COMMONWEALTH OF PENNSYLVANIA
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RE: ACRE Review Request
Montour Township, Columbia County

Dear Tony:

This letter will detail the legal problems with Montour Township's Zoning Ordinance provisions regulating agricultural operations, as well as the Township requiring a special exception for [redacted] proposed swine nursery operation and the conditions it imposed for approval. We will provide proposed changes to the Ordinance that would be acceptable to the Office of Attorney General to resolve this matter by agreement through ordinance amendment and address the approval of [redacted] proposed operation.

The Agriculture Communities and Rural Environment (ACRE) law requires municipalities to comply with State law in imposing requirements on normal agricultural operations. Pennsylvania law provides State agencies with strong and broad regulatory and enforcement power over all agricultural operations, including Concentrated Animal Operations (CAOs) and Concentrated Animal Feeding Operations (CAFOs) and prohibits inconsistent regulation by municipalities. 3 Pa. C.S. § 312, *et seq*. We begin with an overview of the State laws that regulate agricultural operations and then address the Ordinance provisions and conditions imposed on Mr. Sponenberg.

I. CLEAN STREAMS LAW AND DEP REGULATIONS

Under Pennsylvania law, all animal agricultural operations are regulated and defined to fall into one of the three following categories:

- animal agricultural operations too small to be a CAO/CAFO, i.e., non-CAOs/CAFOs, which are subject to the Clean Streams Law regulatory scheme. See 25 Pa. Code § 91.36, discussed below.

- concentrated animal operations (CAO), which are subject to the Nutrient and Odor Management Act and the Clean Streams Law regulatory schemes. See 25 Pa. Code § 83.201, 82.701, and 91.36, discussed below.

- concentrated animal feeding operations (CAFO), which are subject to the Nutrient and Odor Management Act and the Clean Streams Law regulatory schemes. See 25 Pa. Code § 83.201, 82.701, 91.36, and 92a.1, discussed below.

Pursuant to its authority under the Clean Streams Law, 35 P.S. § 691.1, *et seq.*, the Department of Environmental Protection's (DEP) regulations require that manure storage facilities **on any size** agricultural operation must be designed, constructed, operated, and maintained to ensure that the facility is structurally sound, water-tight, and located and sized properly to prevent pollution of surface and groundwater for events up to at least a 25-year/24-hour storm. 25 Pa. Code § 91.36(a)(1). Pursuant to Section 91.36, these requirements are met if the design and construction of the manure storage facility is certified by a registered professional engineer as meeting the USDA Natural Resources Conservation Service's (NRCS) engineering conservation practice standards contained in the Pennsylvania Technical Guide (PaTG), as well as the criteria described in the DEP's Manure Management Manual (MMM). 25 Pa. Code § 91.36(a)(1)(i), (2).

In addition, DEP requires CAFOs to obtain various permits depending on the CAFO's size. All CAFOs must obtain a National Pollutant Discharge Elimination System (NPDES) permit, 25 Pa. Code § 92a.29, .49, the requirements for which are based on the Clean Streams Law and various requirements of 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(a)(2)-(4); 92a.29(e)(3).

With respect to manure management, DEP regulates **all** agricultural operations that use or produce manure whether or not such operations are a CAO or CAFO. 25 Pa. Code § 91.36. All smaller animal operations (or operations that use manure) are required to have a written manure management plan that complies with DEP's MMM. 25 Pa. Code 91.36(b)(1)(i). As discussed below, CAOs and CAFOs are subject to the Nutrient and Odor Management Act and are required to have nutrient management plans developed by a certified nutrient management specialist and approved by the State Conservation Commission. 25 Pa. Code §§ 91.36(b)(1)(ii)-(iii), 92a.29(e)(1).

II. NUTRIENT AND ODOR MANAGEMENT ACT AND REGULATIONS

The State Conservation Commission (SCC), pursuant to its authority under the Nutrient and Odor Management Act (NOMA), 3. P.S. § 501 *et seq.*, and accompanying regulations, 25 Pa. Code § 83.201, *et seq.*, comprehensively regulates nutrient and odor management on CAOs and CAFOs. In addition to requiring an approved site-specific nutrient management plan, the SCC's regulations include mandatory requirements for the "design, construction, location, operation, maintenance, and removal from service of manure storage facilities." 25 Pa. Code § 83.351; see also 25 Pa. Code § 91.36. Manure storage facilities are required to be "designed, constructed, located, operated, maintained, and, if no longer used for the storage of manure, removed from service, in a manner that protects surface and groundwater quality, and prevents the offsite migration of nutrients." 25 Pa. Code § 83.351(a)(1). The SCC's regulations incorporate the manure storage facility design and construction requirements from the DEP's regulation under Section 91.36, *supra*, as well as impose 100 to 300 foot setbacks from property lines and water sources. 25 Pa. Code § 83.351. One of the purposes of the nutrient management regulations is to protect the quality of surface and groundwater. 25 Pa. Code § 83.203.

The SCC's regulations also require CAOs and CAFOs to develop and implement site-specific odor management plans when building new animal housing or manure management facilities. 25 Pa. Code § 83.741. The odor management regulations specify the criteria and requirements for the "construction, location and operation of animal housing facilities and animal manure management facilities, and the expansion of existing facilities." 25 Pa. Code § 83.702(3). An odor management plan (OMP) is a "written site-specific plan identifying the Odor [Best Management Practices] to be implemented to manage the impact of odors generated from animal housing and manure management facilities located or to be located on the site." 25 Pa. Code § 83.701. An OMP must be prepared by a certified Odor Management Specialist and must be approved by the SCC prior to construction or use of the new facilities built after the effective date of the regulations (February 27, 2009). 25 Pa. Code § 83.741 (e), (f), (h); Commonwealth v. Richmond Township, 2 A.3d 678, 684-86 (Pa. Cmwlth. 2010) (holding that the Nutrient and Odor Management Act regulations preempted ordinance provisions regulating "intensive agricultural operations" with requirements that exceed and conflict with the requirements under the Act's regulatory scheme); Burkholder v. Zoning Hearing Board of Richmond Township, 902 A.2d 1006 (Pa. Cmwlth. 2006) (same).

