nutritional needs; type of pasture forage; season of the year; and plan for exercising horses. For example, some horses will never be pastured (ex: dressage), some may be pastured part-time or less, and others may be pastured full-time. These pasturing decisions affect the horse stocking rate for which a farm can effectively implement and maintain best management practices. Accordingly, the Township's attempt to limit the amount of horses directly impacts the equine operator's ability to plan for the economic viability of the operation by assessing optional stocking strategies that may allow for more horses on the operation.

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<sup>1</sup> We note that Section 606 of the Ordinance has a different horse stocking rate of "not less than two acres of pasture land shall be provided for the first horse and not less than one acre shall be provided for each additional horse." This requirement is for boarding horses on less than 5 acres, so the Ordinance allows for a higher animal density on smaller sized lots.

Moreover, horses do not require pasture grasses to meet their nutritional needs, thus higher stocking rates can be obtained if pastures are not used as the major factor in determining animal densities on an operation. The land size required to maintain a horse is not as critical an issue as the management practices of the farm. Appropriate equine stocking rates will vary with the management practices of the farm. Some examples of management regimes to determine stocking rates include:

- Farms which use pastures as an important component of nutrition and exercise
- Farms which use drylots for turnout and exercise rather than pastures
- Farms which use riding, driving, and training programs as a source of exercise with no regular turnout to a pasture

Each of these regimes allows for increased levels of animal densities and requires different management strategies. Accordingly, our PSU experts advise that appropriate pasture management strategies vary from farm to farm, thus need to be determined on an individual basis.

For all of these reasons, the Township's imposition of only one type of pasture management and stocking rate strategy is an invalid exercise of its zoning authority and it also violates State regulations of determining proper animal density limits for an operation. The Township's ordinance provisions are also an unreasonable restriction on farm practices in violation of the AASL and the MPC.

The Township can resolve this legal problem by amending the ordinance to delete Sections 527(A)-(B) and 625(A)-(B) and replace them with a provision that requires the owner or operator of an equine operation to provide the Township with proof of a written manure management plan or certified nutrient management (as applicable) that identifies the pasturing plan and management strategy for the proposed horse stocking rate for the operation.

#### **B. Setbacks from Watercourse and Steep Slope Requirements**

Section 527(C) requires that "[w]here any portion of the property is within the Floodplain Conservation Overlay District, pasture areas shall not be established or maintained within fifty (50) feet of the top bank of the watercourse." As discussed above, an animal operation is required to have a manure management plan that addresses environmentally sensitive areas, such as a watercourse. The setbacks depend upon the situation on a particular farm and can range from 100 to 35 feet. Consequently, we suggest that the Township amend this Section to delete the phrase "pasture areas shall not be established or maintained within fifty (50) feet of the top bank of the watercourse" and replace it to require that an owner or operator shall provide proof of a written manure management plan or certified nutrient management (as applicable) that

identifies environmentally sensitive areas and the setbacks required by the DEP Manure Management Manual.

Section 527(D) requires that “[w]here the property is within the Steep Slope Conservation Overlay District, Best Management Practices, as described in §-202 of Newlin Township’s Stormwater Management Ordinance, to minimize accelerated runoff, erosion and sedimentation and to manage storm water shall be implemented.” Initially, we note that Section 202 is a definitional section that defines Best Management Practices (BMPs), but does not actually set forth specific structural or non-structural BMPs, thus the reference to this section is vague and ambiguous as to what BMPs must be implemented. Kohl V. New Sewickley Township, 108 A.3d 961 (Pa. Cmwlth. 2015) (holding a “zoning ordinance is ambiguous if the pertinent provision is susceptible to more than one reasonable interpretation or when the language is vague, uncertain, or indefinite.” (citation omitted)).

Moreover, by its terms, the Township’s Stormwater Management Ordinance applies to “New development, Redevelopment, and Earth Disturbance Activities” and exempts “Agricultural Related Activities” from compliance so long as agricultural activities are performed either in accordance with the DEP’s Erosion and Sediment Control regulations at 25 Pa. Code § 102 or conservation practices that do not involve any new or impervious surfaces. Newlin Township Stormwater Management Ordinance §§ 105(B)(1), 106(C)(5)(a)-(b). However, DEP’s regulations only require an agricultural operation to have an agricultural erosion and sediment control plan when engaging in agricultural plowing or tilling activities or for animal heavy use areas (a/k/a animal concentration areas). 25 Pa. Code § 102.4. As discussed above, DEP requires an agricultural operation pasturing animals to either maintain the pasture through a prescribed grazing plan or assure that dense vegetation is maintained throughout the season. DEP’s Manure Management Manual, Land Application of Manure Supplement at Section 6. If the operator has pasture land that does not meet these requirements, then it is defined as an animal concentration area (ACA). Id. An operator with an ACA must include the ACA in a manure management plan and identify the best management practices to prevent pollution to water resources and also must have a written agricultural erosion and sediment control plan that identifies best management practices to minimize accelerated erosion and sedimentation. Id., 25 Pa. Code § 102.4(a)(2), (4)(iii).

