

[REDACTED]

[REDACTED]

May 12, 2019

Via Email and First Class Mail

Robert Willig, SDAG  
Pennsylvania Office of Attorney General  
Attn: ACRE Program  
15<sup>th</sup> Floor, Strawberry Square  
Harrisburg, PA 17120

**RE: [REDACTED] Orchard and Family Farm's ACRE Request for Review of  
Upper Macungie Township Zoning Ordinance and Enforcement**

Dear Mr. Willig:

I represent [REDACTED] and [REDACTED]. We are submitting this ACRE request for review of the Upper Macungie Township zoning ordinance provisions regulating direct commercial sales of agricultural commodities and the Township's interpretation and application of the ordinance to the [REDACTED] production and sale of agricultural commodities on their normal agricultural operations. This letter is presented in two sections. The first section will address the [REDACTED] efforts to obtain Township permits to renovate an existing agricultural storage building into a farm market called [REDACTED]. The second section will provide the history that lead to the [REDACTED] efforts to assist Upper Macungie Township in developing an Agritourism and Agritainment ordinance that was enacted in August 2018.

The [REDACTED] have been dealing with officials at Upper Macungie Township for several years in an effort to resolve misinterpretations by the Township regarding the rights of farmers to engage in the production and direct commercial sales of agricultural commodities under the Right to Farm Act. We provide a thorough summary of the [REDACTED] dealings with the Township along with supporting exhibits for your review. Despite the lengthy chronology, however, the crux of the issue presented is the right of a farmer to use equipment to process or manufacture food and drink products using crops grown by the farmer for direct sale and consumption by patrons on the farm. The Township is equating this activity to a restaurant use and not a farm production and direct sales use. It is our position that the Township is violating the Right to Farm Act and other state statutes as discussed below.

## I. Background

██████████ own and operate an orchard and crop farm operation on approximately 114 acres located in Upper Macungie Township, Lehigh County, Pennsylvania (herein referred to as "UMT"). The farm is located in the Township's R1 zoning district where crop farming is a permitted use. ██████████ property is enrolled in the Township's Agricultural Security Area and is also enrolled in the county's Clean and Green tax program.

Since 1939 the family has operated an agricultural operation and sold agricultural commodities they produced, such as eggs, vegetables, fruits and plants, at the properties located on ██████████ in UMT. In the beginning, they sold their products from a truck patch, but in the early 1970s erected greenhouses and then later a farm market building. ██████████ farmed over 80 acres of greenhouses, vegetables, sweet corn and annually grew over 25,000 mums. The ██████████ also engaged in the production and direct commercial sales of these agricultural commodities. Over time, ██████████ converted their operations to orchards and crop farming and ceased using greenhouses.

In 1997, ██████████ added a corn maze, straw maze, corn boxes, pick your own pumpkins and other activities for families to enjoy while picking their own produce and purchasing agricultural commodities produced by ██████████ on the property. Over the years, ██████████ have increased their pick your own fruit operation by planting thousands of apple and cherry trees, strawberries, and pumpkins. The operation currently has approximately 30,000 apple and cherry trees in production. In the fall season, ██████████ offers pick your own apples and pumpkins along with additional agritainment activities. The Grims also produce a variety of food and drink items, hard ciders and fruit wines from their crops which they offer for sale for people to consume on the premises or to take with them.

## II. ██████████ on ██████████

In 2017, ██████████ sought to renovate an existing agricultural storage building into a farm market to produce and sell agricultural commodities using their crops. ██████████ wanted to ensure that the proposed farm market building, ██████████ satisfied zoning requirements prior to expending funds on engineered plans for a building permit. The UMT Solicitor advised ██████████ to submit a letter providing details about the proposed farm market, including a description of the agricultural commodities to be sold. On October 2, 2017, ██████████ submitted a letter addressing the Township's questions about the proposed farm market use. (10/2/2017 ██████████ to UMT Solicitor (Ex. A)). On October 27, 2017, the UMT Solicitor confirmed that the proposed farm market use complied with the zoning ordinance. (October 2017 emails between ██████████ counsel and UMT Solicitor (Ex. B)).

On January 16, 2018, ██████████ submitted a building permit application for ██████████ farm market. (1/16/2018 ██████████ Building Permit Application (Ex C)). After submitting the application, ██████████ was told by the UMT Zoning Officer that the application was approved for zoning and was under structural review with the building code officer. Almost two months later, ██████████ was told by UMT Building Code Officer that a zoning use permit was needed to approve the use of the farm market. On March 8, 2018, ██████████ contacted UMT Solicitor to

inquire about the prior confirmation of zoning use approval for the proposed farm market in October 2017. (3/8/2018 [REDACTED] mail to UMT Solicitor (Ex. D)). On March 15, 2018, UMT Solicitor explained that he spoke with UMT officials and was “advised that so long as the use permit application for uses that are set forth in your letter of October 2, 2017 explaining the intended use of the farm market, the use will be approved without issue.” (3/15/2018 email from UMT Solicitor (Ex. E)). The building permit was issued on March 16, 2018, stating that zoning approval was for the building only and that “occupancy of the building will not be issued until a zoning permit for use has been approved.” (3/16/2018 UMT [REDACTED] Building Permit (Ex. F)). It is axiomatic that it does not make sense to issue a building permit to renovate a building for a farm market only to be told afterwards that the approval to use the building still requires zoning use review and approval. In fact, there is a section on the UMT building permit application for zoning review as part of the process for a building permit review. [REDACTED] sought a zoning review prior to submitting the building permit to ensure that they could renovate the building to use as a farm market before spending money on engineered plans.

