



COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF ATTORNEY GENERAL  
HARRISBURG, PA 17120

**February 23, 2015**

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***Via facsimile and first class mail***  
**Highland Township Board of Supervisors**  
**100 Five Points Road**  
**Coatesville, PA 19320**

**RE: ACRE Review Request  
Highland Township, Chester County**

**Dear Supervisors:**

As you know, the Office of the Attorney General received a request to review Highland Township's zoning ordinance provisions regulating agricultural operations and its interpretation of the applicability of those provisions to [REDACTED] proposed turkey barn operation. It appears from our review that several provisions of the ordinance and the Township's application of the ordinance to [REDACTED] proposed operation unlawfully prohibit or limit a normal agricultural operation in violation of Act 38.

We are prepared to bring legal action against the Township pursuant to Section 315 of Act 38 to invalidate or enjoin the enforcement of the Ordinance provisions. Before doing so, however, we write to offer the Township an opportunity to provide relevant information or materials and to meet with us to discuss the matter.

In an effort to start negotiations to resolve this matter, we will detail the legal problems with the Highland Township Zoning Ordinance provisions regulating agricultural operations and the application to [REDACTED] operation. We will propose changes to the Ordinance and its application 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

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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 DEPARTMENT OF ENVIRONMENTAL PROTECTION'S 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 (DEP) regulates manure management for 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 Manure Management Manual (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). These plans regulate the management and land application of manure to protect water resources.

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 MMM. 25 Pa. Code § 91.36(a)(1)(i), (2).

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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 from 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 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 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; Locust Township, 49 A.3d at 514 (holding 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.”).

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 HIGHLAND TOWNSHIP ZONING ORDINANCE**

##### **A. Section 1402 — Definition of Terms**

We have identified legal problems with the definitions for intensive agriculture, non-intensive agriculture, concentrated animal feeding operation, and concentrated animal operation. The following is an explanation of those problems and the suggested ordinance amendments to resolve them.

**1. Intensive Agriculture**

Intensive agriculture is defined as:

Agricultural uses involving the processing or production of agricultural products with densities which meet either the United States Environmental Protection Agency's definition for Concentrated Animal Feeding Operation (CAFOs) or the Pennsylvania Department of Agriculture's definition for Concentrated Animal Operation (CAO)s.

The DEP's regulations define what operations constitute a CAFO under Pennsylvania law, so reference to the EPA regulatory definitions is erroneous and inapplicable. 25 Pa. Code § 92a.2. The State Conservation Commission defines and regulates CAOs under the Nutrient and Odor Management Act regulations; not the Pennsylvania Department of Agriculture. 25 Pa. Code § 83.201. Thus, this definition should be revised to define intensive agriculture by referencing the DEP's and SCC's definitions. In the alternative, the Township can delete the term intensive agriculture and simply use the State law definitions for CAO and CAFO.

**2. Non-Intensive Agriculture**

The ordinance defines "non-intensive agriculture" as follows:

The cultivation of the soil, and the raising and harvesting of products of the soil, including nurseries, horticulture, commercial greenhouses, forestry, and the raising of animals and poultry **not to exceed** a combined total of one thousand (1,000) pounds per acre or one (1) animal equivalency unit (AEU) per acre, but excluding intensive agriculture.

As set forth above, animal agriculture operations fall into one of three categories: smaller/non-CAO operations, CAOs, and CAFOs. A CAO is an operation with more than 2 AEUs per acre on an annualized basis (and an 8 AEU threshold). The ordinance defines intensive agriculture to include CAOs and CAFOs and non-intensive includes no more than 1 AEU per acre. There is no provision or definition under the ordinance for animal operations that exceed 1 AEU per acre, but do not reach the animal density to be a CAO or CAFO. Thus, there is a gap in the ordinance that can be remedied by the Township simply using the State law definitions for CAO and CAFO to identify smaller and larger animal operations.

Furthermore, the limitation of 1 AEU per acre results in keeping non-intensive operations restricted to very small amounts of animals. 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 without

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being a CAO or CAFO. Pa. C.S. § 312. This is also an unreasonable restriction on farm practices under the AASL. 3 P.S. § 911.

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. Page three of this publication sets forth the standard animal weights and production times used to calculate AEUs on an operation.

We provide the following example calculations demonstrating the maximum amount of animals that a non-intensive animal operation can have and still comply with the 1 AEU restriction in the definition for non-intensive (these examples are based on using 10 acres available for land application, which is taken from the requirement under Section 603(D)(1) that non-intensive operations have a minimum of 10 acres):

- 7.69 Holstein cows (10 acres x 1,000 lbs per acre = 10,000 lbs ÷ 1,300 lbs per cow = 7.69 cows per acre). This number is based on the fact that a cow is on an operation 365 days a year. Thus, a farmer on 10 acres can have a total of only 7 Holstein cows;
- 11 Jersey cows (10 acres x 1,000 lbs per acre = 10,000 lbs ÷ 900 lbs per cow = 11.1 cows per acre). This number is based on the fact that a cow is on an operation 365 days a year. Thus, a farmer on 10 acres can have a total of only 11 Jersey cows;
- Calculations for poultry operations depend upon the number of production days/weeks required for the specific type of poultry. For example, broiler (meat) poultry operations typically raise several separate flocks per year based on production times versus layer (egg) poultry operations that can have poultry on the operation for more than a year.
  - ▶ Broiler chicken farms typically raise 5 flocks per year. In order to comply with the ordinance definition, a farmer can have a total of 4,250 broilers on the operation per flock (4250 broilers x 3 lbs x 285 days (total production days for 5 flocks) ÷ 365,000 = 9.95 AEUs ÷ 10 acres = .995 AEUs per acre).
  - ▶ Turkey farms producing "tom" turkeys typically raise 2 flocks per year. In order to comply with the ordinance definition, a farmer can have a total of 750 tom turkeys on the operation per flock (750 tom

turkeys x 20 lbs x 252 days (total production days for 2 flocks) ÷  
365,000 = 10.3 AEUs ÷ 10 acres = 1.0 AEU per acre).

