

**SEVENTH ANNUAL REPORT OF THE  
ATTORNEY GENERAL TO THE GENERAL ASSEMBLY  
PURSUANT TO SECTION 318 OF ACT 38 OF 2005  
“ACRE”  
AGRICULTURE, COMMUNITIES AND RURAL ENVIRONMENT**

**November \_\_, 2012**

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The Agriculture, Communities and Rural Environment (ACRE) statute, Act 38, took effect on July 6, 2005. The central purpose of Act 38 of 2005 is to protect normal agricultural operations from unauthorized local regulation. The Act furthers that purpose by conferring upon the Attorney General: (1) the power and duty, upon the request of an owner or operator of a normal agricultural operation, to review local ordinances for compliance with State law; and (2) the authority, in the Attorney General's discretion, to bring a legal action against a local government unit in Commonwealth Court to invalidate or enjoin the enforcement of an unauthorized local ordinance.

In response, the Office of Attorney General (OAG) developed and implemented a process for receiving requests for review of ordinances, for completing such reviews within the 120-day time period prescribed by the Act, and for bringing legal action when such action is warranted. Consistent with Act 38, all requests for review received during the year ending July 6, 2012, were completed within 120 days (or required an extension of the 120-day review period to obtain additional information or provide the time required to complete the review) or were still within the 120-day review period.

When the OAG receives a request for review of an ordinance, the OAG sends the owner/operator who requested the review an acknowledgement that the request was received, and the municipality whose ordinance is the subject of the request for review a notice that the request has been received and that the ordinance will be reviewed.

When the OAG completes its review, the OAG advises both the owner/operator and the municipality in writing whether or not it intends to bring legal action to invalidate or enjoin the enforcement of the ordinance. If the OAG advises the municipality that it intends to bring legal action, it affords municipal officers an opportunity to discuss the legal problems identified in the review and to correct such problems before a legal action is brought.

## **I. ANNUAL DATA**

Between July 6, 2011, and July 6, 2012, the OAG:

- Received 6 requests for review of local ordinances;
- Completed review of 3 ordinances (3 additional reviews were completed between July 6, 2011, and the date of this Report, for a total of 6);
- Sent 3 responses to owner/operators advising that no legal action would be filed (includes 2 responses of no legal action sent after July 6, 2011);
- Sent 3 notices to municipalities of legal problems with ordinances (includes one notice of legal problems sent after July 6, 2011);
- Granted one request for reconsideration of a prior denial and sent a notice to the municipality of legal problems with its ordinance.

## **II. AGGREGATE DATA**

Between July 6, 2005, and July 6, 2012, the OAG:

- Received 84 requests for review of local ordinances (one request was submitted, but withdrawn in 2006 and is excluded from the AGGREGATE DATA);
- Completed review of 76 ordinances (includes the 3 additional reviews completed between July 6, 2011, and the date of this report);
- Sent 40 responses to owner/operators advising that no legal action would be filed (includes 2 responses of no legal action sent after July 6, 2011);
- Sent 36 notices to municipalities of legal problems with ordinances (includes one notice of legal problems sent after July 6, 2011, and the notice granting reconsideration from denial to acceptance);
- 3 requests for review of a local ordinance were withdrawn due to a resolution between the owner/operator and the municipality while the OAG's review was pending;
- Brought 7 legal actions against municipalities to invalidate or enjoin the enforcement of an unauthorized local ordinance (four of those legal actions remain active);
- Resolved 23 out of the 36 reviews that were accepted due to legal problems with ordinances.

### **III. REQUESTS FOR REVIEW, NATURE OF COMPLAINTS AND ACTION TAKEN**

#### **A. Status of 7 Legal Actions**

##### **1. Locust Township, Columbia County**

The owner/operator requested review of Ordinance No. 4-2001, which regulates “intensive animal agriculture.” The owner/operator complained that the ordinance conflicts with State law. The OAG notified the Township of legal problems with the ordinance and offered the Township an opportunity to discuss and correct them. After the Township failed to correct the problems, the OAG filed a lawsuit in Commonwealth Court to invalidate and enjoin the enforcement of the ordinance. On preliminary objections, the Commonwealth Court held that Act 38 does not apply to a pre-existing ordinance unless the municipality acts to enforce it. The OAG appealed that decision to the Pennsylvania Supreme Court. On April 29, 2009, in a published opinion, the Supreme Court reversed the Commonwealth Court’s ruling and held that the Attorney General is explicitly empowered to bring action to invalidate enacted local ordinances without regard to enforcement. The case was remanded to the Commonwealth Court.