[REDACTED] submitted a Use Review Application to UMT for the farm market on March 19, 2018. On March 29, 2018, UMT Zoning Officer issued a letter denying the [REDACTED] use application for the farm market stating that it required a conditional use application to engage in direct commercial sales of agricultural commodities. (3/29/2018 UMT ZO letter to [REDACTED] (Ex. G)). [REDACTED] sent several emails to the UMT Solicitor regarding the Right to Farm Act’s protection of direct commercial sales of agricultural commodities as a permitted by right use and also that such direct sales have occurred at [REDACTED] since 1939.<sup>1</sup> As a result, the UMT Zoning Officers issued a letter dated April 17, 2018, rescinding the prior determination that a conditional use was required for the farm market. The letter states [REDACTED] should provide a list of “traditional items” to be sold at the farm market and that they must show that at least 50% of the products to be sold were produced by the operator of the market. (4/17/2018 UMT ZO letter to Grims (Ex. H)). On May 3, 2018, [REDACTED] submitted a revised zoning use permit application for The Dirty Boot explaining that the farm market will be used to engage in the “production, processing and sale of agricultural commodities as defined and permitted by the Right to Farm Act and related agricultural activities.” (5/3/2018 [REDACTED] Zoning Use Application (Ex. I)). [REDACTED] provided a list of examples of items to be sold at the farm market as follows:

The Township requested that [REDACTED] provide a list of items to be sold at the farm market. Some examples of the types of agricultural commodities that will be sold at the farm market include, but are not limited to, raw and processed fruits and vegetables (e.g. jarred jams, jellies, butters, honey etc.); slushies; donuts; soups; baked goods and desserts; kettle corn; hard cider; fruit wine; and other agricultural commodities intended for human consumption. [REDACTED] may periodically sell flowers and plants. The market will also offer grilled fruits, vegetables, and similar agricultural commodities for human consumption in the summer months. The agricultural commodities that will be sold are primarily produced, processed or manufactured using the crops grown by the [REDACTED] [REDACTED] produce in excess of 50% of the products (ag commodities) that are sold on the property throughout the year, which will include the products to be sold at the

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<sup>1</sup> See Exhibit L [REDACTED] /2018 email to UMT Solicitor, supra.

farm market once it is open. Please also see letter dated October 2, 2017, to Solicitor Schantz submitted with this application.

(Ex. I). [REDACTED]'s May 3<sup>rd</sup> letter accompanying the use application explained that a list of the types of commodities to be sold was not and cannot be exhaustive because the items to be sold at the farm market will necessarily vary over time depending on the crop production and many other variables. (Ex. I).

On May 17, 2018, the UMT Zoning Officer issued a zoning use permit for [REDACTED] farm market that stated the following conditions:

1. Only approved for "retail sales of agricultural products grown primarily on the premises" as defined in part 2 of the Upper Macungie Township Zoning Code of Ordinances.
2. **Shall not include any restaurant or cooking facilities.**
3. 897 square feet building has been approved for this use per building permit # 2 18 036R on 3/16/2018 of which 800 square feet may be used for this purpose per Chapter 27 Section 403.4.M(7) of the ordinance.

(5/17/2018 UMT Zoning Use Permit (Ex. J) (emphasis added)).

Against this background of [REDACTED] efforts to obtain the required permitting for [REDACTED] farm market on their well-established agricultural operation, we turn to the ongoing underlying efforts of the UMT Zoning and Building Code Officer, Duane Dellecker, to interpret and enforce the UMT Zoning Ordinance provisions in violation of the Right to Farm Act (RTFA), the Agricultural Area Security Law (AASL) and the Municipalities Planning Code (MPC). While [REDACTED] were attempting to get the farm market permits, Mr. Dellecker told [REDACTED] on many occasions that only the sale of non-processed agricultural crops is permitted on an agricultural operation and that [REDACTED] could not utilize cooking facilities to process their crops into value-added food products for sale on the premises. As discussed further below, [REDACTED] were issued a notice of violation in October 2017 for allegedly engaging in commercial kitchen and restaurant use on their farm because they sold their agricultural commodities for consumption on the premises during their fall festival pick your own activities. The food offered for sale was primarily produced using crops grown by [REDACTED] along with some food items brought onto the farm, which is in conformity with the protections under the RTFA and AASL. At that time, the Township intentionally issued the notice of violation so [REDACTED]'s fall festival would end prior to the thirty (30) day period provided to cease the alleged violation. In November 2017, the UMT Solicitor notified [REDACTED] that the notice of violation was "cured" and "will be marked accordingly." (11/10/2017 email UMT Solicitor and [REDACTED] 11/1/2017 letter to UMT Solicitor (Ex. K)).

In February 2018, Mr. Dellecker told ██████████ that if he tried to sell apple cider donuts, strawberry slushies and other food items processed from ██████████ crops then he could impose a \$12,000 fine based on the prior October 2017 notice of violation even though it had been marked "cured" by the Township. As a result, ██████████ contacted the UMT Solicitor for clarification regarding the ability to engage in the sale of agricultural commodities on the farm and the threat of fines by Mr. Dellecker. (4/9/2018 ██████████ email to UMT Solicitor (Ex. L)). ██████████ explained to the UMT Solicitor that the RTFA protects direct commercial sales of agricultural commodities and agricultural commodities are defined to include processed or manufactured products using products grown on an operation intended for human consumption. 3 P.S. § 952, 953. The UMT Solicitor directed ██████████ to communicate their concerns to Mr. Dellecker.

