Re: Lower Milford Township Ordinance Dispute

I am writing to start discussion on an issue we are having with our local township we feel pertains to Pennsylvania Right to Farm Law and would like direction from the State of Pennsylvania on how to handle this or if we can respectfully appeal for assistance from the Attorney General.

We are a small rural farm located in Lower Milford Township pursuing growing grapes or viticulture and the production of wine from grapes and the sales of that agricultural commodity from our property and the local farmers market.

We approached Lower Milford Township for the approval to do so and were denied based on an ordinance stating that we would be considered a winery and were required to have 5 contiguous acres to apply. We currently have only 2.03 acres which required us to apply to Lower Milford Township for a variance and hardship claim for the local zoning board to pass approval. Twice we stood in front of the Zoning Board and were denied costing us over $1200.00 in application fees.

Our second variance hearing was presented to the board in way that levied the Pennsylvania Right to Farm Law as protection from the local ordinance preventing us from producing and selling our agricultural commodity from our farm or farmers market. We feel the ordinance is in direct contradiction with state law, clearly preventing us from producing and selling our agricultural commodity.

We have included with this letter, the ordinance in question, the entire argument exhibit (Reasoning #2 applies to our RTFL argument) as well as the townships response. I’ve also included our Farm to Wine Conversion Drawing depicting our anticipated yearly gross income.

Our current situation stands as this; [Redacted] has filed for sales of alcohol permitting with both the Federal Government and the State. The State of Pennsylvania has notified the township of our application. We have received notification from the township that if we were to proceed with the production or sales of alcohol from our property [Redacted] would be in violation.

We appeal for your assistance in bringing the local ordinance into compliance with state law.

Sincerely,
BEFORE THE ZONING HEARING BOARD OF
LOWER MILFORD TOWNSHIP, LEHIGH COUNTY, PENNSYLVANIA

IN RE: [Redacted]

DECISION OF THE ZONING HEARING BOARD

FINDINGS

1. This is an appeal by [Redacted] for a Variance pursuant to the Lower
Milford Township Zoning Ordinance Article III, Section 301, Subsection B.10 and
Article XII, Section 1200, Subsection 32.d for relief from the minimum lot size
requirements necessary for a winery.

2. Applicant [Redacted] filed this appeal, and at the hearing, it was agreed by the parties
that [Redacted] would be added to the appeal as a deed owner of the property.

3. [Redacted] and [Redacted] reside at [Redacted]. The
subject property is located in the Agricultural Conservation District (AC) and is 2.01
acres in size.

4. Applicants seek to operate a vineyard and winery on the property.

5. This matter was heard before the Zoning Hearing Board on January 22, 2020.

6. Applicants presented plans showing the location of the existing dwelling, existing wine-
manufacturing facilities, a chicken coop that would be converted to a shed upon approval,
proposed parking and driveway expansion, as well as the necessary sewer enhancements
that would be made should the application be approved.

7. Applicants presented aerial photography of the property and the immediate
neighborhood.
8. Applicants introduced as evidence provisions of the Lower Milford Zoning Ordinance of 1997, as well as selected sections of the Zoning Ordinance of Upper Saucon Township, a campaign letter, a memo regarding a conversation held between the applicants and the Sewer Enforcement Officer, a diagram regarding the process of harvesting grapes into wine, as well as select provisions of the Pennsylvania Right to Farm Law.

9. Applicants live at the property, raising chickens (for personal use, with the exception of selling eggs on their front porch), goats, and growing grapes on approximately one acre of the property.

10. Applicants intend to produce wine for commercial sale, as well as for small, private wine tasting groups.

11. Applicants testified that they performed soil testing on the property, that the testing revealed that a vineyard would be sustainable on the land, and that other crops could also be grown on the land.

12. A minimum of five (5) acres is required for the operation of a winery pursuant to Article XII, Section 1200, Section 32.d of the Zoning Ordinance.

