



COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF ATTORNEY GENERAL

August 25, 2016

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Re: ACRE Review Request - [Redacted]  
Woodward Township-Clinton County

Dear Ladies and Gentlemen:

This letter will detail the legal problems with Woodward Township's Zoning Ordinance provisions permitting crop farming as a use in the Rural Center District, where the property at issue is located, but not livestock operations in that same District. The Township also allows crop farming in the Open Space/Recreation and Flood Fringe & General Floodplain Districts but not animal operations. In sum, the Township cannot allow one form of a Normal Agricultural Operation (NAO) in a District while prohibiting another type of NAO in that same District.

**I. STATE LAW**

We begin with a general overview of the State laws that regulate agricultural operations. The policy of the Commonwealth is to encourage agriculture and both the black letter and spirit of the laws concerning agriculture further this policy. It must be recognized that select Woodward Township ordinances admirably mirror these same policies and the Township should be commended for its efforts.

**A. AGRICULTURE COMMUNITIES AND RURAL ENVIRONMENT (ACRE)**

In 2005, the Legislature passed what is commonly referred to as Act 38 - the Agricultural Communities and Rural Environment (ACRE) law. ACRE prohibits local municipalities from

adopting or enforcing “unauthorized local ordinances.” 3 Pa.C.S. § 313. The ACRE law defines an “unauthorized local ordinance” as one that “[p]rohibits or limits a normal agricultural operation...” 3 Pa.C.S. §312. The Historical and Statutory Notes to ACRE state in pertinent part that, “[t]he General Assembly of the Commonwealth of Pennsylvania declares that the Commonwealth has a vested and sincere interest in ensuring the long-term sustainability of agriculture and normal agricultural operations...In furtherance of this goal, the Commonwealth has enacted statutes to protect and preserve agricultural operations for the production of food and other agricultural products.”

ACRE requires municipalities to comply with State law in imposing requirements on normal agricultural operations. Pennsylvania law provides various State agencies with broad regulatory and enforcement power over agricultural operations. Moreover, ACRE prohibits a municipality from adopting or enforcing a local ordinance prohibited or preempted by State law. Woodward Township permitting one type of NAO in a zoning district while prohibiting another type of NAO in the same district violates ACRE.

#### **B. THE RIGHT TO FARM ACT (RTFA)**

The RTFA states, “[i]t is the declared policy of the Commonwealth to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products...It is the purpose of this act to reduce the loss to the Commonwealth of its agricultural resources by limiting the circumstances under which agricultural operations may be the subject matter of...ordinances.” 3 P.S. § 951. RTFA defines “agricultural commodity” to include, “[l]ivestock and the products of livestock.” 3 P.S. § 952. RTFA further states that a “normal agricultural operation” includes, “[t]he activities, practices, equipment and procedures that farmers adopt, use, or engage in the production and preparation for market of...livestock and their products...” *Id.* RTFA also precludes a municipality from regulating normal agricultural operations as a nuisance and protects direct commercial sales of agricultural commodities. 3 P.S. § 953.

#### **C. THE MUNICIPALITIES PLANNING CODE (MPC)**

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 state law. 53 P.S. § 10603(b). The MPC requires that, “[z]oning ordinances shall encourage the continuity, development and viability of agricultural operations. Zoning ordinances may not restrict agricultural operations or changes to or expansions of agricultural operation in geographic areas where agriculture has traditionally been present...” 53 P.S. § 10603(h)

Moreover, the MPC exists “to accomplish coordinated development...to promote the preservation of this Commonwealth’s...prime agricultural land...to encourage the preservation of agricultural land...to ensure that municipalities enact zoning ordinances that facilitate the present and future economic viability of existing agricultural operations in this Commonwealth and do not prevent or impede the owner or operator’s need to change or expand their operations in the future in order to remain viable...” 53 P.S. §10105. To achieve that end, the MPC requires a Township’s comprehensive plan to take into consideration “the protection of...prime agricultural land” and “[i]dentify a plan for the preservation and enhancement of prime

agricultural land and encourage the compatibility of land use regulation with existing agricultural operations.” 53 P.S. §10301(a)(6) & (7)(iii)

The MPC also provides that a municipality may not under the guise of protecting public health and safety adopt a zoning ordinance that violates or exceeds the provisions of agricultural state law. *See* 53 P.S. § 10603(h); *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 [state law] does not constitute an operation that has a direct adverse effect on the public health and safety.”) Finally, the MPC requires that “[z]oning ordinances shall protect prime agricultural land and may promote the establishment of agricultural security areas.” 53 P.S. §10603(g)(1); *See McGonigle v. Lower Heidelberg Township Zoning Hearing Board*, 858 A.2d 663 (Cmwlth. Ct. 2004)(Preservation of agricultural land is a legitimate government interest); *C&M Developers, Inc. v. Bedminster Township Zoning Hearing Board*, 820 A.2d 143 (Pa. 2002)(Zoning ordinances may be used to protect prime agricultural land and encourage agricultural activity).