Animal operations that are too small to be a CAO or CAFO are not subject to the NOMA. However, the NOMA provides that smaller animal operations "may voluntarily develop" nutrient and odor management plans for approval by the SCC. 3 Pa. C.S. §§ 506(h), 509(f). Recently, the Commonwealth Court addressed whether a municipality can require smaller animal operations (i.e. non-CAOs) to mandatorily comply with the NOMA by imposing requirements to obtain approved nutrient and odor management plans or the equivalent of such plans. Commonwealth v. Locust Township, 49 A.3d 502, 509-511 (Pa. Cmwlth. 2012) (*en banc*). The *en banc* Court held that a municipality cannot require smaller animal operations to mandatorily comply with the NOMA when the General Assembly "has decided that such smaller farms

should not be required to do so; rather they should be encouraged to do so voluntarily." Id. at 511.

Specifically, the Court held that:

> By requiring farms too small to meet the definitions of CAO or CAFO to submit and implement emergency response and nutrient management plans or proposals similar in type and scope to what is required under the NMA, the Township attempts to make mandatory what the General Assembly has already decided must be voluntary. In this regard, Section 503(f) and (j) are in conflict with the NMA and, thus, are preempted pursuant to Section 519 of the NMA.

Id.

For your reference, I have enclosed a chart that summarizes the increasing layers of regulatory requirements as the density of an animal operation increases from smaller to a CAO or CAFO.

III. ADDITIONAL STATE LAWS PROHIBITING CERTAIN LOCAL REGULATION OF AGRICULTURAL OPERATIONS

In addition to the SCC's and DEP's regulatory programs, the Right to Farm Act (RTFA) precludes a municipality from regulating normal agricultural operations as a nuisance and protects direct commercial sales of agricultural commodities. 3 P.S. § 953. The Air Pollution Control Act (APCA) excludes operations engaged in the "production of agricultural commodities" from State air contaminant and air pollution regulations. 35 P.S. § 4004.1. The "production of agricultural commodities" includes "the commercial propagation . . . [of] livestock and livestock products." Id. § 4004.1(b)(1)(v). The Agricultural Area Security Law (AASL) precludes a municipality from enacting ordinances which would unreasonably restrict farm structures or farm practices within the area. 3 P.S. § 911.

The Water Resources Planning Act (WRPA) prohibits political subdivisions from regulating the allocation of water resources and the conditions of water withdrawal. 27 Pa. C.S. § 3136(b). The DEP's Water Resources Planning regulations establish the framework for water withdrawal and use registration, monitoring, record-keeping and reporting requirements. 25 Pa. Code § 110.

The Municipalities Planning Code (MPC) precludes a municipality from enacting a zoning ordinance that regulates activities related to commercial agricultural production if it exceeds the requirements imposed under the NOMA, RTFA or AASL, "**regardless of whether any agricultural operation within the area to be affected by the ordinance would be a concentrated animal operation as defined by the [NOMA].**" 53 P.S. § 10603(b) (emphasis added); Locust Township, 49 A.3d at 517 (holding that a municipality exceeded its authority under the MPC by imposing requirement that smaller animal operations comply with the NOMA). The MPC also provides that no public health or safety issues shall require a

municipality to adopt a zoning ordinance that violates or exceeds the provisions of the NOMA, AASL, or RTFA. 53 P.S. § 10603(h); Richmond Township, 2 A.3d at 687 & n.11 (explaining that section 603(h) of the MPC "indicates that, as a matter of law, an agricultural operation complying with the NMA, AASL and the RFL does not constitute an operation that has a direct adverse effect on the public health and safety").

The Domestic Animal Law (DAL) sets forth the permissible methods under State law for disposal of dead domestic animals and animal wastes. 3 Pa. C.S. §§ 2352, 2389. The DAL preempts any ordinances that pertain to the procedures for disposal of dead domestic animals and animal wastes. Id. § 2389.

Against this background, we turn to the legal problems with the Ordinance and to a suggested compromise that would correct those problems. The starting point is the ACRE law, which prohibits a municipality from adopting or enforcing a local ordinance prohibited or preempted by State law. 3 Pa. C.S. §§ 312, 313. The State laws implicated under our ACRE analysis are set forth above.

IV. LEGAL PROBLEMS WITH ZONING ORDINANCE

A. SECTION 201 — DEFINITION OF TERMS

Initially, we note that the only definition under Section 201 pertaining to agriculture is the term "agricultural operation," which is not used in the ordinance itself. The following terms are not defined under the definition section of the ordinance:

- Animal Equivalent Unit (AEU)
- Animal Husbandry
- Concentrated Animal Operation
- Concentrated Animal Feeding Operation
- Intensive Agriculture

We refer to the absence of these definitions because some of the terms are used elsewhere in the Ordinance while others are used only in the conditions imposed on [redacted] proposed operation. Specifically, one of the requirements imposed for approval of [redacted] special exception was for him to annually report the AEUs on his operation so that the Township could ascertain whether his operation increased in density to become a CAO or CAFO. (April 22, 2014, Zoning Hearing Board Decision at Condition 2.) The condition states that if [redacted] operation went above 2 AEUs, then his operation would become a CAO or CAFO and this would render [redacted] no longer eligible for the "current special exception" because it would put his "use into the category of a CAO or a CAFO." (Id.) However, as more fully discussed below, this condition directly conflicts with and is not supported by the ordinance provision for Intensive Agriculture because AEU, CAO, and CAFO are not terms used in the ordinance and the only category for a special exception is Intensive Agriculture.

