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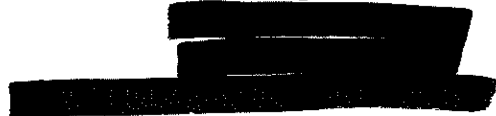

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RE: COP, OAG v. Heidelberg Twp, et al.,
No. 357 MD 2006 (Pa. Cmwlth.)

Dear Counsel:

This letter will detail the legal problems with the Heidelberg and North Heidelberg Townships and Robesonia and Womelsdorf Boroughs Joint Zoning Ordinance provisions regulating agricultural operations and propose changes to the Joint Ordinance that would be acceptable to the Office of Attorney General to resolve this matter by agreement.

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 Joint 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, 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 Joint 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 JOINT ZONING ORDINANCE

A. Section 202 — Definition of Terms

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. "A vague ordinance is one that prescribes activity in terms so ambiguous that reasonable persons may differ as to what is actually prohibited." Id.

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.

The term "Crop Farming" is defined as "[t]he raising of products of the soil and accessory storage of these products. This term shall include orchards, tree farms, plant nurseries, raising of fish, greenhouses **and keeping of animals in numbers that are routinely accessory and incidental to a principal crop farming use.**" The bolded portion of this definition is vague and ambiguous because it does not include a formula based on agricultural science to ascertain the amount of animals that would be "routinely accessory and incidental" to crop farming. It is also inviting of discriminatory enforcement because the amount of animals could be arbitrarily decided based on which municipal official was interpreting the ordinance for a particular operation.

For the same reasons, the definition of "Livestock or Poultry, Raising of," which states: "[t]he raising and keeping of livestock, poultry, or insects for any commercial purposes **or the keeping of any animals for any reason beyond what is allowed under the 'Keeping of Pets' section 403 and beyond what is customarily incidental to a principal 'crop farming' use,**" is also vague, ambiguous and inviting of discriminatory enforcement.

The definition for "Intensive Raising of Livestock or Poultry" (hereinafter "intensive agriculture") is separated into three subsections and each presents legal problems. Under subsection (A) it defines intensive agriculture as follows: "(1) an average of 2 or more animal equivalent units of live weight per acre of livestock or poultry, on an annualized basis; or (2) 300 or more animal equivalent units on one lot, regardless of acreage." This definition 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 identifying agricultural operations that are too small to be subject to the NOMA, thus it conflicts with and is more stringent than the NOMA. The result is that animal operations that are too small to be a CAO/CAFO would be labeled as "intensive" under the ordinance and, in turn, subject them to special exception requirements in zones where agriculture is a permitted use. In addition, as detailed further below, the intensive agriculture requirements in the ordinance duplicate, exceed, or conflict with, and are therefore preempted by, the NOMA regulations. Consequently, imposing these conditions on animal operations too small to be CAOs/CAFOs is precluded by the NOMA and the MPC. See Locust Township, 49 A.3d at 511; 53 P.S. § 603(b), (h). For the same reasons, these requirements also cannot be applied to a CAO/CAFO. The definition is also preempted by the DEP's Clean Streams Law regulatory scheme.

The second part of the definition using 300 AEUs regardless of acreage conflicts with the definition of CAFO. 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. The SCC has advised that using 300 AEUs alone, regardless of available acreage and excluding the CAO threshold, is an inappropriate, irrelevant, and unscientific method to identify a larger animal operation. A farmer can easily have over 300 AEUs and still have enough acreage to not be a CAO. Again, using the ordinance definition would identify smaller operations as "intensive." Thus, this definition conflicts with the definition of CAFO and is beyond municipal authority under the MPC and is preempted by the CSL and NOMA.

For edification purposes, I am enclosing the PSU Extension publication "Agronomy Facts 54, Pennsylvania's Nutrient Management Act (Act 38): Who is Affected?" This PSU publication sets forth in easy to understand terms the State regulatory formula used to calculate AEUs per acre to identify whether an animal agricultural operation is smaller or reaches the density to be a CAO.