On April 25, 2018, ██████████ emailed Mr. Dellecker requesting that he explain his interpretation of the term agricultural commodities that can be produced and sold on farms and his position on asserting that he could charge the Grims fines based on the October 2017 notice of violation. (4/25/2018 ██████████ email to D. Dellecker (Ex. M)). Mr. Dellecker responded on May 24, 2018, stating that should ██████████ attempt to sell processed food products for consumption on the premises, then the Township "could pursue civil enforcement under the 10/5/17 notice of violation as a persistent violation." (5/24/2018 email D. Dellecker to ██████████ (Ex. N)). Mr. Dellecker's email also quoted an incorrect definition of "normal agricultural operation" from the RTFA before it was amended and stated that only raw crops grown on a farm can be directly sold. (Ex. N). These exchanges also coincided with the ██████████ pick your own strawberry season when they use trailers with equipment to make and sell strawberry slushies, donuts and other agricultural commodities using ██████████ crops and Mr. Dellecker telling the ██████████ they cannot sell such food for consumption on the farm.

Based on these exchanges ██████████ again contacted the UMT Solicitor seeking a resolution to Mr. Dellecker's erroneous position that a farmer cannot use cooking or other equipment to process and manufacture agricultural commodities using crops produced by the farmer and engage in direct sales of those commodities for consumption on the premises. (5/30/2018 ██████████ email to UMT Solicitor (Ex. O)).<sup>2</sup> ██████████ explained that the May 17, 2018, zoning use permit stated that the farm market could not include a "restaurant or cooking facilities." (Ex. J). ██████████ concern was that a "restaurant" is defined under the UMT Zoning Ordinance as "An establishment that serves ready to consume food or drink and that routinely involves the consumption of at least a portion of such food on the premises." UMT Z.O. § 27-202 Definitions; Ex. O. Mr. Dellecker was using this definition to equate direct sales of agricultural commodities for human consumption that are processed and produced with equipment on a farm as a "restaurant" use. ██████████ requested a conference call with necessary UMT officials to address these concerns because they cannot operate a business with continuing uncertainty and their strawberry season was set to begin with threats of fines by Mr. Dellecker looming.

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<sup>2</sup> You should also be made aware that there are two wineries located in close proximity to ██████████. These are ██████████. Both of these wineries grow grapes, produce wine and sell it for consumption on the premises along with food items brought in from off site, as well as retail gift and novelty items.

On May 31, 2018, there was a conference call with [REDACTED], their counsel, UMT Solicitor, UMT Manager, UMT Zoning Officers, including Mr. Dellecker, and UMT Director of Community Development. Following the conference call, the UMT Solicitor memorialized the resolutions reached with UMT on the issues as follows:

1. It was discussed and concluded that the Notice of Violation issued in the Fall of 2017 has been cured. Any future action by the Township can no longer rely on the Fall of 2017 Notice, including attempts to impose fines before a District Magistrate. Should the Township determine that a violation(s) exists on the property(ies), a new Notice of Violation would need to be issued, even if the violations are substantially similar to those cited in the Fall of 2017 Notice. Thereafter, and in that event, the property owner would have an opportunity to appeal the Notice to the Zoning Hearing Board.

**[i.e., Mr. Dellecker's threats of fines based on October 2017 Notice of Violation were not legally valid]**

2. Commencing on June 1, 2018, [REDACTED] intends to locate a temporary trailer at a location on the property to service customers patronizing its "pick your own" strawberries. This trailer will prepare/process strawberry donuts and slushies; flavored butters, jellies and other condiment type products as well as strawberry topped ice cream sundaes and other strawberry commodities. The trailer and the use thereof is permitted. The trailer is to be temporary in nature and will be removed within thirty (30) days following the conclusion of strawberry season.

**[i.e. [REDACTED] can use equipment to process and prepare food and drink using their crops and other items for sale and consumption on site]**

3. **The Permit for the use of [REDACTED] store will be revised to allow cooking facilities.** There was much discussion on "restaurants" and the type of cooking that would occur on site. It is acknowledged that cooking facilities can be included in the "use" permit so long as the facilities are used to produce/process agricultural commodities as defined in the Right to Farm Act and not as a principal use or "restaurant". **The term restaurant was discussed and interpreted to be a location where individuals would come with the specific intent to dine and not a place that served food as more of a concession or kiosk.**

**[REDACTED] when operational, intends to provide food, both cooked/prepared and uncooked to its patrons which will include grilled fruits and vegetables grown on the site as well as certain proteins from off-site suppliers (but in conformity with the limitations of the Right to Farm Act). There will be cooking demonstrations and patrons will be able to purchase food and drink products for onsite consumption. [REDACTED] also intends to sell donuts, ice cream and slushes and other food/drink agricultural commodities. This type of operation would be considered as a**

**“Farm Kitchen”** which is an undefined term but it was discussed that such a definition be provided for in a future amendment to the Zoning Ordinance. **Until then, it will be interpreted that the above-described operation would not be interpreted as a “Restaurant”, as defined in the Zoning Ordinance.**

**[i.e. [REDACTED] farm market can use equipment to cook, process, produce and prepare food and drink for consumption on premises and it is not to be interpreted to be a “restaurant” use under zoning]**

4. The discussions related to various “uses” being conducted on the site. The discussions did not include or make any conclusions regarding building codes, including fire codes or inspections of buildings, structures and facilities other than “plug in” “UL Rated” appliances did not need a use review or inspections.

