

**FIFTH 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 10, 2010

**TOM CORBETT
Attorney General**

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, 2010, were completed within 120 days (or required an 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 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, 2009, and July 6, 2010, the OAG:

- Received 10 requests for review of local ordinances;
- Completed review of 5 ordinances (four additional reviews were completed between July 6, 2010, and the date of this Report, for a total of 9);
- Sent 5 responses to owner/operators advising that no legal action would be filed (includes two responses of no legal action sent after July 6, 2010);
- Sent 4 notices to municipalities of legal problems with ordinances (includes two notices of legal problems sent after July 6, 2010).

II. AGGREGATE DATA

Between July 6, 2005, and July 6, 2010, the OAG:

- Received 67 requests for review of local ordinances (one request was withdrawn and is excluded from the AGGREGATE DATA);
- Completed review of 60 ordinances (four additional reviews were completed between July 6, 2010, and the date of this Report, for a total of 64);
- Sent 33 responses to owner/operators advising that no legal action would be filed (includes two responses of no legal action sent after July 6, 2010);
- Sent 31 notices to municipalities of legal problems with ordinances (includes two notices of legal problems sent after July 6, 2010);
- One request for review of a local ordinance was resolved between the farmer, township, and neighbors while the OAG's review was pending;
- Brought 7 legal actions against municipalities to invalidate or enjoin the enforcement of an unauthorized local ordinance.

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. 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 Township filed an Answer to the Petition for Review and the 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*. 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*. The Township filed an Answer to the Petition for Review and the litigation is ongoing.

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*. 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*. The Township filed an Answer to the Petition for Review and the litigation is ongoing.

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. Richmond Township has recently provided draft proposed amendments to the OAG for review and approval.

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 and litigation is ongoing.

B. Matters Unresolved as of 2009 Report

The following is an update on matters listed in our 2009 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. After negotiations, the Township amended its ordinance in May 2010 to bring it into compliance with Act 38.

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, 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 setback 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 Township permitted the owner/operator to move forward with building proposed poultry barns. After negotiations, the Township amended its ordinance in October 2010 to bring it into compliance with Act 38.

4. 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 proposed that, in order for the Township to avoid litigation, the Township should repeal the first ordinance and either repeal the second ordinance or amend it to conform to the final ordinance resolving the *East Brunswick Township* litigation (**see, supra, III.A.5**). In response, the Township repealed the first ordinance and amended the second ordinance to conform to the *East Brunswick Township* ordinance in March 2010.

5. Plumstead Township, Bucks County

The owner/operator requested review of Township ordinance provisions restricting the height of property fencing. The owner/operator complained that the ordinance provisions preclude the erection of a deer fence to protect a sustainable forestry and cattle pasture operation from the surrounding deer population. The owner/operator reached a resolution with the Township and neighboring landowners while the OAG's review was pending.

6. 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.

7. 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. The OAG

proposed that, in order for the Township to avoid litigation, the Township should either repeal the ordinance or amend it to conform to the final ordinance resolving the *East Brunswick Township* litigation (**see, supra, III.A.5**). In response, the Township amended its sewage sludge ordinance to conform to the *East Brunswick Township* ordinance in February 2010.

8. 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. After negotiations, the Township agreed to amend the ordinance to bring it into compliance with Act 38. The case was resolved in March 2010 when the Township enacted the amendments to the ordinance.

9. 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.

10. 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 as not constituting a normal agricultural operation. The owner/operator complained that the Township's application of the ordinance violates state law and prohibits normal agricultural operations. The OAG notified the Township that a normal agricultural operation includes the practice of composting manure; therefore, the Township's application of its ordinance violated state law. After negotiations, the Township agreed to amend the ordinance to adopt the Right to Farm Act definition of normal agricultural operation and permit the owner/operator to continue the manure composting operation. The case was resolved in August 2010 when the Township enacted the amendment to the ordinance.