- ▶ Turkey farms producing “hen” turkeys typically raise 3 flocks per year. In order to comply with the ordinance definition, a farmer can have a total of 2,000 hen turkeys on the operation per flock (2,000 hen turkeys x 7.1 lbs x 252 days (total production days for 3 flocks) ÷ 365,000 = 9.8 AEUs ÷ 10 acres = .98 AEU per acre).

Based on the foregoing reasons and examples, the Township does not have authority to identify animal agricultural operations using AEU amounts that conflict with State law, unreasonably restrict and limit normal agricultural operations, and have no basis in agricultural science. As stated, the Township should amend the ordinance to use the State law definitions for CAO and CAFO to identify smaller and larger animal operations.

### 3. Concentrated Animal Feeding Operation (CAFO)

The ordinance defines CAFO as “[a]gricultural operation with more than one thousand (1,000) animal equivalency unites (AEUs); agricultural operation with a discharge to surface waters during a storm event of less than 25-year/24-hour storm intensity; or a CAO with greater than three hundred (300) animal equivalency unites (AEUs).”

This conflicts with the DEP’s definition for 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 Township should amend the definition for CAFO to conform to the DEP’s definition.

### 4. Concentrated Animal Operation (CAO)

The ordinance defines CAO as: “[a]gricultural operations where the animal density exceeds two (2) animal equivalency units (AEUs) per acre an annualized basis.” 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 would be labeled as “intensive” under the ordinance and, in turn, subject them to conditional use requirements in zones where agriculture is a permitted use. This definition should be amended to conform to the State definition for CAO.



**B. Minimum Acreage Requirements**

Sections 301.4(A)(1), 603(B)(1), and 603(E)(1) impose a 25 acre minimum acreage requirement for agricultural uses. The Township lacks authority to establish a minimum acreage amount for agricultural operations that conflicts 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 RTFA. 53 P.S. § 10603(b) (emphasis added).

There is also a conflict in the ordinance between these Sections and Section 603(D)(1), which imposes a minimum of 10 acres for a non-intensive agriculture use. As stated, the RTFA defines the acreage required for a normal agricultural operation. 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. 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.

**C. Restrictions on Non-Intensive Agriculture**

**1. Section 603(D)(2) — Prohibition on Slaughtering/Preparation for Market**

Section 603(D)(2) states that non-intensive agricultural uses cannot engage in “slaughtering, processing, or production operations for commercial purposes.” This provision violates both the RTFA and MPC. The RTFA defines a normal agricultural operation to include the “activities, practices, equipment and procedures that farmers adopt, use or engage in the production and preparation for market of poultry, livestock and their products.” 3 P.S. § 952. The term agricultural commodity includes “any of the following transported or intended to be transported in commerce:” “[l]ivestock and the products of livestock,” “products of poultry,” and “[a]ny products raised or produced on farms intended for human consumption and the processed or manufactured products of such products intended for human consumption.” Id.

The Pennsylvania Department of Agriculture (PDA) regulates the destruction, slaughter or processing of domestic animals, including issuing licenses and conducting inspections. 3 Pa. C.S. § 2361-62; 7 Pa. Code §§ 1, 13. The PDA has advised us that on-farm slaughtering, processing, or production of livestock and poultry and their products for commercial purposes is part of normal agricultural operations.

Based on the RTFA and our consultation with the PDA, the prohibition under Section 603(D)(2) is preempted by State law. Moreover, the MPC precludes a municipality from

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enacting zoning ordinance provisions that would exceed the RTFA. 53 P.S. 10603(b). The Township should delete this section of the ordinance.

**2. Section 603(D)(3) — Prohibition on Hog Farming**

Section 603(D)(3) states that “[n]o commercial hog farms shall be permitted as part of a non-intensive agricultural use.” The raising of hogs is a normal agricultural operation as defined under the RTFA. The effect of this provision is to preclude any hog raising operations that are smaller than a CAO/CAFO. The Township does not have authority to preclude an agricultural operation from raising hogs at densities less than a CAO/CAFO. 53 P.S. § 10603(b), (h). Therefore, the township should delete this section of the ordinance.

**D. Restrictions on Intensive Agriculture**

**1. Section 603(E)(2) — Adjacent Residential Uses**

Section 603(E)(2) states as follows:

Adjacent residential uses, including agricultural buildings or structures housing mushrooms, poultry, hogs, or other livestock; accessory mushroom composting; feed lots, or other odor or dust producing activities, shall be located a minimum of one hundred (100) feet from any adjacent intensive agricultural use.

This section does not make sense in that it refers to adjacent “residential uses,” but identifies those residential uses as agricultural type of buildings. It directs that the adjacent “residential use” must be located 100 feet from the adjacent intensive agricultural use. This is imposing a setback requirement on a neighboring landowner for a proposed intensive agricultural use on an adjacent property. The Attorney General requests that the Township either delete this provision or provide an explanation as to its application.