**[i.e. [REDACTED] can implement cooking and other equipment/appliances to prepare and cook food and drink on site without the need for a use review for each piece of equipment]**

Should anyone have any further questions or concerns, please be in contact with me at my office. **Otherwise, please keep this for your records.**

(5/31/2018 email UMT Solicitor to [REDACTED] and UMT Officials (Ex. P) (emphasis added)). In a nutshell, the UMT Solicitor’s email confirmed the position of the [REDACTED] on the propriety of their operations and negated the position, interpretations and threats of Mr. Dellecker. After this email, [REDACTED] believed that UMT officials would finally all be on the same page moving forward with [REDACTED] farm market use and farming operation, but that turned out not to be true.

On June 13, 2018, the UMT Zoning Officer issued a revised use permit for the [REDACTED] farm market. Instead of revising the permit to allow for cooking facilities, the permit still stated under Item 2 that the use “Shall not include any restaurant or associated cooking facilities.” (Compare Ex. J with the 6/13/2108 Revised Use Permit 5 18 17 at Item 2 (Ex. Q)). Item 2 was only revised to add the word “associated.” The revision also added a new Item 3 that provided: “A Farm Kitchen is permitted for the preparation of grilled fruits/vegetables, donuts, ice cream, slushies and other food/drink (in conformity with the limitations of the Right to Farm Act) for the Direct Commercial Retail Sale of Agricultural Products Grown Primarily on the Premises.” (Ex. Q). Not only was there no revision to make it clear that food can be sold for consumption on site, but retaining the prohibition on “restaurant” use left the [REDACTED] in the same position as before the May 31<sup>st</sup> memorialized resolutions with UMT. Accordingly, [REDACTED] contacted the UMT Solicitor to address the failure of the UMT Zoning Officer to properly revise the use permit. (6/26/2018 [REDACTED] email to UMT Solicitor (Ex. R)). The UMT Solicitor confirmed that the use permit would be revised again to remove Item 2 and revise Item 3 to provide that food may or may not be consumed on site. (6/27/2018 UMT Solicitor email to [REDACTED] and UMT Officials (Ex. S)). [REDACTED] received a revised use permit that removed Item 2 and replaced it with the following: “A Farm Kitchen is permitted for the preparation of grilled fruits/vegetables,

donuts, ice cream, slushies and other food/drink (in conformity with the limitations of the Right to Farm Act) for the Direct Commercial Retail Sale of Agricultural Products Grown Primarily on the Premises that may or may not be consumed on Premises.” (6/13/2018 Revised Use Permit 5 18 17 (Ex. T)).

During the spring/summer of 2018, [REDACTED] also sought to construct enclosed porches onto [REDACTED] farm market building. On May 15, 2018, [REDACTED] submitted a building permit application for the addition of the porches. (5/15/2018 [REDACTED] Porch Permit Application (Ex. U)). The UMT Zoning Officer denied the permit for the porches under the zoning ordinance because it would render the farm market building greater than 800 square feet in size in violation of Section 27-403.4.M(7) which limits the building floor area permissible for direct commercial sales of agricultural commodities. (See Ex. U at 3 and 5/29/2018 UMT Zoning Officer Denial Letter to [REDACTED] (Ex. V)). Of note, the UMT Zoning Officer reviewed zoning use requirements prior to the building permit being submitted for structural review, which was contrary to how the [REDACTED] building permit for the farm market itself was handled by the UMT.

Subsequently, the UMT Solicitor explained that due to the pending agritourism/agritainment ordinance, discussed below, the Township would approve the permit for the porches on [REDACTED] farm market “conditioned upon the floor area of the ‘retail sales’ being limited to 800 square feet,” which condition would be stricken upon the enactment of the pending ordinance that does not impose square footage limitations on the sale of agricultural commodities. (6/5/2018 UMT Solicitor email to Grims and UMT Officials (W)).

On June 27, 2018, the UMT Solicitor further explained to [REDACTED] follows:

I have been advised that the Zoning Officer’s review of [REDACTED] market has been completed with the determination that the structure, **including the porches, is in compliance with the Township’s Zoning Ordinance**. This includes the set-backs and the size of the structure. Please note that compliance related the size of the structure and **the use thereof** is conditioned upon the floor area of the “retail sales” area being limited to 800 square feet. Direct sales of Agricultural Commodities is not considered “retail sales.”

With the Zoning Officer’s favorable determination, the plans have been submitted for structural review. Upon a favorable review, the Township will issue a Building Permit.

I believe my below e-mail incorrectly stated that a letter would be issued. Not being fully aware of the Township’s policy, a letter would not be issued if **everything is in compliance with the zoning ordinance**. The Township merely forwards the permit along for structural review.

(6/27/2018 UMT Solicitor email to [REDACTED] (Ex. X) (emphasis added)). This is another example of UMT reviewing a building permit for zoning compliance prior to structural review.

Contrary to the UMT Solicitor's representations that zoning review was entirely complete for [REDACTED], UMT Zoning Officer, Duane Dellecker, issued the building permit for the porches for [REDACTED] farm market with conditions that stated:

1. This is a Building Permit Review – only.
2. This is not a Use Review
3. Any Changes to the Approved Use Permit #5 18 17 will require a new application and/or review

(7/27/2018 UMT Building Permit for Porches (Ex. Y)). The building permit also stated that the [REDACTED] would need to provide a bathroom if the use was to be more than seasonal. (Ex. Y).