The OAG filed a Motion for Summary Judgment. On July 17, 2012, the Commonwealth Court issued an en banc decision granting in part and denying in part the OAG’s summary judgment. The Court held that the Township cannot require smaller animal operations to comply with the Nutrient and Odor Management Act because the Act makes compliance for these operations a voluntary option. The Court held the Nutrient and Odor Management Act preempted setback requirements that exceeded those under the Act and the setbacks also exceeded the Township’s authority under the Municipalities Planning Code. The Court held that the requirements for a water impact study, monitoring, and recording were preempted by the Water Resources Planning Act. Finally, the Court held that a requirement for a site plan for a

proposed operation was not preempted by the Nutrient Management Act. The OAG will continue to litigate the undecided issues that remain following the summary judgment ruling.

**2. Lower Oxford Township, Chester County**

The owner/operator requested review of Ordinance No. 2004-1, which regulates composting activities. The owner/operator complained that the ordinance unlawfully restricts mushroom compost preparation. The OAG notified the Township of legal problems with the ordinance and offered the Township an opportunity to discuss and correct them. After the Township failed to correct the problems, the OAG filed a lawsuit in Commonwealth Court to invalidate and enjoin the enforcement of the ordinance. On preliminary objections, the Commonwealth Court held that Act 38 does not apply to a pre-existing ordinance unless the municipality acts to enforce it. The OAG appealed that decision to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court issued a per curiam order affirming the Commonwealth Court's ruling, and the OAG filed a Petition for Reargument, which the Court ordered held pending the outcome of *Locust Township*. On November 10, 2009, the Supreme Court granted the petition and vacated its per curiam order based on its reversal of the Commonwealth Court's decision in *Locust Township*. Following negotiations, Lower Oxford Township enacted ordinance amendments to resolve the legal problems with the ordinance and the OAG withdrew the lawsuit in July 2011.

**3. Heidelberg Township, North Heidelberg Township, Robesonia Borough, Womelsdorf Borough, Berks County**

The owner/operator requested review of the Joint Township Ordinance, which regulates "intensive raising of livestock or poultry." The owner/operator complained that the ordinance conflicts with state law. The OAG notified the municipalities of legal problems with the ordinance and offered the municipalities an opportunity to discuss and correct them. After the municipalities

failed to correct the problems, the OAG filed a lawsuit in Commonwealth Court to invalidate and enjoin the enforcement of the ordinance. On preliminary objections, the Commonwealth Court held that Act 38 does not apply to a pre-existing ordinance unless the municipality acts to enforce it. The OAG appealed that decision to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court issued a per curiam order affirming the Commonwealth Court's ruling. The OAG filed a Petition for Reargument, which the Court ordered held pending the outcome of *Locust Township*. On November 10, 2009, the Supreme Court granted the petition and vacated its per curiam order based on its reversal of the Commonwealth Court's decision in *Locust Township*.

In 2011, the OAG filed an Amended Petition for Review and the parties are currently negotiating to resolve the action through ordinance amendment.

#### **4. Richmond Township, Berks County**

The owner/operator requested review of Ordinance No. 81-2000, which regulates "intensive agricultural activity." The owner/operator complained that the ordinance conflicts with state law. The OAG notified the Township of legal problems with the ordinance and offered the Township an opportunity to discuss and correct them. After the Township failed to correct the problems, the OAG filed a lawsuit in Commonwealth Court to invalidate and enjoin the enforcement of the ordinance. The Township filed a Motion for Judgment on the Pleadings, which the Commonwealth Court denied in its entirety in a published opinion on May 22, 2009.