13. Applicants offered evidence of a hardship on three (3) separate grounds: 1) that the Zoning Ordinance changed after their purchase of the property specifically with regard to the minimum acreage required; 2) that the variance sought is de minimus; and 3) that the Pennsylvania Right to Farm Law requires that they be permitted to operate a winery on less than 5 acres.

14. In addition to the testimony of the applicants, Joe Bauer, a relative of the applicants, spoke to the credibility, work ethic, positivity and general character of the applicants. There were no objectors to the application.
15. Applicants previously were before the Zoning Hearing Board seeking a special exception and a variance to operate a winery on the property on May 22, 2019. That application was denied.

16. All members of the Zoning Hearing Board were present at the hearing.

DISCUSSION

The Zoning Hearing Board is of the opinion that the Applicants’ request for a variance to operate a winery on this undersized lot must be denied.

As a procedural matter, the application forming the basis of this appeal requests only a variance. For the sake of this discussion, and in consideration of the prior application made by the applicants, the Zoning Hearing Board considered this appeal as a request for a special exception to operate a winery with the associated request for a variance to the 5-acre minimum lot size requirement contained within Article XII, Section 1200, Subsection 32.d of the Lower Milford Zoning Ordinance.

Section 1403(B) of the Zoning Ordinance generally confers upon the Zoning Hearing Board the following authority to approve a Special Exception Use:

The Board shall hear and decide on the request in accordance with the standards and criteria for each Special Exception use set forth below:

1. The size, scope, extent, and character of the special exception request is consistent with the Comprehensive Plan of the Township and promotes the harmonious and orderly development of the zoning district involved;

2. The proposed special exception is an appropriate use consistent with the character and type of development in the area surrounding the location for which the request is made and will not substantially impair, alter, or detract from the use of the surrounding property or of the character of the neighborhood in light of the zoning classification of the area affected; the effect on other properties in the area; the number, extent, and scope of nonconforming uses in the area; and the presence
or the absence in the neighborhood of conditions or uses which are the same or similar in character to the condition or use for which the Applicant seeks approval;

3. The proposed special exception is suitable with respect to traffic and highways in the area and provides for adequate access and off-street parking arrangements in order to protect major streets and highways from undue congestion and hazard;

4. The proposed special exception is reasonable in terms of the logical, efficient, and economical extension of public services and facilities, such as public water, sewers, police, fire protection, and public schools, and ensures adequate arrangements for the extension of such services and facilities in specific instances;

5. Conditions are being imposed on the grant of the request necessary to ensure that the general purpose and intent of the property adjacent to the area included in the proposed special exception is adequately safeguarded with respect to harmonious design of buildings, aesthetics, planting, and its maintenance as a sight or sound screen, landscaping, hours of operation, lighting, numbers of persons involved, allied activities, ventilation, noise, sanitation, safety, some and fume control and minimizing of noxious, offensive or hazardous elements;

6. The proposed special exception does not materially and adversely affect the safety, health and general welfare of the Township.

Subsection 32 of Article XII, Section 1200 of the Zoning Ordinance specifically deals with applications for a special exception relating to the operation of a winery. Subsection (d) requires that the winery be located on a lot with a minimum size of 5 acres. The applicants’ property is just over 2 acres in size.

Section 1404.A of the Zoning Ordinance generally confers upon the Zoning Hearing Board the following authority to grant a variance:

...the Zoning Hearing Board shall have the power to authorize, upon appeal, in specific cases such variance from the terms of this Ordinance as will not be contrary to public interest, where owing to special conditions a literal enforcement of the provisions of the Ordinance will result in unnecessary hardship, and so that the spirit of the Ordinance shall be served and substantial justice done. Such unnecessary hardship may not have been created by the applicant.
In considering an application for a variance, the Zoning Hearing Board must review the following factors, contained in Section 1404 B.3 of the Zoning Ordinance:

a. That there are unique physical circumstances or conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the Zoning Ordinance in the district in which the property is located;

