



August 18, 2018

Office of Attorney General
ATTN: SDAG Robert A. Willig

[REDACTED]

[REDACTED]

*Re: ACRE Complaint-Todd Township-Huntingdon County
Matthew Barnett*

Dear Mr. Willig:

We represent Todd Township in connection with the Township's response to your letter regarding [REDACTED] ACRE complaint concerning Township Ordinance No. 2018-02. You requested a written response on the Township's position as to whether the Ordinance violates ACRE. Thank you for the opportunity to respond to this complaint.

In short, the Ordinance prohibits industrial farming activity in Todd Township because of its harmful impact on the Township's clean air, pure water, and preservation of the natural, historic and esthetic values of the environment. The right to a clean environment, and the duty to protect it, are enshrined in Article I of the Pennsylvania Constitution, as is the right of local, community self-government. The Commonwealth of Pennsylvania does not have the authority to legislatively strip constitutional rights through ACRE.

I. Industrial farm activity threatens public health, animal welfare and the environment.

Pollution and runoff from industrial farm activity threaten the drinking water of nearby communities. According to the author of a Pew Commission report on industrial farm animal production in America, the most concerning environmental impacts of industrial farm activity include persistent pollution in nearby surface waters. This can lead to serious health consequences like blue baby syndrome and illnesses caused by pathogens carried by waste into drinking water. Industrial farms can also cause severe air quality problems. Studies by the University of Iowa and University of North Carolina have shown that up to five miles downwind of industrial farm operations, children have an increase in asthma-like symptoms because of the particulate matter that is blown out of barns by ventilation systems.¹

¹ Christina M. Russo, "How Industrial Agriculture Has Thwarted Factory Farm Reforms" (Yale Environment 360, Nov. 19, 2013), available at https://e360.yale.edu/features/interview_robert_martin_how_big_agriculture_has_thwarted_factory_farm_reforms (last accessed Aug. 16, 2018); Johns Hopkins University Center for a Livable Future,

Additionally, industrial farms are not family farms, but something entirely different. Independent farmers and rural communities are economically devastated when mega-farms dominate the markets.²

In Pennsylvania, state law forces residents to accept these harms. Pennsylvanians do not have the option of seeking redress through nuisance suits because of the state Right-To-Farm Act (RTFA), 3 P.S. § 954(a).

Ordinance 2018-02 prohibits such industrial farm activity because it infringes on the right of residents of Todd Township to a healthy, livable climate; the right to sustainable agriculture; the right to clean air, water, and soil; the right to the preservation of the natural, scenic, historic, and esthetic values of the environment; and the right of ecosystems and natural communities within Todd Township, including but not limited to rivers, streams, lakes, and aquifers, to exist, flourish, and evolve, naturally.

II. To the extent it prohibits a municipality from fulfilling its constitutional obligations, ACRE is unconstitutional.

Pennsylvania's ACRE law was drafted and adopted by agribusiness corporate interests, using the legislature as a vehicle, and was passed not to aid family farmers, but agribusiness interests. However, no state law can remove a municipality's constitutional obligations, or command it to ignore such obligations because those obligations trump state legislative action. *Robinson Twp. v. Commonwealth* ("Robinson II"), 83 A.3d 901, 977-78 (Pa.2013) (plurality); *id.* at 1000-08 (Baer, J., concurring).

A. State law can only be a floor, not a ceiling on local authority to address local environmental conditions.

The Todd Township Ordinance declares that, pursuant to Article I, Section 27, Todd Township has the duty to conserve and protect the natural resources of Todd Township, which are held in the public trust; and the people of Todd Township have the right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. To the extent state law is construed to preempt or prohibit the Township from addressing local environmental conditions to protect residents' constitutional environmental rights, such a construction is unconstitutional and invalid. ACRE is, therefore, an unconstitutional constriction of public official duties under Section 27.

"Industrial Food Animal Production in America: Examining the Impact of the Pew Commission's Priority Recommendations" (Fall 2013), available at https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-a-livable-future/_pdf/research/clf_reports/CLF-PEW-for%20Web.pdf (last accessed Aug. 16, 2018).

² See Melanie J. Wender, *Goodbye Family Farms and Hello Agribusiness: The Story of How Agricultural Policy is Destroying the Family Farm and the Environment*, 22 Vill. Envtl. L.J. 141, 167 (2011) (noting that "Our nation's current agricultural policies placate agribusiness and the food processing industries, leaving the family farm in the dust and ravaging many aspects of our natural environment.").

The Pennsylvania Supreme Court in *Franklin Township v. Department of Environmental Resources* emphasized a local government's major responsibility in environmental matters:

Aesthetics and environmental well-being are important aspects of the quality of life in our society, and a key role of local government is to promote and protect life's quality for all of its inhabitants.

500 Pa. 1, 6, 452 A.2d 718, 720 (1982). The Ordinance is therefore a valid exercise of the Township's authority and carries out the Township's obligations to protect its residents' environmental rights and property rights under Article I, Sections I and 27 of the Pennsylvania Constitution. Specifically, the ordinance tailors the impacts of industrial farm activity to local conditions. This is a crucial part of the Township's role as a trustee of public natural resources under Article I, Section 27 of the Pennsylvania Constitution. *Robinson II*, 83 A.3d at 953, 977-81 (plurality); *id.* at 1006, 1007-08 (Baer, J., concurring); *see Pa. Env'tl Defense Found'n v. Com.* ("PEDF"), 161 A.3d 911, 919 (Pa. 2017).

No state law can remove a municipality's implicitly necessary authority to carry out its Section 27 obligations, and no state law can make local protection legally impossible, even under the guise of a statewide law that seeks to preempt all local regulation or place a ceiling on it. *Robinson II*, 83 A.3d at 977-78 (plurality); *id.* at 1000-08 (Baer, J., concurring); *Robinson Twp. v. Commonwealth* ("*Robinson IV*"), 147 A.3d 536, 565 (Pa. 2016)(discussing the now-invalid provisions of Act 13 as a "ceiling" on local regulation that could not be exceeded, "no matter what unique local conditions or needs existed in a particular municipality.")³

Any application of state law that purports to impose a ceiling, not a floor – that is, to prohibit local governments from protecting residents' constitutional rights, health, and safety with regulations stronger than state law – is invalid. *Robinson II*, 83 A.3d at 953, 977-81 (plurality); *id.* at 1006, 1007-08 (Baer, J., concurring); *see PEDF*, 161 A.3d at 919. This includes ACRE. Any case law prior to *Robinson II* and *PEDF* that purports to curtail municipal authority over local environmental conditions must be reevaluated.

Robinson II specifically affirmed that a local role in addressing local conditions is absolutely necessary in a state as diverse as Pennsylvania. *Robinson II*, 83 A.3d at 953, 977, 979-81 (plurality); *id.* at 1006, 1007-08 (Baer, J., concurring). This is consistent with the general rule that municipalities may make such regulations in furtherance of the general law, particularly those regulations that pertain to local needs. *Brazier v. City of Phila.*, 64 A. 508 (Pa. 1906). Thus, the Township, through Ordinance

³ Moreover, there is a presumption against preemption of local regulation. *Provident Mut. Life Ins. Co. of Phila. v. Tax Review Bd. of City of Phila.*, 658 A.2d 500, 502 (Pa. Commw. Ct. 1995). Indeed, total preemption of local authority is rare in Pennsylvania, and has only been found in three cases: anthracite strip mining, alcoholic beverages, and banking. *Id.* at 593.

2018-02, has prohibited industrial farm activity as harmful to residents based on local conditions.

B. ACRE violates the constitutional right of local, community self-government.

The Ordinance also declares that the right of local self-government is natural, fundamental, and unalienable, and also is secured to the people of Todd Township by the United States Constitution and the Constitution of the Commonwealth of Pennsylvania; and that if the Township's previous system of local government infringed upon their rights by preventing them from legislating to protect their rights, health, and safety, then the people of Todd Township have the right to work with their local elected officials to alter that system by instituting a new form that secures and protects their rights, as long as that new system does not infringe other rights secured for people and nature.

Courts possess the inherent authority to recognize fundamental constitutional rights. The Due Process Clause of the Fourteenth Amendment declares that no State shall "deprive any person of life, liberty, or property, without due process of law." Rights protected by the Clause include most of the rights specifically enumerated in the Bill of Rights, along with those unenumerated rights which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *See Duncan v. Louisiana*, 391 U.S. 145, 147-149 (1968); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). The Supreme Court has decided that the right to marry, the right to establish a home and bring up children, the right of privacy, and the right to intrastate travel are "unenumerated" fundamental constitutional rights protected by the "liberty" interests of the U.S. Constitution. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65-67 (2000) (interest of parents in the care, custody, and control of their children is a fundamental liberty interest).

Similarly, the right to local community self-government is a value "deeply rooted in this nation's history and tradition" and one which is "fundamental to our scheme of ordered liberty[.]" *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767 (2010). The Pennsylvania Supreme Court recognized this in *Commonwealth v. McElwee*, 193 A. 628, 630 (Pa. 1937) ("In analyzing this act preparatory to determining whether or not it trenches upon the Constitution, one is impressed with the fact that it violates the principle of 'home rule,' i.e., local self-government, which, like the tripartite separation of governmental powers, is a vital part of both the foundations and general framework of our state and federal governments."). The right to local self-government is so deeply rooted that it is secured by Article I, §§ 1, 2 (political rights) and 25 (rights reserved to the people).⁴

⁴ More recently, the Court articulated the primacy of Article I of the Pennsylvania Constitution:

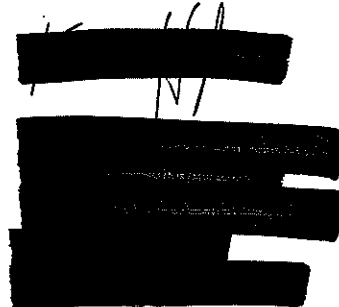
[T]he General Assembly derives its power from Article III of the Pennsylvania Constitution which grants broad and flexible police powers to enact laws for the purposes of promoting public health, safety, morals, and the general welfare. These powers, however, are expressly

Thus, pursuant to the Constitutions of the United States and the Commonwealth of Pennsylvania, ACRE's constriction of right to local self-government – under which the Township enacted this Ordinance – is unconstitutional.

III. Conclusion

For the foregoing reasons, Ordinance 2018-02 is valid. The above do not constitute all the arguments we may make in defense of the Ordinance, and we reserve the right to make others in the event of a lawsuit of any kind on this issue. Please feel free to contact us to discuss this matter so that we can address any further questions or concerns you may have. We look forward to hearing from you.

Sincerely,

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limited by fundamental rights reserved to the people in Article I of our Constitution. Specifically, Section 1 affirms, among other things, that all citizens 'have certain inherent and infeasible rights.' *Id.* at 948 (quoting Pa. Const. art. I, § 1). As forcefully pronounced in Section 25, the rights contained in Article I are 'excepted out of the general powers of government and shall forever remain inviolate.' *Id.* (quoting Pa. Const. art. I, § 25).

PEDF, 161 A.3d at 930-31 (some citations omitted).