The OAG filed a Motion for Summary Judgment. On May 28, 2010, the Commonwealth Court granted the Motion for Summary Judgment on all six counts of the Petition for Review and enjoined Richmond Township from enforcing the provisions of the ordinance relating to intensive agriculture. On August 10, 2010, the Commonwealth Court granted the OAG's motion to designate the summary judgment decision as a reported opinion. Following the Commonwealth

Court's grant of summary judgment, the OAG negotiated with Richmond Township on amendments to the ordinance to resolve the legal problems. The OAG approved Richmond Township's proposed ordinance amendments and Richmond Township enacted those amendments in December 2011.

#### **5. East Brunswick Township, Schuylkill County**

The owner/operator requested review of Ordinance No. 1 of 2006, which regulated land application of biosolids and prohibited land application of biosolids by corporations. The owner/operator complained that the ordinance conflicted with state law. The OAG notified the Township of legal problems with the ordinance and offered the Township an opportunity to discuss and correct them. After the Township failed to correct the problems, the OAG filed a lawsuit in Commonwealth Court to invalidate and enjoin the enforcement of the ordinance, along with an Application for Summary Relief. The Township filed preliminary objections to the lawsuit.

On September 23, 2008, the Commonwealth Court issued a published Opinion denying the OAG's request for summary relief and denying the Township's Preliminary Objections. Also in September 2008, the Township repealed Ordinance No. 1 of 2006, and enacted a new ordinance regulating land application of biosolids, which also had legal problems. The OAG filed an Amended Petition for Review to challenge the new ordinance. The Township filed Preliminary Objections. On August 21, 2009, the Commonwealth Court, in a published opinion, denied the Township's preliminary objections in their entirety.

After the Commonwealth Court denied the Township's preliminary objections, the OAG negotiated with the Township on amendments to the Ordinance to resolve the legal problems. The Township enacted the amendments and the OAG withdrew the lawsuit in November 2009.

**6. Peach Bottom Township, York County**

The owner/operator requested review of an existing ordinance that regulates concentrated animal operations and concentrated animal feeding operations (CAOs/CAFOs), a proposed amendment to the existing CAO/CAFO ordinance, and an ordinance regulating below ground manure storage facilities. The owner/operator complained that the ordinances conflict with state law and impede normal agricultural operations. The OAG notified the Township of the legal problems with the existing and proposed ordinances and offered the Township an opportunity to discuss and correct them. After the Township failed to correct the problems, the OAG filed a lawsuit in Commonwealth Court to invalidate and enjoin the enforcement of the ordinance in August 2009. The Township filed an Answer to the Petition for Review and the litigation is ongoing.

**7. Packer Township, Carbon County**

The owner/operator requested review of the Packer Township Local Control, Sewage Sludge and Chemical Trespass Ordinance, which regulates biosolid land application and prohibits biosolid land application by corporations. The owner/operator complained that the ordinance conflicts with state law. The OAG notified the Township of legal problems with the ordinance and offered the Township an opportunity to discuss and correct them. After the Township refused to engage in negotiations to resolve the legal problems, the OAG filed a lawsuit in Commonwealth Court to invalidate and enjoin the enforcement of the ordinance in August 2009.

The Township filed preliminary objections and the OAG filed an Application for Summary Relief. On January 6, 2010, the Commonwealth Court denied all of the Township's Preliminary Objections. The Court denied the OAG's Application for Summary Relief. The Township filed an Answer to the Petition for Review.

Following discovery, Packer Township filed a Motion for Summary Judgment. The Commonwealth Court denied the motion in its entirety in July 2012. In August 2012, the Court scheduled a trial for January 2013. On September 4, 2012, Packer Township repealed the ordinance. Both parties filed applications with the Court to assess the status of the action; OAG contends the status of the action falls within two exceptions to the mootness doctrine and the Township claims the repeal of the ordinance renders the action moot. The applications are currently pending with the Court.

**B. Matters Unresolved as of 2011 Report**

The following is an update on matters listed in our 2011 Report to the General Assembly, but unresolved as of the date of that Report, which, with respect to each such matter, identifies the ordinance submitted for review; the complaint about the ordinance asserted by the owner/operator who requested the review, the actions taken by the OAG, and the current status.

**1. Fayette County**

The owner/operator requested review of the application of a County ordinance requiring the removal of truck trailers used for hay storage from the farm property. The owner/operator complained that the ordinance violates state law and impedes normal agricultural operations. The owner/operator and County submitted additional information to the OAG and the ordinance review is pending.

