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COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

August 12, 2008

TOM CORBETT
ATTORNEY GENERAL

Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120

VIA FACSIMILE AND FIRST CLASS MAIL

Thomas E. Boop, Esquire
THOMAS E. BOOP LAW OFFICE
106 Market Street
P.O. Box 470
Sunbury, PA 17801-2122

RE: Hartley Township Zoning Ordinance

Dear Mr. Boop:

We notified Hartley Township in January 2007 that our ACRE review determined Sections 200 and 520 of the Ordinance unlawfully prohibit or limit a normal agricultural operation in violation of Act 38. At that time, we had discussions with Charles Zaleski, Esquire, of Reager & Adler, about resolving the legal problems. For various reasons, our negotiations to resolve the legal problems with the ordinance provisions became inactive. It is our understanding that you currently represent Hartley Township in this matter and we are writing to provide details on the provisions of the Hartley Township Zoning Ordinance that present problems under Act 38 and suggest changes to the ordinance that would correct those problems.

We begin with a brief overview of state agencies and laws that regulate concentrated animal operations (CAOs), concentrated animal feeding operations (CAFOs), and animal operations that fall below the State-defined levels that would make the operation a CAO or a CAFO.

CAOs and CAFOs are regulated by the State Conservation Commission (SCC) and the Department of Environmental Protection (DEP). Under the Nutrient and Odor Management Act (NMA), 3 P.S. § 501 *et seq.*, and NMA regulations, 25 Pa. Code § 83.201, *et seq.*, the SCC regulates all aspects of nutrient management for CAOs and CAFOs, including the "design, construction, location, operation, maintenance, and removal from service of manure storage facilities." 25 Pa. Code § 83.351. NMA regulations establish setback requirements for manure storage facilities ranging from 100 to 300 feet from water sources, wells, and property lines,

depending on the date of operation and slope of the property. 25 Pa. Code § 83.351(a)(2)(v)-(viii). The SCC approves nutrient management plans for CAOs and CAFOs, which are specific to the agricultural operation, and which must be developed by a certified nutrient management specialist. 25 Pa. Code § 82.261(8).

DEP regulations require that all manure storage facilities 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). These requirements are met by complying with the Natural Resources Conservation Service's Pennsylvania Technical Guide (PaTG) and DEP's Manure Management Manual (MMM). 25 Pa. Code § 91.36(a)(1)(i). 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 § 92.5a, the requirements for which are based on the Pennsylvania Clean Streams Act, 35 P.S. § 691.1, *et seq.*, 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).

Animal operations that are not a CAO or CAFO are not subject to NMA regulations, including the requirement of a certified nutrient management plan or the setbacks for manure storage facilities. Such operations, however, are not unregulated, as DEP regulates agricultural operations that use or produce manure, 25 Pa. Code § 91.36, whether or not such operations are a CAO or CAFO. Section 91.36 sets forth requirements for manure storage facilities and for land application of manure.

Against this background, we turn to the legal problems with the ordinance and to suggested changes 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. See 3 Pa. C.S. §§ 312 and 313. The NMA preempts local regulation inconsistent with or more stringent than the act or regulations under the act. See 3 Pa. C.S. § 519.

Section 200 defines "commercial livestock operation" (CLO) and "concentrated animal operations" separately, but Section 520 sets identical conditions for both. State law, however, sets different requirements for CAOs/CAFOs and animal operations too small to be CAOs/CAFOs. Accordingly, the ordinance should be amended, as detailed more fully below, to treat such operations differently.

The 500 and 1,000 foot setbacks imposed on a CAO under Section 520(7)(a)-(b) are more stringent than, and therefore preempted by, the NMA, which requires only 100 to 300 foot setbacks for CAOs/CAFOs. Burkholder v. Zoning Hearing Bd. of Richmond Twp., 902 A.2d 1006 (Pa. Cmwlth. 2006); 25 Pa. Code § 83.351(a)(2)(v)-(viii). Moreover, these setback requirements are stricter than, and therefore preempted by, the NMA insofar as they apply to

animal operations too small to be CAOs/CAFOs, since the NMA excludes such operations from its requirements.

The setback problems would be corrected if Section 420(7)(a)-(b) were amended to conform its setback requirement for CAOs/CAFOs to the NMA setback requirements and to exclude from its requirements animal operations too small to be CAOs/CAFOs. A better approach, however, would be to amend the ordinance more broadly to require simply and only 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.*

Section 520(1) and (2)(c), which requires non-CAOs/CAFOs to comply with NMA requirements applicable only to CAOs/CAFOs, is stricter than, and therefore preempted by, the NMA. The problem would be corrected if Section 520(1) and (2)(c) were amended to exclude from its requirements animal operations too small to be CAOs/CAFOs. A better approach, however, would be to amend the ordinance more broadly to require simply and only that: *Agricultural operations that use or produce manure that are not a concentrated animal operation (CAO) or a concentrated animal feeding operation (CAFO) shall comply with Department of Environmental Protection's requirements applicable to such operations, including the requirements specified in 25 Pa. Code § 91.36 and the manuals and guides referenced in that provision.*

Finally, the requirement of Section 404(C)(3)(a) of a thirty-acre minimum lot area for "agricultural use" in the Agricultural Preservation District is more stringent than, and therefore preempted by, the NMA, which requires no minimum lot area for a CAO or CAFO. The thirty-acre minimum lot area also violates the Right to Farm Act, 3 P.S. § 952, which requires only a ten-acre minimum lot area for normal agricultural operations. The problem would be corrected if Section 404(C)(3)(a) were amended to remove the minimum lot area requirement or to conform it to the Right to Farm Act.

I am available to discuss these matters at your convenience, and I look forward to your prompt response.

Sincerely yours,

SUSAN L. BUCKNUM
Senior Deputy Attorney General

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