



COMMONWEALTH OF PENNSYLVANIA
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December 28, 2012

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RE: ACRE Review Request
Huntington Township Zoning Ordinance

Dear Mr. Campbell:

This letter will detail the legal problems with the Huntington Township Zoning Ordinance provisions regulating agriculture and propose changes to the Ordinance that would be acceptable to the Office of Attorney General to resolve this matter by agreement. We begin with an overview of the State laws that regulate agricultural operations and then address the Ordinance provisions.

I. NUTRIENT AND ODOR MANAGEMENT ACT AND REGULATIONS

As the Township is aware, 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 Concentrated Animal Operations (CAOs) and Concentrated Animal Feeding Operations (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. 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); 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

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regulatory scheme); Burkholder v. Zoning Hearing Board of Richmond Township, 902 A.2d 1006 (Pa. Cmwlth. 2006) (same).

Animal operations that are not 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 (non-CAOs) to mandatorily comply with the NOMA by imposing requirements to obtain approved nutrient and odor management 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.

II. CLEAN STREAMS LAW AND REGULATIONS

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 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 United States Department of Agriculture 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 § 92a.29, 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).

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As stated, animal operations that are not a CAO or CAFO are not subject to NOMA regulations, including the requirement for certified nutrient and odor management plans or the setbacks for manure storage facilities, unless an animal operation submits to the SCC's NOMA voluntary participation program. Locust Township, 49 A.3d at 509-511. Smaller animal operations, however, are not unregulated, as 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. Section 91.36 sets forth requirements for the construction of manure storage facilities and for land application of manure. All smaller animal operations are required to have a written manure management plan that complies with the DEP's MMM. 25 Pa. Code 91.36(b)(1)(i).

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. 3 P.S. § 953. The Air Pollution Control Act 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 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").

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. HUNTINGTON TOWNSHIP'S ZONING ORDINANCE UNDER CHAPTER 27

A. Section 27-302 — Definition of Terms

Initially, we note that the term "agriculture" is defined under Section 27-302. The terms "agricultural use" and "agricultural operations" are not defined; however, these terms are used under Sections 27-503 (permitted uses) and 27-504 (conditional uses) to describe uses in the Agricultural Conservation District. We suggest retaining the definition for "agriculture" and amending the terminology used under Sections 27-503 and 27-504 in the manner discussed further below.

Section 27-302 defines a concentrated animal operation as: "agricultural operations where the animal density exceeds two AEUs [Animal Equivalent Units] per acre on an annualized basis." This conflicts with the SCC's definition for concentrated animal operation as "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. The SCC has advised that excluding the "eight or more AEUs" threshold requirement from the ordinance definition results in including agricultural operations that are too small to be subject to the NOMA, thus it conflicts with and is more stringent than the NOMA.

Section 27-302 defines a concentrated animal feeding operation as: "animal operations where large numbers of livestock or poultry are housed inside buildings or in confined areas. These operations are regulated under the Federal Clean Water Act." This definition is vague and ambiguous because it does not include a formula based on agricultural science to ascertain the amount of livestock or poultry that falls under "large numbers." The DEP defines a CAFO as: "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.

Section 27-302 defines "intensive farming operation — see concentrated animal operations" as follows:

- A. **Intensive Beef Cattle Operation.** An operation involving 50 or more beef cattle.
- B. **Intensive Dairy Cattle Operation.** An operation involving 50 or more dairy cattle.
- C. **Intensive Horse Operation.** An operation involving 50 or more horses.
- D. **Intensive Hog, Sheep or Goat Operation.** An operation involving 150 or more hogs, sheep or goats.

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- E. **Intensive Poultry Operation.** An operation involving 1,000 or more birds such as, but not limited to, chickens and turkeys.
- F. **Intensive Small Animal Operation.** An operation involving 1,000 or more small animals such as, but not limited to, guinea pigs, rabbits and minks.

The SCC has advised that using these numbers with only a general animal species identification and excluding available acreage does not provide an accurate assessment of AEUs on an operation and can result in identifying animal operations as "intensive farming operation[s]" when those operations would fall below the numbers required to be a CAO or CAFO. There are a variety of categories within a general animal species. Each category of animal species will have different weights and production times associated with them which ultimately determine the AEUs for that type/category of animal or poultry operation. For example, hogs are managed in various categories and in separate facilities. The weight of a hog differs depending on the category, thus an AEU calculation will vary greatly for hogs. A 150 sow/piglet operation results in a calculation of 64 AEUs, but a 150 hog finishing operation results in a calculation of 21 AEUs. Also, with respect to poultry, there are layers (egg producers) and broilers (meat production) and the categories of poultry include chickens, ducks, and turkeys, all with varying weights and production times. Thus, a 1,000 layer chicken operation calculates to only 2.5 AEUs, which falls below the threshold of 8 or more total AEUs for a CAO. 25 Pa. Code §§ 83.201, .262. Moreover, under the State regulatory scheme, the total AEUs for the operation are also divided by the total acreage available for manure to determine whether the operation is a CAO or CAFO. For these reasons, the Township's use of these generalized amounts of animals to define an "intensive farming operation" is ineffective, not supported by agricultural science, and contrary to State law.

The definition for "large livestock operation" is "an animal concentration on contiguous lands owned by the same owner or owners." We note that "animal concentration" is not defined in the Ordinance, thus this definition is vague, ambiguous and discriminatory. There is no formula, based on agricultural science or otherwise, to ascertain when a livestock operation is a "large livestock operation."

These definitional problems would be corrected if Section 27-302 were amended to delete the definitions for "intensive farming operation" and "large livestock operation" and to correct the definitions for CAO and CAFO to the State law definitions.

We also note that the terms "confined livestock operation" and "intensive agricultural production facility" are defined under Section 27-302; however, these terms are not used within the Ordinance itself. We suggest deleting these terms.

Finally, the term “conditional use” is defined under Section 27-302 as follows:

a use which is not appropriate to a particular zone district as a whole, but which may be suitable in certain localities within the district only when specific conditions and factors prescribed for such cases within this Chapter are present. Conditional uses are allowed or denied by the Board of Supervisors after recommendations by the Township Planning Commission.

This definition is incorrect because a conditional use “is a form of permitted use” that is appropriate within a zoning district. ROBERT S. RYAN, 1 PENNSYLVANIA ZONING LAW AND PRACTICE § 5.1.4 (2001). “A conditional use is nothing more than a special exception which falls within the jurisdiction of the municipal legislative body rather than the zoning hearing board.” In re: Cutler Group, Inc., 880 A.2d 39, 42 (Pa. Cmwlth. 2005). “The fact that a use is permitted as a conditional use evidences a legislative decision that the particular type of use is consistent with the zoning plan and presumptively consistent with the health, safety and welfare of the community.” Id. 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). Accordingly, the statement in the Township’s definition that a conditional use is a use that is “not appropriate to a particular zone” is erroneous.

We suggest amending the definition for conditional use to state: “a use which is expressly permitted in a given zone so long as the conditions detailed in this ordinance are found to exist.”

B. Sections 27-503 and 27-504

Part 5 of Chapter 27 sets forth the land uses for the Agricultural-Conservation District (AC). We note that Section 27-501 states that the AC district “is composed of those areas in the Township whose predominate land use is devoted to agricultural activities.” Section 27-502 provides that the AC district is designed and intended to “[p]ermit only those land uses and activities which are agricultural in nature or incidental thereto.”

Section 27-503 provides that “agricultural uses” are a permitted use. As stated above, “agricultural uses” is not a defined term in the Ordinance.

Section 27-504 provides that “agricultural operations,” “intensive farming operations,” and “large livestock operations” are uses that are permitted subject to conditional use approval.

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As we explained above, there is no definition in the Ordinance for "agricultural operations," thus it is unclear what the difference is between the permitted use for "agriculture uses" and the conditional use for "agricultural operations." Also, the definitions for "intensive farming operation" and "large livestock operation" are in conflict with State law for the reasons discussed above. A significant legal problem with the Ordinance is that an animal operation that is not a CAO/CAFO could nonetheless be identified by the Township as an "intensive farming operation" or "large livestock operation," thus requiring a smaller animal operation in an agricultural zone to obtain conditional use approval to operate. This is the situation that occurred with the Sauble/Weaver proposed poultry layer operation, which was required to obtain conditional use approval even though it was not a CAO. As you have acknowledged in our discussions, it does not make sense to have a zoning district devoted predominately to agricultural uses, but then require that smaller animal operations obtain conditional use approval to operate. In other words, agriculture should be a permitted use by right in an agricultural zone.

With this said, our Office has dealt with municipalities that sought to require conditional use or special exception approval to operate a proposed CAO/CAFO in an agricultural zone. 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); see 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).

The MPC requires a municipality to set forth "express standards and criteria" in a zoning ordinance for conditional use and special exception provisions. 53 P.S. § 10603(c)(1)-(2); In re: Thompson, 896 A.2d at 670. Huntington Township did not comply with this MPC requirement in its zoning ordinance. Section 27-504 states that it establishes conditional uses for the AC district "in accordance with the following standards," but there are no standards set forth in this Section. Section 27-1307 provides that an applicant shall submit a site plan "containing the required information, as part of the application for conditional use." Aside from this statement; however, there are no provisions establishing what information is required for any particular conditional use.

Based on the foregoing, we suggest that the Township amend Section 27-503 to delete the undefined term "agricultural uses" and replace it with the term "agriculture" as defined in the Ordinance. Section 27-504 should be amended to delete the terms: "agricultural operations," "intensive farming operation," and "large livestock operation." If the Township wants to require proposed CAOs/CAFOs to obtain conditional use approval, then it may replace these deleted terms with the terms CAO and CAFO (as amended to conform to State law definitions) under Section 27-504. Furthermore, if the Township intends to require a conditional use for a CAO/CAFO, then it also must add a section to either the AC district provisions or the

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conditional use application provisions to set forth the specific criteria required to obtain the conditional use. The criteria for conditional use approval should state as follows: An owner or operator of a proposed CAO or CAFO shall obtain conditional use approval to operate a CAO or CAFO, which the Township shall grant 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.

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

I look forward to Huntington Township's prompt response to our proposal to resolve this matter through amending the ordinance.

Sincerely,



SUSAN L. BUCKNUM

Senior Deputy Attorney General

SLB/kmag

cc:

