

[REDACTED]

December 29, 2021

Robert A. Willig, Esquire
Office of Attorney General
1251 Waterfront Place
Mezzanine Level
Pittsburgh, PA 15222

RE: ACRE Complaint-Upper Hanover Twp., Montgomery County

Dear Mr. Willig:

I serve as solicitor to Upper Hanover Township, and I am responding to your letter of December 6, 2021. Your letter requests a response from the Township to the assertion of Township resident, [REDACTED], that the Township's enforcement of its noise ordinance against her violates the Agricultural Communities and Rural Environment law ("ACRE") because her barking dogs are actually livestock guard dogs that are a part of the "normal agricultural operations" on her property and therefore are protected from local regulation. She attached a pamphlet to her email to your office that generally explains livestock guard dogs, but she has thus far offered no details about her own dogs or the specific nature of the manner in which her property is used.

A. THE NOISE ORDINANCE

The Township noise ordinance is viewable on the Township website, www.upperhanovertownship.org. The relevant section is 500-2804, which prohibits "Owning, possessing or harboring any animal or bird that frequently or for continued duration generates sounds that create a noise disturbance across a residential real property line." While clearly this is in no way directed specifically at agricultural operations, I understand the issue to be whether it amounts to a local interference with normal agricultural operations as applied to [REDACTED] property.

Procedurally, the noise ordinance is a part of the zoning ordinance, and therefore the violation is pursued through the Pennsylvania Municipalities Planning Code. The MPC requires that an appeal of a notice of a zoning violation be taken to the township Zoning Hearing Board. If no appeal is filed within thirty days, the violation is considered conclusively established, and a complaint can then be filed with the local magistrate for the determination of a possible fine. Presently, [REDACTED] did not appeal her zoning violation notice and a magistrate hearing was scheduled for the possible imposition of a fine. Upon receipt of your letter, we requested and obtained a continuance of that hearing.

In her email to your office [REDACTED] describes the noise ordinance as overbroad and "unbelievable". I would offer on the basis of my experience in this area of law that the ordinance looks very much like other noise ordinances in municipalities around the state. With respect to her observation that her citation was mentioned in the newspaper before she was contacted, this was because the Township Board of Supervisors votes to authorize litigation and thus their discussion by definition precedes the issuance of the citation.

B. THE SUBJECT PROPERTY

The property is owned by [REDACTED] and a [REDACTED]. They have owned it for six years according to county records. It is 2.9 acres and is in the R-3 residential zoning district. There is a stand on the property at the edge of the road indicating that flowers, eggs and vegetables are sold there. A Google Earth image of the property is attached to this letter and from it you can observe that the [REDACTED] property is surrounded by single family homes on comfortably sized lots, except along one side, where the property abuts the parking lot of an office park.

The Township has no knowledge of the volume of sales and assumes that [REDACTED] will be required to demonstrate through tax returns and other records the extent of sales from the asserted agricultural operation. In her email to you [REDACTED] represents the ownership of cows, goats, emus, chickens, turkeys and ducks. The observation is made that the fowl could all be protected in the first instance by being cooped. While there are very occasional reports of a lone coyote in parts of the county, packs of them have never been reported and there is no basis on which to think that cows and emus are potential victims of predation. This really only leaves the goats as potential victims of a large predator, and it is unclear what is derived from the goats and sold to the public.

In the R-3 zoning district, an agricultural operation on a lot that is at least two acres, but less than 3 acres, may include ten fowl, four animals the size of a sheep or goat, and one cow or horse. Ordinance 500-808(b)8. [REDACTED] representation in her email that she has multiple cows on the property would appear to be an acknowledgement of an ordinance violation and in fact the Township would be able at a hearing to produce photographs of more than one cow on the property. However, horses and cows in this region do not have any natural predators.

Although the Township ordinances do recognize a limited amount of permissible agricultural activity on an R-3 residential property, it is not the primary use of the property, and the ordinance expressly identifies the agricultural use as an accessory use to the primary use of residential [REDACTED] property is not a farm under the zoning ordinance, which defines a farm as "A premises of at least *five acres* which is used for the production of agricultural commodities in their unmanufactured state, such as raising livestock, and which shall include those activities which are customarily associated with such production, including the application of manure and/or fertilizers for crop production."

In 2019, the Township issued a zoning violation notice to [REDACTED] and [REDACTED] for exceeding the permitted number of animals on the property. There was no challenge to any Township ordinance under *ACRE* or any other law. [REDACTED] and [REDACTED] appeared before the Township Board of Supervisors to ask whether they could form a cooperative with their adjacent neighbor so that the neighbor's 11 acres could be combined with their own acreage to make them compliant with respect to the number of animals at the location. That request was denied.

C. LIVESTOCK GUARD DOGS

Historically, livestock guard dogs trace back to ancient times, helping herders move herds across vast areas. In the 1970's, they saw an increase in use in parts of the United States after the federal government outlawed certain chemicals that were previously used as a defense against predators.

They are trained from a young age to stay with the herd they are protecting, and this training is coupled with a natural inclination, especially in certain breeds. They are to be distinguished from house pets and even from a farm's working dogs, especially in the sense that they wish to stay with the animals they are protecting at all times and indeed view themselves as a part of the herd or group. Most internet discussions of LGD's involve farms of considerable size.