**2. Section 603(E)(3) — 200 foot Setbacks**

Section 603(E)(3) requires an intensive agricultural building to be setback a minimum of 200 feet from any floodplain or water course. The nutrient management regulations establish 100 to 300 foot setbacks for manure storage facilities from water sources and property lines for CAOs/CAFOs. 25 Pa. Code § 83.351(a)(2)(vi). The regulations also permit manure storage facilities to be sited within a floodplain when “consistent with local ordinances developed under the Pennsylvania Flood Plain Management Act.” *Id.* § 83.351(2)(iii)-(iv). Therefore, the 200 foot setback in the ordinance is more stringent than, and therefore preempted by, the NOMA regulations. Richmond Township, 2 A.3d at 684-686 (holding that the Nutrient and Odor Management Act regulations preempted setback provisions for “intensive agricultural

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operations” that exceed and conflict with the requirements under the Act’s regulatory scheme); Burkholder, 902 A.2d 1006 (Pa. Cmwlth. 2006) (same).

The setback problems would be corrected if Section 603(E)(3) is repealed and replaced with a provision requiring that the applicant for a CAO or CAFO provide the Township with proof of compliance with the siting requirements for CAO/CAFO buildings under the NOMA regulations, including approved nutrient and odor management plans and any required DEP permits and plans.

**3. Section 603(E)(4) — Feed Lot Restrictions**

Section 603(E)(4) states that “[I]and area used for feed lots shall be fenced and shall be graded so that animal wastes and surface runoff are confined to the lot on which they originate.” This restriction conflicts with and is more stringent than, and therefore preempted by, the NOMA regulations and the DEP’s Erosion and Sediment Control regulations. 25 Pa. Code § 102.1, *et seq.*

The nutrient management regulations require that a nutrient management plan must include planned best management practices (BMPs) to address “manure management and storage practices, stormwater runoff control practices and other appropriate BMPs necessary to protect the quality of surface water and groundwater.” 25 Pa. Code § 83.282(b)(1). This requirement includes BMPs for Animal Concentration Areas, which includes feedlots. Id. § 83.201. The regulations include specific provisions addressing feedlot management with BMPs to address nutrient runoff control. Id. § 83.311(a), (c), (d). These provisions include requirements for design, siting, and management of feedlots. Id. § 83.311(c)(1). The management requirements include provisions for manure and stormwater runoff to be collected and either treated, stored, or land applied in accordance with BMPs contained in the PaTG. Id. § 83.311(c)(1)-(6), (d). These BMPs can vary depending on the operation and siting of the feedlot. For this reason, an operator may not be required to confine wastes and runoff to the feedlot itself because the operator may implement various types of perimeter BMPs to filter and safely treat and convey the runoff from the lot, as well as BMPs for land application of collected wastes from the feedlot.<sup>1</sup> Id.

In addition, DEP requires all agricultural operations to have a written Erosion and Sediment Control Plan (E&S Plan) for Animal Heavy Use Areas, which includes feedlots. 25 Pa. Code § 102.1, 102.4(a)(2)(ii). The E&S Plan must identify BMPs to minimize accelerated erosion and sedimentation for animal heavy use areas. Id. § 102.4(a)(4)(iii). The BMPs and their design standards are listed in the NRCS conservation practice standards and include perimeter BMPs to address wastes and runoff. Id. § 102.4(a)(4)(iii), (5).

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<sup>1</sup> The DEP’s Clean Streams Law regulations also require smaller animal operations to plan for feedlot BMPs in a written manure management plan. 25 Pa. Code § 91.36(b).

Based on the foregoing regulatory requirements, the ordinance provision requiring the confinement of animal wastes and surface runoff to the lot on which they originate is more restrictive and conflicts with the NOMA and DEP regulatory scheme. We suggest that the Township amend Section 603(E)(4) to require the owner/operator of a CAO/CAFO to provide the Township with proof of compliance with the State requirements for managing feedlots with BMPs, including an approved nutrient management and E&S Plan.

**4. 603(E)(5) — Compliance with Federal CAFO Regulations**

Section 603(E)(5) states that intensive agricultural uses must be “[c]ompliant with Concentrated Animal Feeding Operation regulations issued in accordance with the Clean Water Act . . . and rules promulgated by EPA.” There are several problems with this provision. First, any applicable EPA regulations for CAFOs are incorporated into the DEP’s approved CAFO permit regulatory scheme. 25 Pa. Code § 92.a.3. In other words, only the DEP regulates CAFOs in Pennsylvania with implementation of some federal requirements into the regulatory program. Second, the Township defines intensive agriculture to include both CAOs and CAFOs, thus it cannot impose CAFO requirements on CAOs. Third, the Township does not have authority to incorporate State or Federal regulatory programs and enforce them locally. For these reasons, the Township should delete this provision from the ordinance. The Township may amend this provision to require that CAOs and CAFOs provide proof of all State required permits and plans.

**E. Appendix 1 — Zoning Use Restrictions on Normal Agricultural Operations**

The Township permits animal and non-animal agricultural uses in all zoning districts either by right or by special exception. However, intensive agricultural uses are only permitted by conditional use in the Agricultural Preservation District and the Industrial District.

All of these categories of agricultural operations 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. 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. These zoning restrictions also violate the protection from unreasonable restriction of farm practices under the AASL.

These legal problems can be resolved by the Township 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 Township decides to preclude

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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.

As a reminder, it is within the Township's 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). Furthermore, a smaller animal operation should not have to obtain a special exception/conditional use 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.

**F. Underground Water Supply Ordinance**

In addition to the zoning ordinance provisions, we were also asked to review the Township's Underground Water Supply Ordinance. This ordinance states that it applies to agricultural wells and requires permits and water impact studies prepared by a licensed geologist and approved by the Township. Ordinance §§ 200-400. The ordinance also provides that the Township can disapprove a proposed well if it determines the well will not provide an adequate supply of water or will affect nearby wells and streams. Ordinance § 700. The Township does not have authority to impose these conditions on agricultural water supplies.

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 the Underground Water Supply Ordinance to any agricultural operation conflicts with and exceeds, and is therefore preempted by, the WRPA and DEP’s regulatory scheme.

The Township should amend Section 200 of the Ordinance to add a sentence after the last sentence of the opening paragraph to state: “Requirements for agricultural wells and water supplies are contained in their entirety under Section 1100.” The references to “agricultural wells” in Sections 200 and 400 should be deleted. The current paragraph under Section 1100 can remain with the exception that reference to Section 501.16 of the CCHD Rules & Regulations should be revised to refer to Section 501.14.4, which is the section addressing agricultural water supply requirements imposed by the County. The Township may further amend Section 1100 to require 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.

**V. Highland Township’s Application of the Zoning Ordinance to [REDACTED]  
Proposed Turkey Barn**

As the Township is aware, [REDACTED] owns a 30.5 acre farm in the Agricultural Preservation District, which is a preserved farm in the Township’s Agricultural Security Area. [REDACTED] seeks to build a turkey barn on his preserved farm property to house 12,500 Tom Turkeys. In 2014, [REDACTED] and his representatives submitted a request for a building permit along with detailed information to the Township regarding the proposed turkey barn and the calculation of AEUs per acre for the project. The proposed operation on this farm will have .87 AEUs per acre based on the State formula to calculate AEUs per acre (504.62 total AEUs on operation ÷ 580 available acres = .87 AEUs per acre). (See enclosed PSU Extension publication “Agronomy Facts 54, Pennsylvania’s Nutrient Management Act (Act 38); Who is Affected?”) This calculation was confirmed in a letter dated September 10, 2014, from Dan Miloser of the Chester County Conservation District (CCCD) to Peter Hughes of Red Barn Consulting, which was also provided to the Township. The CCCD is the agency that regulates CAOs/CAFOs under the NOMA regulatory scheme. We have confirmed with Mr. Miloser that, based on the project information, Mr. Lantz’s proposed turkey barn on this farm is not a CAO under State law.

Accordingly, [REDACTED] proposed turkey barn project is not intensive agriculture (i.e., CAO/CAFO) under the zoning ordinance and [REDACTED] is not required to obtain conditional use approval for the project. It is our understanding that, to date, the Township has refused to issue

**Highland Township Board of Supervisors**

**February 23, 2015**

**Page 15 of 15**

██████████ a permit for his proposed turkey barn despite the fact that he has provided the Township with the information necessary to do so. As stated, we are prepared to bring legal action against the Township to challenge the ordinance provisions set forth above and the Township's refusal to allow ██████████ to proceed with his project. However, this letter is an offer to the Township to resolve these legal problems through ordinance amendment. If the Township is interested in pursuing a resolution in lieu of litigation, we also request that the Township immediately issue ██████████ the necessary permit to proceed with his turkey barn project while we move forward with our negotiations on ordinance amendments.

**VI. CONCLUSION**

As evident from the discussion above, local ordinances that attempt to regulate the how, when, and where of activities already subject to State uniform regulatory schemes "have not fared well under preemption challenges." Commonwealth v. East Brunswick Township, 980 A.2d 720, 730 (Pa. Cmwlth 2009); Richmond Township, 2 A.3d at 684-88. The Township does not have authority to establish its 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 conditional use proceedings for a proposed CAO/CAFO, the Township amend the zoning 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 Township's response to our proposal to resolve this matter through amending the ordinance provisions and allow ██████████ to move forward with his project.

Sincerely,



**SUSAN L. BUCKNUM**  
**Attorney-in-Charge — ACRE Program**  
**Senior Deputy Attorney General**

SLB/kmag  
enclosures

cc: ██████████ (w/o encl.)  
Peter Hughes (w/encl.)  
Robert A. Mulle, Esquire  
Executive Deputy Attorney General (w/o encl.)



Agronomy Facts 54

# Pennsylvania's Nutrient Management Act (Act 38): Who Is Affected?

In spring 1993, the Pennsylvania legislature passed and the governor signed the Nutrient Management Act (Act 6) into law. The regulations implementing this law went into effect in 1997. In 2002 the State Conservation Commission began an effort to revise these regulations. In summer 2005, the Pennsylvania legislature replaced Act 6 with Act 38 as part of the Agriculture, Communities, and Rural Environment (ACRE) initiative. The new regulations, now falling under the new Act 38, were finalized in 2006 and went into effect in October of that year.

These revised regulations include several significant changes in the state's nutrient management program, including changes to who is affected by the regulations. This fact sheet addresses the question "Who is affected (regulated) by this legislation and regulations?"

### CONCENTRATED ANIMAL OPERATIONS

The act states that "concentrated animal operations" will be required to develop and maintain a nutrient management plan. Concentrated animal operations (CAOs) are defined as agricultural operations where the animal density of all livestock on the farm exceeds 2 animal equivalent units (AEUs) per acre on an annualized basis. This animal density criteria has not changed in the new regulations; however, two significant changes were made. First, the definition now includes all livestock, including nonproduction animals such as horses used for recreation and transportation. Second, an operation with less than 8 AEUs is not considered to be a CAO regardless of the animal density.

