

**FOURTH 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**

October 1, 2009

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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, 2009, 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, 2008, and July 6, 2009, the Office of Attorney General (OAG):

- Received 15 requests for review of local ordinances;
- Completed review of 10 ordinances;
- Sent 5 responses to owner/operators advising that no legal action would be filed;
- Sent 5 notices to municipalities of legal problems with ordinances.

II. AGGREGATE DATA

Between July 6, 2005, and July 6, 2009, the Office of Attorney General (OAG):

- Received 57 requests for review of local ordinances (one request was withdrawn and is excluded from the AGGREGATE DATA);
- Completed review of 48 ordinances (six additional reviews were completed between July 6, 2009, and the date of this Report, for a total of 54);
- Sent 28 responses to owner/operators advising that no legal action would be filed;
- Sent 26 notices to municipalities of legal problems with ordinances;
- As of July 6, 2009, there were 5 legal actions pending against municipalities to invalidate or enjoin the enforcement of an unauthorized local ordinance. In August 2009, the OAG filed 2 additional legal actions against municipalities after each failed to correct the legal problems with their respective ordinances that the OAG identified. (See part **III.B.4., 8.** below).

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

A. Status of 5 Legal Actions Pending Prior to July 6, 2009

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. 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, where litigation is ongoing.

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 the OAG filed a Petition for Reargument, which the Court ordered held pending the outcome of *Locust Township*. The Court has not yet acted on the Petition, following its ruling in *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. The OAG filed a Petition for Reargument, which the Court ordered held pending the outcome of *Locust Township*. The Court has not yet acted on the Petition, following its ruling in *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. 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 case is ongoing in Commonwealth Court.

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 has legal problems. 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. The case is ongoing in Commonwealth Court.

B. Matters Unresolved as of 2008 Report

The following is an update on matters listed in our 2008 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 through ordinance amendment 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 through ordinance amendment without resorting to litigation.

3. 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 amend 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. The case was resolved in August 2009 when the Township/Borough enacted the amendments to the ordinance.

4. 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.

5. 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. After negotiations, the Township amended the ordinance to bring it into compliance with Act 38.

6. Lehigh Township, Northampton County

The owner/operator requested review of a Township ordinance that imposes a 500 foot setback requirement for commercial livestock operations. 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. After negotiations, the Township amended the ordinance to bring it into compliance with Act 38.

7. 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 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.

8. 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 to the lawsuit, which are currently scheduled for briefing and oral argument.

9. 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 OAG notified the Township of legal problems with the ordinance and offered the Township an opportunity to discuss and correct them. The OAG is awaiting a response from the Township.

C. New Matters

The following is a summary of the requests for review of local ordinances received by the OAG between July 6, 2008, and July 6, 2009, 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. Robinson Township, Washington County

The owner/operator requested review of a Township ordinance requiring that fencing of outdoor areas for horses be placed no closer than 100 feet from property lines. The owner/operator complained that the provisions reduced grazing land. The OAG notified the owner/operator and the Township that it would not file a lawsuit.

2. Heidelberg Township, Lebanon County

The owner/operator requested review of Township ordinance provisions regulating concentrated animal operations (CAOs). The owner/operator 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 is awaiting a response from the Township.

3. Upper Salford Township, Montgomery County

The owner/operator requested review of an ordinance regulating timber harvesting. The owner/operator complained that the prohibition of forestry activities in certain zoning districts violated 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 negotiations, the Township amended the ordinance to bring it into compliance with Act 38.

4. Neshannock Township, Lawrence County

The owner/operator requested review of a Township ordinance provision imposing a setback of 200 feet from property lines for barns housing livestock. The owner/operator complained that the setback precluded use of a barn to house cows and horses due to a subdivision of the farm land. The OAG notified the owner/operator and the Township that it would not file a lawsuit.

5. Shrewsbury Township, York County

The owner/operator requested review of the Shrewsbury Sewage Sludge Ordinance, which regulates biosolid land application and prohibits biosolid land application by corporations. Subsequently, the owner/operator submitted for review a second ordinance enacted by the Township also regulating biosolid land application. The owner/operator complained that both ordinances conflict with state law and prohibit normal agricultural operations. The OAG notified the 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 ongoing negotiations seeking to resolve the matter without resorting to litigation.

6. Cross Creek Township, Washington County

The owner/operator requested review of the Township's application of an ordinance provision requiring the demolition of an old farm house used for storage. The owner/operator complained that the Township's action violated the Right to Farm Act. The OAG notified the owner/operator and the Township that it would not file a lawsuit.

7. West Earl Township, Lancaster County

The owner/operator requested review of the Township's application of the Uniform Construction Code to a proposed horse barn and indoor riding arena. The owner/operator

complained that the Uniform Construction Code did not apply to the construction of the proposed horse barn and indoor riding arena. The OAG notified the owner/operator and the Township that it would not file a lawsuit.

8. Shrewsbury Township, York County

The owner/operator requested review of the Township's application of the Uniform Construction Code and land development plan requirements to the construction of hoop-style greenhouses on a nursery operation. The owner/operator complained that the Uniform Construction Code and land development ordinance provisions did not apply to the proposed greenhouses. The OAG notified the Township of legal problems with the application of the Code and ordinance provisions to the proposed greenhouses and offered the Township an opportunity to discuss and correct the misapplication. After negotiations, the Township approved the construction of the greenhouses without requiring compliance with the Uniform Construction Code or the land development ordinance.

9. Plumstead Township, Bucks County

The owner/operator requested review of Township ordinance provisions restricting height of property fencing. The owner/operator complained that the ordinance provisions preclude the erection a deer fence to protect a sustainable forestry and cattle pasture operation from the surrounding deer population. At the request of the owner/operator, the OAG deferred a decision on the request pending settlement discussions between the owner/operator and neighboring landowners. The ordinance review is pending.

10. 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 OAG is awaiting additional information from the Township to complete the review.

11. Barry Township, Schuylkill County

The owner/operator requested review of a Township ordinance regulating biosolid land application. 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. To date, the Township has not responded to the OAG's offer.

12. Elizabeth Township, Lancaster County

The owner/operator requested review of a Township ordinance regulating concentrated animal operations, including the imposition of 500 foot setbacks for animal housing facilities. The owner/operator complained that the ordinance violates state law and prohibits normal agricultural operations and the expansion of those 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.

13. Jefferson Township, Berks County

The owner/operator requested review of the Township's application of the Uniform Construction Code to a proposed horse stable for boarding and training thoroughbred horses. The owner/operator complained that the Uniform Construction Code did not apply to the construction of the proposed horse stable. The OAG notified the owner/operator and the Township that it would not file a lawsuit.

14. Martic Township, Lancaster County

The owner/operator requested review of the Township's application of an ordinance provision to shut down a manure composting operation. The owner/operator complained the Township's application of the ordinance violates state law and prohibits normal agricultural operations. The ordinance is under review.

15. Jackson Township, Cambria County

The owner/operator requested review of a Township ordinance requiring that a barn to house livestock be set back 50 feet from property lines. The owner/operator complained the Township's application of the ordinance violates state law and prohibits normal agricultural operations. The OAG notified the owner/operator and the Township that it would not file a lawsuit.