



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

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[REDACTED]

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Guy P. Beneventano, Esq., LLC
4349 Linglestown Road
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Re: Latimore Township – Adams County
ACRE Request – [REDACTED]

Dear Mr. Kalasnik and Mr. Beneventano,

Ms. Seitz complains that her “horticultural business is prohibited from its normal operation by the Latimore Township zoning ordinance.” The ordinance in question is *Article IV, District Regulations, A-C-I, Agricultural-Conservation – I District, Section 402(A)(5), Basic Use Regulations*. Section 402(A)(5) reads that permitted uses “[i]n this District [of] buildings, structures and lots” includes the “[s]ale of agricultural and horticultural products raised or produced on the premises.” The Zoning Officer concluded that pursuant to the Municipalities Planning Code (MPC), 53 P.S. § 10614, he had to “administer the zoning ordinance in accordance with its literal terms,” resulting in an interpretation of § 402 that the plants must be raised or produced “solely” on the [REDACTED] property. The only method by which [REDACTED] can grow hostas is to purchase patented hosta “plugs” from a grower or wholesaler. In the Township’s view, [REDACTED] using “plugs” brought onto the property from off-site meant that her hostas were not raised or produced on her property.

Section 402 in and of itself does not violate state law. However, Latimore Township’s interpretation and implementation of § 402 violates the Agriculture, Communities and Rural Environment (ACRE) Act, 3 Pa.C.S. § 311, *et. seq.*, as applied to [REDACTED]. The Office of the Attorney General (OAG) respectfully submits that Latimore Township’s overly technical interpretation of §402 adds restrictions that are not present in the clear language of that section, and violates state law by improperly hindering [REDACTED] operation. The OAG understands that the Township has not pursued any further action against [REDACTED] since the initial interaction

which gave rise to the ACRE complaint. If true, this letter is offered for informational purposes only. The Township must continue to permit the [REDACTED] to operate using hosta plugs for the reasons given below. If not true, this letter serves as notice to the Township that the OAG will take all appropriate actions to resolve this issue.

The policy of the Commonwealth is to encourage agriculture and both the black letter and spirit of the laws concerning agriculture further this policy. 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...agricultural products.”

The Right to Farm Act (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...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 “horticultural...products.” 3 P.S. § 952. RTFA further states that a “normal agricultural operation” includes “the production, harvesting and preparation for market or use of...horticultural...commodities...” *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.

The MPC precludes a municipality from enacting or interpreting a zoning ordinance regulating activities related to commercial agricultural production in a manner that exceeds requirements imposed under state law. 53 P.S. § 10603(b). The MPC states that “[z]oning ordinances shall encourage the continuity, development and viability of agricultural operations...” 53 P.S. § 10603(h). Moreover, the MPC exists “to ensure that...zoning ordinances...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.

Raising and producing hostas is unlike growing other plants. As the OAG understands it, [REDACTED] is raising hostas on her property from the earliest possible stage. A “plug” is the smallest start of a hosta. To be commercially viable, the [REDACTED] must purchase plugs from a wholesaler in order to produce plants attractive to consumers. Hostas that consistently sell on the open market are those grown from plugs. Moreover, patent law impacts a grower’s ability to produce hostas from scratch.¹ The practical effect of the Township’s interpretation of §402 requires [REDACTED] to grow her hostas directly from seed. Growing hostas from seed is not the customary means of hosta production. The vast majority of hostas are not grown from seed, preventing [REDACTED] from maintaining a commercially viable inventory. Moreover, the few hostas grown from seed are a solid color and unattractive to the majority of gardeners. Consumers overwhelmingly buy the multicolored hostas grown from plugs. Hosta seed varieties, which are mainly solid blue, green or gold, have a 1 in 5 chance of developing into a true clone. Additionally,

¹ For more information on the vast number of hosta varieties which are patented and what one can legally do with those hostas go to http://www.hostalists.org/hosta_list_path.php. Moreover, the US Patent Office describes what rights are conveyed to the owner of a plant patent which includes the preclusion of others from asexually reproducing the patented plant. See <https://www.uspto.gov/patents-getting-started/patent-basics/types-patent-applications/general-information-about-35-usc-161#1>

a 20% success rate makes raising hostas from seed cost prohibitive.² ██████████ cannot remain in business without using plugs; in order for ██████████ to grow commercially attractive, popular hostas she must purchase plugs from a wholesaler with the patent tags attached.

A wholesalers' plug is produced in a sterile lab and given a license, which demonstrates the plug has undergone purity testing guaranteeing it is free from disease. This results in a stronger, healthier plant available to the consumer with the added benefit of reducing the spread of disease.³ ██████████ cannot purchase plugs and then divide them. Not only is this a highly impractical method it would, more importantly, violate patent law as noted above and increase the risk of disease. Selling diseased plants would put ██████████ out of business.

Plugs must be grown by the purchaser before they are suitable for sale. In some instances this is a several year process.⁴ Therefore, it is necessary for ██████████ to purchase plugs on a rotating basis to be able to provide a sufficient level of variety for the commercial market. This is especially true given that 95% of her business is selling hostas.