### Animal Equivalent Units (AEU)

An AEU is 1,000 pounds of live weight of any animal on an annualized basis. Annualized means that if animals are not present on an operation for a whole year, the animal units are adjusted for the proportion of time during the year that animals are present on the operation. The calculation involves determining the number of AEUs of all animals on the farm based on the number of animals and their average weights and then adjusting that for the actual number of days (out of 365) that the animals are on the operation. To determine the number of AEUs on a farm, the following

formula can be used for each type of animal and then added together to get the total AEUs on the farm:

$$\text{AEUs for each type of animal} = \left[ \frac{\text{average number of animals on a typical day that the animals are there} \times \text{animal weight (lb)} \div 1,000 \right] \times \left[ \frac{\text{number of days the animals are on the operation per year}}{365} \right]$$

Table 1 (page 3) lists standard animal weights that are used to calculate AEUs. It is strongly suggested that these standard animal weights be used for this calculation. However, if the farmer has records of actual weights of the animals on the farm, these may be used to determine the appropriate animal weight to be used for this calculation if the records are complete enough to justify the use of the nonstandard weights. Note that for growing animals, an average weight for their growth over the year is used. For example, for broilers that grow from 0.09 to 5.9 pounds per animal over the growth cycle, the average weight would calculate to be 3.0 pounds per animal.

### Acres Suitable for Application of Manure

The acreage number used in the animal density calculation is all acres, owned and rented, that are suitable for the application of manure. This acreage is determined to be those lands that meet the following criteria:

- cropland, hay land, or pastureland (owned or rented) that is an integral part of the operation
- land that is under the management control of the operator
- land that is or will be used for the application of manure from the operation

Farmstead and forestland cannot be included in this calculation as land suitable for manure application.

### Animal Density

The number of acres that meet the criteria listed above are then divided into the total AEUs on the farm to determine the overall animal density for the operation. Use the blank worksheet on page 4 to calculate the animal density on your farm.





**Concentrated Animal Operations Requirements**

A CAO as defined under the original regulations that was in existence on the effective date of the revised regulation (October 1, 2006) should already have an approved nutrient management plan. The following are the new plan submission requirements of CAOs as defined in the revised regulations:

- An existing operation that becomes a CAO due to the changes in the regulations listed above must have submitted a nutrient management plan for approval by October 1, 2008.
- A new CAO that comes into existence after the effective date must have an approved plan prior to the commencement of manure operations.
- An agricultural operation that is planning an expansion that will result in that operation becoming a CAO must have an approved plan prior to the expansion.
- An agricultural operation that because of loss of land suitable for manure application now meets the criteria for a CAO must submit a nutrient management plan within six months after the date of the loss of land.

**EXAMPLE CAO CALCULATIONS**

The following is an example of an AEU per acre calculation.

**Example Farm Data**

|   |  |
|---|--|
| <b>Animal Inventory</b><br>(Average weights taken from Table 1) | 110 dairy cows @ 1,300-lb average weight each<br>35 heifers @ 900-lb average weight each<br>20 calves @ 375-lb average weight each<br>15,000 heavy broilers @ 3-lb average weight each |
| <b>Production Period</b>  | Cows = 365 days per year<br>Broilers = 5 flocks for 57 days each, or 285 days per year   |
| <b>Land Inventory</b>   | Farmstead = 5 acres<br>Woodland = 3 acres<br>Pasture = 4 acres<br>Cropland, home farm = 60 acres<br>Cropland, rented farm = 36 acres   |

This example farm would be defined as a CAO and would be required to develop and implement an approved nutrient management plan. The animal density criterion is not to be construed as prohibiting development or expansion of agricultural operations that would exceed the criterion. It simply means that these operations will be required to have an approved nutrient management plan. Farms with an animal density higher than 2 AEUs per acre are likely to have more nutrients than can be fully used by the crops grown on the farm. Thus, nutrient management plans for CAOs often will describe on-farm manure utilization, as well as procedures for moving some manure off the farm.

**OTHER REQUIRED PLANS**

Farms receiving financial assistance for nutrient management, such as from the Chesapeake Bay Program, are also required to have a nutrient management plan. Any farm that violates the Clean Streams Law also may be required to develop a nutrient management plan.

**VOLUNTARY PLANS**

Farms with fewer than 2 AEUs per acre and farms with fewer than a total of 8 AEUs on the operation are encouraged to voluntarily develop nutrient management plans. Nutrient management plans, whether required or voluntary, can improve farm profits, help protect the environment, provide some protection from liability, and enhance the image with the general public of agriculture as a good steward of our natural resources.

**FOR MORE INFORMATION**

For more information, contact your local Penn State Cooperative Extension office or your local conservation district. For a summary of the Nutrient Management Act and regulations, see Penn State's *Agronomy Facts 40: Nutrient Management Legislation in Pennsylvania: A Summary of the 2006 Regulations*, which is available from your local Penn State Cooperative Extension office.

