COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

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Litigation Section
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[redacted]

Via First Class Mail
Anthony J. McDonald, Esquire
Law Office of Bull, Bull &McDonald, LLP
106 Market Street
Berwick, PA 18603

RE: ACRE Review Request
Salem Township, Luzerne County

Dear Mr. McDonald:

This letter will detail the legal problems with Salem Township's 2014 amendments to provisions regulating agricultural operations under the Zoning Ordinance. 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.

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.

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, 83.701, 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, 83.701, 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 (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).

The DEP's 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).

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 [NOMA], 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 202 — DEFINITION OF TERMS

The Township defines the term "Animal Feeding Operations (AFOs)" as "[a]n agricultural operation where animals are kept and raised in confined situations and feed is brought to the animals rather than the animals grazing or otherwise seeking feed in pastures, fields, or on rangeland."[1] The term AFOs is not used by the DEP or SCC to identify or regulate the density of animal agricultural operations. Instead, as stated above, animal operations under Pennsylvania law fall into three categories small/non-CAO/CAFO, CAO, and CAFO with each category having increased layers of regulatory requirements based on animal density. These categories are determined by definitions and formulas used to determine animal density on an operation.

The problem with the definition of AFO is that it would identify all animal operations that do not pasture animals as an AFO regardless of the amount of animals and subject it to a special exception requirement. This means that small scale poultry, swine, cow, horse, or other farm animal operation could potentially have to obtain a special exception when located in a zoning district in which agricultural is a permitted use by right. Simply put, the definition of AFO has no substantive criteria based on agricultural science to identify the density of an animal operation. We suggest deleting the term AFO and replacing it with the definitions used under State law for CAO and CAFO.

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[1] To the extent the Township was attempting to use the federal definition for AFO, the Township did not use the full AFO definition found under the federal regulations. See 40 CFR § 122.23(b)(1)(i)-(ii). In any event, DEP is delegated authority from the Environmental Protection Agency to regulate CAFOs under its approved regulatory program, so references or use of federal regulatory provisions conflicts with DEP's regulations.

The Township also defines the term "Concentrated Animal Feeding Operation" as "[a]n agricultural operation which meets the definition of an Animal Feeding Operation (AFOs) and also meets certain criteria as established under legislation known as the Pennsylvania Nutrient Management Act, as amended." The NOMA does not define the term CAFO or establish the criteria to identify a CAFO. This is because DEP defines and regulates CAFOs. As discussed above, CAFOs must comply with requirements under the NOMA pursuant to the DEP's regulatory program, but DEP's regulations define what constitutes a CAFO. 25 Pa. Code § 92a.2. For this reason, the Township's definition for CAFO cannot be applied as stated.

We suggest that the Township amend its ordinance to define the terms CAO and CAFO using the State law definitions, which are as follows:

> **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.

B. Agricultural Uses in Zoning Districts

Section 501.3 provides that AFOs and CAFOs are a conditional use in the A-1 zoning district. Based on the above discussion, we suggest that the Township amend the entire ordinance to delete the term AFO and replace it with Concentrated Animal Operation. This will convert the ordinance to using only the terms CAO and CAFO.

Section 509.1 allows agricultural operations in the C-1 zoning district, but precludes CAOs/CAFOs. However, CAOs/CAFOs are types of agricultural production operations that are recognized by the State as normal agricultural operations as defined under the RTFA. 3 P.S. § 952. The Township does not have authority under the MPC to allow certain types of normal agricultural operations as a use in a zoning district while precluding other forms of normal agriculture in the same district because it exceeds the NOMA, RTFA, and AASL. 53 P.S. § 10603(b), (h); 10605. In other words, if the Township allows agriculture as a use in a zoning district, then they must allow all forms of normal agricultural operations as recognized under State law.

With respect a municipality's authority to zone for 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." Commonwealth v. Richmond Township, 2 A.3d 678, 681 (Pa. Cmwlth 2010); Exton Quarries, Inc. v. Zoning Bd. of Adjustment, 228 A.2d 169, 178 (Pa. 1967). In addition, "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).

A municipality's zoning authority is to designate what uses are permitted in particular zoning districts. On the other hand, a municipality does not have authority to regulate the operational aspects of a permitted use. Thus, a municipality cannot allow agriculture as a use in a zoning district, but then limit the type of agricultural production a farmer can engage in within that zoning district, including restricting the amount or type of animals a farmer can have on an operation or precluding a crop farmer from animal production farming. Such limitations are arbitrary, unreasonable, irrational, and discriminatory, as well as an improper attempt 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 limit the amount or type of animals raised on an agricultural operation for zoning purposes.

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).

For these reasons, the Township should amend the ordinance to provide that CAOs/CAFOs are permitted by conditional use in the C-1 zoning district.

C. Section 608.9 Regulations for AFOs/CAFOs

1. Minimum Parcel Size

Section 608.9(1) imposes a minimum acreage requirement of 100 acres. The municipalities lack authority to establish minimum acreage amounts for agricultural operations that conflict with State law. The RTFA requires only a ten (10) acre minimum for normal agricultural operations or less if based on generated income. 3 P.S. § 952. The AASL precludes a municipality from imposing unreasonable regulation on farm practices or structures. The 100 acre minimum requirement is unreasonable because it precludes farmers with less acreage from engaging in farm practices or building structures that may be permissible under the State's regulatory programs. This requirement is an arbitrary and discriminatory infringement on the ability of the owner or operator of a normal agricultural operation to make business decisions for the economic viability of the operation that would be permissible under State law.

Moreover, the DEP and SCC do not require minimum acreage for animal agricultural operations because they utilize formulas based on agricultural science to identify the density of an agricultural operation. For example, the formula to ascertain density under the NOMA includes all land under the management control of the operator, including owned, rented, or leased lands. Accordingly, the 100 acre requirement conflicts with the State's regulation of animal agricultural operations.

The 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). 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 ordinance should be revised to remove the minimum acreage requirement for an agricultural operation or at least to conform it to the Right to Farm Act.

2. Setbacks for Animal Housing Facilities

Section 608.9(2) imposes a 2500 foot setback for animal housing buildings from "any existing dwelling not located on the applicant's property." There are several problems with this setback requirement. First, certain buildings for animal housing are also the manure storage facilities. This is typically true for swine operations. Therefore, this setback is preempted by the 100 to 300 foot setbacks in the NOMA for manure storage facilities. Richmond Township, 2 A.3d at 685; Locust Township, 49 A.3d at 512.

Second, the proper siting for animal housing facilities on CAOs/CAFOs is determined through an odor management. 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). The OMP approves the siting of animal housing facilities (and manure storage) on CAOs and CAFOs in coordination with imposing the required Odor Best Management Practices under a site-specific OMP. 25 Pa. Code §§ 83.771(c); .781. Accordingly, the Township is preempted by the NOMA from imposing the 2500 foot setback on animal housing facilities. Richmond Township, 2 A.3d at 684-686 ("We now hold that the 1500 foot setback is preempted by the N[O]MA regulations to the extent that the Township applies the 1500-foot setback to **any facility** covered by the regulations." (emphasis added)); Burkholder, 902 A.2d at 1016. Finally, the setback provision also violates the MPC, AASL, and CSL.

The setback requirement would be corrected if Section 608.9(2) is deleted 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 under the NOMA regulations, including approved nutrient and odor management plans and any required DEP permits and plans.

3. Evergreen Tree Buffers

Section 608.9(3) requires that a buffer using two staggered rows of evergreen trees must be planted around manure storage and animal housing facilities. The trees must be 8 foot tall at the time of planting and spaced not more than 6 feet apart. This buffer requirement is preempted by the NOMA. 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). The required Odor Best Management Practices to be employed for a particular operation depend on the Odor Site Index score for the proposed operation, which takes in site specific factors. Id. § 83.741, .761. Any requirement for a CAO/CAFO to plant trees or shrubs would be part of an approved OMP. This buffer requirement also violates the MPC and AASL.

The Township should delete this requirement from the ordinance.

4. Approved Nutrient and Odor Management Plans

Section 608.9(4) and (5) require the submission of approved nutrient and odor management plans and supporting materials. This requirement is appropriate for the Township to impose on the owner/operator of a proposed CAO/CAFO. We write only to clarify that the provisions state approved by the Commonwealth of Pennsylvania. It is more accurate to state approved by the State Conservation Commission or Luzerne County Conservation District. The Township may choose to amend the ordinance to clarify the regulatory agencies that approve the NMP and OMP plans for a CAO/CAFO.

V. 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 Township does not have authority to establish its 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.

Sincerely,

Susan L. Bucknum

SUSAN L. BUCKNUM
Senior Deputy Attorney General

SLB/kmag
cc: [redacted]