COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

MICHELLE A. HENRY
ATTORNEY GENERAL

August 22, 2023

Office of the Attorney General
1251 Waterfront Place
Mezzanine Level
Pittsburgh, PA 15222
[redacted]

Independence Township
ATTN: Board of Supervisors
34 Campbell Street – PO Box E
Avella, PA 15312

[redacted]

Re: ACRE Complaint – Independence Township – Washington County

Dear Board of Supervisors, [redacted], and [redacted]

Act 38 of 2005, the Agricultural Communities and Rural Environment ("ACRE") law, 3 Pa.C.S. § 311 *et.seq.*, requires that the Office of Attorney General ("OAG"), upon request, review a local government ordinance for compliance with Act 38. The Act authorizes the Office, in its discretion, to file a lawsuit against the local government unit if, upon review, the Office believes that the ordinance unlawfully prohibits or limits a normal agricultural operation.

We write to inform the Board that we received an ACRE request for review from [redacted] and [redacted] on August 2, 2023. A copy of that request and the ordinance in question is attached for the Board's review. They contend that Independence Township's 200' setback for any building sheltering livestock violates ACRE. If Independence can please respond to the ACRE complaint within thirty (30) days of receipt of this letter I would greatly appreciate it.

I offer the following information that may be of assistance when drafting the Township's response. It is my understanding that the proposed barn is not large and will be used as a lambing shelter for ewes. I may be mistaken but that is the limited information that I have. If my information is correct, neither the building nor the agricultural activity contained therein is substantial. We certainly are not dealing with a Concentrated Animal Operation (CAO) or Concentrated Animal Feeding Operation (CAFO). Attached is the Penn State Extension's publication *Agronomy Facts 40, Nutrient Management Legislation in Pennsylvania: A Summary of the 2006 Regulations.* The longstanding 100, 200, and 300 feet manure setbacks apply only to those larger CAOs and CAFOs and not small farms like the one in this case. *Id., pp.* 1 & 5; *See* 3 Pa.C.S. §§ 506, 519; 25 Pa.Code §83.202. **Scope** and § 83.205. **Preemption of local ordinances.**

The Pennsylvania Supreme Court agrees. *See Berner v. Montour*, 655 Pa. 137, 217 A.3d 238, 250 (Pa. 2019)("Accordingly, we hold with little difficulty that Section 519 [of the Nutrient Management Act] provides preemption protection from local regulation to both [CAOs/CAFOs] subject to the Act's requirements as well as [small farms] that are free from them." I have attached a copy of the *Berner* decision for your review. Moreover, this Office has consistently concluded that setback requirements do not apply to small farms. *See attached* May 7, 2020 OAG Letter to the South Strabane Township Board of Supervisors.

I respectfully submit that the best course of action in this matter may be for Independence Township to permit [redacted] and [redacted] to build their barn while the OAG and the Township work together to draft a legally sufficient setback ordinance acceptable to the Township replacing the current § 410-92. **Agriculture** ordinance. I look forward to your thoughts on this matter. Thank you for your assistance.

Sincerely,

Robert A. Willig
Senior Deputy Attorney General

[redacted]

August 2, 2023

Attorney Robert Willig
ACRE Office

Dear Attorney Robert Willig :

I am writing on behalf of my mother, [redacted] Our farm is located in Independence Township, Washington County. We are in the process of building a new barn that will house sheep. We intend to build the barn 50' to 60' from the property line. The current township ordinance reads that a building used for sheltering livestock has to be 200' from any property line (410-92 B). There are other townships in our county that have setbacks of 50-60', which, we feel is reasonable. As we understand, townships cannot impose setbacks on farms that are not CAOs or CAFOs. Because of the current setback ordinance, we have not been able to obtain a building permit that allows us to continue with construction. I have attached a copy of the current ordinance.

We are located on a dead-end street. Access to the barn would be off our current farm lane, not a public road. The land where this barn is to be built slopes toward our property and not any other adjacent land. We are zoned agriculture and we are in an agriculture secure area.

At this point, the delay of this building is starting to interfere with daily production, time efficiency, and is costing us financially.

Sincerely,

[redacted]

§ 410-92. Agriculture.

Agriculture, as defined herein, and garden nurseries, greenhouses, stables and kennels, where authorized by this chapter, shall be subject to the following requirements:

A. Storage of manure shall be located at least 200 feet from any property line.

B. Any building used for the sheltering, nurturing, raising or feeding of livestock and poultry shall be located at least 200 feet from any street line and from any adjacent landowner's well or dwelling and not less than 100 feet from the landowner's well.

C. Concentrated animal operations shall be subject to compliance with the PA Nutrient Management Act.[1]

D. Greenhouse heating plants shall be at least 100 feet from any property line. The retail sales area for a greenhouse shall not exceed 1,000 square feet for every 10 acres of land farmed. The growing area shall not be considered sales area.