## II. WOODWARD TOWNSHIP ORDINANCES

Woodward Township admirably recognizes the importance of agriculture. Certain portions of the Woodward Township Ordinances mirror State law and policy. For example, Section 103(C) of the Zoning Ordinances, Title, Authority and Purpose, states the ordinances were designed to “preserve prime agricultural and farmland considering topography, soil type and classification, and present use....” It is the OAG’s understanding that the land in question has been used for agricultural purposes, including crops and animals, prior to the Grands wanting to use it for swine operations. Section 103(A) mentions that the ordinances exist to provide “a safe, reliable and adequate water supply for domestic, commercial, agricultural...use” thereby reflecting the Township’s goal of supporting agriculture within its community.

## III. LEGAL PROBLEMS WITH ZONING ORDINANCES

### Zoning Restrictions on Normal Agricultural Operations

This matter concerns property which is located in the Rural Center (RC) Zoning District. The [REDACTED] want to engage in swine agricultural operations but the Township has taken the position that such livestock operations are prohibited in the RC Zoning District. However, the Township is not permitted to allow one type of agriculture in a zoning district while precluding another type of agriculture in the same zone.

The Township is relying upon Section 403 of the Zoning Ordinances, Uses and Structures, to preclude animal farming in the Rural Center Zoning District. Under the subheading “Permitted Principal Uses and Structures (Zoning Officer),” the Township permits “Land cultivation” and “Horticultural activities, including plant nurseries, greenhouses, and/or orchards” in the Rural Center District. *See* Section 403(3) & (4). However, the Township prohibits normal agricultural livestock operations in that same District, allowing only “livestock or poultry for personal use.” *See* Section 403(3), Uses and Structures, “Special Exception Uses and Structures (Zoning Hearing Board).”

Section 202, Definitions, defines “Land Cultivation” as “[t]he tilling or cultivation of soil for crop or tree farming.” That same section defines “Horticulture” as “[t]he growing of fruits,

vegetables, flowers, ornamental plants, shrubs, or trees for profit.” Therefore, a farmer in the RC District is allowed to grow crops and plants as a permitted use pursuant to Sections 403 and 202, but cannot raise livestock for commercial use.

The growing of crops and other plants as well as horticultural activities are expressly recognized as an agricultural commodity under the RTFA. *See* 3 P.S. § 952. Additionally, the Act unequivocally includes livestock as an agricultural commodity. *Id.* There is no doubt that the growing of crops *and* the raising of livestock are normal agricultural operations. Municipalities do not have authority under state law to allow certain types of normal agricultural operations as a use in a zoning district while precluding other forms of normal agriculture operations in the same district. 53 P.S. §§ 10603(b) & (h) and 10605. As a result, if the municipalities allow agriculture as a use in a particular zoning district then they must allow all forms of normal agricultural operations recognized under State law in that district.

Crops have been grown on the [REDACTED] property in the past. Indeed, it is the OAG’s understanding that animals have been present on the farm as well. The MPC mandates that “[z]oning ordinances may not restrict agricultural operations...in geographic areas where agriculture has traditionally been present...” 53 P.S. § 10603(h). The Township may not differentiate between the types of NAO conducted on land in the same zoning district. This is particularly true where the landowners have previously engaged in agricultural operations.

The Township’s practice of permitting one type of an NAO as a permitted use in a particular zone while excluding another NAO in the same zone is not confined to the RC District. The Township permits “land cultivation” in the Open Space/Recreation District but makes no mention of animal operations, presumably prohibiting livestock farming in that zone. *See* Section 409(3), Uses and Structures, “Permitted Principal Uses and Structures (Zoning Officers).” Section 410(5), Uses and Structures, “Permitted Principal Uses & Structures,” contains a blanket prohibition on Concentrated Animal Operation (CAO) and Concentrated Animal Feeding Operation (CAFO). In the Flood Fringe & General Floodplain District, “Land cultivation” and “Horticultural Activities” are allowed but no mention is made of animal agriculture. *See* Section 411(1)&(2), Uses & Structures, “Permitted Principal Uses & Structures (Zoning Officer).”

This appears to run contrary to the regulations implementing the Flood Plain Management Act which are codified in Title 52 as Chapter 106. A fair reading of the Act and its regulations leads to the conclusion that animals are allowed in flood plains. In Chapter 106, “agriculture” is mentioned only as an exception to the definition of obstruction which states: “Obstruction—A structure or assembly of materials owned or maintained by the Commonwealth, a political subdivision of the Commonwealth or a public utility including fill above or below the surface of land or water or an activity conducted by the Commonwealth, a political subdivision of the Commonwealth or a public utility which might impede, retard or change flood flows. *The term excludes planting, cultivation and harvesting of field and orchard crops; the grazing of livestock; and the maintenance of necessary appurtenant agricultural fencing.*” (Emphasis added). The exclusion of both crop and animal NAO’s from the definition of an obstruction necessarily implies that animals, as well as crops, are permitted in flood zones. The OAG is also aware from various SCC officials and other sources that it is common practice to have animals routinely graze in flood plain areas.

