



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

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[REDACTED]

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Re: *ACRE Review Request* [REDACTED]
Todd Township-Huntingdon County

Dear [REDACTED] and [REDACTED]

The Office of the Attorney General (“OAG”) received an Agricultural Communities and Rural Environment (“ACRE”)¹ complaint from [REDACTED] requesting review of Todd Township’s (“Township”) Ordinance No. 2018-02 entitled “A Community Bill of Rights” (“CBR”) which seeks to regulate “industrial farm activities.” [REDACTED] acting as counsel for the Community Environmental Legal Defense Fund (“CELDF”), submitted a response to the ACRE complaint contending the Ordinance did not violate ACRE. The CELDF asserts that Article I, Sections 2, 25² and 27³ of the Pennsylvania Constitution authorizes a local municipality to enact CBRs.

UNAUTHORIZED LOCAL ORDINANCE

The overarching principle of ACRE is this: “[a] local government unit shall not adopt nor enforce an unauthorized local ordinance.” 3 Pa.C.S. § 313(a). An “unauthorized ordinance” is one that “prohibits or limits a normal agricultural operation” (“NAO”) when the local municipality does not have the “authority under State law to adopt the ordinance” and when the municipality is “prohibited or preempted under State law from adopting the ordinance.” 3 Pa.C.S. § 312. The Right to Farm Act (“RTFA”) states that an NAO includes “[t]he 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. A NAO must be ten or more “contiguous

¹ 3 Pa.C.S. §311, *et. seq.*
² CELDF Response, pp. 4-5.
³ *Id.*, pp. 2-3.

acres in area,” or, if not ten or more acres, must have “an anticipated yearly gross income of at least \$10,000.” *Id.*

Upon review of all relevant information, the OAG concludes Ordinance No. 2018-02, the Township’s “A Community Bill of Rights,” is an unauthorized ordinance in violation of ACRE, for it intentionally and effectively prohibits the existence of Concentrated Animal Operations (“CAOs”) and Concentrated Animal Feeding Operations (“CAFOs”)⁴ within Township borders. Indeed, the Township admits as much when it states in the Ordinance “it is our legislative determination that industrial farms have a direct adverse effect on public health, safety and welfare” and “[a]ll residents of Todd Township possess...the right to be free from industrial farm activity....” Ordinance No. 2018-02, **Preamble** and **Section 2-Statements of Law**.

CAOs and CAFOs are undoubtedly NAOs as they are “engage[d] in the production and preparation for market of poultry, livestock and their products” as required under the RTFA. *See Horne v. Haladay*, 728 A.2d 954, 958 (Pa.Super. 1999)(farm of 122,000 egg laying hens “clearly is a ‘normal agricultural operation’ as defined by the Right to Farm Act.”) Municipalities do not have authority under state law to allow certain types of NAOs (*i.e.* non-CAOs/CAFOs) as a use in the agricultural zoning district while precluding other forms of NAOs, here CAOs/CAFOs, in the same district. *See* 53 P.S. §§ 10603(b) & (h) and 10605. As a result, if a municipality allows agriculture as a use in a particular zoning district it must allow *all* forms of NAOs recognized under State law in that district – including CAOs/CAFOs.

Nowhere in the NOMA or its regulations is the term “industrial farm activity” used, let alone defined. In the OAG’s experience, the use of this term⁵ results in imposing additional requirements on those farms with larger numbers of animals than the so-called “traditional” farms. By extension, the use of this term operates to unlawfully restrict the existence of CAOs/ CAFOs within the municipalities. Moreover, in *Commonwealth v. Richmond Township*, 2 A.3d 678, 687 (Pa. Cmwlth. 2010), the Commonwealth Court unequivocally held that an agricultural operation in compliance with the NOMA is not an operation with a direct adverse effect on public health and safety, as the Township contends in the preamble of its ordinance.

The ACRE statute authorizes the OAG’s use of the PSU School of Agriculture as experts in agricultural operations issues. *See* 3 Pa.C.S. § 314(d). In this case, the OAG consulted with a PSU School of Agriculture expert in the field of “animal systems,” which includes CAOs and CAFOs. The expert states that most CAOs/CAFOs are based on the integrator business model, which is ubiquitous across Pennsylvania and the country. An “integrator” is usually a company that contracts with a farmer to raise its animals up to the time they are ready for market. For example, a company (*e.g.* Smithfield, Tysons, Perdue) provides the farmer with chicks or piglets,

⁴ The State Conservation Commission (“SCC”) defines and regulates CAOs under the Nutrient and Odor Management Act (“NOMA”), 3 Pa.C.S. §§ 501-522; regulations found at 25 Pa.Code. § 83.201, *et.seq.* These regulations comprehensively describe how to: calculate Animal Equivalent Units (AEU); compute the number of AEU’s per acre; and determine what land is considered “land suitable for manure application.” *See* 25 Pa Code §83.262. These regulations also explain in the requirements for nutrient management plans, how to manage manure, and standards for manure storage facilities. *See* 25 Pa Code §§83.272, 83.281, 83.282, 83.291, 83.311 & 83.351.

The Department of Environmental Protection (“DEP”) regulations at 25 Pa.Code §92a.2 defines which operations constitute a CAFO under Pennsylvania law. The regulation states that 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(b)(4) (relating to concentrated animal feeding operations (applicable to State NPDES programs, see § 123.25)).”

⁵ As well as terms like “intensive agriculture,” “corporate farming,” “factory farming,” and “industrial farms” amongst others.

feed produced to company specifications, medicine and veterinarian support, and technical advice. In return, the farmer raises the animals for the company and when those animals are ready for market the integrator retrieves them. In essence, the farmer provides the space and the labor needed in raising the animals for so many dollars per head pursuant to the contract with the integrator.

Here, the Township does not specifically mention the terms “CAO” or “CAFO” in its ordinance but it is obvious that its intent is to ban these NAOs within its borders by effectively barring the use of integrators. The Ordinance prohibits “industrial farm activity,” defined as a farm where “the livestock or poultry...are not wholly owned by either the owner of the real property where they are farmed in Todd Township or by a natural person or business entity whose domicile or primary place of business is within Todd Township.” Ordinance No. 2018-02, **Section 1-Definitions**, subsection (a)(1). Under the integrator business model, the local farmer raising the animals does not own the animals; the “out of township” integrator owns the animals and the local farmer simply raises them for the integrator.

The definition for “industrial farms activity” also includes an NAO where “a majority of feed each calendar year is imported from outside Todd Township.” Ordinance No. 2018-02, **Section 1-Definitions**, subsection (a)(2). As the PSU expert explains, the “out of township” integrator usually supplies the feed to a CAO/CAFO operation, which this Ordinance prohibits. The definition further categorizes “industrial farm activity” as one where “a majority of the operation’s sales revenues each calendar year do not go to natural persons or business entities whose domicile or primary place of business is within Todd Township.” *Id.* at Subsection (a)(4). The OAG presumes that the Township means the revenues “come from” instead of “go to” “out of township” persons or companies.⁶ The Township knows full well that integrators are not local companies; any such funds paid to local farmers to raise the animals by necessity comes from outside the Township.

If the Township had enacted an ordinance explicitly banning CAOs and CAFOs, it would unquestionably be an “unauthorized” ordinance under ACRE. CAOs/CAFOs are common, well recognized, heavily regulated NAOs that cannot simply be banned. Despite this, the Township tries to indirectly ban CAOs/CAFOs by forbidding the use of integrators. Regardless of whether the Township openly bans CAOs/CAFOs or disguises its intent by prohibiting a common and necessary CAO/CAFO business practice, the result is the same – an unauthorized local ordinance that cannot stand.⁷

⁶ If the OAG is mistaken and the Township actually intends to force a local farmer to spend a majority of his/her sales revenue inside the Township, it has much bigger problems than just trying to ban CAOs/CAFOS. Government cannot order a citizen to spend his/her money in a specific way, short of requiring the payment of taxes.

⁷ Not content to merely restrict the customary business model of a CAO/CAFO, the definition of “industrial farm activity” also attacks the design aesthetic of such farms by stating that the NAO cannot have “an industrial warehouse esthetic that is incongruous with the surrounding landscape, contrary to the scenic agricultural barns and fields that provide Todd Township’s rural character.” Ordinance No. 2018-02, **Section 1-Definitions**, subsection (a)(3). “Industrial warehouse esthetic” is a meaningless term susceptible to multiple definitions. The Court in *Richmond Township, supra*, 2 A.3d at 682, clearly ruled that township ordinances cannot be vague and ambiguous. The OAG contends that the Township’s use of the term “industrial warehouse esthetic” runs afoul of the *Richmond* prohibition against vagueness and ambiguity. “Industrial warehouse esthetic” is not utilized in any relevant state law or regulation; as such, it is a term incapable of precise definition and application.

CBRs CONTINUOUSLY REJECTED

The Township's attorneys, the CELDF, draft and defend CBRs for municipalities. The Courts have repeatedly ruled the CELDF CBRs illegal:

...the Court has examined CELDF's federal environmental litigation occurring over the past fifteen years in Pennsylvania. CELDF...has championed the notion of "community self-governance" as justification for CELDF-drafted local ordinances to invalidate corporate property rights, and to strike at the preemptive effect of state and federal law where in conflict with a community-enacted ordinance. *See, Penn Ridge Coal LLC v. Allegheny Pittsburgh Coal Co.*, [2009 U.S. Dist. LEXIS 84428 (W.D.Pa. 2009)]; *Range Resources-Appalachia, LLC v. Blaine Township* [649 F.Supp.2d 412 (W.D.Pa. 2009)]; *Friends and Residents of Saint Thomas Township, Inc. v. Saint Thomas Development, Inc.*, 2005 WL 6133388 (M.D. Pa. Mar. 31, 2005), *aff'd sub nom. Friends & Residents of St. Thomas Twp., Inc. v. St. Thomas Dev., Inc.*, 176 Fed.Appx. 219 (3d Cir. 2006). In each cited action, the district court reviewed CELDF's arguments and found them wanting, lacking argument predicated in law or facts, and failing to justify setting aside historically well-settled legal precepts [footnote omitted]. The most recent cases, including the instant action, find identical arguments reasserted, but not advanced in any material manner by distinguishing facts, analogy, or supporting case law from any court of coordinate or superior jurisdiction.

Pennsylvania Gen. Energy ("PGE") Co., LLC v. Grant Twp., 2018 WL 306679 at 10 (W.D. Pa. 2018). The PGE Court continued "that no lessons in good faith legal argument have been learned. Rather, [CELDf lawyers] continue to pursue nearly identical and rejected theories unabated, without regard to their obligation to conduct reasonable inquiry into applicable law prior to filing. As a result, PGE and this Court were left to resolve claims and defenses that in all candor, should have been abandoned, given the absence of any attempt to distinguish or confront adverse authority. Such conduct evinces bad faith..." *Id.*, at 11. The PGE Court finally:

...determined that [the CELDF had] pursued certain claims and defenses in bad faith. Based upon prior CELDF litigation, [it] was on notice of the legal implausibility of arguments previously advanced as to...community self-governance as a justification for striking or limiting long-standing constitutional rights, federal and state laws, and regulations...Despite [its] own prior litigation, CELDF...continue[s] to advance discredited arguments as a basis for CELDF's ill-conceived and sponsored CBR...

Id., at 12. *See also SWEPI, LP v. Mora County, et.al.*, 83 F.Supp.3d 1075 (N.M. 2016)(Court strikes down CELDF drafted CBR).

ARTICLE I, SECTIONS 2 AND 25 ARGUMENTS REJECTED

The Courts have also rejected the CELDF's Article I, Sections 2 and 25 arguments. The CELDF made exactly these same arguments in *Commonwealth v. East Brunswick Township*, 956 A.2d 1100 (Pa. Cmwlth. 2008) that it makes in the instant case. East Brunswick Township directed the Court to "Sections 2 and 25 of the Pennsylvania Constitutions Declaration of Rights." *Id.*, at 1107. The Commonwealth Court was not persuaded, finding "[a] township is not a citizen. Article 1, Section 25 does not recognize or protect the rights of local governments from encroachment by state government." *Id.*, at 1108. Moreover, "Article 1, Section 2 is silent on how a local government is changed. Accordingly, it does not authorize citizens to amend their local form of government without following statutory procedures therefor[e]...In short, the General Assembly acted constitutionally when it restricted municipalities from adopting 'unauthorized local ordinances' that interfere with normal agricultural operations." *Id.*, at 1108.

The Commonwealth Court rejected the CELDF's Article I, Sections 2 and 25 arguments for a second time in *Commonwealth v. Packer Township*, 49 A.2d 495, 499 (Pa.Cmwlth. 2012):

The Township invokes Article 1, section 2 of the Pennsylvania Constitution, which declares that citizens have the "inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper," and Article 1, section 25, which states that each right declared in Article 1 is "excepted out of the general powers of government and shall forever remain inviolate." Pa. Const. art. 1, §§ 2, 25. The Township contends that Article 1, section 2 establishes an "inalienable right of local self-government," (Township's Br. at 49), and that Article 1, section 25 means that "this right is not subject to the general government's procedures for altering government or for providing for local government," (Township's Br. at 46).

Once again, the Court was not swayed. Citing to the *East Brunswick* case, the Court stated that "East Brunswick Township raised a similar self-governance argument in defense of its restrictive sludge ordinance [footnote omitted]. We rejected the argument, explaining that 'local governments are creatures of the legislature from which they get their existence.' [956 A.2d] at 1107 (quoting Robert E. Woodside, *Pennsylvania Constitutional Law* 507 (1985))." *Packer Twp.* 49 A.3d at 499. The *Packer* Court concluded "[h]ere, the instant Ordinance and the Township's self-governance arguments are virtually identical to those involved in *East Brunswick*. We see no reason to depart from our holding in *East Brunswick*." *Id.*, at 499-500 (footnotes omitted). Borrowing the *Packer* Court's language - here, Ordinance No. 2018-02 is virtually identical to those ruled unauthorized in *East Brunswick* and *Packer* and CELDF gives no reason why the Township's Article 1, Sections 2 and 25 arguments are any different or any more persuasive than those raised, and soundly rejected, previously.

ARTICLE I, SECTION 27 ARGUMENT REJECTED

The Township also relies upon Article I, Section 27, the Pennsylvania Constitution's Environmental Rights Amendment ("ERA"), to support its CBR⁸. In its Response, the CELDF

⁸ The Ordinance Preamble even identifies the ERA as the legal foundation for the CBR. *See* Ordinance No. 2018-02, **Preamble**.

contends “[n]o state law can remove a municipality’s implicitly necessary authority to carry out its Section 27 obligations....” (CELDF Response, p. 3). In essence, the Township believes it can take any action it deems necessary under Section 27 in order to “conserve and protect the natural resources of Todd Township, which are held in the public trust....” (*Id.*, p. 2).

The Courts disagree. “While expansive in its language, the ERA was not intended to be read in absolutist terms so as to prohibit development that enhances economic opportunities and welfare of the people currently living in Pennsylvania.” *Funk v. Wolf*, 144 A.3d 228, 233 (Pa.Cmwlth. 2016) *citing to Payne v. Kassab*, 361 A.2d 263, 273 (1976). *See Borough of Moosic v. PUC*, 429 A.2d 1237, 1239 (Pa.Cmwlth. 1981)(“...although Section 27 is self-executing, its terms are not absolute....”). The CELDF repeatedly cites to *Robinson Township v. Commonwealth*, 83 A.3d 901 (2013) as support for its Section 27 argument. *See* CELDF Response, pp. 2-3. CELDF’s reliance on *Robinson Township* is in error, as this case endorses the opposite proposition with the Pennsylvania Supreme Court holding that “the duties to conserve and maintain [public natural resources] are tempered by legitimate development tending to improve upon the lot of Pennsylvania’s citizenry.” *Id.*, p. 958.

CAOs and CAFOs are the most heavily regulated NAOs in the Commonwealth. At a minimum, the following laws address CAO/CAFO farming: NOMA, 3 Pa.C.S. § 501, *et.seq.*; Clean Streams Law, 35 P.S. § 691.1, *et.seq.*; Solid Waste Management Act, 35 P.S. § 6018.101, *et.seq.*; Water Resources Planning Act, 27 Pa.C.S. § 3101, *et.seq.*; Domestic Animal Law, 3 Pa.C.S. § 2301, *et.seq.*; Storm Water Management Act, 32 P.S. § 680.1, *et.seq.* Additionally, the following extensive regulatory schemes apply to CAOs/CAFOs: 25 Pa.Code. Chapters 83 (nutrient management), 91 (pollution control, prevention, and manure management planning), 92a (CAFO regulations), 102 (agricultural erosion and sedimentation control and storm water management), 110 (water resource planning regulations), 271 (land application permits under Subchapter J); National Pollution Discharge Elimination System (NPDES), 40 CFR 122.23. This list is not all-inclusive. It is but an example of the extraordinary care with which the Commonwealth of Pennsylvania regulates the activities of CAOs and CAFOs.

When laws and regulations are enacted to govern activities with an environmental impact, the protections of the ERA are satisfied. For example, in *Concerned Citizens of the Yough v. Department of Environmental Resources*, 639 A.2d 1265, 1275 (Pa.Cmwlth. 2002), the Court wrote:

In *National Solid Waste Management v. Casey*, 143 Pa.Commonwealth Ct. 577, 600 A.2d 260 (1991), we stated that [the Solid Waste Management Act], and the regulations promulgated thereto, indicate the General Assembly's clear intent to regulate in plenary fashion every aspect of the disposal of solid waste, consequently, the balancing of environmental concerns mandated by Article 1, Section 27 has been achieved through the legislative process.

See also EQT Production Company v. Department of Environmental Protection, 181 A.3d 1128, 1147 (2018)(“We appreciate the critical need for protection to vindicate the constitutional entitlement [Art. I, Sec. 27] of the citizenry to a clean environment and recognize that the Clean Streams Law is designed as a mechanism to advance this salutary objective.”). The numerous laws and regulations concerning CAO and CAFO NAOs adequately address the environmental concerns of the ERA.

OTHER CELDF CASES

The CELDF drafted a CBR for the Township of Highland in Elk County, Pennsylvania. Highland enacted the CBR, which was challenged in court; before the case was resolved Highland repealed the CBR. *Seneca Resources Corp. v. Township of Highland*, 863 F.3d 245, 251 (3rd Cir. 2017). The OAG submits that Highland's reasons for doing so are instructive:

After discussing the CBR with both [Seneca's lawyer] and the Township solicitor, Highland determined to repeal the CBR....Instead of exposing the Township and its residents to potentially ruinous civil liability in order to defend a facially untenable ordinance [the Township Board of Supervisors] chose to abide by their fiduciary obligations by rejecting and repealing the CBR....

Seneca Resources Corp. v. Township of Highland, Appellee Seneca's Brief in Opposition to Appeal, 2017 WL 74355 at 8. Seneca's counsel further explained that "[t]he CBR, both as originally adopted and as subsequently amended, was on its face untenable. The Highland Township Board of Supervisors...saw that and, rather than allowing Highland to be used as pawns in a battle that CELDF had no real expectation of winning, took the steps necessary to protect Highland." *Id.*, at 13.

Local officials in the Mora County, New Mexico case cited above on page 4 of this letter came to the same conclusion:

In Mora County, New Mexico, community leaders [in 2015] voted to repeal their CELDF-authored...ordinance after a federal judge ruled against the county in a lawsuit brought by an oil company and landowners. "We weren't comfortable using our county as the test case to try to overturn two centuries of law," said Mora County Commissioner Paula Garcia."

<https://www.reuters.com/article/us-usa-fracking-lawsuits-insight/green-groups-unconventional-fight-against-fracking-idUSKCN0P90E320150629>.

The City of Lafayette, Colorado decided to defend its CELDF drafted ordinance and as of 2015 had "already paid some \$60,000 so far defending its 2013 CELDF-authored community bill of rights in court, knowing the effort is a form of legal disobedience with little hope of yielding a courtroom win." <https://www.reuters.com/article/us-usa-fracking-lawsuits-insight/green-groups-unconventional-fight-against-fracking-idUSKCN0P90E320150629>.⁹ In *Pennsylvania Gen. Energy ("PGE") Co., LLC., v. Grant Township*, 2018 WL 306679 (W.D. Pa. 2018), Grant Township also decided to defend its CBR. That resulted in Grant Township losing the case and the Federal District Court sanctioning the CELDF lawyers \$52,000.00 in legal fees. *Id.* at 13. In fact, the Court referred one of the CELDF lawyers to the Disciplinary Board of the Pennsylvania Supreme Court for his role in pursuing the frivolous case. *Id.*

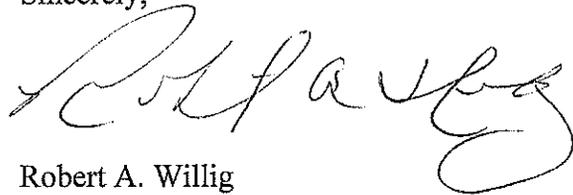
⁹ The City of Lafayette was right in concluding that there was little chance of prevailing. It lost the case. *Colorado Oil and Gas Association v. City of Lafayette*, 2014 WL 7666285 at 10, *affirmed* 2015 WL 3407886, *certiorari denied* 2016 WL 212679, wherein the trial court granted the Plaintiff's motion for summary judgment and issued a permanent injunction enjoining the ordinance, the intermediate appellate court affirmed the trial court, and the Colorado Supreme Court denied certiorari.

That lawyer is Thomas Linzey – executive director of the CELDF. As reported in Reuters, “Linzey says his goal is not to write local laws that are popular, or stand up in court, but rather to trigger a public debate about community rights to local self-government - even if it means a community ultimately falls into financial ruin. ‘If enough of these cases get in front of a judge, there is a chance we could start to have an impact within the judiciary,’ said Linzey. ‘And if a town goes bankrupt trying to defend one of our ordinances, well, perhaps that’s exactly what is needed to trigger a national movement.’” <https://www.reuters.com/article/us-usa-fracking-lawsuits-insight/green-groups-unconventional-fight-against-fracking-idUSKCN0P90E320150629>.

CONCLUSION

All of the foregoing reasons demonstrate, without doubt, that Todd Township’s CBR violates state law. CELDF knows this; more to the point, so do the Courts. The CBR must be repealed in order to avoid costly ACRE litigation.¹⁰ Please let me know how Todd Township intends to proceed in this matter.

Sincerely,



Robert A. Willig
Senior Deputy Attorney General

¹⁰ The ACRE law allows for the collection of attorney fees and the costs of litigation. “In an action brought under [ACRE]...if the court determines that the local government unit enacted or enforced an unauthorized local ordinance with negligent disregard of the limitation of authority established under State law, it may order the local government unit to pay the plaintiff reasonable attorney fees and other litigation costs incurred by the plaintiff in connection with the action.” 3 Pa.C.S. § 317(1), **Attorney fees and costs**.