

**THIRD 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**

**September 19, 2008**

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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 a local ordinance 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.

Act 38 took effect on July 6, 2005. In response, the Office of Attorney General 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, 2008, were completed within 120 days (or within a brief extension of the 120-day review period to obtain additional information needed to complete the review) or were still within the 120-day review period.

When the Office receives a request for review of an ordinance, the Office 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 Office completes its review, the Office 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 Office 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, 2007, and July 6, 2008, the Office of Attorney General (OAG):

- Received 8 requests for review of local ordinances;
- Completed review of 6 ordinances;
- Sent 3 responses to owner/operators advising that no legal action would be filed;
- Sent 3 notices to municipalities of legal problems with ordinances.

## **II. AGGREGATE DATA**

Between July 6, 2005, and July 6, 2008, the Office of Attorney General (OAG):

- Received 43 requests for review of local ordinances (one of which was withdrawn);
- Completed review of 40 ordinances (one review was completed between July 6, 2008, and the date of this Report);
- Sent 22 responses to owner/operators advising that no legal action would be filed;
- Sent 18 notices to municipalities of legal problems with ordinances;
- Brought 5 legal actions against municipalities to invalidate or enjoin the enforcement of an unauthorized local ordinance. The 4 actions brought before July 6, 2006, are ongoing (see part **III.A.1.– 4.** below).

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

### **A. Status of 5 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. 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 case is awaiting oral argument.

**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. 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 OAG filed a Petition for Reargument, which is being held by the Court pending the outcome of *Locust Township*.

**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. 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 OAG filed a Petition for Reargument, which is being held by the Court pending the outcome of *Locust Township*.

**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. Commonwealth Court dismissed all but one of the Township’s preliminary objections. The case is ongoing in Commonwealth Court.

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

The owner/operator requested review of Ordinance No. 1 of 2006, 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 failed to correct the problems, the OAG filed a lawsuit in Commonwealth Court to invalidate and enjoin the enforcement of the ordinance. The Commonwealth Court received briefing on the issues, but has not yet ruled on the legality of the ordinance. While awaiting a ruling from the Commonwealth Court, East Brunswick Township recently repealed Ordinance No. 1 of 2006 and adopted a new ordinance that regulates land application of biosolids. The parties are currently considering how the Township’s actions may impact the pending case.

**B. Matters Unresolved as of 2007 Report**

The following is an update on matters listed in our 2007 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. Lower Towamensing Township, Carbon County**

The owner/operator requested review of the Ordinance of 1978, which prohibits “intensive 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. The OAG and the Township are in ongoing negotiations seeking to resolve the matter without resorting to litigation.

**2. Hartley Township, Union County**

The owner/operator requested review of the Township Zoning Ordinance, which regulates commercial livestock and concentrated animal operations. The owner/operator complained that setback and permitting requirements impede the operation and expansion of 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 the Township are in negotiations seeking to resolve the matter without resorting to litigation.

**3. Salisbury Township, Lehigh County**

The owner/operator submitted a request for review of ordinance provisions that require a special exception for timber harvesting. The owner/operator complained that timber harvesting should not require a special exception. The OAG notified the Township of legal problems with

those provisions and offered the Township an opportunity to discuss and correct them. After negotiations, the Township amended the ordinance to bring it into compliance with Act 38.

**4. Lewis Township & Turbotville Borough, Northumberland County**

The owner/operator requested review of provisions of the Township/Borough Joint Zoning ordinance that regulates concentrated animal operations. The owner/operator complained that the provisions conflict with state law. The OAG notified the Township/Borough of legal problems with the ordinance and offered the Township/Borough an opportunity to discuss and correct them. After negotiations, the Township/Borough agreed to begin the process of amending the ordinance to bring it into compliance with Act 38, suspend enforcement of the ordinance pending formal amendment, and permit the owner/operator to move forward with building proposed poultry barns.

**5. Bethel Township, Berks County**

The owner/operator requested review of the Township Zoning Ordinance. The owner/operator complained that the ordinance unlawfully excludes aquaculture from the definition of agriculture, requires a special exception to engage in aquaculture, and limits spring water extraction. The OAG notified the owner/operator and the Township that it would not file a lawsuit.