b. That, because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the Zoning Ordinance and that the authorization of a variance is, therefore, necessary to enable the reasonable use of the property;

c. That such unnecessary hardship has not been created by the applicant;

d. That the variance, if authorized, will neither alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare;

e. That, in the case where the property is located in party or totally within the designated floodplain, the granting of a variance will not increase the base flood elevations; and

f. That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

In an effort to establish the sort of hardship required for the variance requested, applicants presented three separate theories for consideration: 1) that the minimum lot size requirement was enacted after the purchase of the property, and as such, the property has acquired “grandfather rights;” 2) that the variance requested is so minor that it should be labeled *de minimus* and granted as such; and 3) that the minimum lot size requirements conflict with the mandate of the Pennsylvania Right to Farm Law, and as such a variance is required. It is the
opinion of the Zoning Hearing Board that none of these three theories fit within the accepted
definition of a hardship under the law of this Commonwealth.

According to the narrative submitted by applicants along with their application, the
property was originally purchased in 2007. However, the Deed attached to the Application
(admitted as Exhibit 1) indicates that the current owners, [Redacted], acquired title
to the property in March 2019. While [Redacted] may have acquired this property with his
former spouse in 2007, in the intervening time, and notably subsequent to the enactment of the
2009 Zoning Ordinance, there was a change in ownership status of the property. While this fact
alone may serve to defeat the claim of “grandfathered rights,” what is more is that the applicants
testified at the hearing that the planting of the vineyard on the property, and the application for a
special exception for a winery did not occur until long after the enactment of the 2009
Ordinance. More specifically, while the applicants may have envisioned a winery at the home at
purchase, no action was taken to plant the vineyard until sometime in 2017 or 2018, and no
application was made for a winery until May 2019, and again in December 2019. All of these
events occurred subsequent to the enactment of the 2009 Zoning Ordinance that imposed the 5-
acre minimum size requirement for a winery. As such, any claim for “grandfather rights”
pursuant to any previous versions of the Zoning Ordinance must fail.

With respect to the argument that the variance requested is de minimus in nature,
Applicants presented as evidence certain sections and parts of the Zoning Ordinance of Upper
Saucon Township to establish that the Zoning Ordinance in a neighboring Township permits the
Zoning Hearing Board to grant relief in certain situations if it determines that the relief sought is
de minimus in nature. Applicants admitted, however, that no such provisions exist in the Lower
Milford Zoning Ordinance. Applicant further argued that, since the neighbors did not object to
their proposal, and since aerial photography shows that the neighborhood surrounding the property is not densely populated, the Zoning Hearing Board should grant the variance.

The property at issue is significantly undersized. The minimum lot size for a winery, according to the Lower Milford Zoning Ordinance, is 5 acres. The applicants have less than half that amount of space. There is nothing within the Lower Milford Zoning Ordinance that would provide the authority for the Zoning Hearing Board to ignore the mandated size requirement because of a *de minimus* finding, even if the Board were to determine that this variance was of that nature.

Lastly, applicants argue that the Pennsylvania Right to Farm Law prohibits municipalities from enacting such legislation that would serve as a nuisance to the owners right to sell the products of their farming – in this case, the wine that comes from the grapes planted and harvested at the property. More specifically applied, the applicant seeks a finding from the Zoning Hearing Board that the 5-acre minimum lot requirement for a winery is a nuisance regulation that is preempted by the Pennsylvania Farm Law. The Zoning Hearing Board is authorized to enforce the rules and regulations imposed by the Lower Milford Zoning Ordinance. In a hearing seeking a variance, the Zoning Hearing Board does not have the authority to find that any of the provisions of the Zoning Ordinance are preempted, or otherwise unenforceable. Analysis on a request for a variance is limited to the areas identified in the Zoning Ordinance as well as the Municipalities Planning Code, none of which provide the authority the grant the relief suggested or requested by the applicant.

