

[REDACTED]  
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ATTORNEYS AT LAW

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November 13, 2023

**VIA EMAIL ONLY**  
[REDACTED]

Robert Willig, Senior Deputy Attorney General  
Office of the Attorney General  
1251 Waterfront Place  
Mezzanine Level  
Pittsburgh, PA 15222

**Re: Re: Response of Little Britain Township to the ACRE Complaint of [REDACTED]**  
[REDACTED]

Dear Deputy Willig:

This firm is Solicitor to Little Britain Township (the "Township"). Please allow this letter to serve as the Township's response to the ACRE complaint filed by [REDACTED] through his counsel dated September 8, 2023 (the "Complaint"). [REDACTED] contends that the Township's regulation of composting operations constitutes an "unauthorized local ordinance" in violation of the Agriculture, Communities and Rural Environment Act, 3 Pa.C.S. § 311 *et seq.* ("ACRE"), and that the Township Zoning Ordinance is pre-empted by the Solid Waste Management Act, 35 P.S. §§ 6018.301-303 ("SWMA").

#### **I. BACKGROUND FACTS.**

[REDACTED] ACRE complaint concerns the real property located at [REDACTED] Little Britain Township, Lancaster County, Pennsylvania (the "Property"), which [REDACTED] co-owns with another gentleman named [REDACTED] and [REDACTED]. [REDACTED] acquired the Property in 1992, at which time it was improved with three (3) storage buildings and two (2) manufactured homes. The Property consists of 3.80 acres of land and is located within the Township's Agricultural (A-1) Zoning District.

[REDACTED]  
[REDACTED]

██████████ operates a mushroom farm in one of the buildings situated on the Property. Mushroom farming is a permitted agricultural use within the A-1 District, and the Property was used as a mushroom farm prior to the period of ██████████ ownership. Prior to 2023, the mushroom farm operated without issue or involvement from the Township.

██████████ Complaint is based upon two key misrepresentations concerning his use of the Property, both of which are material to your review of this matter. Those misrepresentations are as follows:

**A. THE USE OF THE PROPERTY SUBSTANTIALLY CHANGED IN SPRING 2023 WHEN ██████████ BEGAN COMPOSTING ON THE PROPERTY.**

The Complaint states: ██████████ mushroom farm has been in operation on the Property for over forty-five (45) years and has not changed during that time.” This statement is false.

Prior to 2023, no outdoor composting operations were conducted on the Property. Instead, substrate prepared for growing mushrooms was delivered to the Property and placed in the mushroom house. Following harvest, spent mushroom substrate was removed from the mushroom house and transported from the Property. From 1992, when ██████████ and ██████████ purchased the Property, through early 2023, there were no known issues with the mushroom farming operation from a zoning perspective.

Sometime in Spring 2023 (approximately May 2023), the nature of ██████████ operations and use of the Property substantially changed when he began producing compost on the Property for use as mushroom substrate. Since May, materials used to make mushroom compost, including straw and manure, have been regularly delivered to the Property in various commercial vehicles, including tractors, dump trucks, and tractor-trailers. The materials delivered to the Property are continuously being wetted and mixed on a concrete pad on the Property. The constant presence and preparation of the compost has created significant health and safety issues for neighboring property owners, including: contaminated water runoff; noxious odors; air pollution; trash pollution; and increased insects and rodents.

**B. ██████████ COMPOSTING OPERATION, RIVERSIDE COMPOST, IS A COMMERCIAL VENTURE.**

The Complaint states: “The compost created on the Property is used exclusively to grow mushrooms on the Property and another mushroom farm owned by ██████████ This statement is also false.

In May 2023, a limited liability company named ██████████ with a registered address at the Property, was registered with the Pennsylvania Department of State Corporations

Bureau.<sup>1</sup> Since May, prepared compost has been shipped from the Property to other farms on a frequent and ongoing basis. The Township has received information that [REDACTED] is a commercial venture and that [REDACTED] is currently shipping compost to approximately 7-8 other farms in the Chester County area. Upon information and belief, the farms receiving compost include the following four (4) mushroom farms in which [REDACTED] holds an ownership interest:

- [REDACTED] Chester County, owned by [REDACTED] and [REDACTED].<sup>2</sup>
- [REDACTED] Chester County, owned solely by [REDACTED].<sup>3</sup> This property is the registered address of [REDACTED].<sup>4</sup> [REDACTED] the manager of [REDACTED]<sup>5</sup> and, upon information and belief, holds an ownership interest in the company.
- [REDACTED] Chester County, owned by [REDACTED].<sup>6</sup>
- [REDACTED] Chester County, owned by [REDACTED].<sup>7</sup>

Additionally, several of [REDACTED] family members and business associates are involved in mushroom farming. For example, [REDACTED] the co-owner of the Property, owns multiple mushroom farms in Chester County and operates his mushroom farming business under the entity [REDACTED]

## II. [REDACTED] COMPOSTING OPERATION IS NOT A NORMAL AGRICULTURAL OPERATION ENTITLED TO PROTECTION UNDER ACRE.

[REDACTED] ACRE Complaint must be closed without further consideration because the composting operation is not entitled to protection under the Right to Farm Act ("RTFA") or ACRE.

<sup>1</sup> A copy of the Pennsylvania Department of State Entity Listing for [REDACTED] is enclosed.

<sup>2</sup> A copy of the Deed for [REDACTED] is enclosed.

<sup>3</sup> A copy of the Deed for [REDACTED] is enclosed.

<sup>4</sup> A copy of the Pennsylvania Department of State Corporations Bureau Entity Listing for [REDACTED] is enclosed.

<sup>5</sup> A copy of a Mortgage signed by [REDACTED] in his capacity as "Manager" of [REDACTED] is enclosed.

<sup>6</sup> A copy of the Deed for [REDACTED] is enclosed. The Mortgage enclosed at Footnote 3 is secured by the [REDACTED] property.

<sup>7</sup> A copy of the Deeds for [REDACTED] is enclosed.

**A. THE COMPOSTING OPERATION IS NOT WITHIN THE STATUTORY DEFINITION OF A  
“NORMAL AGRICULTURAL OPERATION.”**

ACRE prohibits municipalities from enacting or enforcing local ordinances that restrict or limit “normal agricultural operations.” 3 Pa.C.S. § 312. ACRE adopts the definition of “normal agricultural operation” from the RTFA which provides:

“NORMAL AGRICULTURAL OPERATION.” 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 Pa.C.S. § 312; 3 P.S. § 952 (emphasis added).

The express statutory language of the RTFA limits the protections ACRE to agricultural operations conducted on “contiguous” acres. [REDACTED] concedes in his Complaint that he is using compost generated on the Property at “another mushroom farm” he owns.<sup>9</sup>

As set forth above, all of the other farms owned by [REDACTED] are located in Chester County, while the subject Property is located in Lancaster County. By [REDACTED] own admission, the composting operation supports two separate farm properties which are not contiguous. Consequently, the composting operation is not within the statutory definition of a “normal agricultural operation” and is not subject to the protections afforded by ACRE.

**B. THE COMPOSTING OPERATION IS NOT ENTITLED TO PROTECTION UNDER CASE  
LAW INTERPRETING AND APPLYING THE RTFA AND ACRE.**

Case law supports the closure of [REDACTED] Complaint without further action.

**1. *Tinicum Township v. Nowicki***

In *Tinicum Township v. Nowicki*, 99 A.3d 586 (Pa. Cmwlth. 2012), the Commonwealth Court considered whether a mulching operation was a protected agricultural use under the Pennsylvania Municipalities Planning Code (“MPC”) and RTFA. The mulching operation involved the hauling of raw materials, including tree stumps, yard waste, and logs to the property. *Id.* at 588. The materials were processed into mulch using a tub grinder and the finished mulch product was sold

<sup>9</sup> As set forth in Section I.B, [REDACTED] actually shipping compost generated on the Property to *multiple* farm properties in Chester County.

and hauled off to purchasers. *Id.* The property owner did not maintain or manage a forest on the property, and did not develop, cultivate, harvest, transport, or sell trees on the property. *Id.* at 590.

The township issued a notice of enforcement to the property owner on the basis that the mulching operation was a mill, warehouse, or wholesale use which was not permitted within the applicable zoning district. *Id.* at 588. The property owner asserted that the mulching operation was protected as an agricultural or forestry use under the MPC or as an agricultural operation under the RTFA. *Id.* at 589. Both the zoning hearing board and trial court found that the mulching operation did not constitute a protected agricultural or forestry use. *Id.*

On appeal, the Commonwealth Court examined Section 603(h) of the MPC, which limits municipalities from imposing zoning restrictions on agricultural uses<sup>10</sup> in “geographic areas where agriculture has traditionally been present.” *Id.* at 591 (citing 53 P.S. § 10603(h)). Relying on the definition of “agricultural activity” set forth in Section 107 of the MPC, the Court found that the protection afforded by Section 603(h) “is not necessary where the use in question has no connection to the land and could be conducted on any piece of property. *Id.* at 591. Rather, in order to qualify as an agricultural activity, “the use in question must have some connection to or utilization of the land itself for production of . . . livestock or agricultural, agronomic, horticultural, silvicultural, or aquacultural crops or commodities.” *Id.* The Court found that none of the mulch produced by landowner was a product of the property, and none of the mulch was used on the property. *Id.* at 592. Consequently, the use was not protected under the MPC.

The Court likewise found that the protections of the RTFA “requires some connection between the use at issue and the employment of the property in question for the production of agricultural, agronomic, horticultural, silvicultural, or aquacultural crop or commodity.” *Id.* at 593. Because none of the raw materials from the mulching operation are produced on the property, and none of the resulting mulch is used on the property, the Court held that the mulching operation was not protected under the RTFA. *Id.*

## **2. *Green ‘n Grow Composting v. Martic Township Zoning Hearing Board.***

The Lancaster County Court of Common Pleas considered a factually similar case in *Green ‘n Grow Composting v. Martic Township Zoning Hearing Board*, No. CI-17-08939, 2018 Pa. Dist. & Cnty. Dec. LEXIS 2840 (C.P. Lancaster June 19, 2018) (*aff’d*, 212 A.3d 143, No. 1002 C.D. 2018, slip op. (Pa. Cmwlth. May 3, 2019)).<sup>11</sup> *Green ‘n Grow* involved a composting operation conducted by Green ‘n Grow LLC on a seven (7) acre parcel of land (the “GNG Property”). *Id.* at \*3. The GNG Property had previously been a portion of a larger farm property owned by Stephen Lehman, the owner and manager of Green ‘n Grow (the “Lehman Farm”). *Id.* at \*6. During the time the property was part of the larger Lehman Farm, Mr. Lehman operated a chicken manure composting operation. *Id.* at \*7. Both the Attorney General’s office and the Lancaster County

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<sup>10</sup> [REDACTED] as not asserted that the composting operation constitutes a forestry use. Therefore, the portion of the Court’s decision in *Tinicum* has not been addressed.

<sup>11</sup> A copy of the *Green ‘n Grow* decision is enclosed.

Court of Common Pleas determined that the manure composting operation conducted on the Lehman Farm was a “normal agricultural operation” permitted under the township’s zoning ordinance. *Id.*

In 2014, Mr. Lehman subdivided the Lehman Farm to create the GNG Property. *Id.* at \*5. Mr. Lehman also registered Green ‘n Grow as a separate legal entity for purposes of the composting business. *Id.* at \*36. In March 2014, Green n’ Grow obtained a permit from the Department of Environmental Protection (“DEP”) to conduct research and development activities on the Lehman Farm, which permitted composting of packaged, pre-consumer food prior to the removal of packaging. *Id.* at \*9. Between May 2014 and September 2016, Green ‘n Grow was subject to several enforcement proceedings by DEP. *Id.* at \*9-13. In December 2016, Martic Township issued an enforcement notice for violations of its zoning ordinance on the GNG Property after several neighbors complained of foul odors, air pollution and trash pollution. *Id.* at \*13-14, 25.

Testimony before the Zoning Hearing Board established that no crops were ever grown on the GNG Property, and no livestock was ever raised on the property. *Id.* at \*18. None of the material used in the composting operation was produced on the GNG Property. *Id.* Compost manufactured by Green ‘n Grow was applied to a one-half acre area of the GNG Property to facilitate the growing of a border shrub and trees. *Id.* No crops were grown in the area where the compost was used. *Id.* Some of the remaining compost was sold wholesale third parties for sale to consumers, and some was sold private to farmers. *Id.*

On appeal, Mr. Lehman and Green ‘n Grow attempted to distinguish *Tinicum Township* by arguing that the composting operation was directly connected to the land. *Id.* at \*34. They asserted that a significant portion of the material used to generate compost was agricultural waste from Mr. Lehman’s owned or leased farms, and “almost all” of the compost generated by the operation was spread on Mr. Lehman’s farms. *Id.* The Court rejected this argument, holding that the legal relationship between Green ‘n Grow and Mr. Lehman precluded a finding that the composting operation was connected to the land, as follows:

It is important to this Court’s analysis to discuss the relationship between Green ‘n Grow and Lehman. These parties are two separate entities - one a private individual and one a corporation. Lehman created this separate legal entity, Green ‘n Grow Composting, LLC, to conduct the composting business and then carved out a piece of his tract which he sold to this new entity to legally separate it from his farm. If compost from the Green ‘n Grow Operation is used on Lehman’s farms, then the compost is not being used by Green ‘n Grow. Likewise, if the raw materials being used to create the compost are coming from Lehman’s farms, then they are not being generated on the Green ‘n Grow Property. There is clearly no connection of the composting raw materials and the final product with the Green ‘n Grow Property. *Id.* at \*36-37.

### 3. *Application of Tinicum Township and Green 'n Grow Composting.*

The holding in *Tinicum* makes clear that the protections of the RTFA and ACRE apply only to agricultural activities that have a connection to the agricultural use of the property on which they are conducted. A satisfactory "connection" exists when the raw materials used in the activity are produced on the property, or the final product generated by the activity is used for the production of livestock, crops or agricultural commodities.

In [REDACTED] case, the materials used in the composting operation are not produced on the Property, but the final product is used, in part, in the mushroom house located on the Property. The Township does not dispute [REDACTED] right to make compost on the Property for exclusive agricultural use on the Property (provided the composting operation is in compliance with applicable DEP requirements). Indeed, under Section 200.3 of the Township's Zoning Ordinance, agricultural composting is permitted as of right.

By [REDACTED] own admission, however, the compost generated on the Property is not used exclusively for mushroom farming conducted on the Property. Despite [REDACTED] contention that the compost is only used at one other farm, [REDACTED] is selling and delivering compost to seven (7) or eight (8) other farms. Pursuant to both *Tinicum* and *Green 'n Grow*, the use of the compost on other properties and/or sale of the compost, places the composting operation well outside the scope of protection afforded by the RTFA and ACRE.

Moreover, as in *Green 'n Grow*, the relationship between the various parties precludes relief under ACRE. The compost is being generated by [REDACTED] a separate legal entity formed by [REDACTED]. By contrast, the compost is being used on: (1) the subject Property, which is owned by [REDACTED] and [REDACTED] (2) a property owned by [REDACTED] but operated by [REDACTED] a separate legal entity; (3) a property owned and operated by [REDACTED] and [REDACTED] (4) a property owned by [REDACTED] wife. Use of the compost on these other properties does not connect the final product with the subject Property.

### III. THE TOWNSHIP'S ZONING ORDINANCE.

[REDACTED] Property is located in the Township's Agricultural (A-1) Zoning District, the purpose and intent of which is to "promote the continuation of agricultural activities and protect the agricultural land in those areas most suitable for farming." The provisions of the A-1 District have been specifically formulated to further the objectives of the Municipalities Planning Code which provides that local Zoning Ordinances shall be designed "to preserve prime agriculture and farmland considering topography, soil type and classification, and present use."

Section 109 of the Zoning Ordinance defines "Composting Operation" as follows:

**Composting Operation: Residential, Agricultural, Commercial:** Any mixing, combining, processing, aerating, packaging, shipping, or similar use of any

Composting Materials or storing processed compost. The term Composting Operations shall not include manure storage and land application.

**Residential:** A Composting Operation using Composting Materials which consist of normal waste materials of a residential property, generated on the same property.

**Agricultural:** A Composting Operation using Composting Materials of which a minimum of fifty percent (50%) by weight of the composted material must be produced on the Farm.

**Commercial:** All other Composting Operations not defined as Residential or Agricultural.

Under Section 200.3 of the Township's Zoning Ordinance, Agricultural Composting is a use permitted by right in the A-1 District, subject to the provisions of Section 403. Section 403 requires that Agricultural Composting be conducted on contiguous acres. Specifically, the introductory paragraph of Section 403 provides: "Agricultural Composting is permitted as an Accessory Use *at a Farm . . .*" (Emphasis added). Regardless of whether [REDACTED] is using the compost at one other farm, as admitted in his Complaint, or at several other farms, as demonstrated by the Township, under Section 403 of the Zoning Ordinance, use of the compost at *any* location other than the subject Property constitutes commercial composting. This conclusion is consistent with the express statutory language of the RTFA and ACRE, as well as the holding in *Tinincum*.