**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. The OAG and Township are currently in negotiations seeking to resolve the matter without resorting to litigation.

**7. New Milford Borough, Susquehanna County**

The owner/operator requested review of amendments to Zoning Ordinance No. 15, which prohibits farm animals within the Borough limits. The owner/operator has a 9-acre parcel lying within Borough limits that is used for a market garden and to raise chickens for egg production and sales. The owner/operator complained that the ordinance precludes normal farming operations. The OAG notified the owner/operator and the Township that it would not file a lawsuit.

**8. Salem Township, Luzerne County**

The owner/operator requested review of Ordinance No. 06-02, which prohibits farm animals from being within 200 feet of an adjoining landowner or within 200 feet of a residential water-well. The owner/operator complained that the ordinance interferes with normal farming operations and conflicts with state law. The OAG notified the Township of the 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.

**9. Athens Township, Bradford County**

The owner/operator requested review of Township Zoning Ordinance No. 1202, which concerns mineral extraction. The owner/operator complained that he was served with a zoning enforcement notice stating that he is engaged in mineral extraction, but that he is engaged in landscaping and agricultural expansion, not a mineral extraction. 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, 2007, and July 6, 2008, 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. Barrett Township, Monroe County**

The owner/operator of a cattle farm requested review of an “Animals Running at Large” ordinance that fines a property owner when an animal escapes from the property and runs at large upon township property or the property of another. The owner/operator complained that ordinance interfered with his normal agricultural operations. The OAG notified the owner/operator and the Township that it would not file a lawsuit.

**2. Douglass Township, Berks County**

The owner/operator requested review on behalf of herself and 20 other farm owners affected by an ordinance that restricts agricultural retail sales by requiring roadside stands to be located at least 100 feet from all property lines and roads and requires that all products sold at a roadside stand must be grown, produced, or raised on the property. The owner/operator complained that the ordinance violated state law and interfered with normal agricultural operations. The OAG notified the Township of the legal problems with the ordinance and offered the Township an opportunity to discuss and correct them. After negotiations, the Township amended the ordinance to bring it into compliance with Act 38.

**3. Lehigh Township, Northampton County**

The owner/operator requested review of a township ordinance that imposes a 500 foot setback requirement for commercial livestock operations; limits agricultural operations on a

parcel designated as a “flag lot”; and the roadway access provisions. The owner/operator complained that setbacks conflicted with state law and impeded the ability to build 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 the Township have begun negotiations seeking to resolve the matter without resorting to litigation.

#### **4. Moon Township, Allegheny County**

The owner/operator requested review of the Township’s timber harvesting requirements under ordinance section 196. The owner/operator complained that the timber harvesting requirements were too burdensome and impeded the ability to engage in economically beneficial timber harvesting. The OAG notified the owner/operator and the Township that it would not file a lawsuit.

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

The owner/operator requested review of the Township’s application of excavation/land development ordinance provisions for his plan to fill in a large 8 acre hole on his farmland property. The owner/operator complained that the Township was imposing requirements to complete the project that prevented him from engaging in normal agricultural operations. The OAG notified the owner/operator and the Township that it would not file a lawsuit.

#### **6. Lewis Township, Union County**

The owner/operator requested review of Township ordinance 617 that imposed conditional use requirements on a non-concentrated animal operation (CAO), which included conditions to comply with the Nutrient Management Act (NMA) and setbacks requirements. The owner/operator complained that the provisions conflict 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. The OAG and Township are currently in ongoing negotiations seeking to resolve the matter without resorting to litigation, and the Township has permitted the owner/operator to move forward with building proposed poultry barns.

**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 ordinance is under review.

**8. Heidelberg Township, Lebanon County**

The owner/operator requested review of Township ordinance provisions regulating concentrated animal operations (CAOs). The owner/operator complains that the ordinance provisions conflict with state law and impede the ability to engage in normal agricultural operations. The ordinance is under review.