Under subsection (B) of the definition for "Intensive Raising of Livestock or Poultry" it provides that "Two Livestock or Poultry Uses shall not be established on two adjacent lots in common ownership in order to circumvent the application of the Intensive Raising of Livestock and Poultry regulations." This provision places restriction on the ownership structure of a normal agricultural operation in violation of ACRE, MPC, and AASL.

Finally, subsection (C) of the definition for intensive agriculture provides that: "Note – the provisions of this Zoning Ordinance are based upon acreage of a lot, and not acreage that is available for disposal of wastes." Under the NOMA regulations, the number of AEUs per acre is calculated by using "the total number of acres of land suitable for the application of manure," which includes rented or leased land outside the parcel where the agricultural operation is located. 25 Pa. Code 83.262(a)(2). The SCC has advised us that the exclusion of rented or leased land outside the parcel will result in identifying animal operations as intensive when under the NOMA regulations they would not be a CAO, thus for all the reasons discussed above, this provision is preempted by the NOMA, CSL, and MPC.

To remedy these legal problems, we suggest the municipalities delete the bolded language set forth above from the definitions for "Crop Farming" and "Livestock or Poultry, Raising of" which reference keeping of animals in vague terms. In the alternative, both of these terms can be deleted and the ordinance can rely upon the term "Agriculture" that is defined under Section 202, but not used in the ordinance itself. The entire definition for intensive agriculture should be deleted and replaced with the terms CAO and CAFO as defined by State law.

B. Section 306 — Agricultural Uses in Zones

1. Direct Commercial Sales of Agricultural Commodities

Under Section 306(B)(1)(b), it states that on-site sales at a plant nursery are "limited to plant materials primarily grown on the premises." This limitation on agricultural sales is prohibited by the RTFA, which provides that:

> Direct commercial sales of agricultural commodities upon property owned and operated by a landowner who produces not less than 50% of the commodities sold shall be authorized, notwithstanding municipal ordinance, public nuisance or zoning prohibitions. Such direct sales shall be authorized without regard to the 50% limitation under circumstances of crop failure due to reasons beyond the control of the landowner.

3 P.S. § 953(b); 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 legal problem with restricting direct commercial sales of agricultural commodities can be corrected by amending the ordinance to repeal this limitation and replace it with the language from the RTFA under Section 953(b).

2. Zoning Restrictions on Normal Agricultural Operations

Sections 306(B)(1)-(2) preclude certain types of normal agricultural operations in zones where other types of normal agricultural operations are permitted uses. The following uses are permitted in every zoning district: Crop Farming, Plant Nursery, Wholesale Greenhouses, and Forestry. 306(B)(1)(b), (f); 306(B)(2)(b), (h). The "Raising of Livestock and Poultry" is permitted in every zone, except the TR and TC zones. 306(B)(2)(h). Intensive agriculture is only permitted by special exception in the AP, AP(M), LI, and GI zones. 306(B)(1)(f); 306(B)(2)(h). Mushroom raising is only permitted by special exception in the AP and AP(M) zones. 306(B)(1)(f). Finally, "[o]ther type of Plant Nursery" is not permitted in any zone, but is also not defined by the ordinance. 306(B)(1)(b).

These various categories of agricultural operations are all recognized as normal agricultural operations as defined under the RTFA. 3 P.S. § 952. The municipalities do 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. 53 P.S. § 10603(b), (h); 10605. In other words, if the municipalities allow agriculture as a use in a zoning district, then they must allow all forms of normal agricultural operations as recognized under

State law. These zoning restrictions also violate the protection from unreasonable restriction of farm practices under the AASL.

Moreover, the definition for intensive agriculture is in conflict with State law. A significant legal problem with the definition 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 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. 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.

With that said, our Office has dealt with municipalities that sought 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).