Accordingly, Section 527(D) is invalid because it is vague and ambiguous and DEP already regulates erosion and sediment control on agricultural operations. The Township can amend this Section to delete all language following the first comma and replace it to require that an owner or operator of an equine operation shall provide proof of a written manure management plan or certified nutrient management (as applicable) that identifies any animal concentration areas and best management practices required by the DEP MMM and proof of a written agricultural erosion and sediment control plan if required by the DEP.

**C. Special Exception Requirement for Commercial Equine Operations**

The Ordinance provides a "commercial equine operation" is required to obtain a special exception in the Flexible Rural Development District. A "Commercial Equine Operation" is defined as follows:

Any of the following activities involving horses or other equines done in exchange for money and/or services:

1. Boarding; and/or
2. Lessons in riding or driving, including clinics involving one or more clients/students; and /or
3. Competitions/events.

Ordinance § 201. Section 627 establishes that a Commercial Equine Operation is a special exception use that is subject to the requirements discussed above under Sections 527 and 625, as well as several other requirements.

A special exception "is not an exception to the zoning ordinance, but rather a use to which the applicant is entitled provided the specific standards enumerated in the ordinance for the special exception are met by the applicant." In re Thompson, 896 A.2d at 670. A township has authority to designate uses as requiring special exception approval. However, a township does not have authority to zone in a manner that creates an irrational, unreasonable, confiscatory, or discriminatory result. Eller, 414 Pa. at 6-7, 198 A.2d at 866; RYAN, 1 PENNSYLVANIA ZONING LAW AND PRACTICE § 3.4.1. An ordinance that draws an arbitrary distinction may be designed to achieve a type of regulation that is beyond the scope of zoning. RYAN, 1 PENNSYLVANIA ZONING LAW AND PRACTICE § 3.4.1. Furthermore, "[z]oning should be based on planning. A zoning ordinance . . . that draws distinctions . . . without any discernable reason may lack an appropriate planning basis." Id.

In this case, Newlin Township requires a special exception for an equine operation that provides horse riding lessons regardless of the size of the operation, the number and type of lessons, or whether in exchange for money or services. Ostensibly, this requirement is based on the traffic/parking impact of an operation providing lessons to the public. However, the special exception requirement is arbitrary and unreasonable because it fails to account for the amount and type of lessons conducted by an equine operation. An operation may provide a few one on one lessons a week versus an operation that provides many one on one lessons or group lessons a week. In addition to this example, there exists the real-life situation on [REDACTED] where there are no horse riding lessons offered to the public. On [REDACTED] the only lessons that take place are those that its boarders arrange with trainers, which is more akin to a board-only facility.

Accordingly, the requirement for a special exception creates an irrational and unreasonable result because an equine operation providing a small amount of lessons should not have to go through the costs and expenses associated with obtaining a special exception. The Township charges \$1500 application fee for a special exception and applicants incur other costs to engage in the special exception proceedings, including legal fees for representation. This economically impacts equine operations that provide a few lessons to generate income to sustain operations or in exchange for services from the students. The Township is required to have a rational basis to support the requirement for a special exception for providing horse riding lessons. The failure of the Township to establish a threshold number and type of lessons which, when exceeded, would require an operator to apply for a special exception renders the requirement unjustified and lacking a rational basis to support it. This violates the MPC, RTFA, and AASL.

In order to remedy this legal problem, we suggest that our Office and the Township discuss the concerns that lead to the imposition of the special exception requirement regardless of amount or type of horse riding lessons and negotiate a resolution to amend the ordinance with a requirement that is based on sound reasoning and produces a rational result.

To be sure, we are not challenging the Township's requirement for a special exception for equine operations that seek to hold competitions and events. We are not challenging Sections 625(C)-(H).

**D. Horse Training is Not the Same as Horse Riding Lessons**

On July 16, 2015, the Township Zoning Officer issued a letter to [REDACTED] stating that it could not advertise that it offers training at the facility. The term "training" is not contained under the definition of "commercial equine activity" in the Ordinance. The owner of [REDACTED] explained that training is simply the riding of the horses to exercise and keep them in shape. Boarders cannot always ride their horses as often as is required for the health and maintenance of the horse, so the farm offers training services to assist the boarders. Our PSU expert has confirmed that training a horse is distinct from providing a riding lesson. A horse is like an athlete and requires consistent and frequent exercise. Therefore, the practice of offering training is separate and apart from riding lessons and should not be precluded or require a special exception as it goes hand in hand with boarding horses. This conclusion is supported by the definition of commercial equine operation under the AASL, which separately lists training and instruction as part of those operations. 3 P.S. § 903. The Township's enforcement of its ordinance to preclude training unless a special exception is obtained violates the MPC, RTFA, and AASL.

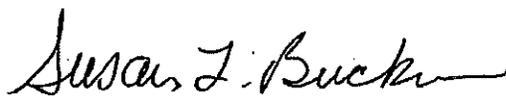
For these reasons, the Township should recognize that all equine operations may offer training services to their boarders as part of normal boarding operations and as of right.

V. 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. For the reasons set forth above, Newlin Township's Ordinance No. 2014-01 contains provisions that violate and are preempted by the MPC, NOMA, Clean Streams law, RTFA, AASL.

I look forward to the Township's response to our proposal to resolve this matter through amending the Ordinance provisions in lieu of litigation.

Sincerely,



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

SLB/kmag

cc: John Good, Esquire  
Robert Mulle, Executive Deputy Attorney General  
*via email only:*

