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June 20, 2022

Via email [redacted]
Office of the Attorney General
1251 Waterfront Place
Mezzanine Level
Pittsburgh, PA 15222

RE: ACRE Complaint—Upper Makefield Township, Bucks County

Dear Attorney Willig:

Please be advised that this firm serves as solicitor to Upper Makefield Township ("Township"). The Township is in receipt of a complaint submitted to the Attorney General's Office on January 26, 2022, and your correspondence dated February 23, 2022, in which you outline a request to review the Township's zoning ordinance as it relates to purported issues of Animal Equivalent Units, Intensive Agriculture, and Agritainment, among other issues. The Township believes its ordinances comply with all existing state law, are consistent with ACRE, and are within the Township's authority under the Municipalities Planning Code. Please allow this correspondence to serve as the Township's response to the complaint.

Procedural and Factual History

On June 10, 2021, Upper Makefield Township issued a zoning enforcement notice ("Enforcement Notice") against the Complainants, [redacted] ("Owners") citing eight separate violations of the Joint Municipal Zoning Ordinance, which governs land use in Upper Makefield Township ("JMZO"). The property is 8.7 acres and located along a busy road in Upper Makefield Township ("Property"). The violations were as follows:

- Failure to comply with JMZO §1403,A.1. which requires a zoning use permit
- Failure to comply with the JMZO §803,H-15.1.a which requires a safe means of egress and ingress from a public street for Roadside Stands for Sales of Agricultural Products Grown on Site

- Failure to comply with JMZO §803,H-15.1.b.(1) which requires a minimum lot area of ten acres for the Agricultural Sales of Farm Products Use

- Failure to comply with the JMZO §803,H-15.1.b.(4) requiring that the Agricultural Sales of Farm Products Use be an accessory use to a principal agricultural use, rather than a principal use in itself.

- Failure to comply with JMZO §803,H-15.1.c.(2) requiring that the Agricultural Entertainment Use be an accessory use to a principal agricultural use, rather than a principal use in itself.

- Failure to comply with JMZO §803,H-15.1.c.(3) requiring that the Agricultural Entertainment Use occur only on lots that measure at least twenty-five (25) acres.

- Failure to comply with JMZO §803,A.A-1 which sets limitations on the number of grazing and non-grazing animals permitted to be kept.

- Failure to comply with JMZO §803,A-2 requiring the Intensive Agriculture Use occur only on lots that measure at least ten (10) acres.

Owners appealed the Enforcement Notice to the Upper Makefield Township Zoning Hearing Board ("Zoning Hearing Board"). In addition to the appeal of the Enforcement Notice, the Owners sought variances for their operation as well. The Zoning Hearing Board conducted three nights of testimony before issuing a decision dated April 1, 2022, denying the Owners' appeal of the Enforcement Notice and denying Owners' requested variances. The Zoning Hearing Board's decision, which includes findings of fact made in its role as a quasi-judicial board, is attached hereto and incorporated herein as ***Exhibit "A"***. Without reciting each factual finding made by the Zoning Hearing Board, the Township wishes to highlight certain aspects of the decision.

At the outset, a determination of the Owners' actual use(s) of the Property is crucial to ascertaining whether it complies with zoning, let alone is the type of activity protected by ACRE. The Zoning Hearing Board found that the Owners were offering their Property as a petting zoo, allowing members of the public to enter upon the property *for admission price* to interact with animals and to take part in activities wholly unrelated to agriculture, such as opportunities to host birthday parties, opportunities to play on a rock-climbing wall, to use a trampoline, etc. In addition to the petting zoo operating on the Property, the Owners sell products, some which are produced

on the Property, but numerous which are imported from off-site (e.g., refrigerated beverages, fruits, and vegetables purchased and resold at the Property). Finally, the Owners sell animals for consumption, selling them live or slaughtered on site *and* are selling live animals for companionship (e.g., cats, dogs, rabbits, guinea pigs). The only approved use which exists on the Property is for the use as a single-family detached dwelling. The Owners have not obtained a permit for any other use, despite running a commercial operation in which they charge admission to their Property.

The Zoning Hearing Board found that the Owners keep over five-hundred chickens on the Property in addition to numerous other fowl. The Owners also keep six ponies, twelve goats, six sheep, two donkeys, one mule, and one cow on the Property. Despite constructing numerous structures on the Property to support their operation and changing uses of the property with no regard for zoning, the Owners have submitted only one zoning permit application. The application was returned as incomplete pending a site visit and a site plan. The Township received no further applications. The Zoning Hearing Board found that the Owners run petting zoo and commercial sales operations in violation of the Zoning Ordinance.

The Zoning Hearing Board denied all relief requested by the Owners. The Owners, who made many of the same arguments to the Zoning Hearing Board as in their Complaint, appealed the decision to the Court of Common Pleas of Bucks County. The case is pending before the Common Pleas at Case No. 2022-02001.

Nutrient and Odor Management Act

Most of the Owners' complaint stems from a mistaken belief that the Nutrient and Odor Management Act ("NOMA") provides the exclusive mechanism of regulating animal-keeping in Pennsylvania, particularly to the exclusion of zoning ordinances enacted under the Municipalities Planning Code (53 P.S. §10101, *et seq.*). In fact, NOMA only regulates nutrient management and odor management. It regulates the storage, handling, and application of manure. It does not regulate land use generally. The exclusion or preemption of municipal regulations is *only for nutrient management practices.* The express preemption language in NOMA reads as follows:

> No ordinance or regulation of any political subdivision or home rule municipality may prohibit or in any way regulate *practices related to the storage, handling or land application of animal manure or nutrients* or to the construction, location or operation of *facilities used for storage of animal manure or nutrients or practices otherwise regulated by this chapter* if the municipal ordinance or regulation is in conflict with this chapter and the regulations or guidelines promulgated under it.

3 P.S. § 519(b), emphasis added. In its entire thirteen-page complaint, Owners do not at any time point to a single Township ordinance which regulates practices related to animal manure or the

location of facilities used to store animal manure. Instead, they simply ignore the preemption language and argue that, because NOMA contains a method of calculating animal density *for the purposes of nutrient management*, the Township is preempted from regulating anywhere in the field of animal-keeping or land use involving animals. Upon review of the appellate court cases involving ACRE challenges to ordinances apparently preempted by NOMA each case where preemption was found centers on a municipal ordinance which expressly regulates nutrient management. See e.g., *Burkholder v. Zoning Hearing Bd. of Richmond Twp.*, 902 A.2d 1006 (Pa. Cmwlth. 2006) finding preemption of setback requirement for building housing a manure containment structure; *Berner v. Montour Twp. Zoning Hearing Bd.*, 217 A.3d 238, 248 (Pa. 2019) finding preemption of zoning ordinance requiring for the submission and approval of "manure and wastewater management." The appellate courts have not found preemption where the regulations had no bearing on the practices or facilities related to the storage, handling, or application of animal manure. The Owners repeatedly ignore the distinction between nutrient management requirements under state law and zoning.

Owners argue that the Zoning Ordinance method of calculating animal density violates NOMA. The JMZO contains a set of regulations that allow property owners to keep Grazing Animals on a property. An Animal Grazing Unit is "One horse, cow or mule; or two donkeys; or four alpaca; or five sheep; or six goats; or one of any other grazing animal not listed...." Where an owner keeps more than those permitted, they may still do so but only under the Township's Intensive Agriculture Use.

State law sets a method for calculating animal density for the determination of nutrient management practices. Those regulations do not speak to the number of animals permitted on a site (and in fact contain no mention of a total carrying capacity for a property of any particular size) and apply for the purposes of nutrient management. To state it another way, state law will not prohibit a certain number of animals on a property so long as an owner can obtain an approved nutrient management plant. That does not mean that a zoning ordinance, which makes no mention of nutrient management, cannot regulate animal density. The Township is free to define animal populations density as it sees fit because it is measuring animal population density for a completely different purpose than for the Nutrient Management Act.

The fact that the Nutrient Management Act sets forth a method of calculating animal density for nutrient and odor management in no way forecloses on the Township's authority to calculate animal density in a different manner for traditional zoning and land use purposes. The MPC expressly allows municipalities to zone for intensity of uses (53 P.S. §10603). The Commonwealth Court succinctly stated this proposition, writing:

> In essence, the Attorney General argues that because the Commission has decided that site plans should be included with nutrient and odor management plan submissions under the NMA, municipalities are preempted by Section 519 of the NMA from requiring an applicant for special exception approval to submit a site plan as part of its application. *We, however, see no conflict or inconsistency between the site plan requirement under the NMA regulations and a local ordinance that requires an applicant for*

> *land use approval to submit a site plan to a municipal body. Each serves a separate purpose with independent legal significance. One provides the Commission with information the Commission requires to review odor and nutrient management plans under the NMA. The other provides the municipality, exercising its authority to regulate land use and development under Section 501 of the Municipalities Planning Code (MPC)*, see Hamilton Hills Group, LLC v. Hamilton Twp. Zoning Hearing Bd., 4 A.3d 788, 795 (Pa.Cmwlth.2010), with the information the municipality requires to ensure that the proposed land use is consistent with the local ordinances that authorize, govern, and restrict that use.

Com., Off. of Atty. Gen. ex rel. Corbett v. Locust Twp., 49 A.3d 502, 508–09 (Pa. Cmwlth. 2012), emphasis added. Owners repeat this same erroneous extension of NOMA to zoning regulations throughout their complaint.

Overgrazing- JMZO §803.A.A-1.3.a.1:

The Zoning Ordinance states:

> Livestock shall not be permitted to over-graze any property in the Jointure Municipalities except during the winter months of November through February. Over-grazing shall be defined as grazing to the point of removing all or almost all vegetative growth from the ground, leaving only one inch or less of cover.

First, the Owners fail to point to any state law that conflicts with this provision. They argue that their Nutrient Management Plan accounts for grazing management and therefore any municipal regulation that broaches the subject of grazing management is preempted. Owners confuse the concepts of field and conflict preemption. While the Nutrient Management Act starts with a proposition that the legislature intends to "occupy the whole field of regulations regarding nutrient and odor management, to the exclusion of all local regulations," later in the same section NOMA reads:

> Nothing in this chapter shall prevent a political subdivision or home rule municipality from adopting and enforcing ordinances or regulations which are consistent with and no more stringent than the requirements of this chapter and the regulations or guidelines promulgated under this chapter.

3 Pa.C.S.A. § 519(d). The legislature expressly permits municipalities to enact local ordinances that are consistent with and no more stringent than the NMA requirements. Therefore, preemption of a zoning ordinance does not inevitably follow simply because a state required plan includes grazing management best practices. Owners would have to show that the above-referenced ordinance provision (JMZO §803.A.A-1.3.a.1) is more strict or inconsistent with state law. More

specifically, Owners would have to show that the zoning ordinance which prohibits over-grazing to the point of removing nearly all vegetative growth is more strict than state regulations.

The Zoning Ordinance provision is clearly consistent with state law. Owners advance an absurd interpretation of state law that amounts to an assertion that livestock shall be permitted to overgraze property. The Zoning Ordinance prohibits overgrazing; the state regulations do not say anywhere that overgrazing shall be allowed. While state regulations may be considerably more detailed and technical in defining "over-grazing," the term is consistent with local regulations. In fact, the Pennsylvania Nutrient Management Act Technical Manual prescribes grazing practices which are considerably *more stringent* than the ordinance stated above. The Technical Manual states

> - Pastures must be managed to minimize bare spots and to maintain dense vegetation at average height of at least 3 inches throughout the growing season.
>
> - Animals need to be restricted from the pasture during the winter, as well as when soil conditions are too wet or muddy to support hooved animals without causing damage to the soil structure or pasture vegetation. Grazing animals will be removed from the pasture when heat or drought conditions cause pastures to dry up and forage regrowth shuts down. During these conditions use either a temporary earthen sacrifice area or permanent concrete heavy use area.

Again, Owners appeal to an incorrect proposition: that the mere existence of a local regulation in the same realm as a state regulation necessarily causes preemption of the local regulation. The General Assembly specifically stated the scope of its preemption. It expressly carves out room for municipalities to legislate so long as the local regulations are no more strict that the state regulations. Owners fail to show the local regulation is in any way conflicting, let along more strict, than the state regulation.

Owners contort themselves to reference all of the non-statutory guides which are either incorporated or referenced in state regulations pertaining to grazing management, but still do not point to a single provision in a single guide which is inconsistent with the local ordinance prohibiting overgrazing. In fact, an examination of those guides reveals that the local ordinance is consistent with or perhaps even *less strict.* Owners cite to NRCS Practice Code 528. Under the heading "General Criteria Applicable to All Purposes" the NRCS Practice Code reads:

> Plants shall be managed by using livestock to have grazing intervals and alternating rest periods for the plants to *maintain forage in a vigorous vegetative state* at its optimum nutrient value for the animal category...

> Manage grazing and/or browsing animals *to maintain adequate vegetative cover on sensitive areas* (i.e., riparian, wetland, habitats of concern, karst areas)…
>
> Manage livestock movements based on rate of plant growth, available forage, and allowable utilization target
>
> Adjust grazing periods and/or stocking rates to meet the desired objectives for the plant communities and the associated resources, including the grazing animal.
>
> Minimize concentrated livestock areas to enhance nutrient distribution and improve or maintain ground cover

Nearly the entire guide contains provisions for assuring that grazing is conducted in a manner that is *entirely consistent with* the general proposition of the local ordinance that overgrazing is not permitted. The regulations described above, however, should not just be understood in a vacuum, void of any context applicable to the Owners' property. Owners' Nutrient Management Plan, approved by the Bucks County Conservation District contains requirements which are as strict or more so than the local ordinance. For instance, in Appendix 2 of the approved Nutrient Management Plan, the specialist states the following with respect to ground cover:

> The balance of the animals are confined 24hr per day, 365 days per year, in fenced lots, most have run-in sheds for shelter. *These animal lots are maintained year-round to keep as much grass cover as possible.*

Appendix 2 to Nutrient Management Plan, emphasis added. Clearly, a zoning ordinance which prohibits "[o]ver-grazing…to the point of removing all or almost all vegetative growth from the ground, leaving only one inch or less of cover" is not inconsistent or more strict than state law.

Keeping of Animals on Greater than Ten Acres- §803.A.A-1.3.a.2

Section 803.A.A-1.3.a.2 states:

> The keeping of animals other than pets on 10 acres or more of contiguous land shall be governed by Pennsylvania Act 38 of 2005, as may be amended, known as the Agricultural, Communities and Rural Environment Act.

Act 38 of 2005 is the Nutrient Management Act and is incorrectly stated in the Ordinance as the Agricultural, Communities and Rural Environment Act. Regardless, the Ordinance does not impose any requirements more strict than state law. It simply states that the keeping of animals on property of 10 acres or more shall be governed by Act 38 of 2005. If Act 38 of 2005 does not require any nutrient management planning due to the state animal density calculations, then the Owners would not have to submit any nutrient management planning. Owners have read into the

ordinance a requirement to submit a nutrient management plan whenever animals are kept on ten acres of more. The Zoning Ordinance does not say that the affected properties *shall* submit a nutrient management plan *regardless of state law*. In fact, it says the opposite, the keeping of animals on greater than ten acres shall comply with state law.

As a separate matter, the Township fails to see how this provision is implicated in this case at all given the Owners' property is 8.79 acres. While the Township recognizes that extent of the Attorney General's jurisdiction on ACRE cases, this provision has no bearing on Owners' property.

Animal Density Calculations- §803.A.A-1.3.a.3

Section 803.A.A-1.3.a.3 states:

> The keeping of grazing animals including, but not limited to, horses, cows, goats and sheep, on contiguous land consisting of less than 10 acres but greater than three acres, shall be limited to no more than one unit of grazing animals as defined on the first three acres of contiguous land, and one unit of grazing animals per acre for each contiguous acre over three acres

Without restating the Township's previous position set forth under the "Nutrient and Odor Management Act" section of this correspondence relating to animal density calculations, the Township reiterates its position that NOMA contains no provisions which are inconsistent with this ordinance section.

Animal Density Calculations- §803.A.A.-1.3.a.4

Section 803.A.A.-1.3.a.4 states:

> The keeping of non-grazing animals including, but not limited to, pigs, on contiguous land consisting of less than 10 acres but greater than three acres, shall be limited to no more than five head of non-grazing animals on the first three acres of contiguous land, and five head of non-grazing animals per acre for each contiguous acre over three acres.

Without restating the Township's previous position set forth under the "Nutrient and Odor Management Act" section of this correspondence relating to animal density calculations, the Township reiterates its position that NOMA contains no provisions which are inconsistent with this ordinance section.

Animal Density Calculations- §803.A.A-1.3.a.6

Section 803.A.A.-1.3.a.6 states:

> The keeping of both grazing and non-grazing animals on the same acreage described above will be limited to the maximum number of grazing and non-grazing animals for the acreage provided in the preceding paragraphs.

Without restating the Township's previous position set forth under the "Nutrient and Odor Management Act" section of this correspondence relating to animal density calculations, the Township reiterates its position that NOMA contains no provisions which are inconsistent with this ordinance section.

Animal Density Calculations- §803.A.A-1.3.a.10

Section 803.A.A-1.3.a.10 states:

> Commercial livestock operations involving more than the number of head of livestock provided for in § 803.A-1.3.a shall be regulated as Intensive Agriculture, Use A-2.

Without restating the Township's previous position set forth under the "Nutrient and Odor Management Act" section of this correspondence relating to animal density calculations, the Township reiterates its position that NOMA contains no provisions which are inconsistent with this ordinance section.

Animal Density Calculations- §803.A.A-1.3.b.1

Section 803.A.A-1.3.b.1 states:

> The keeping of poultry shall be limited to lots which contain at least three acres of land, and shall be limited to no more than 25 head of poultry for the first three acres and up to 25 additional head of poultry per acre up to 10 acres.

Without restating the Township's previous position set forth under the "Nutrient and Odor Management Act" section of this correspondence relating to animal density calculations, the Township reiterates its position that NOMA contains no provisions which are inconsistent with this ordinance section.

Animal Density Calculations- §803.A.A-1.3.b.2

Section 803.A.A-1.3.b.2 states:

> Commercial poultry operations involving more than 25 head of poultry per acre shall be regulated as Intensive Agriculture, use A-2.

Without restating the Township's previous position set forth under the "Nutrient and Odor Management Act" section of this correspondence relating to animal density calculations, the Township reiterates its position that NOMA contains no provisions which are inconsistent with this ordinance section.

Animal Density Calculations- §803.A.A-2.1

Section 803.A.A-2.1 states:

> **Intensive Agriculture.** Intensive agriculture, including but not limited to feedlots, confinement livestock, or poultry operations taking place in structures or closed pens, shall be permitted subject to the following:
>
> 1. The minimum site area for such use shall be 10 acres.

Without restating the Township's previous position set forth under the "Nutrient and Odor Management Act" section of this correspondence relating to animal density calculations, the Township reiterates its position that NOMA contains no provisions which are inconsistent with this ordinance section.

Floodplain and Alluvial Soils- §803.A.A-2.5

Section 803.A.A-2.5 states:

> If any stream or swale is present, it shall be buffered by a twenty-foot strip outside of the outer edge of the floodplain or alluvial soils. An engineering study shall be required ensuring the stream is adequately protected from pollution.

Keeping aside, for the moment, that this provision has not been enforced against the Owners, DEP requires municipalities to implement stormwater controls to protect environmental resources. State law expressly requires municipalities to implement programs minimizing the impacts of runoff. Owners have failed to demonstrate a provision of state law that is inconsistent with this requirement and, indeed, failed to consider the Township's obligations under the Municipal Separate Storm Sewer Program.

Commercial Sales

Aside from raising animals on the Property, the Owners are also operating a commercial sales operation. Owners sell some products traditionally associated with agriculture (*e.g.*, honey and eggs) but have also extended the operation to sell companionship animals (*e.g.*, dogs, cats, and rabbits) and products which bear no tangential relationship to agriculture like refrigerated beverages.

Before delving into an analysis of the Right-to-Farm Act (3 P.S. §951, *et seq.*, "RTFA") and its impact, if any, on the Zoning Ordinance, as a threshold issue, the Owners have not demonstrated that their operations are entitled to protection under the Right-to-Farm Act. The RTFA protects "Normal Agricultural Operations" which are defined 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 and aquacultural crops and commodities 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.

3 P.S. §952. Since the Property is less than ten contiguous acres, the Owners will only qualify for protection under the RTFA if they show gross income of at least $10,000. Owners have made no such demonstration to the Township and the Owners doubt such sum is generated annually without counting the petting zoo admission fees to the figure.

Owners cite to §952 of the RTFA to support the proposition that the Township should not be permitted to regulate in any way commercial sales occurring on the Property. As determined by the Zoning Hearing Board, the owners are not engaging in only sales of agricultural commodities. They are engaging in sales of companionship animals, such as dogs, cats, and rabbits; they are also engaging in sales of items having no relation to agriculture and items imported to the Property.

The RTFA states that direct commercial sales "shall be authorized, notwithstanding municipal ordinance, public nuisance or zoning *prohibitions*." Owners claim they are being prohibited from conducting direct commercial sales. To the contrary, the Township has two direct commercial sales of agricultural products uses permitted in the Township, both accessory uses to an Agricultural Use: the Roadside Stand and the Agricultural Sales Use. The Roadside Stand Use, which is permitted *regardless of lot size* as an accessory use to Agricultural Uses is defined as follows:

> Roadside Stands for Sale of Agricultural Products Grown on Site. Agricultural products grown by the residents of the property may be sold at a roadside stand on the property. Each roadside stand shall sell only products grown by the residents of the property on which the stand is located. Each roadside stand must not exceed a maximum size of 400 square feet and must also provide, to the Township's satisfaction, a safe means of egress and ingress from a public street as well as sufficient off-street parking to accommodate customers. Said roadside stand need not be in the immediate

> proximity to a public roadway if the other standards as herein set forth are met.

§803H.H-15.1.a. The Township also allows for a more intensive agricultural sales use in the Agricultural Sales of Farm Products Use, which requires a ten-acre lot size. Far from So, through these two uses, the Township provides ample opportunity for sales of agricultural products.

There is no prohibition on direct commercial sales of agricultural products in the Township. Rather, Owners interpret routine zoning requirements, such as safe means of ingress and egress, to be a prohibition. There is no support in the RTFA or elsewhere for the proposition that zoning simply does not apply to direct commercial sales in any respect. The MPC directly authorizes municipalities to regulate all aspects of building location, even for agricultural operations unless expressly preempted (see e.g., *Fazio v. Zoning Hearing Bd. of E. Marlborough Twp.*, 378 A.2d 1299, 1302 (Pa. Cmwlth. 1977) holding setback requirement for mushroom house found to be permissible exercise of municipal zoning).

The Pennsylvania Supreme Court "found an intent to totally preempt local regulation in only three areas: alcoholic beverages, banking and anthracite strip mining." *Council of Middletown Twp., Delaware Cnty. v. Benham*, 523 A.2d 311, 314 (Pa. 1987). Total preemption is the exception and not the rule. *Id.* at 315. Even assuming the proposition that a municipality must allow for sales of agricultural products in all zoning districts, there is no evidence that traditional zoning regulations do not apply to facilities where those sales occur. See, e.g., *Hoffman Min. Co. v. Zoning Hearing Bd. of Adams Twp., Cambria Cnty.*, 32 A.3d 587 (Pa. 2011) holding the Surface Mining Act's preemption clause expressly preempts the regulation of surface mining but does not preempt local regulation of land use via zoning ordinances, including setback provisions which fall clearly within the purview of traditional zoning regulations.

Agritainment

The Owners argue that the Township has misinterpreted the Zoning Ordinance to apply to their agricultural entertainment uses on the Property. They allege to not engage in the activities that the Zoning Ordinance consider to be Agricultural Entertainment. This is plainly not a determination that is permitted to be made by the Attorney General's Office under ACRE. The Attorney General's Office is not permitted to engage in ordinance interpretation to ascertain whether a particular use occurs on the Property. This endeavor is the exclusive province of the Zoning Hearing Board. Indeed, the Zoning Hearing Board *has* made this determination and it made the determination in the affirmative; in fact, the Owners *are* engaging in agricultural entertainment as the Zoning Ordinance defines the term.

The Zoning Hearing Board received substantial evidence in support of this determination. The Zoning Hearing Board received evidence that the Owners charged admission fees to the property which were distinct from the charges for any products purchased on site. The Owners featured pumpkins delivered to the Property to provide seasonal entertainment; the Owners propose to grow Christmas trees on the Property. The Zoning Hearing Board is endowed with the authority to interpret the Zoning Ordinance. The remedy for a perceived abuse of that discretion is appeal to the Court of Common Pleas from the decision of the Zoning Hearing Board. The Owners

have already pursued this option and have an appeal of the Zoning Hearing Board decision pending before the Court of Common Pleas. Without descending into an in-depth discussion on the authority of the Zoning Hearing Board to render decisions interpreting the Zoning Ordinance, the issue of whether the Owners' uses of the Property constitute Agricultural Entertainment was squarely heard and squarely addressed by the Zoning Hearing Board. The adjudication outside the bounds of the Attorney General's authority under ACRE runs the risk of inconsistent opinions and moot advisory opinions on issues presented to the Bucks County Court of Common Pleas.

The Owners pivot away from the discussion of whether their operation was properly adjudicated as an Agricultural Entertainment Use by the Zoning Hearing Board to a discussion of whether state law prohibits municipalities from regulating agricultural tourism ("agritainment"). In their complaint, the Owners presented the Attorney General's Office with speculative, unsupported arguments that, even if factually supported, provide only tenuous support for their proposition.

The MPC defines "Agricultural Operation" as follows:

> "Agricultural operation," an enterprise that is actively engaged in the commercial production and preparation for market of crops, livestock and livestock products and in the production, harvesting and preparation for market or use of agricultural, agronomic, horticultural, silvicultural and aquacultural crops and commodities. The term includes an enterprise that implements changes in production practices and procedures or types of crops, livestock, livestock products or commodities produced consistent with practices and procedures that are normally engaged by farmers or are consistent with technological development within the agricultural industry.

53 P.S. §10107. Owners do not point to any statutory support for the idea that so-called Agritainment is a Normal Agricultural Operation which would come under the jurisdiction of the Attorney General in an ACRE Complaint. The definition of "Normal Agricultural Operation" in the RTFA speaks to the "activities, practices, equipment and procedures that farmers adopt...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...crops." Nowhere in the definition is there a phrase that could be interpreted to extend the protections of Normal Agricultural Operations to recreational or entertainment uses on a property.

Among the only ACRE cases that even discuss Agritainment in the context of the RTFA is the North Middleton Township complaint filed in February of 2019. That case involves the proposed operation of a winery on a property where grapes are grown. The case, though filed in early 2019, is still pending before the Attorney General's Office as the zoning appeals work their way through the zoning hearing board and appellate courts.

To be clear, Owners propose a fundamental shift in the application of zoning ordinances throughout Pennsylvania. They propose to remove the zoning authority from municipalities for

virtually all entertainment activities that happen to occur on a farm. The only support Owners can allege to abrogate municipal zoning for Agritainment is the Agritourism Activity Protection Act (3 P.S. §2601, *et seq.*, "AAPA"), a law which has absolutely nothing to do with municipal zoning authority or preemption of local ordinances. The Owners argue that the AAPA should be used to graft Agritainment onto the definition of a Normal Agricultural Operation. Owners propose that the AAPA, *which provides for immunity from civil liability for "agritourism activity providers,"* should be read to extend the reach of the RTFA. Agritainment is an activity separate and distinct from agriculture. Agritourism has nothing to do with the production or the processes of preparing livestock or crops for market. It is a completely separate activity which merely has agriculture as a backdrop for other entertainment endeavors.

The Agritourism Activity Protection Act, irrelevant as it is to this discussion, recognizes that agritourism is its own activity when it defines "Agritourism Activity" as:

> "A *farm-related* tourism or *farm-related entertainment activity* that takes place on agricultural land …"

3 P.S. §2602, emphasis added. Agritainment is entertainment; it is recreation; it is *not* agriculture. Agritainment involves a fundamentally different use of the Property than agriculture. It is a use which invites the public onto the property; it is a use that requires additional planning for sewer facilities; it is a use which requires traffic planning. All of these additional considerations and challenges to the land are the traditional and exclusive province of municipal zoning. Owners' proposed inclusion of Agritainment as being covered by ACRE requires municipalities to allow virtually any activity on a farm simply because it occurs on a farm. The Penn State extension, which provides expertise to farmers in Pennsylvania, even recognizes the applicability of zoning ordinances to agritourism activities when it writes: "In some situations, it may be clear that the planned agritourism activity is not permitted under the local zoning laws." Agritourism in Pennsylvania - Legal and Regulatory Issues, March 24, 2020, Claudia Schmidt (https://extension.psu.edu/agritourism-in-pennsylvania-legal-and-regulatory-issues).

By way of guidance, the Commonwealth Court interpreted the definition of Normal Agricultural Operation and RTFA protection in the context of a mulching operation, a process with much closer nexus to agricultural production than a petting zoo. In *Tinicum Township v. Nowicki,* the Commonwealth court held that the mulching operation was not afforded RTFA protection because the mulch was not used for the production of livestock, crops, or agricultural commodities. 99 A.3d 586 (Pa. Cmwlth. 2014). The Court found the RTFA "focuses on the use of farmland for the production of crops and livestock " and held:

> "We believe that the definition of 'normal agricultural operation' necessarily requires some connection between the use at issue and the employment of the property in question for the production of an agricultural, agronomic, horticultural, silvicultural or aquacultural crop or commodity."

Id. at 594. The Owners' invitation to the public to interact with animals on their Property for a fee does nothing to contribute to the production of an agricultural crop or commodity. Rather, it is a

merely ancillary activity meant to generate additional income. The agricultural production, that is, the animals and their products will continue to grow and produce regardless of the public paying to interact with them.

Conclusion

In recap, the Township maintains that the Zoning Ordinance's method of calculating animal density does not conflict with and is no more strict than any state law or regulation. With respect to the agricultural sales uses on the Property, the Township's regulations permit such sales subject to standard zoning criteria common throughout the state. Finally, with respect to the agritainment uses on the Property, the Township asserts that such activities are not within the purview of the RTFA and are not included as "Normal Agricultural Operations" leaving them outside of the Attorney General's purview in an ACRE complaint.

The Township also notes that this case is currently on appeal to the Court of Common Pleas in Bucks County. Owners have raised the same issues in the appeal as they raise in their complaint to the Attorney General's Office.

Very truly yours,

GRIM, BIEHN & THATCHER

By: /S/ [redacted]

Enclosures

cc: [redacted]