These legal problems can be resolved by the municipalities allowing all forms of normal agricultural operations as uses either permitted by right or through a special exception/conditional use in each zoning district or by precluding agricultural operations in specified zoning districts (except for forestry which must be permitted as of right in all zoning districts pursuant to 53 P.S. § 10603(f)). Of course, if the municipalities decide to preclude agriculture as a use in certain zones and there already exists agricultural operations in that zone, those operations can be recognized and/or defined as pre-existing non-conforming uses. The municipalities should also explain what is meant by "[o]ther type of Plant Nursery."

Finally, 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) under Sections 306(B)(1)-(2) and 402(Y)(5). The problems with the conditions for a special exception under Section 402(Y)(5) are discussed below.

C. Section 308 — Required Minimum Acreage

Section 308(B)(1) imposes a minimum acreage requirement within the AP and AP(M) zones of 50 acres in Heidelberg Township and 40 acres within North Heidelberg Township.[1] 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 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"). Moreover, the MPC requires a municipality to enact uniform provisions for each class of uses within a zoning district. 53 P.S. § 10605. 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.

I recall that the municipalities raised the issue of preserving agricultural land through the use of these minimum acreage requirements. We submit that the goal of preserving prime agricultural land is more properly addressed in a SALDO provision that restricts subdivision of land. However, we are willing to discuss an alternative resolution through an amendment that would permit agricultural operations on tracts of land that do not meet the minimum acreage requirements.

D. Section 309(G) — Water Studies

Section 309 addresses sewage and water services in all zoning districts. Section 309(G) requires a hydrogeologic study for a proposed use that will involve water usage of 10,000 gallons per day and 5,000 gallons per day in North Heidelberg Township. It also states that the municipality may require the applicant to enter into a legal binding agreement to mitigate negative impacts on water users and post financial security to "provide alternative water supplies to a use on a neighboring lot if that use's pre-existing water supply becomes insufficient as a result of impacts from the water withdrawal."

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[1] We note that Section 402(Y)(2)(1)-(2) imposes minimum acreage requirements ranging from 5 to 25 acres on non-intensive animal agricultural operations depending on the AEUs numbers on the operation. These minimum acreage requirements conflict with those under Section 308(B).

With respect to 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 that are similar to those in this case were preempted by the WRPA. Id. Accordingly, the application of the requirements under Section 309(G) to any agricultural operation conflicts with and exceeds, and is therefore preempted by, the WRPA and DEP's regulatory scheme. The municipalities may amend Section 309(G) to require only that an applicant for an agricultural operation, including 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. In the alternative, the municipalities can amend Section 309(G) to exclude application to any agricultural operations or delete the section in its entirety.

E. Section 402(Y)(2)-(4) — Requirements for Non-Intensive Agriculture

1. Minimum Acreage Based on AEUs

Section 402(Y)(2) sets forth requirements for "all Raising of Livestock and Poultry uses," thus for non-intensive animal agriculture. Subsections 402(Y)(2)(a)(1)-(2) set forth minimum acreage requirements based on the number of AEUs on the operation as follows:

Minimum lot area – 5 acres, except:

1) a minimum lot area of 10 acres shall apply if the use will involve more than 2 but less than 5 animal equivalent units, and

2) a minimum lot area of 25 acres and a minimum lot width of 400 feet shall apply if the use will involve 5 or more animal equivalent units.[2]

The municipalities do not have authority to impose minimum acreage depending on the number of AEUs on the agricultural operation. This requirement violates the RTFA, AASL, NOMA, MPC, and CSL. The number of AEUs and available acreage are used under State law to identify the level of regulatory requirements for all animal agricultural operations. The State regulatory programs do not impose minimum acreage requirements based on amount of AEUs, thus the ordinance conflicts with and is more stringent than State law. The limitations in these provisions also lack any basis in agricultural science or common sense. Richmond Township, 2 A.3d at 684-88.

