



COMMONWEALTH OF PENNSYLVANIA
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Lower Milford Township
Board of Supervisors
7607 Chesnut Hill Church Road
Coopersburg, PA 18036
[REDACTED]

ACRE Request for Review – Lower Milford Township, Lehigh County

Dear Board of Supervisors and [REDACTED],

[REDACTED] filed an Agricultural Communities and Rural Environment (“ACRE”)¹ request with the Office of the Attorney General (“OAG”) challenging Lower Milford Township’s requirement that the “minimum lot area for establishment of a winery is five (5) acres.” *Ordinance No. 114*, ARTICLE XII, SUPPLEMENTARY REGULATIONS, Section 1200.A.32.d., Winery. A copy of the ACRE request is attached for the Board of Supervisor’s review. After careful review of the relevant facts, the OAG concludes that [REDACTED] is correct; in this instance Lower Milford’s five acre requirement for a winery violates ACRE.

ACRE prohibits municipalities from adopting or enforcing an unauthorized local ordinance. 3 Pa.C.S. § 313(a). An “unauthorized local ordinance” is one that “[p]rohibits or limits a normal agricultural operation” or “[r]estricts or limits the ownership structure of a normal agricultural operation.” 3 Pa.C.S. § 312(1) & (2). The Right to Farm Act (“RTFA”)² defines a normal agricultural operation (“NAO”) as consisting of “[t]he activities, practices, equipment and procedures that farmers adopt, use or engage in the production and preparation for market” of agricultural commodities and is “not less than ten contiguous acres in area” or if less than ten acres “has an anticipated yearly gross income of at least \$10,000.” 3 P.S. § 952. The RTFA specifically includes “viticultural...products” in the definition of “agricultural commodity.” *Id.*³

¹ 3 Pa.C.S. §311 *et. seq.*

² 3 P.S. §951 *et. seq.*

³ The Merriam-Webster Dictionary defines “viticulture” as “the cultivation of grapes especially for wine making.”

There is no doubt that [REDACTED] growing grapes and producing wine is an “agricultural commodity.” The RTFA expressly includes this agricultural practice; moreover, so does Lower Milford. The Township defines “agriculture” as “[t]he cultivation of the soil and the raising and harvesting of the products of the soil including...vineyards...” *Ordinance No. 127, ARTICLE II, DEFINITION OF TERMS, AGRICULTURE*. While the proposed vineyard/winery would be on a 2.03 acre lot, [REDACTED] includes with his ACRE request a flow chart demonstrating that the “anticipated yearly gross income” on just one of those acres is \$37,500, thereby far exceeding the RTFA’s \$10,000 threshold. Unquestionably, the proposed [REDACTED] winery is a NAO.

The issue now becomes whether Lower Milford’s five acre minimum for a winery meeting the definition of a NAO is an “unauthorized ordinance;” put simply – it is. The Township lacks authority to establish a minimum acreage amount for agricultural operations in conflict with State law. As already noted, while the RTFA requires ten acres for NAO’s that acreage does not apply if the farm “has an anticipated yearly gross income of at least \$10,000.” 3 P.S. § 952. The Municipalities Planning Code (“MPC”) precludes a municipality from enacting a zoning ordinance regulating agricultural activities if it exceeds the requirements imposed by the RTFA. As long as a farmer anticipates more than \$10,000 income a year acreage requirements are inapplicable.

Every ACRE case is different and requires analysis under the facts and circumstances unique to that particular farmer and municipality. In this matter, the [REDACTED] property is located in the AC-Agricultural Conservation-Zoning District (“AC District”). There is no doubt Lower Milford intends to support agriculture within the AC District and should be commended for this support. The AC District “is intended to...[p]rotect the Township’s agricultural uses from conflicts by minimizing the encroachment of non-farm land uses” and is intended to “[s]upport the Township and regional agricultural economy and agri-tourism efforts.” *Ordinance No. 114, ARTICLE III, AC-AGRICULTURAL CONSERVATION DISTRICT, § 300.A & C, INTENT*. Indeed, Lower Milford states that “[a]griculture shall be permitted by right in the AC” zone. *Ordinance No. 127, ARTICLE XII, SUPPLEMENTARY REGULATIONS, Section 1200.A.2, Agriculture*. Here, [REDACTED] own property in the AC District where agriculture is a use as of right and intend to practice agriculture on that property; they must be permitted to do so without the five acre requirement.

An examination of the applicable Lower Milford ordinances *in toto* as well as the Zoning Hearing Board’s (“ZHB”) decision,⁴ reveals that the Township understandably wants to

⁴ [REDACTED] asked Lower Milford Township for a variance from the 5 acre minimum requirements necessary for a winery. The Township denied the variance and [REDACTED] appealed to the ZHB. The ZHB conducted a hearing on January 22, 2020. [REDACTED] introduced into evidence plans showing the structures on the property, proposed parking and driveway expansions, and all necessary sewer enhancements should the appeal be granted. They also presented aerial photography of their property and the surrounding area. [REDACTED] directed the Board’s attention to various Lower Milford and neighboring Upper Saucon Township ordinances, offered a summary of a conversation they had had with the sewer enforcement officer, a winemaking diagram, and provisions of the RTFA. See ZHB Decision, pp. 1-2. The ZHB denied the appeal on February 19, 2020. The ZHB disagreed with [REDACTED] position that since they had bought the property prior to the 2009 ordinance amendments they were exempt from the 5 acre minimum. *Id.*, pp. 6-7. The ZHB also rejected [REDACTED] argument that the relief they sought was *de minimus* because in the Townships view “[t]he property at issue is significantly undersized.” *Id.*, p. 7. Nor did the ZHB find persuasive [REDACTED]’ claim that the RTFA allowed them to operate a vineyard/winery. The ZHB concluded that since [REDACTED] could conduct “substantial and

minimize inconvenience to its residents and in furtherance of that goal enacted the minimum acreage requirement. Yet Lower Milford itself acknowledges that “[r]esidents of the AC...must be willing to accept the impacts associated with daily farming practices and related businesses” - a statement that is both legally correct and consistent with common sense. See *Ordinance No. 114*, ARTICLE III, AC-AGRICULTURAL CONSERVATION DISTRICT, § 300, INTENT. Lower Milford even goes so far as to include an “Agricultural Nuisance Disclaimer” in its ordinances:

Lands within the AC...are intended principally for use in commercial agricultural production...Owners, residents, and other users of a lot may be subjected to inconvenience and discomfort arising from normal and accepted agricultural practices and operations...Owners, residents, and users of a lot should be prepared to accept these conditions and are hereby put on official notice that...[the RTFA] may bar them from obtaining legal judgment against such normal agricultural operations.

Ordinance No. 114, ARTICLE III, AC-AGRICULTURAL CONSERVATION DISTRICT, § 304.A, AGRICULTURAL NUISANCE DISCLAIMER. Lower Milford is correct in highlighting that the RTFA directly addresses the issue of agricultural nuisance. “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 nuisance suits and ordinances.” 3 P.S. § 951. The RTFA also states that “[e]very municipality that defines or prohibits a public nuisance shall exclude from the definition of such nuisance any agricultural operation conducted in accordance with normal agricultural operations so long as the agricultural operation does not have a direct adverse effect on the public health and safety.” 3 P.S. § 953(a).

While [REDACTED] neighbors in the AC District would have to “be willing to accept the impacts associated with” a vineyard/winery in their backyard, it is hard to see how approving the proposed use would inconvenience anyone. As the ZHB noted, [REDACTED] already “live at the property, raising chickens...goats, and growing grapes on approximately one acre of the property.” ZHB Decision, p. 2. None of the neighbors objected to the proposed use and the [REDACTED] presented to the board an aerial photograph of the property “show[ing] that the neighborhood surrounding the property is not densely populated...” *Id.*, pp. 6-7. The proposed use of the land, a small vineyard/winery, is little different from the current use of the land, is entirely consistent with Lower Milford’s desire to support agriculture and agri-tourism, and is entirely consistent with the RTFA. Despite all of this, the ZHB still ruled against [REDACTED]. There is no nuisance at [REDACTED] now and there would be no nuisance if the property is converted into the [REDACTED].

Ordinance No. 114, ARTICLE XII, SUPPLEMENTARY REGULATIONS, Section 1200.A.32.d., currently reads “[t]he minimum lot area for establishment of a winery is five (5) acres.” In order to be in compliance with ACRE and the RTFA, Lower Milford must change the language of this subsection to read “if the yearly anticipated gross income is more than \$10,000, there is no minimum lot area for establishment of a winery. If the yearly anticipated gross

wide-ranging crop growth” as well as “other farm-based operations” other than a vineyard/winery on their property the RTFA was not violated. *Id.*, pp. 7-8.

income is less than \$10,000, the minimum lot area for establishment of a winery is five (5) acres.”

Please respond to this letter within thirty days of receipt indicating how Lower Milford intends to proceed. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert A. Willig". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Robert A. Willig
Senior Deputy Attorney General