



COMMONWEALTH OF PENNSYLVANIA
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November 9, 2016

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Via First Class Mail

Samuel E. Wisner, Esquire
Salzmann Hughes, P.C.
79 St. Paul Drive
Chambersburg, PA 17201

**RE: ACRE Review Request
Cumberland Township, Adams County**

Dear Mr. Wisner:

As you are aware, an ACRE request was submitted to this Office requesting review of Cumberland Township's zoning ordinance provisions regulating animal agricultural operations. We notified Cumberland Township that there were ordinance provisions that prohibited or limited normal agricultural operations in violation of ACRE.

This letter will detail the legal problems with Cumberland Township's zoning ordinance provisions regulating agricultural operations. We will provide proposed changes to the ordinance that would be acceptable to the Office to resolve this matter by agreement through ordinance amendment.

The Agriculture Communities and Rural Environment (ACRE) law requires municipalities to comply with State law in imposing requirements on normal agricultural operations. Pennsylvania law provides State agencies with strong and broad regulatory and enforcement power over all agricultural operations, including Concentrated Animal Operations (CAOs) and Concentrated Animal Feeding Operations (CAFOs) and prohibits inconsistent regulation by municipalities. 3 Pa. C.S. § 312, *et seq.* We begin with an overview of the State laws that regulate agricultural operations and then address the Ordinance provisions.

I. CLEAN STREAMS LAW AND DEP REGULATIONS

Under Pennsylvania law, all animal agricultural operations are regulated and defined to fall into one of the three following categories:

- animal agricultural operations too small to be a CAO/CAFO, i.e., non-CAOs/CAFOs, which are subject to the Clean Streams Law regulatory scheme. See 25 Pa. Code § 91.36, discussed below.
- concentrated animal operations (CAO), which are subject to the Nutrient and Odor Management Act and the Clean Streams Law regulatory schemes. See 25 Pa. Code §§ 83.201, .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, .701, 91.36, and 92a.1, discussed below.

Pursuant to its authority under the Clean Streams Law, 35 P.S. § 691.1, *et seq.*, the Department of Environmental Protection (DEP) regulates all agricultural operations that use or produce manure whether or not such operations are a CAO or CAFO. 25 Pa. Code § 91.36. All smaller animal operations (or operations that use manure) are required to have a written manure management plan that complies with DEP's 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).

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 set forth in the DEP's Manure Management Manual (MMM). 25 Pa. Code § 91.36(a)(1)(i), (2).

In addition, DEP requires CAFOs to obtain various permits depending on the CAFO's size. All CAFOs must obtain a National Pollutant Discharge Elimination System (NPDES) permit, 25 Pa. Code §§ 92a.29, .49, the requirements for which are based on the Clean Streams Law and various requirements of the federal Clean Water Act. Large CAFOs and manure storage facilities with large storage capacities are required to obtain a separate water quality management permit. 25 Pa. Code §§ 91.36(a)(2)-(4); 92a.29(e)(3).

II. NUTRIENT AND ODOR MANAGEMENT ACT AND REGULATIONS

The State Conservation Commission (SCC), pursuant to its authority under the Nutrient and Odor Management Act (NOMA), 3. P.S. § 501 *et seq.*, and accompanying regulations, 25 Pa. Code § 83.201, *et seq.*, comprehensively regulates nutrient and odor management on CAOs and CAFOs. In addition to requiring an approved site-specific nutrient management plan, the SCC's regulations include mandatory requirements for the "design, construction, location, operation, maintenance, and removal from service of manure storage facilities." 25 Pa. Code § 83.351; *see also* 25 Pa. Code § 91.36. Manure storage facilities are required to be "designed, constructed, located, operated, maintained, and, if no longer used for the storage of manure, removed from service, in a manner that protects surface and groundwater quality, and prevents the offsite migration of nutrients." 25 Pa. Code § 83.351(a)(1). The SCC's regulations incorporate the manure storage facility design and construction requirements from the DEP's regulation under Section 91.36, *supra*, as well as impose 100 to 300 foot setbacks from property lines and water sources depending on site-specific conditions. 25 Pa. Code § 83.351. One of the purposes of the nutrient management regulations is to protect the quality of surface and groundwater. 25 Pa. Code § 83.203.

The SCC's regulations also require CAOs and CAFOs to develop and implement site-specific odor management plans when building new animal housing or manure management facilities. 25 Pa. Code § 83.741. The odor management regulations specify the criteria and requirements for the "construction, location and operation of animal housing facilities and animal manure management facilities, and the expansion of existing facilities." 25 Pa. Code § 83.702(3). An odor management plan (OMP) is a "written site-specific plan identifying the Odor [Best Management Practices] to be implemented to manage the impact of odors generated from animal housing and manure management facilities located or to be located on the site." 25 Pa. Code § 83.701. An OMP must be prepared by a certified Odor Management Specialist and must be approved by the SCC prior to construction or use of the new facilities built after the effective date of the regulations (February 27, 2009). 25 Pa. Code § 83.741 (e), (f), (h); Commonwealth v. Richmond Township, 2 A.3d 678, 684-86 (Pa. Cmwlth. 2010) (holding that the Nutrient and Odor Management Act regulations preempted ordinance provisions regulating "intensive agricultural operations" with requirements that exceed and conflict with the requirements under the Act's regulatory scheme); Burkholder v. Zoning Hearing Board of Richmond Township, 902 A.2d 1006 (Pa. Cmwlth. 2006) (same).

Animal operations that are too small to be a CAO or CAFO are not subject to the NOMA. However, the NOMA provides that smaller animal operations "may voluntarily develop" nutrient and odor management plans for approval by the SCC. 3 Pa. C.S. §§ 506(h), 509(f). Recently, the Commonwealth Court addressed whether a municipality can require smaller animal operations (i.e. non-CAOs) to mandatorily comply with the NOMA by imposing requirements to obtain approved nutrient and odor management plans or the equivalent of such plans. Commonwealth v. Locust Township, 49 A.3d 502, 509-511 (Pa. Cmwlth. 2012) (*en banc*). The *en banc* Court held that a municipality cannot require smaller animal operations to mandatorily comply with the NOMA when the General Assembly "has decided that such smaller farms

should not be required to do so; rather they should be encouraged to do so voluntarily.” Id. at 511.

Specifically, the Court held that:

By requiring farms too small to meet the definitions of CAO or CAFO to submit and implement emergency response and nutrient management plans or proposals similar in type and scope to what is required under the NMA, the Township attempts to make mandatory what the General Assembly has already decided must be voluntary. In this regard, Section 503(f) and (j) are in conflict with the NMA and, thus, are preempted pursuant to Section 519 of the NMA.

Id.

For your reference, I have enclosed a chart that summarizes the increasing layers of regulatory requirements as the density of an animal operation increases from smaller to a CAO or CAFO.

III. ADDITIONAL STATE LAWS PROHIBITING CERTAIN LOCAL REGULATION OF AGRICULTURAL OPERATIONS

In addition to the SCC’s and DEP’s regulatory programs, the Right to Farm Act (RTFA) precludes a municipality from regulating normal agricultural operations as a nuisance and protects direct commercial sales of agricultural commodities. 3 P.S. § 953. The Air Pollution Control Act (APCA) excludes operations engaged in the “production of agricultural commodities” from State air contaminant and air pollution regulations. 35 P.S. § 4004.1. The “production of agricultural commodities” includes “the commercial propagation . . . [of] livestock and livestock products.” Id. § 4004.1(b)(1)(v). The Agricultural Area Security Law (AASL) precludes a municipality from enacting ordinances which would unreasonably restrict farm structures or farm practices within the area. 3 P.S. § 911.

The Water Resources Planning Act (WRPA) prohibits political subdivisions from regulating the allocation of water resources and the conditions of water withdrawal. 27 Pa. C.S. § 3136(b). The DEP’s Water Resources Planning regulations establish the framework for water withdrawal and use registration, monitoring, record-keeping and reporting requirements. 25 Pa. Code § 110.

The Municipalities Planning Code (MPC) precludes a municipality from enacting a zoning ordinance that regulates activities related to commercial agricultural production if it exceeds the requirements imposed under the NOMA, RTFA or AASL, “regardless of whether any agricultural operation within the area to be affected by the ordinance would be a concentrated animal operation as defined by the [NOMA].” 53 P.S. § 10603(b) (emphasis added); Locust Township, 49 A.3d at 517 (holding that a municipality exceeded its authority under the MPC by imposing requirement that smaller animal operations comply with the

NOMA). The MPC also provides that no public health or safety issues shall require a municipality to adopt a zoning ordinance that violates or exceeds the provisions of the NOMA, AASL, or RTFA. 53 P.S. § 10603(h); Richmond Township, 2 A.3d at 687 & n.11 (explaining that section 603(h) of the MPC “indicates that, as a matter of law, an agricultural operation complying with the [NOMA], AASL and the RFL does not constitute an operation that has a direct adverse effect on the public health and safety”).

The Domestic Animal Law (DAL) sets forth the permissible methods under State law for disposal of dead domestic animals and animal wastes. 3 Pa. C.S. §§ 2352, 2389. The DAL preempts any ordinances that pertain to the procedures for disposal of dead domestic animals and animal wastes. Id. § 2389.

Against this background, we turn to the legal problems with the Ordinance and to a suggested compromise that would correct those problems. The starting point is the ACRE law, which prohibits a municipality from adopting or enforcing a local ordinance prohibited or preempted by State law. 3 Pa. C.S. §§ 312, 313. The State laws implicated under our ACRE analysis are set forth above.

IV. LEGAL PROBLEMS WITH ZONING ORDINANCE

A. Section 27-201 — Definition of Terms

The Township defines the term “concentrated animal operations” as “agricultural operations that exceed an animal density of two animal equivalent units per acre.” As stated above, animal operations under Pennsylvania law fall into three categories small/non-CAO/CAFO; CAO; and CAFO. These categories are determined by definitions and formulas used to determine animal density on an operation. Under the NOMA, a CAO is defined “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 us that excluding the “eight or more AEUs” threshold for determining animal density can result 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.

We suggest that the Borough can amend the ordinance to define concentrated animal operations using the State law definition for a CAO.

B. Setbacks for Animal Housing and Manure Storage Facilities

Section 27-401.7 imposes minimum setback distances of 100 and 200 feet from property lines for animal housing and manure storage facilities based on whether the operation is less than or greater than “2 animal equivalent units per developable acre.” These provisions are preempted by the NOMA because they attempt to regulate the location for manure storage and animal housing facilities more stringently than the NOMA regulations. Richmond Township, 2 A.3d at 685; Locust Township, 49 A.3d at 512.

The first issue, as stated above, is that using 2 AEU's per acre without the threshold 8 AEU's on the operation can result in identifying animal operations that are too small to be subject to the NOMA. The NOMA preempts the setbacks to the extent the ordinance provision would identify and apply them to smaller animal operations. Richmond Township, 2 A.3d at 685; Locust Township, 49 A.3d at 512. A smaller animal operation must construct a manure storage facility in compliance with DEP's MMM and PaTG, which requires a registered professional engineer to conduct a site evaluation to determine the best location for a manure storage facility, which would include consideration of proximity to neighboring landowners.

The NOMA regulations require 100 to 300 foot setbacks from property lines and water sources for manure storage facilities on CAOs/CAFOs depending on a number of site-specific factors. 25 Pa. Code § 83.351. These setbacks can be waived by neighboring landowners. Id. Thus, the blanket setbacks in the ordinance are preempted because they are more stringent than the NOMA.

Moreover, the proper siting for animal housing and manure storage facilities on new or expanding CAOs/CAFOs is determined through development of an odor management plan pursuant to the NOMA. The odor management regulations specify the criteria and requirements for the "construction, location and operation of animal housing facilities and animal manure management facilities, and the expansion of existing facilities." 25 Pa. Code § 83.702(3). The OMP approves the siting of animal housing and manure storage 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. The OMP is developed by conducting an Odor Site Index evaluation, which applies site-specific "factors such as proximity to adjoining landowners, land use of the surrounding area, type of structures proposed, species of animal, local topography and direction of prevailing winds." Id. §§ 83.701; .771(b)(1)(i)-(iv).

Accordingly, 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 N[O]MA regulations to the extent that the Township applies the 1500-foot setback to **any facility** covered by the regulations." (emphasis added)); Burkholder, 902 A.2d at 1016. The setback provisions are also preempted and go beyond municipal authority under the MPC, RTFA, APCA, AASL, and CSL.

Section 27-401.7.A should be repealed and replaced with a provision requiring animal operations that are not a CAO/CAFO to provide proof of a certification by a registered professional engineer that the design and construction of the manure storage facility meet the Manure Management Manual and Pennsylvania Technical Guide.

Section 27-401.7.B should be repealed and replaced with a provision requiring an applicant for a conditional use for a CAO or CAFO to provide the Township with proof of compliance with the building siting requirements for CAOs/CAFOs under the NOMA

regulations, including approved nutrient and odor management plans and any required DEP permits and plans.

C. Minimum Lot Size

Section 27-401.7.B imposes a 25 minimum acreage requirement within the Agricultural Districts for animal operations requiring a conditional use. The Township lacks 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 AASL precludes a municipality from imposing unreasonable regulation on farm practices or structures. The 25 acre minimum requirement is unreasonable because it precludes farmers with less acreage from engaging in farm practices or building structures that may be permissible under the State’s regulatory programs.

Moreover, the RTFA definition for normal agricultural operation is incorporated into ACRE. 3 Pa. C.S. § 312. As you know, ACRE was enacted to protect normal agricultural operations from unauthorized local ordinances, which are ordinances that prohibit or limit a normal agricultural operation. Id. Accordingly, because a normal agricultural operation is defined as an agricultural operation with a minimum of ten acres or less acreage if based on generated income under ACRE, the 25 acre minimum requirement prohibits and limits a normal agricultural operation with less acreage.

Furthermore, the DEP and SCC do not require minimum acreage for animal agricultural operations because they utilize formulas based on agricultural science to identify the density of an agricultural operation. For example, the formula to ascertain density under the NOMA includes all land under the management control of the operator, including owned, rented, or leased lands. Accordingly, the 25 acre requirement conflicts with the State’s regulation of animal agricultural operations. 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.

D. Section 27-400.8 Conditional Use Requirements

Section 27-400.8 establishes requirements for animal operations that require a conditional use. There are legal problems with these requirements as applied to a CAO/CAFO. However, Section 27-400.7.C requires a conditional use for the keeping of domestic dogs and cats, thus Section 27-400.8 could apply to those operations because ACRE does not apply to domestic dog and cat operations. Therefore, the Township needs to clarify and/or separate the requirements for a conditional use for a CAO/CAFO from those for the keeping of dogs and cats. To be sure, the Township is within its 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). We will set forth the legal problems with the provisions under Section 27-400.8 as applied to CAOs/CAFOs and the Township can decide how to address them in a proposed amendment. We suggest a separate section for conditional use requirements for a CAO/CAFO.

1. Manure Management Plan

Sections 27-400.8 and 27-400.8.A require the preparation of a manure management plan with the assistance of the Adams County Soil Conservation Service and Penn State Cooperative Extension. The NOMA regulations require CAOs/CAFOs to develop a site-specific nutrient management plan prepared by a certified nutrient management specialist and that plan is approved by either the SCC or the county conservation district. 25 Pa. Code §§ 83.261; .361; see also 25 Pa. Code § 91.36(b)(1)(ii)-(iii). The regulations set forth the scope and content required to be in a NMP. Id. § 83.271; .272; .281. The Township should amend the ordinance to require that applicants for a conditional use for a CAO/CAFO shall provide a copy of an approved nutrient management plan and any DEP required permits or plans.

2. Manure Management Requirements

Section 27.400.8.B has several manure management requirements and all of them are preempted by the NOMA. The first sentence requiring a plan to “include provisions for control of runoff, odor, vectors, and other nuisances” is an attempt to regulate agricultural operations as a nuisance in violation of the RTFA. Richmond Township, 2 A.3d at 688. It is also preempted by the NOMA regulations that mandate the proper BMPs for manure and odor management. This provision is also preempted, violates, or goes beyond municipal authority under the MPC, APCA, AASL, and CSL. This sentence should be deleted.

The second sentence requires storage of outdoor wastes to be located not less than 200 feet from property lines and water sources. As discussed above, the NOMA imposes 100 to 300 foot setbacks from water sources and property lines based on site-specific conditions; therefore, this setback provision is more stringent than, therefore is preempted by, the NOMA. It is also

beyond the Township's authority under the MPC. This requirement can be amended to require the applicant for a conditional use for a CAO/CAFO to provide the Township with proof of compliance with the building siting requirements for CAOs/CAFOs under the NOMA regulations, including approved nutrient and odor management plans; certifications and verifications by a registered professional engineer; and any required DEP permits and plans.

The last two sentences requiring that land application of wastes must be done in accordance with the practices recommended by the county conservation district and prohibiting land application on "lands exceeding 15% slope and where bedrock lies less than 2 feet below the ground surface" are preempted by the NOMA and CSL regulations. A NMP for a CAO/CAFO contains the site-specific requirements for the land application of nutrients for that particular operation, which includes planning for the topography and soil type. 25 Pa. Code § 83.281(b)(4). The NOMA and CSL regulatory schemes require the use of best management practices for land application of nutrients, which are found in the DEP's MMM and the federal PaTG. The Township does not have authority to regulate land application of nutrients. Accordingly, these sentences should be deleted and replaced with a requirement for an applicant for a conditional use for a CAO/CAFO to provide an approved nutrient management plan and any required DEP permits and plans.

3. Inspections by the Zoning Officer

Section 27-400.8.C requires that a manure management plan include a statement that the Township zoning officer will be permitted to conduct periodic inspections of the operation. The Township has no authority to conduct inspections of a CAO/CAFO to ensure compliance with State law and regulatory schemes. Richmond Township, 2 A.3d at 684-686; Commonwealth v. East Brunswick Township, 980 A.2d 720, 733 (Pa. Cmwlth 2009) ("Liverpool and Synagro teach that a township cannot duplicate the regulatory regime established in the SWMA."). Cumberland Township has remedies available to address violations of the NOMA or the Clean Streams Law. It can intervene in the site approval process and also report suspected violations to the DEP, SCC, or county conservation district so that they may inspect and take any appropriate enforcement action pursuant to the regulations. The Township can also bring action at law or in equity to restrain violations of the NOMA or Clean Streams Law as provided for in Section 514 of the NOMA and Section 691.601 of the Clean Streams Law. 3 Pa. C.S.A. §§ 514(c), (d); 35 P.S. § 691.601. The other statutes discussed above have similar remedies available to the Township. East Brunswick Township, 980 A.2d at 734 ("The remedies provided by the legislature in the SWMA preclude other forms of 'self-help' by the Township."). The problems with this provision can be resolved by repealing and replacing it with a section stating only that the Township will report suspected violations of the SCC's or DEP's regulations to the SCC, DEP, or county conservation district for appropriate enforcement action, bring an action to restrain violations of the NOMA or Clean Streams Law as permitted under those statutes, or pursue remedies available under other applicable State statutes.

4. Information of Rented or Leased Lands

Section 27-400.8.D requires an applicant to provide the lease or rental agreement for land to be used for land application of manure from the operation. A NMP is required to contain information of all owned, rented, or leased lands under the management control of the operator of the facility, including the names and addresses of the owners of the rented or leased lands. 25 Pa. Code § 83.281(a)(6)-(7). For this reason, the ordinance provision is preempted by the NOMA. The Township can amend to require that an applicant provide an approved NMP.

5. Requirements for the Disposal of Dead Domestic Animals

Section 27-400.8.E precludes the land application of composted dead domestic animals, except for composted poultry. This provision is preempted by the NOMA regulatory scheme which permits and regulates the land application of composted dead domestic animals as a nutrient source. 25 Pa. Code §§ 83.201; .282(a)(2)(vii); .293(d).

The second sentence under this Section mandates that the only method to dispose of dead domestic animals is through rendering. This conflicts with, and is therefore preempted by, the DAL, which allows dead domestic animals to be disposed of by several approved methods, including burial, incineration, rendering, fermenting, and composting. 3 Pa. C.S. § 2352(a)(4). The DAL explicitly preempts ordinances attempting to regulate the methods for disposal of dead domestic animals. *Id.* § 2389. This provision can be amended to provide that a CAO/CAFO shall provide the Township with information on plans for compliance with the State's requirements for disposal of dead domestic animals.

E. Precluding Concentrated Animal Operations in the Agricultural Residential District

Cumberland Township amended Section 27-402 of its zoning ordinance to remove concentrated animal operations as a conditional use in the Agricultural Residential District. The preclusion of concentrated animal operations while allowing other forms of agricultural operations is beyond Cumberland Township's authority and contrary to State statutes and regulatory programs for the following reasons.

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

With respect a municipality's authority to zone for uses, it is well-settled that "[a] local government unit has no authority to adopt an ordinance that is arbitrary, vague or unreasonable or inviting of discriminatory enforcement." Richmond Township, 2 A.3d 678 at 681; Exton Quarries, Inc. v. Zoning Bd. of Adjustment, 228 A.2d 169, 178 (Pa. 1967). In addition, "the power to . . . regulate does not extend to an arbitrary, unnecessary, or unreasonable intermeddling with the private ownership of property." Eller v. Bd. of Adjustment, 414 Pa. 1, 6, 198 A.2d 863, 865-66 (1964); Van Sciver v. Zoning Bd. of Adjustment, 152 A.2d 717, 724 (Pa. 1959) (same); Schmalz v. Buckingham Twp. Zoning Board, 132 A.2d 233, 235 (Pa. 1957) (same).

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

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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.

For these reasons, the Township should amend the ordinance to provide that any form of normal agricultural operation is a permitted use in the AR District with the option of imposing a requirement for a special exception or conditional use approval for a proposed CAO/CAFO.

V. CONCLUSION

As evident from the discussion above, local ordinances that attempt to regulate the how, when, and where of activities already subject to State uniform regulatory schemes "have not fared well under preemption challenges." Commonwealth v. East Brunswick Township, 980 A.2d 720, 730 (Pa. Cmwlth 2009); Richmond Township, 2 A.3d at 684-88. The Township does not have authority to establish its own regulatory scheme for either smaller animal operations or CAOs/CAFOs that duplicates, exceeds, or conflicts with the SCC's and DEP's regulatory schemes.

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

Sincerely,



SUSAN L. BUCKNUM
Senior Deputy Attorney General

SLB/kmag

cc: Tom Clowney (w/o encl.)