



COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF ATTORNEY GENERAL

JOSH SHAPIRO  
ATTORNEY GENERAL

June 1, 2017

Office of the Attorney General  
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564 Forbes Avenue  
Pittsburgh, PA 15219

[REDACTED]

[REDACTED]

Board of Supervisors  
Ferguson Township  
3147 Research Drive  
State College, PA 16801

*Re: ACRE Review Request - [REDACTED]  
Ferguson Township-Centre County*

Dear [REDACTED] and Board of Supervisors,

The Office of the Attorney General (OAG) received an Agriculture, Communities, and Rural Environment (ACRE) complaint from [REDACTED] challenging the Township's ordinances requiring a minimum of fifty (50) acres to engage in agricultural operations and a conditional use for riding stables and academies. Ms. Fleck owns 21.74 acres which she has developed as a farm with a house, barn, shed, fencing, and horse-back riding trails. As the OAG understands it, [REDACTED] developed the property to accommodate those uses when her property was zoned Rural Agricultural (RA). Her land has since been rezoned Rural Residential (RR).

One of the mandates of the RR district is that lots used in agricultural operations must be at least 50 acres. See Chapter 27, Part 3, *Zoning*, Rural Districts, Rural Agricultural & Rural Residential, §§ 27-301 & 302, and Tables 301 & 302. The Township has permitted [REDACTED] to continue operating on her less than 50 acres as a nonconforming use. The Township wrote to [REDACTED] in June 17, 2013 stating that her "property may continue to be used [as riding stables and academies]" in the RR zone as a nonconforming use. However, the Township has removed horse riding stables and academies as a permitted use in the RR district.

Ferguson Township acted correctly in permitting [REDACTED] to continue her horse operations on less than 50 acres as a "grandfathered" use. It is a well-established principle of law that a municipality may not retroactively employ an ordinance to negatively impact an existing use or property right. "It has long been the law of this Commonwealth that municipalities lack the power to compel a change in the nature of an existing lawful use of property." *Northwestern*

*Distributors, Inc. v. ZHB of Twp of Moon*, 584 A.2d 1372, 1375 (Pa. 1991) (citing among others *Hanna v. Bd. of Adjustment*, 183 A.2d 539, 543 (Pa. 1962); *Yocum Zoning Case*, 141 A.2d 601, 604 (Pa. 1958) (municipality is without power to compel change in nature of use where property was not restricted when purchased and is being used for lawful purpose)). Additionally, statutory construction rules generally provide for a presumption against retroactive effect. 1 P.S. §1926. Had [REDACTED] property been a nonconforming use prior to the ordinances' amendment, this analysis would not change. The Township acknowledges this by indicating that it is the intent of the ordinances "to recognize the right of nonconformities to continue...." Chapter 27, Part 9, *Nonconformities*, Intent, § 27-901. Therefore, under any possible analysis, [REDACTED] prior use of her property would be protected. The larger issue in this case, however, is whether the denial of equine operations as a permitted use as well as the 50 acre lot requirement in both the RA and RR Districts violate ACRE. Upon review of the relevant law, the Office of Attorney General concludes that these restrictions violate ACRE.

In 2005, the Legislature passed what is commonly referred to as Act 38 - ACRE. 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 [NAO]..." 3 Pa.C.S. §312. The first issue that must be addressed, therefore, is whether equine operations constitute an NAO.

Equine operations are recognized as NAO's 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, experts the OAG has consulted at the Pennsylvania State University College of Agricultural Sciences (PSU) and the Pennsylvania Department of Agriculture (PDA) have advised that equine operations which board, train, and provide lessons are engaged in the production of agriculture.

The Township's ordinance at § 27-301.2, Rural Agricultural District, refers the reader to Table 301 for a list of permitted uses within that District. This Table shows that "[t]he tilling of the land, the raising and selling of crops, fruits and vegetables and the raising of, keeping and selling of livestock and poultry," "forestry uses," "farm structures," and "horticultural uses related to the raising, propagating and selling of trees, shrubs, flowers, fruits, vegetables and other plant materials" are all permitted uses as of right in the RA District. Further, the ordinance at § 27-302.2, Rural Residential District, directs the reader's attention to Table 302. Table 302 states that "[a]ll permitted uses in the Agricultural District...[a]s set forth in Table 301" are allowed. Sections 27-301 & 302 and Tables 301 & 302 make no mention of equine operations.

Under the Municipalities Planning Code ("MPC") municipalities do not have authority under state law to allow certain types of NAO's as a use in a zoning district while precluding other forms of NAO's in the same district. 53 P.S. §§ 10603(b) & (h); 53 P.S. §10605. As a result, if a municipality allows agriculture as a use in a particular zoning district then it must allow all legitimate forms of NAO's, including equine activities, in that district.

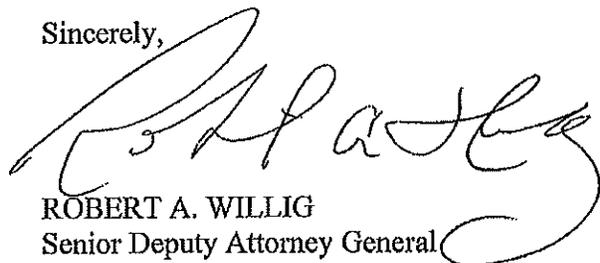
Ferguson Township's 50 acre requirement for NAO's also violates ACRE. RA Table 301, Uses 1-4 (crops, fruits, vegetables, livestock, poultry, forestry, farm structures, horticultural) requires a minimum lot size of 50 acres. As discussed above, RR Table 302 refers to Table 301 to describe the permitted uses in that zone. Therefore, in both the RA and RR Districts farmers must operate their NAO on at least 50 acres. Ferguson Township lacks authority to establish a minimum acreage amount for agricultural operations that conflict with State law. The Right to Farm Act (RTFA) requires only a ten (10) acre minimum for NAO's; even that minimum is inapplicable if the farm "has an anticipated yearly gross income of at least \$10,000." 3 P.S. § 952. The MPC precludes a municipality from enacting a zoning ordinance that regulates activities related to agriculture if it exceeds the requirements imposed under the RTFA. 53 P.S. §10603(b). Moreover, the Department of Environmental Protection (DEP) and the State Conservation Commission (SCC) do not require minimum acreage for animal operations; instead, they utilize formulas based on agricultural science to identify the density of an agricultural operation.

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

- Include in Table 301 under the "Permitted Uses, Primary Uses" heading an additional box which reads "Commercial Equine Activity which includes the boarding of equines, the training of equines, the instruction of people in handling, driving or riding equines, the use of equines for riding or driving purposes, and the pasturing of equines."
- Remove the 50 acre minimum requirement for an agricultural operation from Table 301.

I thank you for your attention in this matter and I look forward to the municipality's response to our proposal to resolve this matter through amending the above-referenced ordinances.

Sincerely,



ROBERT A. WILLIG  
Senior Deputy Attorney General