



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

MICHELLE A. HENRY
ATTORNEY GENERAL

April 26, 2023

Office of the Attorney General
ATTN: SDAG Robert A. Willig
1251 Waterfront Place-Mezzanine Level
Pittsburgh, PA 14222
[REDACTED]

City of Philadelphia Law Department
ATTN: Code & Public Nuisance Litigation Group
[REDACTED]

151 Arch Street-17th Floor
Philadelphia, PA 19102

Re: ACRE Review-City of Philadelphia [REDACTED] Property, [REDACTED],
[REDACTED]

Dear [REDACTED]

[REDACTED] filed an Agricultural Communities and Rural Environment ("ACRE")¹ complaint with the Office of the Attorney General ("OAG") requesting review of Philadelphia's actions and ordinances concerning his urban farming operation at [REDACTED]. [REDACTED]'s main concern relates to the City's prohibition on engaging in on-site, direct commercial sales. Essentially, [REDACTED] contends that Philadelphia will not allow him to sell from his farm what he grows on the farm. I have attached a copy of the ACRE request for your reference.

Initially, Law Department Attorney [REDACTED] responded to [REDACTED] ACRE complaint; a copy of his October 11, 2019 response is also attached. As [REDACTED] is no longer with your Office, I am bringing this matter to your attention. It appears Philadelphia contends that [REDACTED] plans for two primary uses on the property – a single family dwelling and a Market or Community Supported Farm. The Zoning Code prohibits "more than one principal use...per lot in the...RSA...zoning district[]..." *Philadelphia Code*, § 14-401(4)(a). Since [REDACTED] property is located within in the RSA-2 Zone, the ordinance prevents him from having two principal uses on the land. The City further asserts that [REDACTED] cannot claim the farm as an accessory use, which would remove him from the dual primary use prohibition. An accessory use is one that "must...be customarily found in association with the principal use..." *Id.*, § 14-604(a)(c)(3). [REDACTED] writes that "[i]n no sense of the word 'customarily' can it be said that sale or distribution of crops...is a customary use in association with a single family dwelling."

¹ 3 Pa.C.S. §311, *et. seq.*

The OAG questions the Law Bureau's position for several reasons. The *Philadelphia Code* expressly allows an urban farmer to sell his products from the farm irrespective of any alleged primary dual use prohibition. The *Code* cannot be any clearer. "Sales are permitted on the same lot as the urban agriculture use...." *Id.*, **Urban Agriculture, General**, § 14-603(15)(a)(1). The OAG respectfully submits that should end the inquiry, for by its own terms the ordinance allows [REDACTED] to sell from his urban farm. *See also Id.*, **Market or Community-Supported Farm**, § 14-601(11)(c) ("An area managed and maintained by an individual or group of individuals to grow and harvest food crops or non-food crops (e.g., flowers) *for sale or distribution* that is not incidental in nature. *Market farms may be principal or accessory uses* and may be located on a roof or within a building.") (emphasis added)

Additionally, the OAG believes Philadelphia's prior permit approvals estops it from asserting [REDACTED] intended actions amount to a prohibited dual primary use of his property. Equitable estoppel "applies to prevent a party from assuming a position or asserting a right to another's disadvantage inconsistent with a position previously taken... Reduced to its essence, the doctrine is one of fundamental fairness, designed to preclude a party from depriving another of a reasonable expectation when the party inducing the expectation albeit gratuitously knew or should have known that the other would rely on that conduct to his detriment." *Jacob v. Shultz-Jacob*, 923 A.2d 473, 480 (Pa. 2007) (citations and quotations omitted).

Attached for your review is paperwork from two permits Philadelphia previously issued to [REDACTED]. The permit applications demonstrate [REDACTED] repeatedly informed the City that the farm was an accessory use; and their approval is evidence that Philadelphia agreed with his characterization. In the March 19, 2019 *Application for Zoning/Use Registration Permit*, [REDACTED] told the City that he wanted permission to operate an "accessory seasonal market/community supported farm [m]arket." He indicated that his plans also included an "accessory market (1st floor front) seasonal community supported farm 'by right' located on the roof..." Philadelphia approved the application, issuing the permit on June 3, 2019. In doing so, the City expressly granted [REDACTED] permission to use the property for a "single family household living with an accessory use of market or community supported farm..."

[REDACTED] renewed the permit in early 2020. His January 28, 2020 *Application for Zoning/Use Registration Permit* clearly stated that the proposed use on the property was "Single Family Residential with accessory Market Community Supported Farm..." pursuant to §§ 14-601(11)(c) and 14-603(15)(a)(1). On February 10, 2020, for the second time, Philadelphia granted [REDACTED] permission to have "a single family household living with an accessory use of market or community supported farm..." Essentially, [REDACTED] characterized the farm/market as an accessory use and informed the City that he wanted to grow and sell on the property; with the permit approvals, Philadelphia agreed with his proposed actions. Relying upon the City's approvals, [REDACTED] understandably went forward with his plans. Yet now the City contends that [REDACTED] cannot sell from his property and that the farm/market is not an accessory use. Simply put – this is not consistent with the City's prior permit approval and ultimately, not equitable under the circumstances.

Philadelphia cannot now contend that it erred under the law when it issued those permit approvals on the grounds that the market would be considered a primary use. An accessory use "is [one] secondary to the principle use and that the use is customarily found with the principle use," *Tennyson v. Zoning Hearing Bd. of W. Bradford Twp.*, 952 A.2d 739, 745 (Pa. Cmwlth. Ct. 2008) (citation omitted). Here, the City asserts that "[i]n no sense of the word 'customarily' can it be said that sale or distribution of crops... is a customary use in association

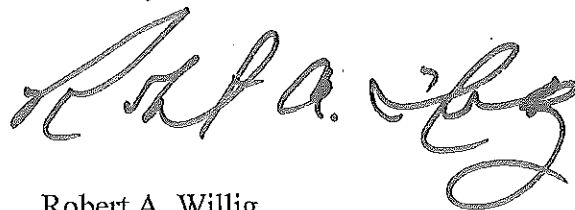
with a single family dwelling.” (Philadelphia Response to ACRE Complaint, p. 2) In the context of farming, the OAG submits that just the opposite is true.

Philadelphia admirably permits and even encourages urban farming through its ordinances. When a municipality accepts farming within its borders it must necessarily also accept those things that “customarily” come along with farming – such as, farmers living on their farms and selling their agricultural product from those farms. The U.S. Department of Agriculture (“USDA”), National Agricultural Statistics Service (“NASS”), noted in its 2012 *Census of Agriculture* that 76.9% of farmers live on their farms. Also attached is an April 29, 2022 USDA NASS News Release which shows that “Pennsylvania ranks second in value of total direct food sales” in the entire United States. “Most farms that sold directly to consumers sold through outlets such as *on farm stores*. Pennsylvania had over 5,000 operations engaged in direct-to-consumer sales earning \$152 million.” (emphasis added)

The Right to Farm Act (“RTFA”) recognizes the ubiquity of on-site, direct commercial sales throughout the Commonwealth. See 3 P.S. §951, *et. seq.* “Direct commercial sale of agricultural commodities upon 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 prohibitions. Such direct sales shall be authorized without regard to the 50% limitations under circumstances or crop failure due to reasons beyond the control of the landowner.” *Id.*, § 953(b), **Limitation on local ordinances**. By law, a farmer may sell from on-site as long as at least 50% of the “agricultural commodity” sold is generated on-site, and even that 50% limitation is suspended during extreme times. The RTFA unequivocally demonstrates that direct commercial sales from residential farms is commonplace, some might say “customary,” across the Commonwealth. Whether the farm is in a rural County or urban Philadelphia, the law is the same – farmers are allowed to sell from their farms.

The OAG respectfully submits that [REDACTED] should be permitted to engage in on-site, direct commercial sales from his farm. We look forward to engaging with the Law Bureau to resolve this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read 'R. A. Willig', with a stylized flourish at the end.

Robert A. Willig
Senior Deputy Attorney General