**2. Heidelberg Township, Lebanon County**

OAG received requests from two separate owners/operators requesting review of Township ordinance provisions regulating concentrated animal operations (CAOs). The owners/operators complained that the ordinance provisions conflict with state law and impede the ability to engage in normal agricultural operations. The OAG notified the Township of legal

problems with the ordinance and offered the Township an opportunity to discuss and correct them. The OAG and Township are currently in negotiations seeking to resolve the matter without resorting to litigation.

**3. Douglass Township, Montgomery County**

The owner/operator requested review of a Township ordinance regulating land application of biosolids. The owner/operator complained that the ordinance conflicts with state law and prohibits normal agricultural operations. The OAG notified the Township of legal problems with the ordinance and offered the Township an opportunity to discuss and correct them. The OAG and Township are in negotiations seeking to resolve the matter through ordinance amendment without resorting to litigation.

**4. Maiden creek Township, Berks County**

The owner/operator of a greenhouse operation located in the Township's commercial zone requested review of the Township's action in enforcing its ordinance requiring mandatory connection and use of public water and prohibiting the owner's/operator's use of a well on the property to irrigate horticultural crops. The owner/operator complained that the ordinance conflicts with state law and prohibits and limits his normal agricultural operation. The OAG notified the Township of legal problems in the application of its mandatory connection ordinance and offered the Township an opportunity to discuss and correct them. The OAG and Township are in negotiations seeking to resolve the matter without resorting to litigation.

**5. Hilltown Township, Bucks County**

The owner/operator requested review of a Township ordinance restricting sales of agricultural products at a roadside stand. The owner/operator also requested review of the Township ordinance requirements for land development, including stormwater management

requirements. The OAG notified the owner/operator that it would not file a lawsuit with respect to the land development or stormwater management issues. The OAG notified the Township of legal problems with the ordinance provisions for sales at agricultural roadside stands and offered the Township an opportunity to discuss and correct them. The OAG approved Hilltown Township's proposed ordinance amendments and the Township is on schedule to enact those amendments in February 2013.

#### **6. Fairview Township, Erie County**

The owners/operators requested review of Fairview Township's ordinance and actions in re-zoning an agricultural zone to a residential zone and precluding a pre-existing agricultural operation. The owners/operators complained that the ordinance prohibits or limits normal agricultural operations. The OAG notified the owner/operator and the Township that it would not file a lawsuit. The owners/operators requested reconsideration of the OAG's decision and submitted additional information to prove they are engaged in a normal agricultural operation. The OAG is considering that additional information and the Township's written response.

#### **7. East Allen Township, Northampton County**

The owner/operator requested review of East Allen Township's application of the Uniform Construction Code to barn renovations and zoning requirements to engage in wine promotion events on the property. The owner/operator complained that East Allen Township's actions prohibit or limit the normal agricultural operations. The OAG requested that the owner/operator provide additional information necessary to conduct the review. After considering the additional information, the OAG notified the owner/operator and the Township that it would not file a lawsuit.

**8. Upper Makefield Township, Bucks County**

The owner/operator requested review of a joint municipal ordinance that regulates on-site events at wineries. The owner/operator complained that the regulation prohibits or limits a normal agricultural operation. The OAG notified the owner/operator and the Township that it would not file a lawsuit.

**9. Buffalo Township, Union County**

The owner/operator requested review of Buffalo Township's interpretation of the ordinance definition for "Agricultural Operation" to exclude the practice of processing biosolids through the addition of lime to produce agricultural lime for application to farm fields. The owner/operator complained that the Township's action violates State law and prohibits and limits a normal agricultural operation. The ordinance review is pending.

**10. Shrewsbury Township, York County**

The owners/operators requested review of Shrewsbury Township's building permit requirements and fees. The owners/operators complained that the building permit requirements and fees prohibit or limit normal agricultural operations. The OAG notified the owner/operator and the Township that it would not file a lawsuit.

**C. New Matters**

The following is a summary of the requests for review of local ordinances received by the OAG between July 6, 2010, and July 6, 2011, which, with respect to each request, identifies the ordinance submitted for review; the complaint about the ordinance asserted by the owner/operator who requested the review, and the actions taken by the OAG up to the date of this Report.