On March 29, 2019, [REDACTED] submitted a building permit for [REDACTED] market to add the required bathrooms, a tasting room and sink room. [REDACTED] included a sketch plan for the entire layout of [REDACTED] market, including the bathrooms, equipment to be used in the production, processing, storage, display and sale of agricultural commodities in the farm market and the service counters and hard cider tasting counter for customers of the farm market. (3/29/2019 [REDACTED] Building Permit Application (Ex. Z)). In a letter dated April 29, 2019, UMT Zoning Officer, Duane Dellecker, denied the [REDACTED] permit application alleging that it was a commercial kitchen and restaurant use. (4/29/2019 UMT Zoning Officer permit denial letter to [REDACTED] (Ex. AA)). Mr. Dellecker asserted the following erroneous reasons for the denial:

- He claims that the farm market “no longer appears” to be a “market where only horticultural or agricultural products are sold, and where a minimum of 50 percent of the products were produced by the operator of the market.” (Ex. AA). As explained above, Mr. Dellecker has continuously asserted that only raw and unprocessed agricultural products can be sold at a farm market, which is contrary to and in violation of the RTFA, AASL and MPC.
- Mr. Dellecker mistakenly states that the Use Permit 5 18 17 “specifically stated that the use shall not include any restaurant or associated cooking facilities.” (Ex. AA). This language was removed from Use Permit 5 18 17 at the direction of the UMT Solicitor after the conference call with UMT Officials. (See Exs. P - T).
- Mr. Dellecker claims that the installation of seating at a tasting counter in the farm market renders it a “restaurant,” but failed to mention that the Use Permit specifically provides for the use of a Farm Kitchen and that sales of food or drink can be consumed on the premises. (Ex. T). Mr. Dellecker's denial also ignores the UMT Solicitor's direction that the proposed use of the farm market is not to be interpreted as a restaurant use, but a Farm Kitchen. (Ex. P at ¶ 3). The UMT Solicitor specifically advised the UMT Officials to keep his May 31, 2018, email detailing agreed upon terms for their records. (Ex. P).

- Mr. Dellecker claims that the sketch plan submitted with the building permit “show[s] a full-blown commercial kitchen with an ice cream bar and seating for 15 persons.” (Ex. AA at ¶ 6). Again, the Use Permit explicitly provides for use of a Farm Kitchen “for the preparation of grilled fruits/vegetables, donuts, ice cream, slushies and other food/drink . . . that may or may not be consumed on the premises” (Ex. T). Moreover, UMT Solicitor’s confirmation email states that “plug in” “UL rated” appliances did not need a use review. (Ex. P at ¶ 4). The equipment listed on the [REDACTED] sketch plan includes coolers, sinks, convection ovens, ice cream cabinets, slushie machines, prep tables, counters and display cases, which are all consistent with the processing and production of food and drink using crops grown by [REDACTED] approved by UMT and is consistent with the RTFA. (Ex. P, T).
- Mr. Dellecker claims the farm market is “being converted into a restaurant.” (Ex. AA at ¶ 8). It is important to reiterate [REDACTED] farm market is on their 114 acre farming operation. The principle use of the property is engaging in agricultural production operations and not a restaurant. As explained by the UMT Solicitor, the “term restaurant was discussed and interpreted to be a location where individuals would come with the specific intent to dine and not a place that served food as more of a concession or kiosk.” (Ex. P at ¶ 3).

Mr. Dellecker’s reasoning in his denial letter is in direct contravention of the legal guidance and direction provided by the UMT Solicitor in his May 31<sup>st</sup> email, [REDACTED] approved Use Permit 5 18 17 and state law.

As is obvious from the events discussed above, [REDACTED] have patiently attempted to work with UMT to obtain zoning approval for their farm market use even though the RTFA protects the right to engage in direct sales of agriculture commodities regardless of any zoning. 3 P.S. § 953(b). Mr. Dellecker has established a clear track record of interpreting and enforcing the zoning ordinance in violation of the RTFA, AASL and MPC, which violates the ACRE statute. [REDACTED] have expended substantial resources trying to work with UMT officials to no avail. Therefore, we are requesting the Attorney General’s intervention under ACRE to put an end to this unreasonable situation.

We provide the following legal analyses to aid in the Attorney General’s review:

The specific UMT zoning ordinance provisions at issue are for “Retail Sales of Agricultural Products Grown Primarily on the Premises.”<sup>3</sup> (Ex. BB). There are three provisions regarding this use that violate state law. However, as discussed below, UMT enacted an Agritourism and Agritainment Ordinance in August 2018 that now governs the sales of agricultural commodities on agricultural operations. Therefore, rather than amend the provisions, UMT should simply rescind the provisions for “Retail Sales of Agricultural Products Grown Primarily on the Premises” as obsolete. Nevertheless, the fact that Mr. Dellecker

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<sup>3</sup> The UMT zoning ordinance is available on line at [www.uppermac.org](http://www.uppermac.org).

continues to rely upon these ordinance provisions to prohibit and limit [REDACTED] normal agricultural operations requires that they be addressed by the Attorney General.

First, UMT requires a conditional use approval to engage in "Retail Sales of Agricultural Products Grown Primarily on the Premises." UMT Z.O. § 27-306(2) (Ex. BB)). This violates the RTFA's authorization and protection of direct commercial sales of agricultural commodities as a permitted use by right regardless of any zoning or other ordinance requirements. 3 P.S. § 953(b). It is also an unreasonable restriction on farm practices under the AASL. 3 P.S. § 911. The MPC precludes a municipality from regulating commercial agricultural production with requirements that would exceed the RTFA or AASL, thus the imposition of a conditional use requirement is beyond UMT's MPC authority. 53 P.S. § 10603(b), (h).

