



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL
June 18, 2008

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**Board of Supervisors
PEACH BOTTOM TOWNSHIP
545 Broad Street
Delta, PA 17314**

RE: Peach Bottom Township Zoning Ordinance

Dear Board of Supervisors:

As you know, the Office of Attorney General has been engaged in an Act 38 review of several provisions in the Township's zoning ordinance that regulate Concentrated Animal Operations (CAOs) and Concentrated Animal Feeding Operations (CAFOs). This letter will outline the legal problems we've identified with the provisions under review and suggest how those problems can be resolved.

We start by providing a brief overview of the State laws and agencies that regulate CAOs and CAFOs.

The State Conservation Commission (SCC), pursuant to its authority under the Nutrient and Odor Management Act (NMA), 3. P.S. § 501 *et seq.*, and accompanying regulations, 25 Pa. Code § 83.201, *et seq.*, comprehensively regulates nutrient management on CAOs and CAFOs, which includes requirements for the "design, construction, location, operation, maintenance, and removal from service of manure storage facilities." 25 Pa. Code § 83.351. Specifically, a manure storage facility must meet the National Resource Conservation Service's engineering conservation practice standards contained in the Pennsylvania Technical Guide (PaTG), as well as the criteria described in the Department of Environmental Protection's (DEP) Manure Management Manual (MMM).

The SCC also approves nutrient management plans for CAOs and CAFOs that are specific to the operation, including the manure storage facility. The SCC has pursued enforcement against at least 32 farms since 1997. The enforcement actions have imposed monetary penalties ranging from \$500 to \$59,000 and have ordered corrective actions that must be complied with before the operation may continue. For example, the SCC ordered a farm to

relocate its manure storage facility, and because the farmer could not afford to make this corrective change, he had to shut down the operation.

DEP's regulations require that manure storage facilities be designed, constructed, operated, and maintained to ensure the facility is structurally sound, water-tight, and located and sized properly to prevent pollution of surface and groundwater during events up to at least a 25-year/24 hour storm. 25 Pa. Code § 91.36. This requirement is met by complying with the PaTG and MMM in designing and constructing a manure storage facility. DEP requires a CAFO to obtain certain permits depending on the size of the operation. All CAFOs must obtain a National Pollutant Discharge Elimination System (NPDES) permit. 25 Pa. Code § 92.5a. The NPDES permit requirements are based on the Pennsylvania Clean Streams Act, 35 P.S. § 691.1. *et seq.*, and include requirements from the federal Clean Water Act. Large CAFOs and manure storage facilities with large storage capacities are required to obtain a separate water quality management permit. 25 Pa. Code § 91.36. In addition to requiring a separate leak detection system, the water quality management permit assures proper siting, design, construction, and operation for these facilities.

Against this background, we discuss the following legal problems with the ordinance provisions.

The formula for the calculation of animal equivalent units per acre in the definition of "Concentrated Animal Operation" under Section 501 and in Section 336(2) (b) conflicts with the NMA. These provisions state that the number of animal equivalent units per acre is determined by calculating the total number of animal equivalent units and dividing that number by "the number of acres **within the parcel** proposed for the location of a Concentrated Animal Operation suitable for the application of manure." Sections 501, 336(2)(b). Under the NMA, the amount of acreage for the calculation includes land suitable for the application of manure, which may include rented or leased land outside the parcel where the agricultural operation is located. 25 Pa. Code 83.262(a)(2). Thus, the formula set forth in the ordinance is stricter than the NMA, because it is limiting the land to be included in the calculation to only that within the parcel. The Township should amend the ordinance to conform its definition of a CAO to the NMA definition.

The requirement of Section 336 that a parcel of land for a CAO or CAFO must be a minimum of fifty (50) acres is more stringent than and therefore preempted by the NMA, which requires no minimum acreage for a CAO or CAFO. The fifty-acre minimum also violates the Right to Farm Act, because CAOs and CAFOs are normal agricultural operations, and the Right to Farm Act requires only a ten (10) acre minimum for normal agricultural operations. Section 336 should be amended to remove the minimum acreage requirement or at least to conform it to the Right to Farm Act.

Similarly, the 400 and 2000 foot setbacks required under Section 336 are more stringent than and therefore preempted by the NMA, which requires only 100 to 300 foot setbacks. Burkholder v. Zoning Hearing Bd. of Richmond Twp., 902 A.2d 1006, 1016 (Pa. Cmwlth. 2006)

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(explaining that the “most stringent setback requirement for a “manure storage facility” contained in the NMA’s regulations is 300 feet.”). Section 336 should be amended to remove the setback requirements or at least to conform them to the NMA.

The requirement of Section 202.2 that a CAFO or CAO be located on “land of low quality for agricultural use” is preempted by the NMA’s site requirements for such operations (which DEP evaluates during its permitting process). Section 202.2 should be amended to remove application to CAOs or CAFOs.

Section 397’s requirement that an owner or operator of a manure storage facility install test wells and enter into an agreement to permit inspections by the Township zoning officer at the owner’s or operator’s expense, and its provisions establishing a local enforcement scheme, conflict with and are preempted by the NMA and DEP regulations. As observed already, the NMA regulates the “design, construction, location, operation, maintenance, and removal from service of manure storage facilities.” 25 Pa. Code § 83.351. DEP also regulates the design, construction, and inspection of manure storage facilities through its permitting program. 25 Pa. Code §§ 92.5a, 91.33, 91.36. The Township should amend Section 397 to remove all reference and application to manure storage facilities.

In light of the comprehensive regulation of CAOs and CAFOs by the SCC and DEP, and in place of the ordinance provisions that we’ve recommended that the Township remove, we suggest that the Township amend its ordinance to require only, and simply, that: *An owner or operator of a proposed CAO or CAFO shall obtain a Township permit to operate a CAO or CAFO, which the Township shall issue to the owner or operator upon the Township’s receipt of proof that the owner or operator has an approved nutrient management plan and has obtained all required DEP permits.*

Please contact me at your earliest convenience to discuss these matters.

Sincerely,



SUSAN L. BUCKNUM

Senior Deputy Attorney General

SLB/lls