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Via First Class Mail
Donald G. Karpowich, Esquire
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85 Drasher Road
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RE: ACRE Review Request
Gratz Borough, Dauphin County

Dear Mr. Karpowich:

As we recently discussed, an ACRE request was submitted to this Office on behalf of [redacted] through his counsel, Christopher L. Ryder, Esquire. We were asked to review zoning ordinance provisions regulating animal agricultural operations and we notified Gratz Borough that there were ordinance provisions that prohibited or limited normal agricultural operations in violation of ACRE. The Borough agreed to suspend enforcement of the ordinance to permit [redacted] to build his poultry house.

This letter will detail the legal problems with Gratz Borough'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, 83.701, 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, 83.701, 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 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 described in the DEP's Manure Management Manual (MMM). 25 Pa. Code § 91.36(a)(1)(i), (2).

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

II. NUTRIENT AND ODOR MANAGEMENT ACT AND REGULATIONS

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

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

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

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

Specifically, the Court held that:

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

Id.

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

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

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

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

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

NOMA). The MPC also provides that no public health or safety issues shall require a municipality to adopt a zoning ordinance that violates or exceeds the provisions of the NOMA, AASL, or RTFA. 53 P.S. § 10603(h); Richmond Township, 2 A.3d at 687 & n.11 (explaining that section 603(h) of the MPC "indicates that, as a matter of law, an agricultural operation complying with the [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 201.4 — DEFINITION OF TERMS

The Township defines the term "Agriculture (Intensive)" as follows:

> Specialized agricultural activities including but not limited to mushroom, egg and poultry production, and dry lot livestock production, which due to the intensity of production or raw material storage needs, necessitate special control of operation, raw material storage and processing, and disposal of liquid and solid wastes. Intensive agricultural activities also include those activities involving more than three and one half (3.5) animal equivalent units per acre. An animal equivalent unit is equal to a 1,000 pound animal, e.g., 1 unit = 100 chickens or 5 hogs.

Ordinance § 201.4(10). This definition contains two separate descriptions on how intensive agriculture is defined and both are fundamentally flawed.

The first sentence of the definition is vague, ambiguous, arbitrary and invites discriminatory enforcement. It is well-settled that "[a] local government unit has no authority to adopt an ordinance that is arbitrary, vague or unreasonable or inviting of discriminatory enforcement." Richmond Township, 2 A.3d at 681; Exton Quarries, Inc. v. Zoning Bd. of Adjustment, 228 A.2d 169, 178 (Pa. 1967). "A vague ordinance is one that prescribes activity in terms so ambiguous that reasonable persons may differ as to what is actually prohibited." Id. "A zoning ordinance is ambiguous if the pertinent provision is susceptible to more than one reasonable interpretation or when the language is vague, uncertain, or indefinite." Kohl v. New Sewickley Twp., 108 A.3d 961, 968 (Pa. Cmwlth. 2015) (citation omitted). Moreover, "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).

In Richmond Township, the ordinance defined intensive agricultural activities as "specialized agricultural activities including, but not limited to, mushroom farms, poultry production and dry lot livestock production, which due to the intensity of production, necessitate development or specialized sanitary facilities and control." Id. at 682. The court opined that "reasonable people may differ as to what actually falls within the definition of intensive agriculture." Id. at 683. Therefore, the court held that "because a person cannot read the Ordinance and ascertain whether a particular activity would be considered intensive agriculture, the Ordinance is vague and ambiguous." Id. Moreover, the court held that because the "enforcement of the ordinance depends upon the subjective determination of Township officials, the Ordinance invites discriminatory enforcement." Id. Accordingly, the court enjoined enforcement of the ordinance because it drew no "clear distinction between intensive agriculture and normal agriculture." Id.

The same is true here. The first sentence in this definition is virtually identical to that analyzed in Richmond Township and provides no meaningful or defined method to determine when an agricultural operation is Agriculture versus Intensive Agriculture. Thus, a person cannot read the ordinance and ascertain whether a particular agricultural activity is considered Agriculture or Intensive Agriculture. 2 A.2d at 683. As in Richmond Township, "the Ordinance fails to provide any guidance as to how the Township determines when activities associated with [an animal husbandry] operation intensify to the level that they transform into an intensive agricultural activity." Id.

The second sentence identifying intensive agriculture as an operation with 3.5 animal units per acre is equally flawed. 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 that using the 3.5 AEUs per acre, but excluding the "eight or more AEUs" threshold for determining animal density results in including agricultural operations that are too small to be subject to the NOMA, thus it conflicts with and is more stringent than the NOMA. In addition, a CAFO is 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 § 92.1.

Moreover, the defining of 1 animal unit equaling 100 chickens or 5 hogs is erroneous. The standard weights of both chickens and swine used to calculate AEUs are dependent upon the type of animal and length of time in production. The weight of a chicken ranges from 1.42

(pullet) to 4 (layer, brown egg) pounds and hogs from 30 (nursery pig) to 155 (grow to finish) pounds. 25 Pa. Code at Supplement 5. Therefore, the Borough's reference to 100 chickens would mean that the chickens weighed 10 pounds each, which is much higher than the standard weights used under State regulations. The same is true for hogs. For 5 hogs to comprise 1,000 pounds live weight means that the hogs would weigh 200 pounds each. Again, this is much higher than the standard weights used in the regulations. For these reasons, the use of these weights conflicts with and, therefore, is preempted by the NOMA.

We suggest that the Borough can amend the ordinance to define intensive agriculture by incorporating the State law definitions for CAO and CAFO or to amend the ordinance to delete the term intensive agriculture and simply add the terms CAO and CAFO using the State law definitions, which are as follows:

> **Concentrated Animal Operation (CAO)** is "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.
>
> **Concentrated Animal Feeding Operation (CAFO)** is "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.

B. Minimum Lot Size

Section 400.3(1) imposes a minimum acreage requirement within the Agricultural Preservation District of 30 acres for all forms of agriculture. The Borough 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 30 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.

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 30 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.

C. Sections 400.5 and 400.10 Special Exception Requirements for Intensive Agriculture

1. Siting of Facilities for Intensive Agriculture

Sections 400.5(1)(c) and 400.10(1)(c) requires that the "location of all facilities and areas devoted to intensive agriculture shall take into account prevailing wind patterns and give consideration to residential uses located downwind of such activities." 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 facilities (and manure storage) 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).

The location for a manure storage facility also must comply with the 100 to 300 foot setbacks from property lines and water sources under the NOMA. 25 Pa. Code § 83.351; Richmond Township, 2 A.3d at 685; Locust Township, 49 A.3d at 512.

These provisions are preempted by the NOMA because they attempt to regulate the location for manure storage and animal housing facilities. 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. They are also preempted, violate, or go beyond municipal authority under the MPC, RTFA, APCA, AASL, and CSL. Sections 400.5(1)(c) and 400.10(1)(c) should be repealed and replaced with a provision requiring the applicant for a CAO or CAFO provide the Township with proof of compliance with the

building siting for CAOs/CAFOs under the NOMA regulations, including approved nutrient and odor management plans and any required DEP permits and plans.

2. Minimum Parcel Size

Sections 400.5(1)(d) and 400.10(1)(d) impose a minimum acreage requirement of 30 acres. For all of the reasons discussed above regarding Section 400.3(1), this minimum acreage requirement should be amended to either remove it or conform it to the RTFA.

D. Precluding Agricultural Uses in Zoning Districts

Section 401.2(3) allows "any form of agriculture and horticulture excepting intensive farming practices" as a permitted use in the R-A zone. Section 402.2(5) allows "[a]ny form of agriculture, provided that no hogs, goats, poultry, or the commercial keeping and handling of farm stock, exotic animals or other similar domestic animals shall be permitted" as a permitted use in the R-1 zone. However, 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 Borough'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 farming. 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.

A CAO and CAFO are subject to increased regulatory requirements than those for a smaller animal operation. For this reason, some municipalities may seek to require conditional use or special exception approval to operate a proposed CAO/CAFO in a zone in which agriculture is a permitted use. We have advised these municipalities that it is within their authority to require a conditional use or special exception for a CAO/CAFO; however, the conditions imposed to obtain that approval cannot conflict with or exceed State law. 53 P.S. § 10603(b); Richmond Township, 2 A.3d at 686-87 (holding that municipality exceeded its authority in imposing requirements for a special exception that conflict with the NOMA); Locust Township, 49 A.3d at 509-511 (holding that a municipality exceeds its authority and is preempted from requiring smaller animal operations to comply with the NOMA).

For these reasons, the Township should amend the ordinance to provide that any form of agriculture is a permitted use in the R-A and R-1 zones with the option of imposing a requirement for a special exception or conditional use for CAOs/CAFOs.

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

SUSAN L. BUCKNUM
Senior Deputy Attorney General

SLB/kmag
cc: [redacted]