In a 1985 study covering multiple U.S. states, only 22 percent of the sheep farmers in the study had a flock that was less than one hundred, and by a fair reading they certainly did not have only four sheep. See, *Livestock Guarding Dogs: Their Current Use Worldwide*, by Robin Rigg, slovackwildlife.org. In an article entitled "Mitigating Human Conflicts with Livestock Guardian Dogs in Extensive Sheep Grazing Systems", *Rangeland Ecology & Management*, Volume 73, Issue 5, September 2020, the authors concluded that LGD's should be 1500 feet from recreation and residential areas. In their totality, although there is nothing that expressly disallows LGD's on a 2.9-acre lot, the articles on this topic refer repeatedly to the use of such dogs in the manner one might expect: across vast areas of land where other alternatives, including fencing, are not possible. By way of example, a voluntary program in 1978, in which the dogs were supplied free of charge to farmers who agreed to participate, included a minimum threshold for participation of at least two dozen sheep or goats and a proven past threat of predation. "A Decade of Use of Livestock Guarding Dogs", University of Nebraska-Lincoln, <https://digitalcommons.unl.edu/vpethirteen>. In a 2020 article in *The Wildlife Society* entitled "Cost Effectiveness of Livestock Guardian Dogs for Predator Control", Volume 44, Issue 1, the authors concluded that the costs of acquiring and maintaining five LGD's on a farm with 500 sheep would exceed the savings from reduced predation. Stated most simply, LGD's are only worth it where there is high predation and dogs that are effective in significantly reducing the predation rate.

Upper Hanover Township requests that [REDACTED] be required to satisfactorily answer the following questions:

- a. How many dogs are on the property?
- b. What breed are the dogs, and at what age were they introduced to the animals they are protecting?
- c. What training did they receive?
- d. Were the dogs obtained in response to actual predation episodes or was it simply assumed that they would be needed?
- e. Have other alternatives been considered to protect the livestock?
- f. What details can be provided about the nature of the agricultural operations on site, including a description of the manner in which each animal listed in her email is a part of the operation?

g. Can she produce documentation of having grossed over \$10,000.00, including tax returns that include income from these gross receipts?

D. ACRE ANALYSIS

Since [REDACTED] did not appeal the zoning violation notice, it has been conclusively established as a factual matter that the barking of her dogs amounted to a violation of the noise ordinance. In order to halt further application of the ordinance, she must demonstrate that the barking of the dogs is a part of “normal agricultural operations”.

The Township suggests that the first inquiry is whether the property enjoys the protection of ACRE, which borrows from the Right to Farm Act in much of its language. These acts do impose a minimum earning requirement for farms under ten acres in size, but mustn't the property nonetheless meet the definition of “farm”? The Township's minimum size for a farm, five acres, is not met here, and the agricultural activities are only an accessory to the primary use, residential. Neither the Right to Farm Act nor ACRE expressly defines what a farm is, focusing on the activity being conducted, but they do refer to the activity being undertaken by “farmers”, whereas [REDACTED] is better described as a resident. Requiring that the property in question meet the definition of “farm” is consistent with the very reason that these laws were enacted, which was to protect farmland, i.e., “geographic areas where agriculture has traditionally been present.” See, *Tinicum Township v. Nowicki*, 99 A3d 586 (Pa. Comwlth. 2014). It is also noted that while a farmer may of course reside on the farm, courts have recognized the dictionary definition of a farm as land “devoted to special or general cultivation”, i.e., with such activity as its primary purpose. *Commw v Hammond*, 4 Pa D&C 2d 577 (1955).

Equally important, even if an accessory agricultural use allows the property to be considered a farm, the inquiry must be considered in context. In the unreported decision *Boswell v. Skippack Township*, 2012 WL 8670346 (Pa. Cmwlth. 2012), landowner filed a complaint in Commonwealth Court's original jurisdiction after the Attorney General declined to pursue a claim on the landowner's behalf. The landowner sought a determination that his use of a device called the Critter Blaster Pro to scare deer away from his tree farm (so that they would not eat the tree bark) was part of a “normal agricultural operation” and thus precluded the Township's application of its “Peace and Good Order” ordinance. The landowner did not prevail because although he produced an opinion from the Game Commission that devices like the Critter Blaster are commonly used as deer deterrents, there was no proof that it amounted to a normal agricultural

operation *contextually*, as actually applied to landowner's property. The inquiry is fact and circumstance specific.

Thus, boom mounted water irrigation canons that do not warrant a second look on a large farm could under no circumstance be characterized as normal on [REDACTED] 2.9-acre residential parcel. The same could be said about any number of devices or structures common to larger parcels devoted to farming. Hence, it is not enough to merely ask whether it is common to see livestock guard dogs on a farm, but whether it is something that could be considered ordinary on a 2.9-acre parcel in a high-density residential zoning district where agricultural activity is only a secondary use. The time and money that have to be invested in livestock guard dogs cannot be justified in this context, and there is no explanation of the extent to which fencing and traps were explored first- in fact, there are no details regarding actual events of loss from predation, absent which the dogs would not be a normal addition to the property even if it were legitimately a farm.

[REDACTED] has declared in conclusory fashion that her dogs are livestock guard dogs and has offered no evidence with respect to the dogs themselves or which supports a conclusion that they are a part of normal agricultural operations on her property, which Upper Hanover asserts does not enjoy the protections of ACRE in the first instance. The Township is prepared to provide a supplemental response either after additional materials are submitted or upon a request from your office.

Respectfully,

[REDACTED]

cc: [REDACTED]
Upper Hanover Twp.

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Google Earth

Imagery date: 9/22/20 - newer

40 m

Camera: 372 m

40°24'18"N 75°30'57"W

107 m

