

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**COMMONWEALTH OF PENNSYLVANIA,
OFFICE OF ATTORNEY GENERAL
BY THOMAS W. CORBETT, JR., ATTORNEY GENERAL
Petitioner**

v.

NO.

M.D. 2006

**LOCUST TOWNSHIP, and
LOCUST TOWNSHIP BOARD
OF SUPERVISORS
Respondents**

**PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT FOR
DECLARATORY JUDGEMENT AND INJUNCTIVE RELIEF**

The Commonwealth of Pennsylvania, by the Attorney General, brings this Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief and alleges the following:

STATUTORY AUTHORITY

1. Petitioner brings this Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief pursuant to the “Declaratory Judgments Act”, 42 Pa.C.S. § 7531 et. seq.; Pennsylvania Rules of Civil Procedure, Rule 1602 et. seq. and 3 Pa.C.S. § 315.

JURISDICTION

2. The Court has jurisdiction of this Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief pursuant to 42 Pa.C.S. § 761, which provides jurisdiction over all civil actions or proceedings by the Commonwealth government, and 3 Pa.C.S. § 315, which provides jurisdiction over actions by the

Attorney General to invalidate and/or enjoin the enforcement of an unauthorized local ordinance.

PARTIES

3. Petitioner is the Pennsylvania Office of Attorney General, an agency of the Commonwealth of Pennsylvania, whose principal business address is Strawberry Square, Harrisburg, PA 17120. Pursuant to 3 Pa.C.S. §§ 314 and 315, the Attorney General is authorized to review local ordinances and to bring actions against local government units to invalidate and/or enjoin the enforcement of unauthorized local ordinances.

4. Respondent Locust Township Board of Supervisors is the duly elected governing body of Respondent Locust Township, a municipal corporation and township of the second class, with offices at 1123a Numidia Drive, Catawissa, Pennsylvania, 17820.

FACTS

5. Respondent Locust Township is a political subdivision of the Commonwealth of Pennsylvania within which an Agricultural Security Area has been created pursuant to 3 P.S. § 911.

6. On or about August 23, 2001, Locust Township adopted Ordinance Number 4-2001 (“Ordinance”), captioned “AN ORDINANCE AMENDING THE ZONING ORDINANCE OF LOCUST TOWNSHIP, COLUMBIA COUNTY, PENNSYLVANIA TO PROVIDE FOR AND REGULATE INTENSIVE ANIMAL AGRICULTURE.” A copy of the Ordinance is attached as Exhibit A.

7. Section 302 of the Ordinance defines “Intensive Animal Agriculture” as the keeping, housing, confining, raising, feeding, production, or other maintaining of livestock or poultry animals when, on a annualized basis, there exists more than 150 Animal Equivalent Units (A.E.U.’s) on the agricultural operation, regardless of the actual acreage owned, used, or otherwise available to the agricultural operation.

8. Section 302 of the Ordinance states that intensive agricultural also specifically includes: (1) Concentrated Animal Operations (CAO). CAO’s are defined as agricultural operations having an animal density of more than two Animal Equivalent Units per acre of cropland or acre of land suitable for application of animal manure on an annualized basis; and (2) Concentrated Animal Feeding Operations (C.A.F.O.’s). CAFO’s are defined as agricultural operations with either more that 1,000 A.E.U.’s or agricultural operations with 301 to 1,000 A.E.U.’s, which have the potential to discharge surface waters.

9. Section 503 of the Ordinance permits intensive animal agriculture by special exception which is conditioned upon compliance with eleven subsections and “such other lawful criteria as the Zoning Hearing Board deems necessary.”

10. Section 503(a) of the Ordinance states that that an applicant for intensive animal agriculture shall comply with all applicable federal, state and local laws and regulations, specifically including, but not limited to those of the Department of Environmental Protection of Pennsylvania, requirements under the Nutrient Management Act and regulations found in Title 25, Chapter 83, as amended, and any other laws, rules or regulations relating to said operations, including storage and handling of manure, shall be followed before said operation shall operate in the Township.

11. Section 503(d) of the Ordinance requires a Site Plan illustrating topographic and other significant features of the land, inhabited residences, other buildings and structures, manure storage facilities, prevailing wind direction, building ventilation direction, stormwater retention facilities, groundwater sources, and fresh water streams and tributaries.

12. Section 503(f) of the Ordinance requires the preparation of an emergency contingency plan to address inadequate manure management practices, manure leaks and spills, disease and other manure handling emergencies to be provided to the Zoning Hearing Board, the Township, and local emergency management.

13. Section 503(g) of the Ordinance requires intensive animal agricultural operations which are expected to consume 10,000 gallons or more of water per day to register with the Susquehanna River Basin Commission as a Consumptive Water Use; submit a water impact study prepared by a hydrologist holding a Ph.D.; and to meter, measure and record in a bound log book the amount of water actually used on a daily basis.

14. Section 503(h) of the Ordinance requires intensive agricultural operations to take into account prevailing seasonal wind patterns and to include in a Site Plan the direction of seasonal prevailing wind patterns and the distance to the nearest inhabited residence.

15. Section 503(j) of the Ordinance requires a written proposal for controlling and eliminating malodors, including specific odor control practices.

16. Part 3(a) of the Ordinance requires a 60 acre minimum lot size for an intensive animal agricultural operation.

17. Part 3(b) of the Ordinance requires a setback of 500 feet from any adjacent property line or water source for intensive agricultural operations.

18. Part 5 of the Ordinance requires an intensive agricultural operation to maintain a surety bond or insurance of \$150,000 to \$300,000 depending on the size of the agricultural operation.

19. On or about October 18, 2005, the operator of a normal agricultural operation in Locust Township requested that the Attorney General review the Ordinance pursuant to 3 Pa. C.S. § 314. A copy of the request is attached as Exhibit B.

COUNT I

VIOLATION OF 3 Pa.C.S. § 313

20. Petitioner incorporates paragraphs 1 through 19 as if fully set forth.

21. 3 Pa. C.S. § 312 defines an unlawful local ordinance as an ordinance enacted or enforced by a local government unit which prohibits or limits a normal agricultural operation unless the local government: (1) has expressed or implied authority under State law to adopt the ordinance; and (2) is not prohibited or preempted under State law from adopting the ordinance.

22. 3 Pa C.S. § 313 prohibits a local government unit from adopting or enforcing an unauthorized local ordinance.

23. 3 P.S. § 952 defines a normal agricultural operation as the activities, practices, equipment and procedures that farmers adopt, use or engage in the production and preparation for market of poultry, livestock, and their products and in the production, harvesting and preparation for market or use of agricultural, agronomic, horticultural, silvicultural and aquacultural crops and commodities and is: (1) not less than ten

contiguous acres in area: or (2) less than ten contiguous acres in area but has anticipated yearly gross income of at least \$10,000. The term includes new activities, practices, equipment and procedures consistent with technological development within the agricultural industry. Use of equipment shall include machinery designed and used for agricultural operations, including but not limited to, crop dryers, feed grinders, saw mills, hammer mills, refrigeration equipment, bins and related equipment used to store or prepare crops for marketing and those items of agricultural equipment and machinery defined by the act of December 12, 1994 (P.L. 944, No. 134) known as the Farm Safety and Occupational Health Act. Custom work shall be considered a normal farming practice.

24. “Intensive Animal Agriculture”, as defined in Section 302 of the Ordinance, is a normal agricultural operation as defined in 3 P.S. § 952.

25. Locust Township has no express or implied authority to define, differentiate or regulate “Intensive Animal Agriculture”.

26. Section 503 of the Ordinance, which grants special exception for intensive animal agriculture upon such other lawful criteria as the Zoning Hearing Board deems necessary, is arbitrary, vague and invites discriminatory enforcement.

27. The restrictions imposed by Section 503(a),(d),(f),(g),(h), and (j), Part 3(b) and Part 5 of the Ordinance are preempted by State law.

28. The restrictions imposed by the Ordinance are prohibited by the agricultural protections set forth in the Right to Farm Law, 3 P.S. 952, the Municipalities Planning Code, 53 P.S. § 10603, and the Agricultural Area Security Law, 3 P.S. § 912.

29. The Ordinance prohibits or limits a normal agricultural operation in violation of 3 Pa C.S. § 313.

COUNT II

VIOLATION OF THE NUTRIENT MANGEMENT ACT,

3 Pa C.S. § 501

30. Petitioner incorporates paragraphs 1 through 29 as if fully set forth.

31. The Nutrient Management Act (NMA) occupies the whole field of regulation regarding nutrient management and odor management to the exclusion of all local regulation.

32. The NMA provides that no ordinance or regulation of any political subdivision may prohibit or in any way regulate practices related to the storage, handling, land application of animal manure or nutrients or to the construction, location or operation of facilities used for storage of animal manure or nutrients or practices otherwise regulated by this chapter if the municipal ordinance or regulation is in conflict with this chapter and the regulations or guidelines promulgated under it.

33. Section 503(a) of the Ordinance is preempted by the NMA to the extent that it requires normal agricultural operations not subject to the NMA to comply with its terms.

34. Section 503(d) of the Ordinance requiring a site plan is preempted by the NMA in that it imposes requirements more stringent than those imposed by the NMA and attempts to regulate nutrient management and odor management practices.

35. Section 503(f) of the Ordinance is preempted by the NMA to the extent that it requires normal agricultural operations not subject to the NMA to submit an emergency contingency plan and attempts to regulate practices of nutrient management.

36. Section 503(h) and (j) of the Ordinance are preempted by the NMA which comprehensively regulates odor management of normal agricultural operations.

37. The requirement of a 500 foot setback for intensive agriculture under Part 3(b) of the Ordinance is preempted by the NMA and is arbitrary, unreasonable and not substantially related to the health, safety, morality and general welfare of the community.

38. The setback provisions of Part 3(b) of the Ordinance conflict with and are more stringent than, the various 100, 200, and 300 foot setback requirements of the NMA regulations, 25 Pa. Code § 83.351.

39. The requirement for a bond or insurance in Part 5 of the Ordinance conflicts with and is more stringent than the NMA, which regulates manure storage and disposal, but does not require a bond or insurance.

COUNT III

VIOLATION OF THE WATER RESOURCES PLANNING ACT,

27 Pa C.S. § 3131

40. Petitioner incorporates paragraphs 1 through 39 as if fully set forth.

41. Section 3136 of the Water Resources Planning Act prohibits political subdivisions from regulating the allocation of water resources and the conditions of water withdrawal.

42. The restrictions on allocation of water resources in Section 503(g) of the Ordinance are preempted under Section 3136 of the Water Resources Planning Act.

COUNT IV

VIOLATION OF THE MUNICIPALITIES PLANNING CODE,

53 P.S. § 10603(h)

43. Petitioner incorporates paragraphs 1 through 42 as if fully set forth.

44. The Municipalities Planning Code (MPC) provides that zoning ordinances shall encourage the continuity, development and viability of agricultural operations. Further, the MPC states that zoning ordinances may not restrict agricultural operations or changes to or expansions of agricultural operations in geographic areas where agriculture has traditionally been present unless the agricultural operation will have a direct effect on the public health and safety.

45. The Ordinance restricts agricultural operations in violation of the MPC.

COUNT V

VIOLATION OF THE AGRICULTURAL AREA SECURITY LAW,

3 P.S. § 911

46. Petitioner incorporates paragraphs 1 through 45 as if fully set forth.

47. The Agricultural Area Security Law (AASL) provides that every municipality or political subdivision within which an agricultural security area is created shall encourage the continuity, development and viability of agriculture within such an area by not enacting local laws or ordinances which would unreasonably restrict farm structures or farm practices within the area in contravention of the purposes of this act unless such restrictions or regulations bear a direct relationship to the public health or safety.

48. The Ordinance unreasonably restricts farm structures and farm practices in violation of the AASL.

COUNT VI

VIOLATION OF THE RIGHT TO FARM LAW,

3 P.S. § 953

49. Petitioner incorporates paragraphs 1 through 48 as if fully set forth.

50. The Right to Farm Law provides that every municipality shall encourage the continuity, development and viability of agricultural operations within its jurisdiction. Every municipality that defines or prohibits a public nuisance shall exclude from the definition of such nuisance any agricultural operation conducted in accordance with normal agricultural operations so long as the agricultural operation does not have a direct adverse effect on the public health and safety.

51. Part 3(a) of the Ordinance, which requires a 60 acre minimum lot size, conflicts with the Right to Farm Law, which defines a normal agricultural operation as a farm of 10 or more contiguous acres.

WHEREFORE, Petitioner prays that the Court grant the following relief:

- (a) declare Locust Township Ordinance Number 4 of 2001 null and void;
- (b) enjoin Locust Township from enforcing Ordinance Number 4 of 2001; and
- (c) grant such other relief as it may deem just and proper under the circumstances.

Respectfully submitted,

THOMAS W. CORBETT, JR.
Attorney General

BY: _____

Michael T. Killion
Deputy Attorney General
Attorney ID # 201923

Gregory R. Neuhauser
Senior Deputy Attorney General
Attorney ID # 31485

Susan J. Forney
Chief Deputy Attorney General
Attorney ID # 27744

Office of Attorney General
Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 705-2331

Date: June 29, 2006

VERIFICATION

I, LOUIS J. ROVELLI, verify that the statements contained in the foregoing document are true and correct to the best of my knowledge, information and belief. I understand that false statements are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Date: _____

LOUIS J. ROVELLI

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NOTICE TO DEFEND

You have been sued in Court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and Notice are served, by entering a written appearance personally or by an attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so, the case may proceed without you and a judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Legal Referral Service
Pennsylvania Bar Association
800-692-7375 or (717) 238-6715

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CERTIFICATE OF SERVICE

I, Michael T. Killion, Esquire, hereby certify that service of a true and correct copy of the enclosed Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief was delivered in person to:

Locust Township Board of Supervisors
1123a Numidia Drive
Catawissa, Pennsylvania 17820

**MICHAEL T. KILLION
DEPUTY ATTORNEY GENERAL**

Date: _____