**1. Willistown Township, Chester County**

The owners/operators of a garden center requested review of Willistown Township’s application of its ordinance to cite the operation for noise and odors related to the storage of mulch brought in from off-site for sale on-site. The owners/operators complained that the Township’s application of its ordinance prohibits or limits a normal agricultural operation. The OAG notified the owner/operator and the Township that it would not file a lawsuit.

**2. Richland Township, Bucks County**

The owner/operator of a lawn and tree removal service processes trees obtained through the tree removal service into firewood on a farm owned by a relative. The owner/operator requested review of Richland Township’s application of its ordinance to preclude the firewood operation because it is not an agricultural use, but a mill use that is not permitted in the Agricultural Residential Zone. The owners/operators complained that the Township’s application of its ordinance prohibits or limits a normal agricultural operation. The OAG notified the owner/operator and the Township that it would not file a lawsuit.

**3. Huntington Township, Adams County**

The owner/operator of an agricultural operation requested review of Huntington Township’s zoning ordinance requirement for conditional use approval for a proposed “intensive farming” operation in the Agricultural Zone that is not a concentrated animal operation and the imposition of conditions to obtain a State approved Nutrient and Odor Management Plan to obtain conditional use approval. The owner/operator complained that the Township’s ordinance and conditional use requirements prohibited or limited a normal agricultural operation. The OAG notified the Township of legal problems with the ordinance and offered the Township an

opportunity to discuss and correct them. The OAG and Township are in negotiations seeking to resolve the matter without resorting to litigation.

**4. Pulaski Township, Lawrence County**

The owner/operator of an agricultural operation requested review of the Pulaski Township's ordinance requirements for stormwater management to construct a barn building. The owner/operator complained that the stormwater management requirements prohibited or limited a normal agricultural operation. The OAG notified the owner/operator that it would not file a lawsuit.

**5. Limestone Township, Lycoming County**

The owners/operators of two separate agricultural operations requested review of Limestone Township's zoning ordinance requirements for "intensive agricultural use." The owners/operators complained that the ordinance requirements prohibited or limited their normal agricultural operations, including the ability to construct manure storage facilities. The OAG notified the Township of legal problems with the ordinance provisions. The OAG and Township are in negotiations seeking to resolve the matter without resorting to litigation. The Township also agreed to allow the owners/operators to proceed with construction of manure storage facilities in accordance with State standards during the pendency of the negotiations with the OAG.

**6. Warrington Township, Bucks County**

The owner/operator of a nursery operation requested review of Warrington Township's application of its zoning ordinance to preclude the production of potting soil and mulch for use and sale on the nursery operation. The owner/operator complained that the Township's application prohibited or limited a normal agricultural operation. The OAG notified the

Township of legal problems with the ordinance provisions. The OAG and Township are in negotiations seeking to resolve the matter without resorting to litigation.

**D. Re-Opened Matters**

**1. Lehigh Township, Northampton County**

The OAG accepted a request for review of an ordinance that regulated “commercial livestock operations.” In 2009, after negotiations, Lehigh Township enacted amendments that resolved the legal problems with the ordinance. In 2011, the OAG was notified that Lehigh Township enacted new ordinances in 2010 to regulate Concentrated Animal Feeding Operations. The OAG notified Lehigh Township of legal problems with the ordinances and offered the Township an opportunity to discuss and correct them. The OAG and Township are currently in negotiations seeking to resolve the matter without resorting to litigation.

**2. West Fallowfield Township, Chester County**

The owner/operator requested review of the Township ordinance provisions for signs at roadside stands and restrictions on the keeping of livestock. The owner/operator complained that the ordinance prohibits or limits normal agricultural operations. The OAG notified the owner/operator and the Township on two occasions it would not file a lawsuit. The owner/operator requested reconsideration of the OAG’s decision and submitted additional information to prove that he is engaged in a normal agricultural operation on the property. After considering the additional information, the OAG notified the Township of the legal problems with its application of residential ordinance provisions to preclude the owner/operator’s keeping of livestock on a normal agricultural operation and offered the Township an opportunity to discuss and correct those problems. With respect to the signs at roadside stands, the OAG notified the owner/operator that it would not file a lawsuit.