E. The minimum lot area for keeping horses shall be five acres. The minimum lot area for keeping horses shall not be less than two acres per horse.

F. No stable shall be located within 200 feet of any property line.

G. All grazing and pasture areas shall be adequately fenced.

H. Outdoor kennels shall be located at least 300 feet from any occupied dwelling on an adjacent lot and at least 200 feet from any property line that adjoins an A, R-1, R-2 or V District.

1. **Editor's Note: See 3 Pa.C.S.A. § 501 et seq.**

Agronomy Facts 40

Nutrient Management Legislation in Pennsylvania:

A Summary of the 2006 Regulations

INTRODUCTION

In spring 1993, the Pennsylvania Nutrient Management Act (Act 6) became law. On October 1, 1997, the State Conservation Commission's regulations detailing the requirements under Act 6 went into effect in Pennsylvania. Before this legislation became effective, problems with nutrient pollution were handled primarily under the Clean Streams Law. Regulations implementing the Clean Streams Law stated that if a farmer follows practices in the Department of Environmental Protection (DEP) publication *Manure Management for Environmental Protection* (Manure Manual), no special permits or approvals are required for using manure on farms. Since Act 6 regulations went into effect, high-density animal operations were required to develop and implement approved nutrient management plans. Also, many other animal operations voluntarily developed and implemented nutrient management plans. In 2002, the State Conservation Commission was required by law to review the Act 6 regulations. This extensive review along with a concurrent policy initiative known as Agriculture, Communities, and Rural Environment (ACRE) resulted in a new law (Act 38), which replaced Act 6, and in revised regulations that went into effect October 2006. The Clean Streams Law requirements still apply to all farms using manure. However, Act 38 imposes additional requirements on high-density animal operations.

This fact sheet summarizes the nutrient management provisions of Act 38 and the 2006 revised regulations associated with this law.

Authority under the Act

The primary authority to develop and implement regulations and policies under this act is held by the State Conservation Commission (SCC). Administration and enforcement of the act can be delegated to local conservation districts. The revised regulations described here were approved by the State Conservation Commission in March 2006 with an effective date of October 1, 2006.

WHO IS AFFECTED BY THESE REGULATIONS?

Concentrated Animal Operations (CAOs)

CAOs are required to develop and implement nutrient management plans. CAOs are defined as operations having 8 or more animal equivalent units (AEUs) where the animal density exceeds 2 animal units (AUs) per acre of land suitable for manure application on an annualized basis (AEU). An AU is defined as 1,000 pounds of animal live weight.

AEU Calculation

To determine the number of AEUs on a farm, the following formula is to be used for each different type of animal on the farm:

> Number of animals (i.e., average number on a typical production day) × average animal weight over production period (lb) ÷ 1,000 × number of production days per year ÷ 365 = total AEUs for each type of animal

The total AEUs for each type of animal are then summed to get the total AEUs on the farm.

The 2006 regulations require horse and other nonproduction animal operations to comply with the law if they meet the CAO criteria described above. Dairy, beef, veal, swine, and poultry were included in the original regulations.

The regulations set a lower limit of 8 AEUs total on the farm. This means that farms with less than 8 AEUs are not required under this law to have an approved nutrient management plan regardless of the animal density on the farm.

Acres Suitable for Manure

The other factor in this calculation is the total number of acres of land suitable for the application of manure. These acres include croplands, hay lands, or pasturelands (owned or rented) that are

- an integral part of the operation;
- under the operator's management control (meaning they are farmed by the operator of the animal operation;
- or will be used for the application of manure from the operation.

Farmstead (including barnyards, feedlots, and other animal concentration areas) and forestlands cannot be included. However, manure application is not restricted only to the acres described above, but these acres are the acres to be used in the animal density calculations to identify CAOs.

AEU per Acre

The animal density is determined by dividing the total AEUs by the acres suitable for the application of manure.

The animal density criterion does not prohibit development or expansion of agricultural operations that would exceed 2 AEUs per acre. It simply means that these farms will be required to implement an approved nutrient management plan under the act.

Any farm that violates the Clean Streams Law also may be required by DEP to develop a nutrient management plan regardless of their animal density.

Penn State Extension's *Agronomy Facts 54: Pennsylvania's Nutrient Management Act (Act 38): Who Is Affected?* provides standard animal weights and a worksheet to assist farmers in determining their CAO status.

Volunteers

Approximately 5 percent of Pennsylvania's animal operations fall into the CAO category. The other 95 percent are encouraged to develop and implement nutrient management plans voluntarily to maintain and improve health, safety, and the environment for the people of the Commonwealth. Voluntary nutrient management plans follow the same planning criteria as plans developed for CAOs. Under the Clean Streams Law, all farms in Pennsylvania are required to have a manure management plan based on the DEP Manure Manual. An Act 38 nutrient management plan for a CAO or volunteer would meet this requirement.