Using this example data and the worksheet, the calculation of animal density (AEUs per acre) for this farm would be as follows:

| ANIMAL TYPE | NO. ANIMALS | X ANIMAL WEIGHT (LBS) | X PROD. DAYS | + FACTOR =                   | AEU    |
|-------------|-------------|-----------------------|--------------|------------------------------|--------|
| Dairy       | 110         | x 1,300               | x 365        | ÷ 365,000 =                  | 143.0  |
| Heifers     | 35          | x 900                 | x 365        | ÷ 365,000 =                  | 31.5   |
| Calves      | 20          | x 375                 | x 365        | ÷ 365,000 =                  | 7.5    |
| Broilers    | 15,000      | x 3                   | x 285        | ÷ 365,000 =                  | 35.14  |
|             |             | x                     | x            | ÷ 365,000 =                  |        |
|             |             | x                     | x            | ÷ 365,000 =                  |        |
|             |             | x                     | x            | ÷ 365,000 =                  |        |
|             |             |                       |              | Total* =                     | 217.14 |
|             |             |                       |              | Acres available for manure** | ÷ 100  |
|             |             |                       |              | AEUs/acre                    | = 2.17 |

\*If this figure is less than 8, then the farm would not be a CAO, regardless of the AEU/acre figure calculated below.

\*\*Includes only cropland, hayland, and pastures; for this example there are 96 acres of cropland/hayland and 4 acres of pastures.

**Table 1. Standard animal weights used to calculate animal equivalent units to identify concentrated animal operations.**

| TYPE OF ANIMAL                       | STANDARD WEIGHT (LB)<br>USING PRODUCTION RANGE | TYPE OF ANIMAL | STANDARD WEIGHT (LB)<br>USING PRODUCTION RANGE |
|--------------------------------------|--|----------------|--|
| <b>Dairy</b>                         |  |                |  |
| <b>Medium-Breed Cattle</b>           |  |                |  |
| Cow                                  | 1,300  |                |  |
| Heifer: 1-3 yr                       | 900 (800-1,100)                                |                |  |
| Calf 0-1 yr                          | 375 (300-600)                                  |                |  |
| Bull                                 | 1,500  |                |  |
| <b>Ayrshire/Galloway</b>             |  |                |  |
| Cow                                  | 1,100  |                |  |
| Heifer: 1-3 yr                       | 800 (675-1,025)                                |                |  |
| Calf 0-1 yr                          | 330 (300-375)                                  |                |  |
| Bull                                 | 1,200  |                |  |
| <b>Jersey</b>                        |  |                |  |
| Cow                                  | 900  |                |  |
| Heifer: 1-3 yr                       | 600 (400-800)                                  |                |  |
| Calf 0-1 yr                          | 225 (20-400)                                   |                |  |
| Bull                                 | 1,000  |                |  |
| <b>Swine</b>                         |  |                |  |
| Nursery pig                          | 30 (15-40)                                     |                |  |
| Wean to finish                       | 140 (13-200)                                   |                |  |
| Grow finish                          | 150 (65-200)                                   |                |  |
| Seawater sow                         | 400  |                |  |
| Sow and litter                       | 470  |                |  |
| Bor                                  | 450  |                |  |
| <b>Poultry</b>                       |  |                |  |
| Layer: 18-40 wk.                     | 3.10 (2.75-3.45)                               |                |  |
| Layer: 40-52 wk.                     | 3.15 (weighted avg.)                           |                |  |
| Layer, brown egg: 20-40 wk.          | 3.0 (2.3-4.3)                                  |                |  |
| Layer, brown egg: 20-50 wk.          | 4.00 (3.3-4.7)                                 |                |  |
| Pullet: 0-18 wk.                     | 1.42 (0.66-2.70)                               |                |  |
| Broiler, large: 0-53 days            | 3.0 (0.69-6.0)                                 |                |  |
| Broiler, medium: 0-35 days           | 2.3 (0.99-4.5)                                 |                |  |
| Roaster                              | 3.64 (0.89-7)                                  |                |  |
| Male: 0-7 wk.                        |  |                |  |
| Female: 0-6 wk.                      |  |                |  |
| Turkey, tom: 0-18 wk.                | 20.0 (0.12-40)                                 |                |  |
| Turkey, hen: 0-12 wk.                | 7.1 (0.12-14)                                  |                |  |
| Duck: 0-43 days                      | 3.06 (0.11-7)                                  |                |  |
| Quail: 0-14 to 24 wk.                | 1.0 (0.06-3.70)                                |                |  |
| Pheasant: 0-13 to 43 wk.             | 1.63 (0.05-3)                                  |                |  |
| Chick: 0-13 to 43 wk.                | 0.62 (0.04-1)                                  |                |  |
| Quail: 0-13 to 43 wk.                | 0.36 (0.02-0.9)                                |                |  |
| <b>Beef</b>                          |  |                |  |
| Calf 0-6 mo.                         | 300 (100-600)                                  |                |  |
| Finishing: 6-24 mo.                  | 900 (300-1,400)                                |                |  |
| Cow                                  | 1,400  |                |  |
| Bull                                 | 1,800  |                |  |
| <b>Wool</b>                          |  |                |  |
| Wool                                 |  |                |  |
| Wool: 0-30 wk.                       | 270 (80-440)                                   |                |  |
| <b>Larger Breed Sheep</b>            |  |                |  |
| Lamb: 0-1 yr.                        | 80 (70-100)                                    |                |  |
| Ewe                                  | 170  |                |  |
| Ram                                  | 250  |                |  |
| <b>Smaller Breed Sheep</b>           |  |                |  |
| Lamb: 0-1 yr.                        | 50 (40-60)                                     |                |  |
| Ewe                                  | 100  |                |  |
| Ram                                  | 150  |                |  |
| <b>Goats</b>                         |  |                |  |
| Goat 0-1 yr.                         | 60 (5-120)                                     |                |  |
| Goat                                 | 100  |                |  |
| Buck                                 | 200  |                |  |
| <b>Dairy Goats</b>                   |  |                |  |
| Goat 0-1 yr.                         | 40 (5-80)                                      |                |  |
| Goat                                 | 120  |                |  |
| Buck                                 | 170  |                |  |
| <b>Mixed Breeds and Mixed Breeds</b> |  |                |  |
| Foal 0-6 mo.                         | 35 (20-45)                                     |                |  |
| Weanling: 6-12 mo.                   | 80 (40-70)                                     |                |  |
| Yearling: 12-24 mo.                  | 100 (75-120)                                   |                |  |
| Two-Year-Old: 24-36 mo.              | 150 (120-170)                                  |                |  |
| Mature                               | 200  |                |  |
| <b>Paints and Drafts</b>             |  |                |  |
| Foal 0-6 mo.                         | 65 (30-100)                                    |                |  |
| Weanling: 6-12 mo.                   | 100 (50-200)                                   |                |  |
| Yearling: 12-24 mo.                  | 200 (100-400)                                  |                |  |
| Two-Year-Old: 24-36 mo.              | 400 (200-600)                                  |                |  |
| Mature                               | 600  |                |  |
| <b>Light Breeds and Steers</b>       |  |                |  |
| Foal 0-6 mo.                         | 100 (50-200)                                   |                |  |
| Weanling: 6-12 mo.                   | 400 (200-600)                                  |                |  |
| Yearling: 12-24 mo.                  | 700 (300-1000)                                 |                |  |
| Two-Year-Old: 24-36 mo.              | 900 (500-1,000)                                |                |  |
| Mature                               | 1,100  |                |  |
| <b>Draft Horses</b>                  |  |                |  |
| Foal 0-6 mo.                         | 300 (150-600)                                  |                |  |
| Weanling: 6-12 mo.                   | 600 (300-1,000)                                |                |  |
| Yearling: 12-24 mo.                  | 1,000 (500-1,500)                              |                |  |
| Two-Year-Old: 24-36 mo.              | 1,400 (700-1,800)                              |                |  |
| Mature                               | 1,800  |                |  |
| <b>Sheep</b>                         |  |                |  |
| Wool                                 |  |                |  |
| Wool: 0-1 yr.                        | 120 (50-1,000)                                 |                |  |
| Cow                                  | 1,200  |                |  |
| Bull                                 | 2,000  |                |  |
| <b>Other</b>                         |  |                |  |
| Foal: 0-6 mo.                        | 35 (7-40)                                      |                |  |
| Weanling Cow: 6-18 mo.               | 95 (60-120)                                    |                |  |
| Weanling Buck: 6-18 mo.              | 110 (60-150)                                   |                |  |
| Mature Cow                           | 140  |                |  |
| Mature Buck                          | 200  |                |  |
| <b>Alpacas</b>                       |  |                |  |
| Wool                                 |  |                |  |
| Wool: 0-1 yr.                        | 80 (70-140)                                    |                |  |
| Mature Female                        | 140  |                |  |
| Mature Male                          | 170  |                |  |
| <b>Llamas</b>                        |  |                |  |
| Wool                                 |  |                |  |
| Wool: 0-1 yr.                        | 80 (50-100)                                    |                |  |
| Wooling: 1-3 yr.                     | 220 (100-300)                                  |                |  |
| Mature                               | 300  |                |  |

Using this worksheet to determine if your farm is a CAO:

| ANIMAL TYPE | NO. ANIMALS | X ANIMAL WEIGHT (LBS) | X PROD. DAYS               | + FACTOR =  | AEU |
|-------------|-------------|-----------------------|----------------------------|-------------|-----|
|             |             | X                     | X                          | ÷ 365,000 = |     |
|             |             | X                     | X                          | ÷ 365,000 = |     |
|             |             | X                     | X                          | ÷ 365,000 = |     |
|             |             | X                     | X                          | ÷ 365,000 = |     |
|             |             | X                     | X                          | ÷ 365,000 = |     |
|             |             | X                     | X                          | ÷ 365,000 = |     |
|             |             | X                     | X                          | ÷ 365,000 = |     |
|             |             |                       |                            | Total* =    |     |
|             |             |                       | Acres available for manure |             | ÷   |
|             |             |                       | Animal density: AEU/acre** |             | =   |

\*If the total AEU's on the farm are less than 8, the farm is not a CAO, regardless of the animal density.

\*\*Farms with an animal density of greater than 2 AEU's/acre are defined as CAOs.

Prepared by Douglas Beegle, distinguished professor of agronomy, and Jerry Martin, senior extension associate, in cooperation with and with funding from the Pennsylvania State Conservation Commission.

**extension.psu.edu**

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COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF ATTORNEY GENERAL  
HARRISBURG, PA 17120

May 11, 2015

KATHLEEN G. KANE  
ATTORNEY GENERAL

Litigation Section  
15<sup>th</sup> Floor, Strawberry Square  
Harrisburg, PA 17120



Roger E. Legg, Esquire  
Attorney at Law  
430 West First Avenue  
Parkesburg, PA 19365

RE: ACRE Review Request  
Highland Township, Chester County

Dear Mr. Legg:

Thank you for your letter dated March 3, 2015, in which you discuss our proposals to resolve the legal problems with Highland Township's zoning ordinance through ordinance amendments. We will address your response and explain the process of working with our Office to finalize ordinance amendments.