We understand the main concern of Township officials and of the [REDACTED] neighbors is that the [REDACTED] would be operating a Concentrated Animal Operation/Concentrated Animal Feeding Operation (CAO/CAFO). Based on the facts gathered during our review, this is not the

case. The [REDACTED] have 400-450 pigs. The farm where the pigs are located consists of approximately 60+ acres, which does not take into account the other substantial plots of land the [REDACTED] either own or rent. A CAO is defined in part as an agricultural operation where animal density exceeds 2 Animal Equivalent Units (AEU) per acre. Erring on the side of the Township by using higher numbers and taking into account only those 60+ acres used for the swine operation, the AEU on that plot would be  $1.1625$  ( $450$  grow finish pigs  $\times$   $155$  lbs standard weight  $\times$   $365$  productive days divided by  $365,000 = 69.75$  AEU's divided by  $60$  acres available for manure =  $1.1625$  AEU's per acre). Finally, the farm is not a CAO that has more than 300 AEU's when all animal types are combined.

Additionally, the swine operation is not a CAFO. The farm does not have 2,500 swine 55 lbs or more, nor 10,000 swine under 55 lbs. The farm does not have more than 1,000 AEU's when all animal types are combined. While the Township has concerns about odors, flies, and water quality issues, those matters are governed by state laws and regulations the [REDACTED] are required to follow. If moving forward the Township and/or its residents have problems with odors, flies, water quality or any other concerns, the remedy lies with lodging complaints with the DEP and/or the State Conservation Commission.

This case is not one involving the health, safety and welfare of Township residents, but rather, it appears, one involving the [REDACTED] neighbors not wanting pigs next to their properties. Matters of private desires may not be effectuated by zoning ordinances. *See Sanko v. Rapho Township*, 293 A.2d 141 (Pa.Cmwlt. 1972)(Township may not prohibit use simply because neighbors do not like it if the use does not impact upon the health, welfare, and safety of the citizens); *C&M Developers, supra*, 820 A.2d 143 (Pa. 2002); *National Land and Inv. Co. v. Kohn*, 215 A.2d 597 (Pa. 1965). Laws already in place guarantee that the health, safety, and welfare of Woodward Township residents will be protected.

In similar cases our Office has dealt with municipalities that sought to require conditional use or special exception approval to operate proposed CAO's or CAFO's in a zone in which agriculture is a permitted use. We have advised these municipalities that it is within their authority to require a conditional use or special exception for a CAO/CAFO; however, the conditions imposed to obtain that approval cannot conflict with or exceed State law. 53 P.S. § 10603(b); *Richmond Township, supra*, 2 A.3d at 686-87 (holding that municipality exceeded its authority in imposing requirements for a special exception that conflict with the Nutrient Odor Management Act (NOMA)); *Commonwealth v. Locust Township*, 49 A.3d 502, 509-511 (Pa.Cmwlt. 2012)(*en banc*)(holding that a municipality exceeds its authority and is preempted from requiring smaller animal operations to comply with the NOMA). That being said, the calculations cited above show that the [REDACTED] are running neither a CAFO nor a CAO.

These legal problems can be resolved by Woodward Township allowing all forms of normal agricultural operations in the RC, OP/R and FF&GF Districts.

#### IV. CONCLUSION

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. Cmwlt. 2009); *See Richmond Township, supra*, 2 A.3d at 684-88.

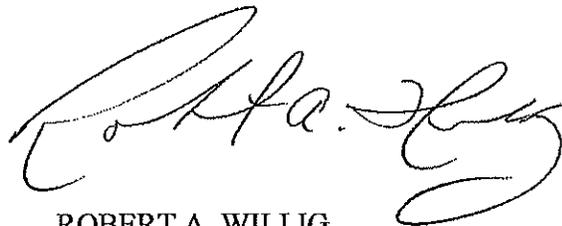
The Township can remedy the deficiencies in its ordinances by completing the following:

Counsel of Record, Team AG, and the Grands  
August 25, 2016

- Omit Section 403(3), Uses and Structures, “Special Exception Uses and Structures (Zoning Hearing Board).
- Consolidate Sections 403(3) & (4), Uses and Structures, “Permitted Principal Uses & Structures (Zoning Officer),” into one Section and replace the current verbiage with the definition of an NAO found § 952 of the RFTA. It is not necessary to include every word in § 952 of RFTA. A brief statement that a farmer is permitted to conduct normal agricultural operations as defined in § 952 of RFTA would suffice.
- In Section 409, Uses and Structures, “Permitted Principal Uses and Structures (Zoning Officers),” consolidate §§ 3-5 and replace the current verbiage with the definition of an NAO found in § 952 of the RFTA.
- Under Section 410, Uses and Structures, “Permitted Principal Uses & Structures,” replace § 3 with the definition of an NAO found § 952 of the RFTA.
- In the Flood Fringe & General Floodplan District, Section 411, Uses and Structures, consolidate §§ 1 and 2 and replace the current verbiage with the definition of an NAO found § 952 of the RFTA

I look forward to the municipality’s response to our proposal to resolve this matter through amending the above-referenced ordinances.

Sincerely,

A handwritten signature in black ink, appearing to read "R. A. Willig", written in a cursive style.

ROBERT A. WILLIG  
Senior Deputy Attorney General