Voluntary nutrient management plans on non-CAOs can often save the farmer money and improve yields on the operation. Also, properly implemented Act 38 nutrient management plans provide liability protection for the operator from civil penalties and actions. Opportunities to receive financial assistance from various agencies may be available to operators who develop and implement voluntary nutrient management plans. Reimbursements (for plan development), low-interest loans, and grants (for plan implementation) will be provided to eligible operators to the extent that funds are available. For more information on volunteer participation under Act 38, contact the local county conservation district or the State Conservation Commission at 2301 N. Cameron Street, Harrisburg, PA 17110-9408 or phone 717-787-8821.

NUTRIENT MANAGEMENT PLAN CONTENT REQUIREMENTS

Standard Plan Requirements and Format

Any farm classified as a CAO must have a nutrient management plan prepared by a certified nutrient management specialist. The Pennsylvania Department of Agriculture oversees the program to certify specialists to write and review nutrient management plans. Farmers may obtain certification to write their own plans. Farmers who are not certified planners themselves will need to consult with a certified nutrient management specialist, who will help to develop a nutrient management plan for the operation. All plans are to be reviewed by the county conservation district or SCC for approval. Details concerning the certification process will be discussed on page 7.

Volunteer plans also must be prepared by a certified nutrient management specialist and be reviewed and approved as described above for CAOs.

Plans developed under Act 38 (CAO or volunteer) follow a standard plan format approved by the commission. The following is a list of the things that are included in the standard nutrient management plan format.

Farm Identification and Operator Agreement Elements

Specific information describing the operation must be included in the plan. This information is mainly for the benefit of the reviewer, but it also will assist the planner in developing future plan updates to the approved plan. A good farm description can greatly simplify and speed up the review process as well as the development of future plan updates. The following farm identification issues are included in the plan:

- operator and planner name and contact information
- general description of the farm operation
- operator agreement to carry out the plan
- record-keeping requirements
- maps showing
  - — field and operation boundaries
  - — soil types and slopes
  - — proposed and existing manure storages and barnyards
  - — location of proposed structural best management practices (BMPs)
  - — location of in-field stacking areas
  - — manure application setback and buffer areas

    year-round: including 100 feet from streams, lakes, ponds, or open sinkholes. If a minimum 35-foot permanent vegetative buffer exists along the sensitive area, then a 35-foot manure application setback is acceptable

    year-round: 100-foot setback from active drinking water well or spring

    Winter: 100 feet from aboveground intakes to agriculture drainage systems; also 100 feet from prior delineated wetlands adjacent to exceptional value streams
  - — manure application equipment capacity and practical application rates based on manure spreader calibration

Nutrient Management Plan Summary

The nutrient management plan summary includes all information necessary for the farmer to implement the plan. The assumption is that although the farmer may want to review the detailed information and calculations used to develop

the plan, the plan summary is the only part of the plan that the operator will need in making management decisions. This summary must be prominently placed at the front of the plan. Some of the major issues addressed in the plan summary include the following:

- field application summary, including
  - — field identification
  - — field acreage and expected yields
  - — manure and fertilizer application rates and timing
- in-field stacking criteria specifying
  - — location (based on soils, topography, sensitive areas, etc.) and year-to-year rotation of pile location
  - — shape and management of piles
  - — piles must be covered if the manure will be stacked for more than 120 days
- planned BMPs to address manure management and stormwater concerns on the operation
- description and storage capacity of any newly proposed manure storage facility
- summary of the plan should include notes clarifying details of the plan for the operator
  - — examples of information that should be included in the summary notes:

    winter spreading procedures and restrictions for any fields where winter spreading is planned

    location of environmentally sensitive areas and setbacks as appropriate

    details about multiple or split applications on fields

    details about grazing management (e.g., stocking rate, days and hours per day on pasture)

    any significant changes from standard management procedures should be highlighted in a note

NUTRIENT MANAGEMENT PLAN CALCULATIONS

Required Information and Calculations

The information and calculations required to determine the manure applications outlined in the nutrient management plan summary must be included in appendices as part of the standard nutrient management plan format. The list below outlines the major elements that are included in these required appendices to the nutrient management plan:

- amount of each type of nutrient source used on the operation
- amount of manure generated on the operation
  - — measured or calculated if necessary
- nutrient content of the manure used on site
  - — use actual annual manure analysis
  - — book values acceptable when actual testing is not possible
- crop nutrient requirements
  - — realistic expected crop yields
  - — soil test recommendations (updated every 3 years)
  - — residual nitrogen based on past manure applications and legume crops
- planned spreading periods and incorporation time for the manure and other nutrient sources
- nutrient application rates (manure and other organic sources and chemical fertilizers)
  - — application rates limited based on amount of nitrogen (N) required, or in the case of legumes, removed by the crop
  - — application rates may be further limited based on the Phosphorus (P) Index analysis
- manure irrigation restrictions where this application process is used
- restriction on application of liquid manure at rates greater than 9,000 gallons/acre at any one time

ALTERNATIVE USES FOR EXCESS MANURE

Excess Manure

For operations where manure is to be used for other than land application on the operation, i.e., excess manure, a strategy for using this manure is to be included as part of the nutrient management plan.