**I. HIGHLAND TOWNSHIP'S AGREEMENT TO AMEND THE ORDINANCES**

Your letter indicates that the Township has agreed to amend the following ordinance provisions:

- Definitions for "Intensive Agriculture" and "Non-Intensive Agriculture" by utilizing the definitions for CAO and CAFO;
- An amendment to reduce the minimum acreage requirements for agricultural uses under Sections 301.4(A)(1), 603(B)(1), and 603(E)(1) from 25 acres to 10 acres;
- Section 603(D)(2) will be amended to delete the subsection in its entirety, which will allow non-intensive agricultural operation to engage in slaughtering, processing, or production operations for commercial purposes;

**Roger E. Legg, Esquire**  
**May 11, 2015**  
**Page 2 of 6**

- Section 603(D)(3) will be amended by deleting the subsection in its entirety so that non-intensive agricultural operations can raise hogs (we note that in your letter you refer to this provision as Section 603(E)(2), but the correct section is Section 603(D)(3);
- Section 603(E)(2) will be amended to delete the section in its entirety;
- Section 603(E)(4) will be amended to delete the current language in this subsection in its entirety and replace it with language stating that the owner/operator of a CAO/CAFO will provide the Township with proof of compliance with the State requirements for managing feedlots with BMPs, including an approved nutrient management and E&S Plans;
- Section 603(E)(5) will be amended to delete the language in the subsection in its entirety and replace it with language stating that CAOs and CAFOs are required to provide proof of all State required permits and plans.
- The Underground Water Supply ordinance will be amended to add a sentence to Section 200 after the last sentence of the opening paragraph to state: "Requirements for agricultural wells and water supplies are contained in their entirety under Section 1100." The references to "agricultural wells" in Sections 200 and 400 should be deleted. The current paragraph under Section 1100 can remain with the exception that reference to Section 501.16 of the CCHD Rules & Regulations should be revised to refer to Section 501.14.4, which is the section addressing agricultural water supply requirements imposed by the County. The Township will amend Section 1100 to require 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.

We appreciate the Township's cooperation in agreeing to these amendments and to suspending enforcement until the completion of the amendment process.

Roger E. Legg, Esquire

May 11, 2015

Page 3 of 6

## II. REMAINING ISSUES WITH ORDINANCE PROVISIONS

We now turn to the ordinance provisions that were either not addressed by the Township or for which the Township provided an equivocal response about amending.

There was no mention of Section 603(E)(3) in your letter. Section 603(E)(3) requires an intensive agricultural building to be setback a minimum of 200 feet from any floodplain or water course. In our February 23, 2015, letter, we advised that Section 603(E)(3) was preempted by the Nutrient and Odor Management Act and beyond the Township's authority under the MPC.

The setback problems would be corrected if Section 603(E)(3) is repealed and replaced with a provision requiring that the applicant for a CAO or CAFO provide the Township with proof of compliance with the siting requirements for CAO/CAFO buildings under the NOMA regulations, including approved nutrient and odor management plans and any required DEP permits and plans.

Finally, you asked for further clarification on our proposal regarding agricultural uses in the Township's zoning districts. As you recall, the Township permits animal and non-animal agricultural uses in all zoning districts either by right or by special exception. However, intensive agricultural uses are only permitted by conditional use in the Agricultural Preservation District and the Industrial District.

As we explained, all of these forms of agricultural operations 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.

In order to remedy this legal problem, we suggested that the Township amend the ordinance to allow all forms of normal agricultural operations as uses in each zoning district or to designate particular zoning districts in which all forms of normal agricultural operations are a use (except for forestry which must be permitted as of right in all zoning districts pursuant to 53 P.S. § 10603(f)).

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

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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).

The Township does not have authority to regulate the operational aspects of an agricultural operation. A municipality’s zoning authority is to designate what uses are permitted in particular zoning districts. On the other hand, 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. 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.

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A CAO and CAFO are subject to increased regulatory requirements than those for a smaller animal operation. For this reason, some municipalities have 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. A conditional use/special exception "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). 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); Commonwealth v. Locust Township, 49 A.3d 502, 509-511 (Pa. Cmwlth. 2012) (*en banc*) (holding that a municipality exceeds its authority and is preempted from requiring smaller animal operations to comply with the NOMA).

Accordingly, we advised the Township that it is within its authority to require a special exception or conditional use approval for a proposed CAOs/CAFOs in a zone in which agriculture is a use. However, as ought to be apparent based on the above discussion, a smaller animal operation should not have to obtain a special exception to engage in operations in a zoning district in which agriculture is a permitted use. RYAN, 1 PENNSYLVANIA ZONING LAW AND PRACTICE § 5.1.2 ("If a use is consistent with a particular zoning district, it should be permitted of right."). However, a municipality can require a permit for smaller animal operations, which shall be issued to the operator after providing proof of compliance with DEP's Clean Streams Law regulatory requirements. 25 Pa. Code § 91.36.

We reiterate that, in light of the comprehensive regulation of CAOs and CAFOs by the SCC and DEP, we suggest that, in lieu of requiring conditional use/special exception proceedings for a proposed CAO/CAFO, the Township amend the zoning 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.*



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We request that the Township draft proposed ordinance amendments based on the above-stated agreements and submit them to our Office for review and approval prior to the enactment process. We appreciate the Township's efforts to resolve this ACRE action.

Sincerely,



**SUSAN L. BUCKNUM**  
**Attorney-in-Charge — ACRE Program**  
**Senior Deputy Attorney General**

SLB/kmag

cc:

  
**Peter Hughes**