Based on the reasons discussed below, we suggest that the Township amend its ordinance to define the terms AEU, AEU per acre, CAO and CAFO using the State law definitions, which are as follows:

> **Animal Equivalent Unit (AEU)** is "one thousand pounds of live weight of livestock or poultry animals, on an annualized basis, regardless of the actual number of individual animals comprising the unit." 25 Pa. Code § 82.201.
>
> **AEU per acre** is "an animal equivalent unit per acre of cropland or acre of land suitable for application of animal manure." 25 Pa. Code § 83.201. The land suitable for application of manure is defined under 25 Pa. Code § 83.262(A)(2)(i)-(ii) and includes rented or leased lands outside the operation that are under the control of the operator.
>
> **Concentrated Animal Operation (CAO)** is "an agricultural operation with eight or more animal equivalent units [AEUs] where the animal density exceeds two AEUs per acre on an annualized basis." 25 Pa. Code §§ 83.201, .262.
>
> **Concentrated Animal Feeding Operation (CAFO)** is "a CAO with greater than 300 AEUs, any agricultural operation with greater than 1,000 AEUs, or any agricultural operation defined as a large CAFO under 40 CFR § 122.23." 25 Pa. Code § 92a.2.

The Township may define "Animal Husbandry" as "the management and use of farming resources for the production of livestock and poultry as defined in 3 Pa. C.S. § 503, but not including concentrated animal operation or concentrated animal feeding operation" 25 Pa. Code § 92.1. The term "Intensive Agriculture" should either be deleted or may be defined as either a CAO or CAFO as defined under State law.

B. SECTION 402 — TABLE OF USE REGULATIONS

Although the terms "Animal Husbandry" and "Intensive Agriculture" are not defined under Section 201, there is a description of these terms under Section 402 Table of Use Regulations. However, the descriptions used for these terms provide no clear distinction between what constitutes an Animal Husbandry use versus an Intensive Agriculture use, thus the Township went beyond its authority in enacting these provisions.

Animal Husbandry and Intensive Agriculture are described in the ordinance as follows:

> **Animal Husbandry:** The raising and keeping of livestock and poultry with the intent of producing capital gain or profit or the intent of selling any livestock or poultry products, provided, however, that intensive farming operations such as, but not limited to, feedlots, hog farms, poultry, etc., shall be subject to the requirements of § 402(1)(E).

> **Intensive Agriculture:** Commercial feedlots, veal finishing, hog raising, poultry breeding or egg or meat production operations, livestock auctions, wholesale produce centers, fertilizer and seed distributors, commercial horse farms, grain storage and feed mills, and similar uses.

It is well-settled that "[a] local government unit has no authority to adopt an ordinance that is arbitrary, vague or unreasonable or inviting of discriminatory enforcement." Richmond Township, 2 A.3d at 681; Exton Quarries, Inc. v. Zoning Bd. of Adjustment, 228 A.2d 169, 178 (Pa. 1967). "A vague ordinance is one that prescribes activity in terms so ambiguous that reasonable persons may differ as to what is actually prohibited." Id. "A zoning ordinance is ambiguous if the pertinent provision is susceptible to more than one reasonable interpretation or when the language is vague, uncertain, or indefinite." Kohl v. New Sewickley Twp., 108 A.3d 961, 968 (Pa. Cmwlth. 2015) (citation omitted). Moreover, "the power to . . . regulate does not extend to an arbitrary, unnecessary, or unreasonable intermeddling with the private ownership of property." Eller v. Bd. of Adjustment, 414 Pa. 1, 6, 198 A.2d 863, 865-66 (1964); Van Sciver v. Zoning Bd. of Adjustment, 152 A.2d 717, 724 (Pa. 1959) (same); Schmalz v. Buckingham Twp. Zoning Board, 132 A.2d 233, 235 (Pa. 1957) (same).

As you may recall, in Richmond Township, the ordinance defined "intensive agricultural activities [to] include, but not [be] limited to, mushroom farms, poultry and egg production, and dry lot farms, wherein the character of the activity involves a more intense use of the land than found in normal farming operations." Id. at 682. The court opined that "reasonable people may differ as to what actually falls within the definition of intensive agriculture." Id. at 683. Therefore, the court held that "because a person cannot read the Ordinance and ascertain whether a particular activity would be considered intensive agriculture, the Ordinance is vague and ambiguous." Id. Moreover, the court held that because the "enforcement of the ordinance depends upon the subjective determination of Township officials, the Ordinance invites discriminatory enforcement." Id. Accordingly, the court enjoined enforcement of the ordinance because it drew no "clear distinction between intensive agriculture and normal agriculture." Id.

The same is true here. The ordinance provides no meaningful or defined method to determine when an agricultural operation is Animal Husbandry versus Intensive Agriculture. There is no formula based on the number of animals on an operation and available acreage for manure management. This ordinance sits on all fours with that evaluated by the court in Richmond Township in that a person cannot read the ordinance and ascertain whether a particular agricultural activity is considered Animal Husbandry or Intensive Agriculture. 2 A.2d at 683. As in Richmond Township, "the Ordinance fails to provide any guidance as to how the Township determines when activities associated with [an animal husbandry] operation intensify to the level that they transform into an intensive agricultural activity." Id.

For example, poultry production is included under both Animal Husbandry and Intensive Agriculture. This begs the question of when is poultry production considered Animal Husbandry and when is it considered Intensive Agriculture. There are no provisions in the ordinance for a person to make that determination, including the municipal officials.

The same is true for livestock operations. The word "livestock" is used under Animal Husbandry, but excludes "intensive farming operations such as . . . feedlots, hog farms, poultry, etc." Intensive Agriculture identifies specific types of livestock, including animals on commercial feedlots, veal, hogs, and horses. This ordinance language raises many questions that are left unanswered in the ordinance itself. Such as, what livestock are encompassed in an Animal Husbandry operation? Is the raising of livestock on commercial feedlots, veal, hogs, and horses a use that is always Intensive Agriculture regardless of the number of animals? Does the ordinance language mean that an Animal Husbandry operation cannot raise veal or hogs regardless of the number of animals on the operation? Can an Animal Husbandry operation raise livestock other than those listed under Intensive Agriculture in numbers that would make it a CAO/CAFO? If animal numbers are not considered by the Township, then the result is that a farmer raising 10 hogs is considered Intensive Agriculture requiring a special exception and a farmer with a dairy cow CAO/CAFO is Animal Husbandry permitted by right. The Township does not have authority to regulate the operational aspects of an agricultural operation. The Township cannot differentiate between a permitted by right agricultural use versus an agricultural use by special exception based only on the type of animal being raised regardless of the size of the operation. This is an arbitrary, unreasonable, irrational, and discriminatory ordinance that improperly attempts to regulate the details of the business on an agricultural operation and not land use.

In Appeal of Sawdey, our Supreme Court explained that:

> Zoning ordinances, interfering as they do with free use of property, depend for their validity on a reasonable relation to the police power. An ordinance for example if it permitted a butcher shop to be located in an area but prohibited its sale of pork, or a drugstore but prohibited its sale of candy, or a grocery store but prohibited its sale of bread, would surely be regarded a[n] unreasonable legislation on details of a business not a matter of public concern. If it may prohibit a hotel from dispensing liquor, it can well forbid it selling meals, or cigars or candy, or newspapers. Zoning ordinances may not be used for such purposes.

85 A.2d 28, 32 (Pa. 1951) (citations omitted); In re Thompson, 896 A.2d 659, (Pa. Cmwlth. 2006) (explaining that "[z]oning only regulates the *use* of land and not the particulars of development and construction.").

"A zoning ordinance that permits a use but excludes or regulates the normal activities involved in the use shifts away from the type of land use regulation that is the function of zoning." ROBERT S. RYAN, 1 PENNSYLVANIA ZONING LAW AND PRACTICE § 3.4.4 (George T. Bisel Company, Inc. 2001). "Zoning is a regulation of uses, not a means of regulating the manner in which business is conducted." Id. § 3.3.14A.

Moreover, our experts at Penn State College of Agricultural Science have advised that environmental, health, or safety concerns arising from animal production operations are the same regardless of the type or number of animals. Those concerns are addressed through manure

management and operational best management practice requirements imposed under State law. There is no basis in agricultural science to distinguish between types of animals raised on an agricultural operation for zoning purposes.

The consequence of using the terms Animal Husbandry and Intensive Agriculture as set forth in the ordinance is that an animal operation that is not a CAO/CAFO could nonetheless be identified by the ordinance as an intensive agriculture operation, thus requiring a smaller animal operation to obtain a special exception to operate. This is exactly what happened with [redacted]s proposed swine nursery operation, which is not a CAO or CAFO. This is the reason that we call for amending the ordinance to simply use the terms/formulas for CAO/CAFO as defined under State law. As ought to be apparent, a smaller animal operation should not have to obtain a special exception to engage in operations in a zoning district in which agriculture is a permitted use. RYAN, 1 PENNSYLVANIA ZONING LAW AND PRACTICE § 5.1.2 ("If a use is consistent with a particular zoning district, it should be permitted of right."). However, a municipality can require a permit for smaller animal operations, which shall be issued to the operator after providing proof of compliance with DEP's CSL regulatory requirements. 25 Pa. Code § 91.36.

A CAO and CAFO are subject to increased regulatory requirements than those for a smaller animal operation. For this reason, some municipalities may seek to require conditional use or special exception approval to operate a proposed CAO/CAFO in a zone in which agriculture is a permitted use. We have advised these municipalities that it is within their authority to require a conditional use or special exception for a CAO/CAFO; however, the conditions imposed to obtain that approval cannot conflict with or exceed State law. 53 P.S. § 10603(b); Richmond Township, 2 A.3d at 686-87 (holding that municipality exceeded its authority in imposing requirements for a special exception that conflict with the NOMA); Locust Township, 49 A.3d at 509-511 (holding that a municipality exceeds its authority and is preempted from requiring smaller animal operations to comply with the NOMA).

If the Township wants to require proposed CAOs/CAFOs to obtain special exception approval, then it should replace the term intensive agriculture with the terms CAO and CAFO (as amended to conform to State law definitions). However, smaller animal operations in an agricultural zone should be a permitted use by right regardless of type of animal being raised.

In light of the comprehensive regulation of CAOs and CAFOs by the SCC and DEP, we suggest that, in lieu of requiring special exception proceedings for a proposed CAO/CAFO, the Township amend the 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 approved nutrient and odor management plans and has obtained all required DEP permits and plans.*

Finally, we note that the description for Intensive Agriculture also includes businesses that are related to agriculture, but are not normal agricultural operations. These businesses include: "livestock auctions, wholesale produce centers, fertilizer and seed distributors, . . . grain

storage and feed mills, and similar uses." It would make more sense to separate out these uses into another subsection, so that agricultural operations and ag-related businesses are independently regulated in the zoning ordinance.

C. REQUIREMENTS FOR "ANIMAL HUSBANDRY"

1. Prohibition on Garbage Feed Pigs

Section 402(1)(A)(1) states that "[n]o raising of garbage feed pigs or minks shall be allowed." The term "garbage-fed pigs" is not defined in the ordinance. We believe this provision is referring to hog raising operations that utilize State approved food processing wastes as feed for the hogs. This is a well-recognized beneficial recycling practice between food processing industries and livestock producers, which is regulated by the DEP.

Pursuant to DEP's residual waste management regulations, a normal farming operation is defined to include "the storage and utilization of agricultural and food processing wastes, screenings and sludges for animal feed." 25 Pa. Code § 287.1. Agricultural operations are exempt from DEP permit requirements if the utilization of food processing wastes is conducted in the course of normal farming operations and in accordance with the best management practices established in DEP's Food Processing Residual Management Manual. Id. § 287.101. Accordingly, a hog raising operation is authorized under State law to use feed comprised of food processing wastes.

This subsection is found under the section listing requirements for purportedly non-intensive animal agriculture; however, hog raising operations can be smaller, non-CAO operations or a CAO/CAFO based on animal density. Hog raising operations are not distinguishable based on type of feed materials used in the operation. Therefore, the municipalities can delete this restriction in its entirety or amend it to provide only that a hog raising operation utilizing food processing wastes shall provide proof of compliance with DEP's residual waste management regulations.

2. Restrictions on Agricultural Buildings

Section 402(1)(A)(3) states that the "construction of new buildings which, by their size or nature, will inhibit future residential development should not be permitted." This is an unreasonable and improper exercise of the Township's police power. Schmalz, 132 A.2d at 236 (Pa. 1957) (holding it is unreasonable and improper for an ordinance to regulate based on possible future conditions). This is also an unreasonable restriction on farm structures under the AASL. 3 P.S. § 911. This section should be deleted.

D. REQUIREMENTS FOR INTENSIVE AGRICULTURE

1. Imposing Legally Binding Assurances with Performance Guarantees

Section 402(E) provides that Intensive Agriculture operations must submit the following:

> Legally binding assurances with performance guarantees which demonstrate that all facilities necessary for manure and wastewater management, materials storage, water supply and processing or shipping operations will be conducted without adverse impact upon adjacent properties. For purposes of this chapter, adverse impacts may include, but are not limited to, groundwater and surface water contamination, groundwater supply diminution, noise, dust odor, heaving truck traffic, and migration of chemicals offsite.

The Township does not have authority under the MPC to impose these requirements upon any agricultural operation. 53 P.S. § 10603(b), (h). The DEP and SCC regulate agricultural operations pursuant to the CSL and NOMA with requirements that protect the safety of surface and groundwater. The Township is preempted by these regulatory programs from imposing legally binding assurances and performance guarantees to protect against surface and groundwater contamination for the benefit of adjacent properties or otherwise. The Township has remedies available to address alleged violations of the NOMA or the CSL. It can intervene in the site approval process for CAOs/CAFOs and also report suspected violations to the DEP, SCC, or county conservation district so that they may inspect and take any appropriate enforcement action pursuant to the regulations. The Township can also bring action at law or in equity to restrain violations of the NOMA or CSL as provided for in Section 514 of the NOMA and Section 691.601 of the CSL. 3 Pa. C.S.A. §§ 514(c), (d); 35 P.S. § 691.601; East Brunswick Township, 980 A.2d at 734 ("The remedies provided by the legislature in the SWMA preclude other forms of 'self-help' by the Township."). Moreover, adjacent property owners have these same remedies available in addition to potential tort-based causes of action against a neighboring landowner. 35 P.S. § 691.601(c).

The Township can amend Section 402(E) to state only that, with respect to agricultural operations, the Township will report suspected violations of the SCC's or DEP's regulations to the SCC, DEP, or county conservation district for appropriate enforcement action, bring an action to restrain violations of the NOMA or Clean Streams Law as permitted under those statutes, or pursue remedies available under other applicable State statutes.

With respect to assurances and guarantees for consumptive water use, the MPC states that a municipality's comprehensive plan should contain a statement recognizing that "[c]ommercial agriculture production may impact water supply sources." 53 P.S. § 10301(b)(2). The WRPA precludes municipalities from allocating water resources and regulating "the location, amount, timing, terms or conditions of any water withdrawal by any person." 27 Pa. C.S. § 3136(b). The DEP regulates consumptive water use pursuant to the WRPA and accompanying Water Resources Planning regulations. 27 Pa. C.S. §§ 3118, 3131, 3133-34; 25 Pa. Code § 110, *et seq.* The DEP's Water Resources Planning regulations establish the framework for water withdrawal

and use registration, monitoring, record-keeping and reporting requirements. 25 Pa. Code § 110.2. A person "whose total withdrawal from a point of withdrawal . . . within a watershed [which] exceeds an average rate of 10,000 gallon per day in any 30-day period" is required to register with the DEP and provide the information specified under Section 110.203 of the regulations. 25 Pa. Code § 110.201(3). DEP also requires registrants to submit annual reports regarding water withdrawal and use. 25 Pa. Code § 110.301-.305. Specifically, an agricultural user's annual water withdrawal and use report must include information on irrigation and animal water use and water storage information. Id. § 110.305(6)(i)-(iii).

In Locust Township, the *en banc* panel opined that "[w]hile the MPC does provide municipalities with the authority to consider water supply in regulating land use, it does not authorize municipalities to impose water withdrawal and use requirements on agricultural uses." 49 A.3d at 514; Richmond Township, 2 A.3d at 684-686. Thus, the court held that the ordinance provisions in Locust Township requiring water studies and reporting requirements were preempted by the WRPA. Id. Accordingly, the requirement under Section 402(E) for legally binding assurances and performance guarantees for water supply and groundwater diminution conflicts with and exceeds, and is therefore preempted by, the WRPA and DEP's regulatory scheme.

The Township may amend Section 402(E) to require only that an applicant for a CAO or CAFO provide proof of whether or not the applicant is required to register water withdrawals with the DEP, and, if so, to also provide copies of registration papers and any reports submitted to the DEP.

The requirement for an agricultural operation to provide assurances and guarantees that operations will not have noise, dust or odor impacts violates the RTFA. The RTFA precludes a municipality from regulating normal agricultural operations as a nuisance. 3 P.S. § 953; Richmond Township, 2 A.2d at 688. This requirement is also preempted by the APCA, 35 P.S. § 4004.1, an unreasonable restriction on farm practices under the AASL, 3 P.S. § 911, and beyond municipal authority under the MPC, 53 P.S. § 10603(b), (h). The Township should delete this language from Section 402(E) as applied to agricultural operations.

2. Setbacks for Intensive Agriculture Operations

Section 402(E)(1) imposes 400 foot setbacks from property lines for intensive agricultural activities and manure storage facilities. These setbacks are preempted by the 100 to 300 foot setbacks in the NOMA and cannot be applied to smaller animal operations. Richmond Township, 2 A.3d at 685; Locust Township, 49 A.3d at 512. These provisions also violate the MPC, AASL, and CSL.

Specifically, in Locust Township, the ordinance imposed a minimum setback of 500 feet for intensive agricultural operations. The court held that the 500 foot setback was preempted because it was more stringent than the NOMA regulations. The court explained as follows:

> The only setback requirements imposed by the NMA relate to a specific type of facility, or structure, within a CAO or CAFO—that being a manure storage facility. Though there are several different setback requirements in the NMA regulations for manure storage facilities, the most stringent setback requirement is 300 feet from a property line. 25 Pa. Code § 83.351(a)(2)(vi)(H). Because the Ordinance imposes a setback on *all* portions of an intensive agricultural operation (not just manure storage facilities), and because the 500 foot setback (a) exceeds the a maximum setback provided in the NMA regulations for just manure storage facilities on CAOs and CAFOs, and/or (b) applies to farming operations that the General Assembly has deemed to be so small as to justify their exclusion from the lesser NMA setback requirements for larger farming operations, the Ordinance setback requirement is more stringent than that imposed under the NMA regulations and thus is preempted under Section 519 of the NMA.

49 A.3d at 512 (footnote omitted). The setback problems would be corrected if Section 402(E)(1) is repealed and replaced with a provision requiring the applicant for a CAO or CAFO provide the Township with proof of compliance with the siting requirements for CAOs/CAFOs buildings under the NOMA regulations, including approved nutrient and odor management plans and any required DEP permits and plans.

3. Requirements for Disposal of Dead Domestic Animals

Section 402(E)(2) provides that disposal of dead domestic animals must be within 24 hours of death. This conflicts with, and is therefore preempted by, the DAL, which allows disposal within 48 hours of death. 3 Pa. C.S. §§ 2352(a)(2), 2389. This section can be amended to provide that a CAO/CAFO provide the Township with information on plans for compliance with the State's requirements for disposal of dead domestic animals.

4. Requirements for Manure Storage Facilities

Section 402(E)(6) requires manure storage facilities to be designed, constructed and operated in compliance with the DEP's MMM and to have plans for manure storage facilities to be reviewed by the Columbia County Conservation District "with proof of their review prior to issuance of a zoning permit." As discussed above, the design, construction, and operation requirements for manure storage facilities on CAOs/CAFOs is regulated by both the DEP and SCC, thus the Township is preempted from imposing the requirements under this Section. 25 Pa. Code §§ 91.36, 83.351. In addition, the county conservation districts do not review and approve plans for manure storage facilities. The SCC or county conservation district requires a registered professional engineer and contractor to certify in writing that the site specific design for a manure storage facility on a CAO/CAFO "protects surface and groundwater quality and prevents offsite migration of nutrients." 25 Pa. Code § 83.351(c). They also require the registered professional engineer and contractor to provide a written verification, including a quality assurance inspection plan, documenting that the manure storage facility was constructed in accordance with design plans. Id. § 83.351(d). For CAFOs, the DEP reviews and approves the design plans for manure storage facilities. This section of the ordinance can be amended to

provide that a proposed CAO/CAFO provide the Township with copies of the plan documents submitted to the SCC (or county conservation district) and the DEP for a manure storage facility, including certifications and verifications and any DEP approvals of those plans.

E. SECTION 601 — ABATEMENT OF NOXIOUS INFLUENCES

Section 601 places restrictions on noise and odors for land uses in the Township. The Township does not have authority and is preempted from regulating normal agricultural operations as a nuisance pursuant to the RTFA and MPC. 3 P.S. § 953; 53 P.S. § 10603(b), (h). The APCA exempts agricultural operations from State air contaminant and air pollution regulations. 35 P.S. § 4004.1. The Township is also preempted by the NOMA from regulating odor management on CAOs/CAFOs and cannot impose odor control requirements on smaller animal operations. For these reasons, the Township should amend Section 601 to add a provision stating that agricultural operations are exempt from its application.