Simply failing to meet the standards imposed by the Zoning Ordinance is not a hardship as defined by the Zoning Ordinance or common law. That the property is located in a certain zone, with certain restrictions on the use and development of the property is not a sufficient basis
for the claim of hardship. The claim of a hardship must focus on the physical characteristics of the property itself and must show that the property is of such a nature that, as zoned and restricted, it is effectively of no value. In that regard, it is not enough for an applicant to allege that the zoning classification or restrictions prohibit the precise activity desired; it must be that the zoning classification and restrictions prohibit any valuable use of the property.

That the applicants do not have the space to run a winery does not render their property useless or of no value. The 2-acre property not only contains their home, it also includes an existing vineyard, goats and chickens. Testimony at the hearing established that the soil located on the property would support substantial and wide-ranging crop growth, and that in the past, the property was home to other farm-based operations. While it is unfortunate that the Applicant is unable to achieve a desire to run a commercial winery from this location, that frustration is not a legally recognized hardship that would give the Zoning Hearing Board the authority to grant the requested relief.
ORDER

For the reasons stated, the application for a variance is denied.

BY THE BOARD:

Sheila Quigley
Sheila Quigley

Girard Graham

Denise G. Holub

James Stango

Dissenting from this Decision:

Roger Hall

DATE: February 19, 2020
Lower Milford Township  
Zoning Hearing Board  
7607 Chestnut Hill Church Road  
Coopersburg, PA 18036  

January 22, 2020

Re: [REDACTED] Variance APPROVAL Request

Dear Lower Milford Township Board Members,

We are truly blessed that you are willing to hear us again. We know your time is valuable and we sincerely appreciate every minute you spare us.

Since we last left you, my family and I have been eagerly searching for additional property to purchase in close proximity to satisfy the boards concerns regarding the minimum area requirements for a winery. We have appealed to both our neighbors who respectfully declined the sale of property and we nearly pursued a land deal only a quarter mile from our home until we uncovered the property to be mostly unusable and considered wetland. We eagerly await additional farmland to enter the market and have been in contact with the USDA Farm Agency as well as Mid Atlantic Farm Credit in preparation for securing farm loan funding to move forward.

Until additional land is available, we would like to lay two arguments respectfully before the board this evening and solidify the Variance and Special Exception to proceed with the Winery as previously submitted before the board.

**Reasoning #1 - Hardship**

As stated in the Lower Milford Ordinance, for a variance to be granted, a hardship must be provided.

Our stated hardship is this:

Our property was purchased in 2007 with the intention to homestead and farm the property as an agricultural resource producing and selling farm goods to our Lower Milford neighbors under the guidelines of the 1997 Lower Milford Zoning Ordinance, as well as ordinance amendments dated May 27th 2003 relating to the addition of subsection 332.14 Vineyard and Winery. This subsection focuses on concerns solely of maximum building size with no mention of lot size requirements.

While at the time, it was all we could do to financially support and maintain the property as a residence; our family was growing, and things were financially tight. But through hard work and perseverance we eventually found ourselves in a position to pursue the homesteading and agricultural dream we carried and for several years that agricultural dream meant viticulture and opening a winery. After putting enough money away, we felt we could finally implement our business plan. Our initial step was to plant the vineyard which we did, purchase processing equipment which we did and make our first few batches of amazing wine, which we did. The next step was to apply for an AC exception, and moving on to constructing the winery.

At this point, we find our progress is stopped instantly because of a superseding ordinance limitation on lot size coming to pass in 2009, only 2 years after the purchase of the property, preventing the property
from becoming what it was originally intended to become. We respectfully stand here tonight pleading for
the board to view this as Grandfathered Rights and or a Viable Hardship.

In the event that the board decides the hardship stated above is not adequate, we hereby respectfully plead
with the board members to consider the ordinance subsection in question, in this particular instance, be
labeled DE MINIMIS or too trivial or minor to merit consideration, when held in contrast to the open
space satellite map exhibit. It is apparent that natural buffer areas, while not within our ownership, clearly
exist and satisfy the intention of the subsection thus giving the board the authority to grant the variance.