C. New Matters

The following is a summary of the requests for review of local ordinances received by the OAG between July 6, 2009, and July 6, 2010, 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. Douglass Township, Montgomery 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. The OAG and Township are in negotiations seeking to resolve the matter through ordinance amendment without resorting to litigation.

2. Colerain Township, Lancaster County

The owner/operator requested review of the Township's action in refusing to issue a building permit for the expansion of a dairy barn on his concentrated animal operation due to a neighbor's appeal of the zoning hearing board's decision granting the owner/operator a special exception to build the barn. The owner/operator also requested review of the provisions of the Township ordinance regulating intensive agricultural operations and the requirements for a special exception. The owner/operator obtained all state approvals for the dairy barn expansion; thus the owner/operator complained that the Township's refusal to issue a building permit and the provisions of the ordinance conflict with state law and prohibit normal agricultural operations. The OAG notified the Township that its refusal to issue the building permit unlawfully prohibited a normal agricultural operation in violation of Act 38. The OAG also notified the Township of legal problems with the ordinance provisions regulating an "intensive agricultural production facility" and offered the Township an opportunity to discuss and correct them. The Township issued the owner/operator a permit to build the dairy barn and submitted proposed amendments to its ordinance to resolve legal problems. The OAG and the Township are in negotiations seeking to resolve the matter through ordinance amendment without resorting to litigation.

3. Blooming Valley Borough, Crawford County

The owner/operator requested review of the Borough's enforcement of a posted weight-restriction on a road used by the milk hauling truck servicing the owner/operator's dairy farm. The owner/operator complained that the Borough's action in prohibiting the milk hauling truck from using the road prohibited or limited his normal agricultural operation. The OAG notified the owner/operator and the Township that it would not file a lawsuit.

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/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 is engaged in discussions and an exchange of information with the Township regarding the legal issues implicated in this review. The ordinance review is pending.

5. 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 that it would not file a lawsuit. The owner/operator requested reconsideration of the OAG's decision and submitted additional information. The OAG is currently considering the request and additional information.

6. Lehigh Township, Northampton County

The owner/operator requested review of the Township's enforcement of an ordinance directing the removal of a storage building and to cease and desist his dog grooming operation on the property. The owner/operator complained that the Township's enforcement violated state law and prohibited a normal agricultural operation. The OAG notified the owner/operator and the Township that it would not file a lawsuit.

7. Lower Saucon Township, Northampton County

The owner/operator requested review of the Township's enforcement of an ordinance requiring the owner/operator to obtain zoning use and occupancy permits and an approved site plan for a nursery/horticultural operation. The owner/operator complained that the Township's ordinance requirements violate state law and are an unauthorized regulation of a normal agricultural operation. The OAG notified the owner/operator and the Township that it would not file a lawsuit.

8. Middlesex Township, Butler County

The owner/operator requested review of the Township's enforcement of an ordinance requiring the mandatory tapping of the residence into the municipal sewage system. The owner/operator claimed that the Pennsylvania Department of Agriculture granted the operation an agricultural exemption from requiring mandatory connection to a public sewage system; thus the owner/operator claimed that the Township violated state law by enforcing the mandatory sewage connection ordinance. The OAG notified the owner/operator and the Township that it would not file a lawsuit.

9. 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. 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 and the Township are in negotiations seeking to resolve the matter through ordinance amendment without resorting to litigation. The OAG is engaged in discussions and an exchange of information with the

Township and counsel for the owner/operator regarding the remaining issues on the requirements for land development. The ordinance review with respect to land development requirements is pending.

10. Drumore Township, Lancaster County

The owners/operators requested review of the Township's interpretation of the definition of agriculture to preclude a licensed Cervidae Livestock Operation from an agricultural zone. The owner/operator complained that the Township's action violated state law and prohibited a normal agricultural operation. The OAG notified the Township that a normal agricultural operation includes a licensed Cervidae Livestock Operation; therefore, the Township's application of its ordinance violated state law. The OAG and the Township are in negotiations seeking to resolve the legal problem with the Township's interpretation of the term agriculture without resorting to litigation.