The Township should realize that its "literal" reading of §402 will not be restricted to the ██████████ if the Township is consistent in its application of § 402 to all agricultural and horticultural operations. This overly restrictive interpretation will result in unintentional, but very real, harm to agricultural operations. If ██████████ cannot bring hosta plugs onto her property, by extension a nursery is prevented from its customary use off-site tree saplings as well as vegetable, herb, or flower seedlings. Moreover, animal operations do not confine themselves to processing only animals born and raised on the farm. These operations routinely use integrators to bring young animals on to the farm where those animals are then raised, and at the appropriate time, removed from the farm for processing. Many egg laying operations cannot be viable without outside sources bringing chicks onto the property where they mature into egg laying hens. Under the Township's interpretation of § 402 none of these routine and customary practices are permitted because the tree, vegetable, herb, flower, or animal did not come "solely" from the nursery/farm. ██████████ operation is no different from those animal operations where young animals are brought onto the farm to be "raised" by the farmer until they reach the age where the grown animals are removed for processing; here, ██████████ brings plugs into the nursery and "raises" them so that she can "produce" hosta plants for sale.

The instant matter is similar to a prior OAG ACRE review involving *Warrington Township, Bucks County*.⁵ There the nursery in Warrington Township brought materials from off-

² A hosta website at the Pennsylvania State University states that "[a] possible, yet uncommon, method of Hosta propagation is via seed germination. This method is generally discarded due to the low rate of phenotypic, parent-plant resemblance. In a market flooded with cultivars, hostas that are not deliberately crossed typically have low market value." *Plant Propagation Portfolio*, <https://sites.psu.edu/plantsarefriends/2016/05/02/hosta-tissue-culture/>

³ The article *Tissue Culture of Hostas* found at <http://www.plantsgalore.com/care/hostas/Hosta-propagation-TC.htm> describes the highly scientific process of producing hosta plugs which includes the absolute necessity of sterile lab conditions.

⁴ "Hostas take two to eight years to reach mature size. The mature overall spread, height and leaf size varies considerably between varieties and cultivars. Nurseries commonly list the mature size of each plant. Hostas are divided into fast growing, moderate, and slow-growing groups. The slow-growing varieties take up to eight years to mature and tend to be larger overall, while the fast-growing varieties take two to three years to mature and tend to be smaller." *How Fast Will a Hosta Grow?* found at <http://homeguides.sfgate.com/fast-hosta-grow-66223.html>.

⁵ The Warrington Township matter was resolved by agreement between the Township, the OAG, and the nursery without resorting to litigation. The Township supervisors agreed that the nursery was a normal agricultural operation and that the owners could continue their nursery as a permitted agricultural use.

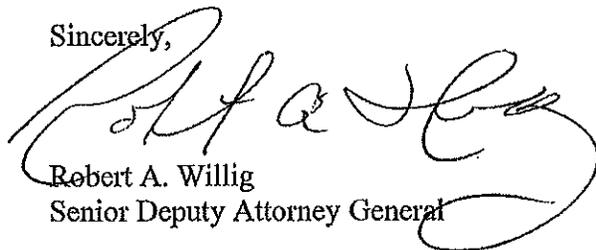
site to produce mulch and potting soil in order to grow plants for sale. Warrington Township tried to prohibit the nursery from bringing off-site material onto the grounds. Pursuant to ACRE, the OAG consulted with both the Penn State College of Agricultural Sciences (PSU) and the Pennsylvania Department of Agriculture (PDA). Both PSU and PDA experts opined that bringing material from off-site to produce potting soil and mulch for use in the nursery operations were normal agricultural operations as defined by the RTFA. *See* 3 P.S. § 952 (RTFA).

Furthermore, in *Gaspari v. Township of Muhlenberg*, 392 Pa. 7, 139 A.2d 544 (1958), as the result of a shortage in horse manure, a long-time mushroom farmer began to make a synthetic compost as the medium to grow mushrooms. *Gaspari*, 392 Pa. at 9-10, 139 A.2d at 545-46. The synthetic compost was made from hay and crushed corn brought onto the farm from outside and put through a composting process. *Id.* at 11, 139 A.2d at 546. The township issued a cease and desist order to the mushroom farmer, which the farmer appealed. On appeal, the court discussed the testimony of a mushroom expert from PSU which explained that bringing material from off-site to grow a crop is an agricultural activity. *Id.* at 8-9, 12-13, 139 A.2d at 545, 547. The court reversed the order and held that a mushroom farmer's method of using off-site material to produce compost for growing mushrooms was proper. *Id.* at 15, 139 A.2d at 548.

The OAG contends that there is no meaningful distinction between the activities at issue in Warrington Township or *Gaspari* and [REDACTED] bringing hosta plugs from off site and "raising" them to maturity to "produce" hostas for sale. [REDACTED] cannot raise and produce commercially viable hostas without plugs. To hold otherwise puts the [REDACTED] out of business. That is a fact and not just a mere possibility. Here, the Township's overly restrictive and self-defined "literal" interpretation of §402 is inconsistent with established judicial precedent as well as the statutory framework which is designed to promote, not arbitrarily restrict, agriculture.

The Township's interpretation of Section 402(A)(5), as applied to [REDACTED] violates ACRE. Latimore Township has admirably suspended any action against [REDACTED]. If Latimore decides that it will take no action against [REDACTED] in light of this letter, this matter is closed. If the Township decides to proceed against [REDACTED] the OAG will continue its efforts to resolve this dispute. I would greatly appreciate it if you would respond to this letter within thirty days of receipt. I look forward to your response as to how the Township intends to proceed and I thank you for your consideration of this matter.

Sincerely,



Robert A. Willig
Senior Deputy Attorney General