Indeed, the practical effect of the application of these provisions results in keeping non-intensive operations restricted to very small amounts of animals given the acreage. This unreasonably limits and prohibits a normal agricultural operation from raising livestock or poultry in economically viable amounts when the operator would be permitted to have larger amounts of animals under State regulations. The following are examples of calculations using these provisions:

- 2 AEUs = 2,000 lbs, which is 1.5 cows (using 1,300 lbs per cow (Holstein)) or 645 chickens (using 3.1 lbs per chicken (layer)) on 10 acres. This is 0.2 AEUs per acre (2 AEUs ÷ 10 acres), which is nowhere near the density for a CAO;

- 5 AEUs = 5,000 lbs, which is 4 cows (using 1,300 lbs per cow (Holstein)) or 1625 chickens (using 3.1 lbs per chicken (layer)) on 10 acres. This is 0.5 AEUs per acre (5 AEUs ÷ 10 acres), which is nowhere near the density for a CAO;

- 5.1 AEUs on 25 acres = 0.2 AEUs per acre (5.1 AEUs ÷ 25 acres), which is nowhere near the density for a CAO; and

- 45 AEUs = 45,000 lbs, which is 34.6 cows (using 1,300 lbs per cow (Holstein)) on 25 acres. This is 1.8 AEUs per acre (45 AEUs ÷ 25 acres). This approaches the density for a CAO, but the ordinance restricts acreage to only the lot of the operation, so that this scenario could produce lower AEU numbers depending on the available acreage.

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[2] These minimum acreage requirements conflict with the 40 to 50 minimum acreage found under Section 308(B).

Therefore, based on this application, a farm with 10 acres is limited to a maximum of 4 cows and a 25 acre farm would also be limited to low animal numbers. Also, the 400 foot minimum lot width under Section 402(Y)(2)(a)(2) is preempted by the NOMA setback provisions and cannot be applied to smaller animal operations. Locust Township, 49 A.3d at 512. In the end, these AEU/minimum acreage provisions do not make sense and appear geared toward keeping animal operations that are not intensive at low animal numbers when under State law the operations could have larger amounts of animals, but remain below the AEUs to be a CAO/CAFO. We request that the municipalities delete Sections 402(Y)(2)(a)(1)-(2) in their entirety.

2. "Garbage-Fed" Pig Requirements

Subsection 402(Y)(2)(d) states that the keeping of "garbage-fed pigs shall be setback a minimum of 600 feet from all lot lines. For any garbage-fed pigs, the applicant shall provide a written statement of the methods to be used to control odors, pests, rodents and health hazards." 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.

The 600 foot setbacks from all lot lines conflicts with and is more stringent than the 100 to 300 foot setbacks under the NOMA, thus this provision is preempted as applied to either smaller hog operations or a CAO/CAFO. Richmond Township, 2 A.3d at 685; Locust Township, 49 A.3d at 512. This provision also violates the MPC and AASL.

The requirement for a written statement of methods to control odor and pests is preempted by the NOMA and APCA as applied to either smaller hog operations or a CAO/CAFO. It also violates the RTFA's preclusion against defining a normal agricultural operation as a nuisance, thus is beyond municipal authority under the MPC.

This subsection is found under the section listing requirements for 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 section 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. If amended, the municipalities may decide to place this provision under a different section in the ordinance.

3. Building Setback Requirements based on AEUs

Subsections 402(Y)(3) and (4) impose 300 and 400 foot setbacks for buildings used in non-intensive animal agricultural operations. 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. We also note that the AEUs used in these subsections could encompass CAO/CAFO depending on available acreage. Thus, a non-intensive operation could be a CAO/CAFO under State law, but not identified as intensive under the ordinance. We suggest that these sections be deleted and replaced with a provision that provides that a non-CAO/CAFO should provide proof of compliance with manure storage facility building requirements under the DEP's CSL regulations. 25 Pa. Code § 91.36.

F. Section 402(Y)(5) — Requirements for Intensive Agriculture

Section 402(Y)(5) sets forth the standards that apply to an intensive agriculture use, many of which are beyond municipal authority and preempted by State law.