Second, Section 27-403.4.M(7) impermissibly limits the building floor area that can be devoted to direct commercial sales to a maximum of 800 square feet.<sup>4</sup> UMT Z.O. § 27-403.4.M(7) (Ex. BB). The RTFA authorizes direct commercial sales of agricultural commodities regardless of any zoning prohibition, which includes limiting the building floor area used to engage in the sales. 3 P.S. § 953(b). The RTFA does not impose any limitation on the amount of building floor area that can be used for sales of agricultural commodities because agricultural operations necessarily will differ in the type of building space available and the size of the operation. This restriction is also an unreasonable restriction on farm structures in violation of the AASL and beyond UMT's MPC authority. 3 P.S. § 911; 53 P.S. § 10603(b), (h).

Third, the use is defined as "[a] market where only horticultural or agricultural products are sold." UMT Z.O. § 27-202 (Ex. BB). Mr. Dellecker has continuously interpreted this ordinance provision to limit [REDACTED] to only sales of raw and unprocessed agricultural commodities. This interpretation violates the RTFA, AASL and MPC for the following reasons.

The RTFA defines a normal agricultural operation to include the "**activities, practices, equipment** and procedures that farmers adopt, use or engage in . . . in the production, harvesting and **preparation for market or use** of agricultural, agronomic, horticultural . . . crops and commodities." 3 P.S. § 952 (emphasis added). An agricultural commodity is broadly defined to include:

Any of the following transported or intended to be transported in commerce:

- (1) Agricultural, aquacultural, horticultural, floricultural, viticultural or dairy products.
- (2) Livestock and the products of livestock.
- (3) Ranch-raised fur-bearing animals and the products of ranch-raised fur-bearing animals.

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<sup>4</sup> Eight hundred square feet is approximately a 28' by 28' building area, which is a relatively small space within which to engage in direct sales on a normal agricultural operation.

- (4) The products of poultry or bee raising.
- (5) Forestry and forestry products.
- (6) **Any products raised or produced on farms intended for human consumption and the processed or manufactured products of such products intended for human consumption.**

Id. (emphasis added).

These definitions specifically include a farmer's use of equipment to produce and prepare agricultural commodities for market or use. This includes a farmer's ability to process or manufacture products produced by the farmer into other products intended for human consumption. Accordingly, the RTFA explicitly permits a farmer to make food or drink products using crops produced by the farmer. This includes adding ingredients to those crops in order to "process or manufacture" products from the crops produced by the farmer.

██████████s process and manufacture products using the crops they grow which are intended for human consumption. Examples of such products include commodities such as raw and processed fruits and vegetables (e.g. jarred jams, jellies, butters, honey, etc.), slushies, donuts, ice cream sundaes with fruit, baked goods and desserts, soups, kettle corn, hard cider, fruit wine, and other food/drink items depending on the type of crop grown.<sup>5</sup> These commodities are all produced, processed or manufactured using crops grown by ██████████ and fit squarely into the definition of an agricultural commodity under the RTFA.

The RTFA provides that: "[d]irect commercial sales of agricultural commodities upon the property owned and operated by a landowner who produces not less than 50% of the commodities sold **shall be authorized**, notwithstanding municipal ordinance, public nuisance or zoning prohibition." Id. (emphasis added). This provision means that UMT cannot preclude the ██████████ from directly selling agricultural commodities they produce using crops grown by them or prevent them from selling additional agricultural commodities from outside sources in accordance with the percentage requirements under the RTFA. The products produced by the ██████████ using their crops along with other ingredients are considered commodities produced by ██████████. The sale of agricultural commodities that do not contain any portion of crops grown by ██████████ as an ingredient would be considered products not produced by ██████████.<sup>6</sup>

With respect to the "fifty percent rule," the RTFA's protection applies to the direct sales of agricultural commodities "upon the property" of the farmer. Id. This means that an evaluation of the fifty percent rule would encompass the direct sales a farmer engages in with respect to the entire property over the course of operations. To be sure, the RTFA does not

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<sup>5</sup> ██████████ operations are the same as on site sales of a dairy farm operating a creamery and providing ice cream with toppings, an animal operation producing processed meat products, a nursery selling floral arrangements and a winery offering food products brought onto the operation served with wine.

<sup>6</sup> A farmer's right to process or manufacture food or drink products using both crops grown by the farmer along with other ingredients is an ongoing fundamental misunderstanding by Mr. Dellecker that we request the Attorney General to address with UMT.

separate out different forms of direct commercial sales for individualized application of the fifty percent rule. [REDACTED] engage in a variety of direct commercial sales of agricultural commodities on the farm throughout the year. As stated, [REDACTED] offer pick your own strawberries and cherries in the spring, vegetables, herbs, plants and flowers in spring/summer/fall and apples and pumpkins in the fall. They also sell food and drink items made from their crops during the pick your own seasons. These activities are part of their direct commercial sales of agricultural commodities produced by them. [REDACTED] farm market will be only a part of the overall direct commercial sales conducted on [REDACTED] farm for purposes of the fifty percent rule. We mention this point out of an abundance of caution that UMT will somehow attempt to contend that [REDACTED] farm market on its own does not comply with the RTFA's fifty percent rule at some isolated occasion in time given the Township's established track record. [REDACTED] will primarily sell agricultural commodities produced by [REDACTED] but may also include other items for sale as permitted under the RTFA. We request that the Attorney General address and confirm the application of the fifty percent rule with respect to the entirety of a farmer's operations with UMT.

Finally, the RTFA's authorization for direct commercial sales of agricultural commodities on an agricultural operation should inherently and obviously permit the farmer to provide seating for patrons to consume the commodities on site. UMT should be advised to cease interpreting the direct commercial sales of agricultural commodities as a restaurant use under its ordinance.