Reasoning #2 - Right to Farm Law

My family and homestead are blessed to be a part of the Lower Milford Township Agricultural
Conservation District. As members of the Pennsylvania Farm Bureau, we desire and strive for
preservation and conservation of local farms, farmland and open space. My family is committed to
backing farm preservation and working with the community to maintaining the beauty of Lower Milford
Township.

While the intention of the Lower Milford Township Ordinance Section 103 “Conflict” of the Lower
Milford zoning Ordinance is clearly understood, stating, “when one ordinance imposes greater restrictions
than another regarding land use, the stricter ordinance shall be controlling”, we would like to make note
of additional Township ordinance declarations we feel the Township should be held responsible for and
are relevant to our variance and special exemption request.

Lower Milford Township Ordinance Article 1 Section 104 “Community Development Objectives”

This Zoning Ordinance reflects the following community development objectives of Lower Milford
Township as specified in the policy goals found within the Southwestern Lehigh County Comprehensive
Plan of 2005:

Subsection 11 states “Encourage uses within the Township that promote tourism by building upon the
area’s heritage, arts, culture and recreational assets.”

Lower Milford Township Ordinance Article 3 Agricultural Conservation District Section 300
“Intent” Subsection C

In accordance with the objectives of the Southwestern Lehigh County Comprehensive Plan, and in
addition to achieving other community development objectives of Section 104 of this Ordinance, the AC
Agricultural Conservation District is intended to: “Support the Township and regional agricultural
economy and agri-tourism efforts;” “Residents of the AC – Agricultural Conservation District must be
willing to accept the impacts associated with daily farming practices and related businesses”.

Lower Milford Township Ordinance Article 3 Agricultural Conservation District Section 301 “Use
Regulations”

B. Uses permitted by special exception.

Within the AC-Agricultural Conservation District the following uses may be permitted by the Zoning
Hearing Board as a Special Exception in accordance with Article 14, the applicable supplemental
standards of Article 12, and any other applicable provisions of this Ordinance. Special Exception uses
shall be compatible with the surrounding neighborhood and shall not be detrimental to public health, safety, or welfare:

10. Winery.

Now Let's talk Pennsylvania Right to Farm Law....

The State of Pennsylvania Agricultural Security Handbook section 8.3 states the Pennsylvania Right to Farm Law. The stated legislative policy is as follows:

Section 951: “It is the declared policy of the Commonwealth of Pennsylvania to conserve, protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. When nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits and ordinances. As a result, agricultural operations are sometimes forced to cease operations. Many others are discouraged from making investments in farm improvements. 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.”

We are here this evening to appeal to the board, viticulture and the production of wine from grapes is acknowledged by the Commonwealth of Pennsylvania as a “Normal agricultural farming operation” and is legally protected by nuisance claims inherently classifying Lower Milford Township Article 7-Supplemental Regulations, Subsection 32d. “The minimum lot area for establishment of a winery is five (5) acres” a clear contradiction of State Law.

For the Right to Farm Law to apply, one must be considered to engage in “Normal agricultural operation”. To further clarify that shall be protected by the Right to Farm Law, Section 952 of the Right to Farm Law “Definitions”, defines “Normal agricultural operation.” As the activities, practices, equipment and procedures that farmers adopt, use or engage in the production and preparation for market of poultry, livestock and their products and in the production, harvesting and preparation for market or use of agricultural, agronomic, horticultural, silvicultural, aquaculture crops and agricultural commodities (applicable to and is:

(1) not less than ten contiguous acres in area; OR

(2) less than ten contiguous acres in area but has an **anticipated** yearly gross income of at least $10,000. (applicable to See Farm to Wine Conversion Chart.

An “Agricultural commodity.” Is defined as any of the following transported or intended to be transported in commerce:

(1) Agricultural, aquaculture, horticultural, floricultural, viticulture or dairy products.

The definition of Viticulture (from the Latin word for vine) or winegrowing (wine growing) is the cultivation and harvesting of grapes which is a branch of the science of horticulture

(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.
Now that we’ve clarified that [redacted] satisfies the requirements as an Agricultural Operation, we can look at the ordinance in question.

In the board’s response to our previous variance hearing, the board stated “The 5 acre property size required by the zoning ordinance for a winery provides a buffer area. Even though the neighbors were supportive of the project, the lot size is simply too small for the use proposed by the applicants.”

****If we look at the board’s response, we feel we can all equally interpret the intention of the ordinance subsection as to prevent infringement on neighbors by way of a nuisance or some similar undesirable effect, internally defining the ordinance subsection 5-acre lot requirement a nuisance prevention ordinance. Not only are we promoted by our neighbors but feel we are protected by the Right to Farm Law in this respect and have a legal right to proceed with the Farm Winery as expressed by State Law. [redacted] would be protected by such claims making the issue of a buffer area or potential nuisance null and void.****

Now let’s look at how the State specifically views this type of local ordinance.

Right to Farm Law Section 953 “Limitation on Local Ordinances” states the following

(a) Every municipality shall encourage the continuity, development and viability of agricultural operations within its jurisdiction. Every 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.

(b) *****Direct commercial sales 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 (regardless) of municipal ordinance, public nuisance or zoning prohibitions. *****

We have also prepared and provided additional exhibits from our neighboring Upper Saucon Township Ordinance for the board be aware of and to take into consideration.

**Right to Farm Exemption Example - Upper Saucon Township Ordinance Section 424 Titled “Commercial Produce Operations” Subsection B “ states...Within the Agricultural Zone the minimum lot area is ten (10) Acres, except that this may be reduced if the applicant can demonstrate compliance with the Pennsylvania Right to Farm Law;**

**Agricultural Nuisance Disclaimer Example - Upper Saucon Township Ordinance Article 2 Subsection 201.1 All lands within the Agricultural Preservation Zone are located within an area where land is used for commercial agricultural production. Owners, residents and other users of this property may be subjected to inconvenience, discomfort and the possibility of injury to property and health arising from normal and accepted agricultural practices and operations, including, but not limited to, noise, odors, dust, the operation of machinery of any kind, including aircraft, the storage and disposal of manure, the application of fertilizers, soil amendments, herbicides, and pesticides. Owners, occupants and users of this property should be prepared to accept such inconveniences, discomfort and possibility of injury from normal agricultural operations, and are hereby put on official notice that Section 4 of Pennsylvania Act 133 of 1982, “The Right to Farm Law,” and the Agriculture Communities and Rural Environment**
(ACRE), PA Act 38 of 2005, may bar them from obtaining a legal judgment against such normal agricultural operations. all subsequent subdivision plans submitted within the Agricultural Zone shall require a note which duplicates this section and which must be transferred to the purchaser by the seller.

**De Minimis Example - Upper Saucon Township Ordinance Section 1010 Titled “Powers and Duties” Subsection 1.G. “Variances” states...** A grant of a variance shall not be allowed simply for economic reasons if the applicant has not met the required standards for a variance that are provided in State law, which are restated in paragraphs. A through. E above. The reasons for granting a variance must be serious, substantial and compelling, unless the applicant is able to prove that a de minimis variance is being requested.

*****Based on the information provided to us by the Commonwealth of Pennsylvania as discussed here this evening, and the fact that all other supplemental regulations and requirements can be met regarding a Winery, we respectfully ask the board to grant the requested variance and allow... to proceed to the permitting and construction phase of the project.*****

Closing Statement (APPROVED) – We are truly thankful for each member here tonight and would like to express our gratitude to each of you for your service, hard work and sacrifice to this township. Your position is truly a labor of love; we look forward to working together in the future to make the most of this beautiful area our Lord had blessed us with.

Respectfully, that is all we have.

Sincerely,