The Zoning Ordinance does not preclude a composting operation on the Property. [REDACTED] can lawfully engage in agricultural composting on the Property, provided the compost generated on the Property is used exclusively for farming of the Property. He may also engage in commercial composting on the Property to generate compost for use on his other farms and/or sale to third parties. Pursuant to Section 200.5 of the Zoning Ordinance, commercial composting is permitted within the A-1 Zoning District by conditional use.

[REDACTED] has chosen not to pursue either of these two lawful options. Instead, he is attempting to avoid compliance with the Zoning Ordinance by misrepresenting the extent of his operations and pursuing this ACRE challenge under false pretenses. For the reasons set forth above, the composting operation being conducted on the Property by [REDACTED] and/or [REDACTED] is not protected as a "normal agricultural operation," and there is no basis for OAG to conclude that the Zoning Ordinance is an unauthorized local ordinance under ACRE.



#### IV. THE CASES PROVIDED BY OAG ARE NOT DISPOSITIVE.

In your October 4, 2023 letter, you provided three prior OAG decisions which may be applicable to this matter: *Warrington Township*, *Lower Oxford Township*, and *Franklin Township*. For the following reasons, none of these prior decisions is dispositive:

- *Warrington Township*: The property owner in Warrington Township was a commercial nursery that, for many years, made potting soil for its nursery using a soil mixer and peat moss. Facing a shortage in available peat moss, the property owner obtained a grinder machine and began receiving decayed leaf waste from local municipalities and tree trimmings from tree trimming businesses. The property owner used the grinder and materials to make potting soil and mulch, which were predominantly used on the property in the nursery, with some offered for sale.

The use of the grinder to make potting soil and mulch was merely a continuation of the property owner's prior practice of making potting soil using the soil mixer. The final product generated by the grinder was connected to the land because it supported the property owner's nursery operations. The sale of some potting soil and mulch was consistent with the commercial nature of the nursery.

By contrast, the compost being generated by [REDACTED] is not a continuation of any previous compost-making operation on the Property. Prior to this year, [REDACTED] obtained mushroom substrate by having it delivered to the Property and immediately placed inside the mushroom house. The current operation, which involves regular delivery of raw materials, the constant presence and mixing of compost on the Property, and frequent deliveries to other farms, is well beyond the scope of historical agricultural operation of the property. Additionally, direct sale to the public, either of mushrooms or compost, has never been offered on the Property.

- *Lower Oxford*: The decision for Lower Oxford does not contain any facts concerning the property owner's operations or the ordinance question. Absent this information, the applicability of this decision, if any, is unclear.
- *Franklin Township*: The zoning ordinance at issue in Franklin Township prohibited mushroom farming and substrate production as agricultural uses in the township's Agricultural Residential District. The Township does not dispute that composting/substrate preparation is normal agricultural activity when the final product is used in a mushroom farm located on the same property. In accordance with the RTFA, ACRE and OAG's *Franklin Township* decision, agricultural composting is a use permitted by right in the Township's A-1 District. As set forth in detail above, Mr. Vivero's composting operation is commercial in nature and is not entitled to protection under the RTFA or ACRE.

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Moreover, commercial composting is permitted in the A-1 District subject to conditional use approval. As OAG recognizes in the *Franklin Township* Decision, the Township is permitted to impose a special exception or conditional use requirement to engage in composting.

**V. [REDACTED] COMPOSTING OPERATION IS NOT IN COMPLIANCE WITH THE SOLID WASTE MANAGEMENT ACT.**

Finally, [REDACTED] asserts that the Township's Zoning Ordinance is pre-empted and precluded by the Solid Waste Management Act ("SWMA"), 35 P.S. §§ 6018.301-303. To the Township's knowledge, [REDACTED] is currently operating without a residual waste permit or appropriate Mushroom Farm Environmental Management Plan ("MFEMP") that addresses the composting operation. Notwithstanding this fact, that Township submits that its Zoning Ordinance is consistent with the SWMA.

**VI. CONCLUSION.**

For the reasons set forth above, [REDACTED] ACRE challenge is without merit, and the Township requests that OAG close this matter without further action.

Sincerely,

[REDACTED]

Solicitor for Little Britain Township

Enclosures

cc: Little Britain Township (via email w/ encls.)