In addition to the RTFA, [REDACTED] farm is a property enrolled in UMT's Agricultural Security Area pursuant to the AASL. Like the RTFA, the AASL provides protection to agricultural operations. 3 P.S. § 911. Under the AASL, a municipality is precluded from enacting "ordinances which would unreasonably restrict farm structures or farm practices." Id. The AASL defines agricultural production as the "production for commercial purposes of crops, livestock and livestock products, including the processing or retail marketing of such crops, livestock or livestock products if more than 50% of such processed or merchandised products are produced by the farm operator." Id. § 903. As established, [REDACTED] are engaged in agricultural production on their farm and are protected from ordinances that would unreasonably restrict the structures or practices utilized in those operations, including food and drink production using their crops.

Moreover, the MPC provides municipalities with authority to enact zoning ordinances. 53 P.S. § 10105. One purpose of the MPC is 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." Id. To that end, municipalities are explicitly precluded from enacting ordinances regulating commercial agricultural production with requirements that would exceed the RTFA and AASL. Id. § 10603(b). The MPC also requires zoning ordinances to "encourage the continuity, development and viability of agricultural operations . . . [and] not restrict agricultural operations or changes or expansions to agricultural operations in geographic areas where agriculture has traditionally been present." Id. § 10603(h). Finally, the MPC directs that zoning ordinance are to be interpreted in favor of a landowner to impose the least restriction of use of property. Id. § 10603.1. The UMT

Zoning Officer's interpretation and enforcement of the zoning ordinance violates the RTFA and AASL, thus also goes beyond UMT's municipal authority under the MPC. Commonwealth v. Richmond Twp., 2 A.3d 678, 687 & n.11 (Pa. Cmwlth. 2010).

For these reasons, we respectfully request the Attorney General to take action pursuant to its authority under ACRE and require the Township to rescind its ordinance provisions for "Retail Sales of Agricultural Products Grown Primarily on the Premises" and provide confirmation to the Township that the RTFA permits farmers to produce, process and manufacturer food and drink products using crops grown by farmer along with other ingredients to be sold for consumption on the farm as the direct sale of agricultural commodities on normal agricultural operations.

### III. History of Upper Macungie Township's 2018 Agritourism/Agritainment Ordinance

Since at least 1997, [REDACTED] have offered a variety of family friendly activities during pick your own operations, as well as providing tours of their agricultural operations to school groups. The agricultural industry recognizes the use of this marketing tool to promote direct sales of agricultural commodities while at the same time providing both educational and recreational activities on an agricultural operation. It is similar to local wineries hosting events and being part of regional wine trails on a year round basis.

In 2016, UMT requested that [REDACTED] apply for a conditional use for certain activities and parking that would be added to his already long-standing pick your own agricultural operation. [REDACTED] filed a conditional use application in March 2016. After [REDACTED] expended significant time and expense on public hearings, the Township never took action on the conditional use application and, instead, suggested that [REDACTED] submit a proposed "agritainment" ordinance to the Township. Again, attempting to comply with the Township's directions, [REDACTED] submitted a proposed agritainment ordinance in December 2016. However, UMT did not actively pursue the proposed ordinance during 2017. [REDACTED] also submitted an application for a special event permit in February 2017 in anticipation of his fall 2017 pick your own festival and in accordance with the advice from the Township.<sup>7</sup> The Township never acted on the special events permit until October 2017.

Despite [REDACTED] cooperation with UMT's directions, the Township issued a violation notice and a denial of the special events permit both dated October 5, 2017, which is during the [REDACTED] pick your own fall festival season. (10/5/2017 UMT Violation Notice to [REDACTED] (Ex. CC)). The violation notice cited [REDACTED] for operating a "commercial kitchen" and engaging in a "restaurant" use by selling "ready-to-consume food or drink . . . that routinely involves the consumption of at least a portion of such food on the premises." (Ex. CC).

<sup>7</sup> In 2016, at the direction of UMT [REDACTED] submitted a special event permit application for the fall pick your own season. UMT granted the permits in 2016, but ignored [REDACTED] identical application for 2017 even though he applied for them well in advance in February 2017 and followed up with UMT on the status of the permits prior to the fall pick your own season.

Subsequently, the Township issued a press release regarding the violation and stated that:

Upper Macungie Township supports and values [REDACTED] in our community and is not preventing [REDACTED] from continuing its agriculture operation including pick-your-own fruit, sales of agricultural produce grown on the property and those items listed, but not limited to: Apple Pie, Pumpkin Pie, Apple Dumplings, Apple Cider Donuts, Pumpkin Ice Cream, Apple Fries, Apple Cider Slushie, Apple Cider Floats, Apple Cider Slushie Gelato, Caramel Apples, Fudge Coated Apples, etc.

**Lastly, [REDACTED] may continue to offer all food items that can be consumed on the property and may continue the agricultural sales that have been conducted on the property for many years.**

(10/11/2017 UMT Press Release (Ex. DD) (emphasis added)). Therefore, UMT cited [REDACTED] for preparing and selling agricultural commodities for on-site consumption as an improper commercial kitchen and restaurant use, but then, days later, contradicted itself in a press release stating that [REDACTED] could prepare and sell all food items for consumption on the property. Accordingly, this letter and supporting exhibits demonstrate an ongoing theme of constant contradiction by UMT officials against the [REDACTED] operations.

We provide this history to you to demonstrate that despite the efforts by the [REDACTED] to work with UMT to reach an understanding of the nature of normal agricultural operations and the scope of permitted and protected farm practices under the RTFA, [REDACTED] remain in the same position now as they did in 2017 with UMT asserting that they are operating a commercial kitchen and a restaurant instead of a normal agricultural operation. The Attorney General needs to put an end to UMT's erroneous and illegal interpretations of the RTFA so that the Grims can put their entire focus and efforts where they belong on running their agricultural operations.

In spite of the ongoing issues with the UMT Zoning Officers [REDACTED] along with other agricultural operators, worked with the Township's Solicitor, Zoning Officer, Director of Community Development, Planning Commission and Board of Supervisors to develop an ordinance to regulate Agritourism and Agritainment in the Township. (UMT 2018 Agritourism/Agritainment Ordinance (Ex. EE)). The ordinance was developed during meetings with UMT starting in December 2017 and was ongoing through the MPC process until finally enacted in August 2018. The new ordinance allows farm markets, food and drink sampling, sales and concessions, ice cream shop/bakeries, farm dining, breweries, cideries, distilleries, wineries and "other activities that directly market agricultural commodities produced by the farmer in their natural or manufactured state and as permitted and protected under the Right to Farm Act." (Ex. EE at Agritourism definition). These are many of the activities submitted on [REDACTED] zoning use application and discussed with UMT officials for the farm market use. This means that during the time [REDACTED] were attempting to obtain permits for [REDACTED] farm market, the UMT Zoning Officers, including Mr. Dellecker, were not only aware of the pending ordinance and its content, but the UMT Solicitor specifically mentioned in emails regarding the permits that once the new ordinance was enacted the old ordinance provisions regulating retail sales of agricultural commodities would be stricken. (See Ex. W). As stated,

the new ordinance was enacted in August 2018, but Mr. Dellecker's recent 2019 permit denial for [REDACTED] references the obsolete ordinance provisions. (Ex. AA). Accordingly, we request that the Attorney General require UMT to issue a new Use Permit to the [REDACTED] farm market to provide for it as an Agritourism use.

#### **IV. Conclusion**

As stated above, Upper Macungie Township should rescind its ordinance provisions for "Retail Sales of Agricultural Products Grown Primarily on the Premises" because its 2018 Agritourism and Agritainment Ordinance regulates direct commercial sales of agricultural commodities on farms. [REDACTED] should simply be issued a new use permit for [REDACTED] lot.

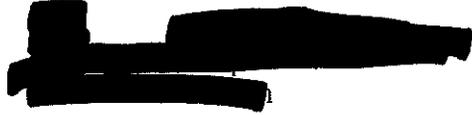
The rescission of the ordinance provisions will not resolve this ACRE case because the predominant problem is the Township's persistent illegal interpretation of the RTFA's definition of normal agricultural operation, agricultural commodities and direct commercial sales. As a result, we are respectfully requesting that the Attorney General confirm to the Township that the legal analyses and conclusions in this letter are correct as follows:

1. The RTFA's definitions for normal agricultural operation and agricultural commodity encompass a farmer's use of equipment to process or manufacture food or drink products using crops produced by the farmer along with other ingredients;
2. Direct commercial sales of agricultural commodities include all products containing any portion of the farmer's crops as well as other products brought onto the farm for sale subject to the fifty percent rule;
3. The fifty percent rule of the RTFA is evaluated by the overall sales on the entire property of a farmer throughout the year and the products produced by the farmer are any products containing some part of a farmer's crops;
4. Direct commercial sales of agricultural commodities include selling food or drink products for consumption on the farm site, including providing seating for patrons.

Robert Willig, SDAG  
May 12, 2019  
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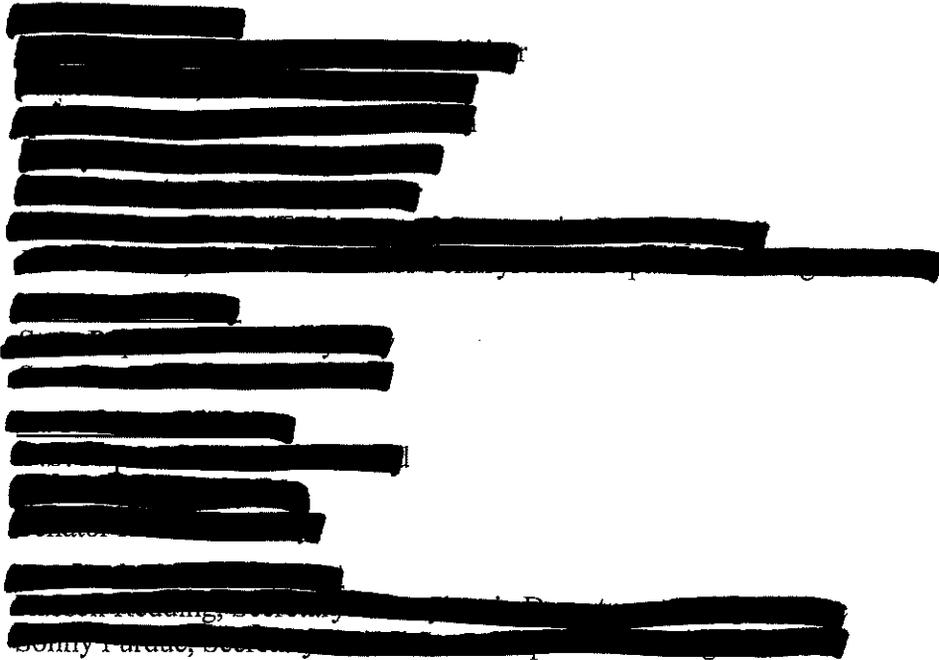
We appreciate your time and attention to this matter. I look forward to hearing from you.

Sincerely,



Enclosures

cc:



[Redacted list of names]