1. Setback Requirements

To start, the various 200 to 1200 foot setbacks for "any building for the keeping of livestock or poultry" under subsections 402(Y)(5)(a)-(b) are more stringent than, and therefore preempted by, the NOMA regulations. The nutrient management regulations require only 100 to 300 foot setbacks from property lines and water sources for manure storage facilities on CAOs/CAFOs. 25 Pa. Code § 83.351. The odor management regulations approve the siting of new manure storage and animal housing facilities 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. In a nutshell, the appropriate location for manure storage and animal housing facilities on CAOs and CAFOs is determined through approved nutrient and odor management plans. 25 Pa. Code §§ 83.205, 272(a), .281-82, .351, .703, .705, .761, .771, .781; Richmond Township, 2 A.3d at 684-686 ("We now hold that the 1500 foot setback is preempted by the NMA 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. In Richmond Township, the court also held that the setbacks were beyond municipal authority under the MPC and violated the AASL by restricting farm structures. 2 A.3d at 686-688.

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. Specifically, the Locust Township 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(Y)(5)(a)-(b) were 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.

2. Soil and Water Conservation Plans

Section 402(Y)(5)(c) requires an applicant for an intensive agriculture use to submit a soil and water conservation plan to the County Conservation District for review. There is no State regulatory requirement for any agricultural operation to have a water conservation plan. Thus, the requirement for a water conservation plan conflicts with State law and is preempted by the WRPA, MPC, and AASL.

Also, the reference to a "soil conservation plan" and review by the County Conservation District is inaccurate and conflicts with State law. Under State law, all agricultural operations are required to develop and implement a written plan to reduce erosion on their crop fields and Animal Heavy Use Areas (AHUAs). 25 Pa. Code § 102.4(a)(2). These plans are called Erosion and Sediment Control Plans (Ag. E&S Plan) and are regulated under Chapter 102 of DEP's Erosion and Sediment Control regulations. The Ag. E&S Plan "must, at a minimum, limit soil loss from accelerated erosion to the soil loss tolerance (T) over the planned crop rotation" (T over rotation) and "must identify BMPs to minimize accelerated erosion and sedimentation [from

AHUAs]." 25 Pa. Code § 102.4(a)(4)(i), (iii). These plans are not submitted for review or approval by the DEP or SCC (or County Conservation District), but are required to be available on site if the DEP, SCC, or CCD requests them. 25 Pa. Code §§ 102.4(a)(2), 102.5(j), (k). A "conservation plan" is similar to an Ag. E&S Plan, but it is a plan required for participation in federal agricultural programs. A conservation plan is written or reviewed by a person who is certified through federal training programs. A conservation plan that includes the DEP requirements for T over rotation and AHUAs satisfies DEP's requirement for an Ag. E&S Plan. 25 Pa. Code § 102.4(a)(7).

There are also E&S Plans required under the DEP's Erosion and Sediment Control regulations for construction activities, which includes construction of buildings on agricultural operations. These E&S Plans are distinct from an Ag. E&S Plan and do require DEP or County Conservation District approval and, possibly, NPDES permits issued through DEP.

For these reasons, subsection 402(Y)(5)(c) should be amended to delete the requirement for a water conservation plan and clarify that a CAO/CAFO should provide proof to the municipalities of a written Ag. E&S Plan and, if construction activities are proposed, for proof of an approved construction E&S Plan and any required NPDES permit.

3. Disposal of Solid and Liquid Wastes/Odor Requirements

Section 402(Y)(5)(d)(1) requires that an applicant must prove to the satisfaction of the Zoning Hearing Board that: "solid and liquid wastes will be disposed of in a manner that mitigates unnecessary insect, odor and rodent nuisances." The court in Richmond Township considered the legality of virtually identical ordinance language which required that "solid and liquid wastes to be disposed of daily in a manner to avoid creating insect or rodent problems, or a public nuisance and provides that no emission of noxious, unpleasant gases shall be permitted in such quantities as to be offensive outside the lot lines." 2 A.3d at 685, 687-88. The court held that this provision was preempted by the NOMA and RTF and also exceeded the township's authority under the MPC. Id. This provision is also preempted by the APCA's exclusion of agricultural production from air pollution regulations. This requirement should be deleted from this subsection.

Sections 402(Y)(5)(d)(1), (3), (4), (e), and (f) require the following:

- submission of a written odor plan for township approval;
- facilities must be located with consideration of prevailing winds;
- a row of trees shall be planted between any new building for an Intensive Raising of Livestock or Poultry Use and any dwelling on another lot that will be within 300 feet of the building;

- a written plan regarding proposed methods of controlling nuisances and avoiding pollution;

- provide a plan showing the method and operation to be used for the storage, processing and disposal of liquid and solid waste.

These provisions are preempted by the NOMA because they attempt to regulate manure and odor management. They are also preempted, violate, or go beyond municipal authority under the MPC, RTFA, APCA, AASL, and CSL. These provisions should be repealed and replaced with a provision requiring the applicant for a CAO or CAFO provide the Township with proof of compliance with the building siting and manure management requirements for CAOs/CAFOs under the NOMA regulations, including approved nutrient and odor management plans and any required DEP permits and plans.

4. Water Supply Requirements

Section 402(Y)(5)(d)(6) of the Ordinance states that sufficient water supplies shall be available to serve the facility without adversely affecting the water supplies on neighboring properties and refers to ordinance Section 309. For the reasons stated above in the discussion regarding Section 309, this subsection is preempted by the WRPA and violates authority under the MPC. This subsection should be deleted.

F. Section 403(D)(3) — Requirements for Composting Use

Section 403(D)(3)(a) of the Ordinance states that composting shall be conducted in a manner that does not create a fire, rodent or disease carrying insect hazard and does not cause noxious odors off the subject property. These requirements violate the RTFA, MPC, APCA, NOMA, and the AASL. Richmond Township, 2 A.3d at 684-688.

Section 403(D)(3)(b) of the Ordinance limits composting to biodegradable vegetative material, including trees, shrubs, leaves and vegetable waste. This provision is preempted by the DAL, which allows composting as a means of disposal of dead domestic animals, 3 Pa. C.S. §§ 2352, 2389, and also violates the MPC and AASL. Moreover, the DEP's Residual Waste Management regulations allow agricultural operations to use various waste materials in composting operations. 25 Pa. Code §§ 287.1, .101. When an agricultural operation uses materials for composting as part of normal farming operations, then a DEP permit is not required, so long as best management practices are being complied with as set forth in manuals and technical guidance documents. 25 Pa. Code § 287.101. There are certain situations that may require an agricultural operation to obtain a DEP permit to engage in composting activities. There are best management practice manuals published by DEP and the PSU Cooperative Extension that set forth composting practices depending on the materials being used in the

compost. In addition, the DAL sets forth requirements and methods for disposal of dead domestic animals. 3 Pa. C.S.A. § 2352.

Finally, Section 403(D)(3)(e) places water restrictions on composting operations by referring to Section 309 requirements for water studies. Thus, this requirement is preempted by the WRPA for the reasons discussed above regarding Section 309.

These sections should repealed and can be replaced with a requirement that an agricultural operation engaging in composting activities provide proof of compliance with DEP regulations and applicable best management practices, as well as copies of any required permits.

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 municipalities do not have authority to establish their own regulatory scheme for smaller animal operations and/or CAOs/CAFOs that duplicates, exceeds, or conflicts with the SCC's and DEP's regulatory schemes.

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 municipalities amend the Joint 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 the municipalities' response to our proposal to resolve this matter through amending the Joint Ordinance.

Sincerely,

SUSAN L. BUCKNUM
Senior Deputy Attorney General

SLB/kmag
cc: