

NARRATIVE IN SUPPORT OF APPEAL

Appellant, Ryan Heenan (“Appellant”) appeals from the May 14, 2021 Enforcement Notice (“Enforcement Notice”) issued by the zoning officer of Willistown Township (“Township”). Appellant is the owner of certain real property located at and known as 8 Castlebar Lane, Willistown Township, Pennsylvania 19355 (being UPI No. 54-6-52.4H) (“the Property”). The Property is located in the Township’s RU-Rural Zoning District. Appellant sells flowers and other products as a by-right accessory use under Section 139-12.G(4) of the Willistown Township Zoning Ordinance (“Zoning Ordinance”), where more than 50% of such products are produced on the Property.

I. Appeal from the May 14, 2021 Enforcement Notice

The zoning officer issued the Enforcement Notice directly in response to Appellant’s Mother’s Day sale on May 9, 2021, which promoted Appellant’s sale of flowers and other products produced on the Property. The Enforcement Notice alleges that the event “included the sale of ‘fresh cut, seasonal blooms along with planters and gifts,’ the provision of food and alcohol to the public, and photographs in a ‘signature flower truck.’” (Enforcement Notice, 5/14/21, at 1.) The Enforcement Notice states that this activity violated Section 139-12 of the Zoning Ordinance, stating that “it appears as though the commercial use of the Property has exceeded that allowable as an ‘accessory use’ under the Zoning Ordinance and is, instead, the principal use of the Property.” (*Id.*, at 2.) The Enforcement Notice further states that “the holding of events on the Property is not permitted.” (*Id.*, at 2.) The Township filed a separate summary action in the Magisterial District Court, alleging a violation of Section 75-2 of the Township Code (the “Public Exposition Ordinance”) based on Appellant’s failure to obtain a “public exposition” permit for the events of May 9, 2021.

Appellant appeals the Enforcement Notice to the extent necessary to protect his ability to hold promotional events related to the accessory sales use. The frequency and scope of such events would not establish a new principal use of the Property in violation of Section 139-12 of the Ordinance.

Therefore, the Enforcement Notice is in error to the extent it could be interpreted as prohibiting such events.

Second, Appellant appeals the Enforcement Notice to the extent necessary to protect his right, confirmed by the March 4, 2021 Zoning Opinion of the zoning officer, to hold bouquet and planter-building workshops in the barn on the Property as an integral part of the accessory flower-sale use (such workshops have not yet been held). The March 4, 2021 Zoning Opinion conditioned such right on Appellant's installation of ADA-compliant parking and renovations to the barn, which Appellant has expended significant resources for the now completed installations in reliance on the Zoning Opinion. These workshops involve the direct commercial sale of flowers and products grown on the Property to customers who then arrange them in the workshop, which is akin to other agricultural operations that offer instruction on the use of the agricultural commodities being directly sold on the farm and horseback riding lessons on equine operations). Therefore, the Enforcement Notice is in error to the extent it could be interpreted as prohibiting the direct commercial sales workshops.

Moreover, the Right to Farm Act [RTFA] places limitations on municipal authority to regulate agricultural operations in order "to conserve and protect and encourage the development and improvement of [the Commonwealth's] agricultural land for the production of food and other agricultural products." 3 P.S. § 951. The RTFA defines a "normal agricultural operation" in broad and anticipatory terms to include 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 "includes new activities, practices, equipment and procedures consistent with technological development within the agricultural industry." Id. § 952. A "normal agricultural operation" includes an operation engaged in agricultural production that is "less than ten contiguous acres in area but has an anticipated yearly gross income of at least \$10,000." Id. § 952. Appellant owns and operates a normal agricultural operation as defined under the RTFA.

The RTFA provides that an agricultural operator is permitted by right to engage in direct commercial sales of agricultural commodities on property owned and operated within a municipality. Specifically, the RTFA provides that: “[d]irect commercial sales of agricultural commodities upon the property owned and operated by a landowner who produces not less than 50% of the commodities sold **shall be authorized**, notwithstanding municipal ordinance, public nuisance or zoning prohibition.” Id. (emphasis added). This provision means that the Township cannot preclude an agricultural operator from selling agricultural commodities produced from their property or prevent the operator from selling additional commodities from outside sources in accordance with the percentage requirements under the RTFA.

It is well-established that in recent decades agricultural operators across Pennsylvania and the nation have developed agritourism businesses on their agricultural operations. The agricultural industry recognizes that agricultural operators offer agritourism activities to market, use and sell their agricultural products, provide education and entertainment, educate on the availability, nature, use and quality of Pennsylvania-produced agricultural commodities, preserve farmland and farm heritage, provide community service and supplement income to sustain operations. Agritourism encompasses activities used to market and engage in direct sales of agricultural commodities in combination with the farm setting, thus is part of the practices and activities of normal agricultural operations as defined under the RTFA. The Agritourism Activity Protection Act (AAPA) established civil liability protections for the owners or operators of normal agricultural operations that engage in agritourism activities. 3 P.S. § 2601. Under the AAPA, an “agritourism activity” is defined as “[a] farm-related tourism or farm-related entertainment activity that takes place on agricultural land and allows members of the general public, whether or not for a fee, to tour, explore, observe, learn about, participate in or be entertained by an aspect of agricultural production, harvesting, husbandry or rural lifestyle that occurs on the farm.” Id. § 2602. “Agricultural

land” is defined as “[I]and that is used for a normal agricultural operation” as defined under the RTFA. Id. Accordingly, the use of agritourism activities by normal agricultural operations is recognized under state law in this Commonwealth.¹

Agritourism activities fall into four main categories: (1) direct sales to consumers; (2) agricultural education; (3) recreation/entertainment; and (4) agricultural lodging. In fact, there are many other normal agricultural operations located within Willistown Township’s encompassing RU-Rural Zoning District that engage in a wide variety of recognized agritourism activities. Therefore, Appellant further appeals the Enforcement Notice to the extent necessary to protect his normal agricultural operation in accordance with the RTFA and other state laws protecting normal agricultural operations and to address potential discriminatory enforcement.

Furthermore, the Municipalities Planning Code (MPC) provides municipalities with authority to enact zoning ordinances in accordance with the purposes, responsibilities and limitations imposed upon that authority. 53 P.S. § 10601, *et seq.* To accomplish this purpose, Section 10603 of the MPC sets forth limits on municipal authority to enact zoning ordinances regulating agricultural operations. Municipalities are explicitly precluded from enacting ordinances regulating commercial agricultural production with requirements that would exceed the RTFA. Id. § 10603(b). The MPC also requires zoning ordinances to “encourage the continuity, development and viability of agricultural operations . . . [and] not restrict agricultural operations or changes or expansions to agricultural operations in geographic areas where agriculture has traditionally been present, unless the agricultural operation will have a direct adverse effect on the public health and safety. Nothing in this

¹ Furthermore, the Clean and Green Act was amended in 2005 to provide that an owner of agricultural land who engages in recreational activities, including agritainment, on the land will not lose eligibility for the preferential tax assessment program because of the recreational use. 72 P.S. § 5490.2, .3(f), .8(f). “Agritainment activities” are broadly defined as: “Farm-related tourism or farm-related entertainment activities which are permitted or authorized by a landowner in return for a fee on agricultural land for recreational or educational purposes.” Id. § 5490.2.

subsection shall require a municipality to adopt a zoning ordinance that violates or exceeds [the RTFA].” Id. § 10603(h).

The Agriculture Communities and Rural Environment (ACRE) statute precludes a municipality from enacting or enforcing unauthorized local ordinances. 3 Pa. C.S. § 313. An unauthorized local ordinance is one that prohibits or limits a normal agricultural operation in violation of state law.² Id. § 312.

In Commonwealth v. Richmond Township, the Commonwealth Court held that ordinances that exceed the requirements of the RTFA necessarily violate Sections 10603(b), (h) of the MPC. 2 A.3d 678, 687 & n.11 (Pa. Cmwlth. 2010). It further held that agricultural operations complying with the RTFA, as a matter of law, do “not constitute an operation that has a direct adverse effect on the public health and safety.” Id. Therefore, the Township cannot impose requirements that would exceed those under the RTFA, which includes placing limitations on direct commercial sales of agricultural commodities.

With respect to a municipality’s authority to zone for uses, it is well-settled that “[a] local government unit has no authority to adopt an ordinance that is arbitrary, vague or unreasonable or inviting of discriminatory enforcement.” Commonwealth v. Richmond Township, 2 A.3d 678, 681 (Pa. Cmwlth. 2010); Exton Quarries, Inc. v. Zoning Bd. of Adjustment, 228 A.2d 169, 178 (Pa. 1967). In addition, “the power to . . . regulate does not extend to an arbitrary, unnecessary, or unreasonable intermeddling with the private ownership of property.” Eller v. Bd. of Adjustment, 198 A.2d 863, 865-66 (Pa. 1964); Van Sciver v. Zoning Bd. of Adjustment, 152 A.2d 717, 724 (Pa. 1959) (same); Schmalz v. Buckingham Township. Zoning Bd., 132 A.2d 233, 235 (Pa. 1957) (same).

² The ACRE statute incorporates the RTFA’s definition of “normal agricultural operation.” 3 Pa. C.S. § 312 (incorporating 3 P.S. § 952).

A municipality's zoning authority is to designate what uses are permitted in particular zoning districts. MarkWest Liberty Midstream and Resources, LLC v. Cecil Twp. Zoning Hr'g Bd., 184 A.3d 1048, 1060 (Pa. Cmwlth. 2018). On the other hand, a municipality does not have authority to regulate the operational aspects of a permitted use. MarkWest, 184 A.3d at 1060 (explaining that "the MPC does not authorize those municipalities to dictate specific business operations (i.e., the *how*) under the guise of zoning regulation."). "A zoning ordinance that permits a use but excludes or regulates the normal activities involved in the use shifts away from the type of land use regulations that is the function of zoning." ROBERT S. RYAN, 1 PENNSYLVANIA ZONING LAW AND PRACTICE § 3.4.4 (George T. Bisel Company, Inc. 2001). "Zoning is a regulation of uses, not a means of regulating the manner in which business is conducted." Id. § 3.3.14A.

In Appeal of Sawdey, our Supreme Court explained that:

Zoning ordinances, interfering as they do with free use of property, depend for their validity on a reasonable relation to the police power. An ordinance for example if it permitted a butcher shop to be located in an area but prohibited its sale of pork, or a drugstore but prohibited its sale of candy, or a grocery store but prohibited its sale of bread, would surely be regarded a[n] unreasonable legislation on details of a business not a matter of public concern. If it may prohibit a hotel from dispensing liquor, it can well forbid it selling meals, or cigars or candy, or newspapers. Zoning ordinances may not be used for such purposes.

85 A.2d 28, 32 (Pa. 1951) (citations omitted); In re Thompson, 896 A.2d 659 (Pa. Cmwlth. 2006) (explaining that "[z]oning only regulates the *use* of land and not the particulars of development and construction.").

Accordingly, a municipality cannot allow agriculture as a use in a zoning district, but then exclude or regulate the normal activities involved in the use, including direct commercial sales. The RTFA provides that a landowner's direct commercial sales of agricultural commodities are protected as a use by-right in accordance with Section 953(b). 3 P.S. §

953(b). An agricultural operator’s direct commercial sales use necessarily involves activities to market and sell the agricultural commodities. This includes providing instruction, guidance and answering customer questions on the use of the agricultural commodities being sold. It also includes marketing strategies to bring customers to the agricultural operation in order to engage in direct commercial sales. The Township’s limitations on direct commercial sales of agricultural commodities are arbitrary, unreasonable, irrational, discriminatory, and not reasonably related to the protection of health, safety and welfare, as well as an improper attempt to regulate the details of the business on an agricultural operation and not land use. For these reasons, Appellant further appeals the Enforcement Notice to the extent necessary to protect his normal agricultural operation from impermissible regulation of the operational aspects of his agricultural operations.³

II. Conclusion

Appellant will present testimony and evidence in support of this Appeal in conformance with law during a hearing before the Zoning Hearing Board.

<p>Respectfully submitted:</p> <hr/> <p>Susan L. Bucknum, Esquire BUCKNUM LAW PLLC 2233 Brigade Road Enola, PA 17025</p>	<p>Respectfully submitted:</p> <hr/> <p>Matthew M. McKeon, Esquire MacElree Harvey, Ltd 17 West Miner Street West Chester, PA 19382</p>
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³ This appeal also challenges the citation to Section 139-112(G) in the Enforcement Notice contending that an “‘accessory use’ shall not include a business.” As stated, the RTFA protects the right to engage in direct commercial sales of agricultural commodities. The RTFA also defines a “normal agricultural operation” as an operation that is engaged in commercial production agriculture. The application of Section 139-112(G) to preclude a normal agricultural operation from engaging in the business of commercial agricultural production and direct commercial sales would constitute an unauthorized local ordinance under ACRE.

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