V. [redacted] PROPOSED SWINE NURSERY OPERATION

[redacted] owns an 82 acre farm in Montour Township's agricultural zoning district upon which he raises beef cattle and field crops. His farm is also part of the Township's Agriculture Security Area. [redacted] sought to build a 4800 head swine nursery barn on his farm. This proposed use would result in total AEUs for his operation at 1.82 AEUs per acre, thus it would not be classified as a CAO or CAFO. He was told by the Township that because he proposed to raise hogs that his operation was intensive agriculture requiring a special exception under the ordinance even though his proposed operation was not a CAO or CAFO. On April 3, 2013, [redacted] filed a request for a special exception to build the swine nursery barn on his farm.

For all of the reasons discussed above, [redacted] proposed 4800 head swine nursery barn should have been a permitted use by right in the agricultural zone not requiring a special exception because his operation is too small to be a CAO/CAFO. He should have never been forced to go through the time and expense of special exception proceedings. In fact, the Township's own reviews and approvals of [redacted] proposed operation demonstrate that the various Township officials had different interpretations of the meaning and applicability of the ordinance provisions. Thus, this real-life application of the ordinance to [redacted] proposed operation proves that the provisions are arbitrary, vague, unreasonable and inviting of discriminatory enforcement.

A. MONTOUR TOWNSHIP PLANNING COMMISION

The Montour Township Planning Commission submitted comments on [redacted] special exception application to the Zoning Hearing Board on April 23, 2013. (04/23/2013 Montour Township Planning Commission Memorandum to Montour Township Zoning Hearing Board.) In those comments, the Planning Commission opined that "[t]his increase in animals places the farm enterprise as a: Concentrated Animal Feeding Operation (CAO)." This statement is incorrect because the proposed operation is not a CAO. Furthermore, the Planning

Commission used the terms CAO, AEU, and CAFO in its Memorandum even though those terms are not used in the zoning ordinance.

B. MONTOUR TOWNSHIP ZONING HEARING BOARD

On May 29, 2013, the Montour Township Zoning Hearing Board granted the special exception to [redacted] for an Intensive Agricultural use subject to a condition to annually report AEU numbers to the Township. Specifically, the condition states as follows:

> You are to produce an annual report beginning in January 2014 and every year thereafter which certifies to the Township Zoning Officer that your AEU's or animal equivalent units does not meet or exceed the current level of 2.0 which **would make you ineligible for the current special exception and would put you into the category of a CAO or a CAFO.**

(05/29/2013 Letter from Solicitor Weist to [redacted] (emphasis added).) Accordingly, the Zoning Hearing Board determined that [redacted]s proposed swine nursery operation was Intensive Agriculture under the ordinance, but was not a CAO, which contradicted the Planning Commission's interpretation. (Id.; see also April 22, 2014, Zoning Hearing Board Findings of Fact ¶¶ 23-25 and Condition 2.)

The MPC requires a municipality to set forth "express standards and criteria" in a zoning ordinance for a special exception. 53 P.S. § 10603(c)(1)-(2). As explained by the Supreme Court, "we note that a special exception in a zoning ordinance is a use which is expressly permitted in a given zone so long as certain conditions detailed in the ordinance are found to exist." Broussard v. City of Pittsburgh, 907 A.2d 494, 499 (Pa. 2006). "A special exception is not an exception to the zoning ordinance, but rather a use to which the applicant is entitled provided the specific standards enumerated in the ordinance for the special exception are met by the applicant." In re: Thompson, 896 A.2d 659, 670 (Pa. Cmwlth. 2006); Southdown, Inc. v. Jackson Twp. Zoning. Hrg. Bd., 837 A.2d 634 (Pa. Cmwlth. 2002) ("A special exception is one envisioned by the ordinance and if the standards established by the ordinance are met, the use is one permitted by its express terms."). A zoning hearing board "may attach such reasonable conditions and safeguards, in addition to those expressed in the ordinance, as it may deem necessary to implement the purposes of this act and the zoning ordinance." 53 P.S. § 10912.1.

The "condition" to annually report AEUs directly conflicts with the rules for special exceptions and the terms of the ordinance. Under the ordinance, an animal production operation is either an Animal Husbandry by right use or an Intensive Agriculture use by special exception. [redacted] was told that his operation was Intensive Agriculture under the ordinance requiring a special exception. The Zoning Hearing Board found that he satisfied all of the conditions required under the ordinance. (April 22, 2014, Zoning Hearing Board Findings of Fact ¶¶ 23-28; Conclusions of Law ¶¶ 8-9.) The terms Animal Equivalent Units, Concentrated Animal Operation (CAO), and Concentrated Animal Feeding Operation (CAFO) are not used in the ordinance. As detailed above, the ordinance does not contain any formula or other method to identify animal agricultural operations by animal numbers or AEUs. There is no separate special

exception category for a CAO or CAFO under the ordinance. Therefore, the Zoning Hearing Board's condition declaring that if [redacted] operation would exceed 2 AEUs, then he would not be eligible for the "current" special exception because he would be in the CAO/CAFO category has no basis under the ordinance. Moreover, the condition does not qualify as one necessary to implement the purposes of the MPC or the zoning ordinance because the Zoning Hearing Board's condition created a new category of special exception that does not exist under the ordinance, which is beyond its authority. Riverfront Dev. Group, LLC v. City of Harrisburg, 109 A.3d 358, 365 (Pa. Cmwlth. 2015) (explaining that "[z]oning boards . . . must not impose their concept of what the zoning ordinance should be, but rather their function is only to enforce the zoning ordinance in accordance with applicable law . . . [and] the [b]oard is required to apply the terms of the Zoning Ordinance as written rather than deviating from those terms."); Hill v. Maxatawny Twp., 142 A.2d 1245, 1248, 1251 (Pa. Cmwlth. 1991) (striking conditions imposed by the Board because the zoning ordinance did not contain regulations pertaining to the imposed conditions and the Board was without authority to do so."). For these reasons, the condition imposed upon [redacted] illustrates the Township's arbitrary, irrational, and discriminatory enforcement of the ordinance, as well as the fact that township officials differ in interpreting the application of the ordinance.

We also note that in the Zoning Hearing Board proceedings, neighboring property owners opposed [redacted] proposed operation based on concerns that the soils on his operation were not suitable for land application of manure. (April 22, 2014, Zoning Hearing Board Findings of Fact ¶¶ 29-36.) The Zoning Hearing Board rejected the neighboring property owners' evidence and opined that the NOMA preempts local regulation of the land application of manure. (Id. at Findings of Fact ¶ 37; Conclusions of Law ¶¶ 7, 10.)

C. MONTOUR TOWNSHIP ENGINEER

Subsequent to obtaining special exception approval, [redacted] proceeded through the land development process with the Township. The Township Engineer sent a letter to [redacted] project consultant with comments about the proposed land development plan. (07/02/2013 Letter from Twp. Engineer to TeamAg and 07/22/2013 Letter from TeamAg to Twp. Engineer.) In that correspondence, the Township Engineer states that [redacted] property is located in the Agricultural District and that his "proposed nursery is permitted by right in the A District." (Id.) Consequently, this is the third different interpretation of the type of use for [redacted] proposed operation by a Township official.

The Township Engineer applied Section 601 of the ordinance to require that [redacted] provide a written odor management plan. (07/02/2013 Letter from Twp. Engineer to TeamAg and 07/22/2013 Letter from TeamAg to Twp. Engineer.) [redacted] project consultant informed the Township Engineer that because the operation is not a CAO or CAFO there is no requirement for an odor management plan. As discussed above, Section 601 cannot be applied to agricultural operations.

The Township Engineer stated that [redacted] would be required to provide a hydrogeological report regarding the effect of well water withdrawals on surrounding water sources. (07/02/2013 Letter from Twp. Engineer to TeamAg and 07/22/2013 Letter from TeamAg to Twp. Engineer.) The Township is preempted by the WRPA from imposing this requirement. 27 Pa. C.S. § 3136(b); Locust Township, 49 A.3d at 514.

On November 14, 2013, the Township Supervisors approved [redacted] land development plan subject to certain conditions. (11/14/2013 Resolution of Montour Township Supervisors.) Two of the conditions imposed were beyond the Township's authority and are preempted by State law, thus are null and void.

Condition 2 requires [redacted] at his own expense, to hire a certified water testing company to conduct well water tests of 6 wells located within a 2,500 foot radius from the property lines of the proposed manure application fields. (Id. at Condition 2.) The DEP and SCC regulate agricultural operations pursuant to the CSL and NOMA with requirements that protect the safety of surface and groundwater. These agencies do not require agricultural operations to conduct testing of water wells on properties of neighboring landowners, thus this Condition conflicts with and is stricter than the State's regulatory programs. As a result, the Township is preempted by these regulatory programs from imposing this Condition. The Township also does not have authority under the MPC to impose this Condition upon any agricultural operation. 53 P.S. § 10603(b), (h); Richmond Township, 2 A.3d at 687 & n.11 (explaining that section 603(h) of the MPC "indicates that, as a matter of law, an agricultural operation complying with the NMA, AASL and the RFL does not constitute an operation that has a direct adverse effect on the public health and safety"). This Condition is also preempted by the WRPA.

Condition 5 imposes requirements for the land application of manure on [redacted] operation. (11/14/2013 Resolution of Montour Township Supervisors at Condition 5.) As stated, the DEP and SCC comprehensively regulate the land application of manure and the Township is preempted from imposing this Condition. This Condition is also beyond the authority of the Township under the MPC and an unreasonable restriction on farm practices pursuant to the AASL. Richmond Township, 2 A.3d at 684-688.

Interestingly, the Township's Zoning Hearing Board acknowledged that manure management is an area in which municipal regulation is preempted, but the Supervisors did not. This serves as yet another example of conflict among Township officials in interpreting the ordinance and the extent of municipal authority.

We propose that the Township enact a resolution to remove these two conditions from the approval of [redacted] land development plan.

VI. CONCLUSION

As evident from the discussion above, local ordinances that attempt to regulate the how, when, and where of activities already subject to State uniform regulatory schemes "have not fared well under preemption challenges." Commonwealth v. East Brunswick Township, 980 A.2d 720, 730 (Pa. Cmwlth 2009); Richmond Township, 2 A.3d at 684-88. The municipalities do not have authority to establish their own regulatory scheme for either smaller animal operations or CAOs/CAFOs that duplicates, exceeds, or conflicts with the SCC's and DEP's regulatory schemes.

I look forward to the Township's response to our proposal to resolve this matter through amending the Ordinance and enacting a resolution to remove the two conditions from [redacted] approved land development plan. In order to facilitate a resolution, I think it would be advantageous for us to arrange a meeting to include Township officials and our PSU expert. The meeting would be to further discuss resolving the legal problems with the ordinance and to answer any questions or concerns of the Township. Please let me know if the Township is willing to schedule this meeting.

Sincerely,

Susan L. Bucknum

SUSAN L. BUCKNUM
Senior Deputy Attorney General

SLB/kmag
cc: [redacted] w/o encl.)
Richard Roberts, Esquire (w/encl.)
Matthew Hennesy (w/encl.)