Exemption for Small Amounts of Manure

The following requirements for alternative uses of excess manure are not required for importing operations receiving small amounts of manure defined as

- 5 tons or less of poultry manure
- 25 tons or less of nonpoultry solid manure
- 10,000 gallons or less of liquid manure

Certified Manure Haulers and Applicators

All manure transfers from, or manure applications on, the operation conducted by commercial manure haulers and applicators or brokers must be done by a manure hauler or broker certified by the Pennsylvania Department of Agriculture under Act 49 of 2004.

Manure Exported to a Known Location for Land Application

When manure will be transferred to known landowners or operators for application to agricultural land, the plan shall contain:

- a signed agreement between the exporter and the importing operator(s)
- nutrient balance sheet (NBS) detailing the manure application locations, rates, and methods of application for each importing site
  - — Three options are available with the NBS for determining N and P application rates:

    1. Where no soil tests exist for the receiving fields, manure application rates cannot exceed P or N crop removal and manure applications must be set back at least 150 feet from water bodies.

2. For fields with a soil test indicating soil P levels less than 200 ppm (using the Mehlich 3 soil test), manure can be applied up to an N-balanced application rate (no P limitations relating to application rate) as long as these applications are set back at least 150 feet from water bodies.

3. When applying to fields having a soil test P level in excess of 200 ppm or on fields within 150 feet of a stream, the operator is to use the P Index to determine P application limitations while also ensuring the application does not exceed N crop removal.

— An approved nutrient management plan can be developed and used instead of an NBS.

- operators who export manure also will be required to give the importer an informational packet including:
  - — appropriate sections of the Manure Manual
  - — educational publications relating to nutrient management
  - — manure export sheets

Manure Exported through a Broker

For operations where the manure will be transferred through a manure broker, the broker, who must be certified under Act 49, assumes responsibility for the manure once he or she takes control of the manure. For operations using a broker, the plan must include:

- a signed agreement between the exporter and the broker

Manure Exported for Use Other Than Land Application

For operations where manure will be transferred to a known importer for use other than application to agricultural land, the plan must include:

- a signed agreement between the exporter and the importer, including a brief description of the planned use for the imported manure and the amount of manure the operator plans to transfer to the importer

Manure Processed or Used on the Operation for Use Other Than Land Application

When manure will be processed or used on the operation where it is produced for a purpose other than the application to agricultural land, the plan is to include:

- a brief description of the planned use for the manure, including the estimated amount expected to be processed or used and when

Manure Marketed through an Open Marketing System

If manure is to be marketed from an existing agricultural operation by using an open marketing system (this option is not available for a new operation) and the importers cannot be identified at planning time, the plan must include:

- proposed marketing scheme
- estimated amount of manure to be marketed and when

An operator using this exporting scheme must be a certified broker under Act 49. NBSs must be developed for all importing sites where the manure will ultimately be land applied (with the exception of small-quantity importers as explained above).

MANURE MANAGEMENT

Manure and Barnyard Management

In preparing the plan, the nutrient management specialist must conduct an on-site review of the adequacy of existing manure management practices to prevent surface water or groundwater pollution and to identify these problem areas in the plan.

The plan will list areas on the operation where water pollution would be expected under normal climatic conditions and the practices required to be implemented to correct these problem areas.

Practices to Be Evaluated During Site Visit

The plan is to include manure handling, collection, barnyard runoff control, emergency manure stacking provisions, in-field manure stacking provisions, and manure storage practices

Manure Management BMPs

The plan is to include a list of BMPs that are necessary to correct any identified water contamination sources. BMP design work is not required as part of the plan; however, during implementation of the approved plan, the operator will be responsible for obtaining the necessary BMP designs. The BMP designs must be kept on site.

Manure Storage Standards

In the implementation of an approved plan, new or expanded manure storage and handling facilities must be designed, constructed, located, operated, maintained, and, when no longer used for the storage of manure, removed from service in such a way as to prevent the pollution of surface water and groundwater and the off-site migration of nutrients by meeting *Pennsylvania Technical Guide* specifications. Manure storages include:

- storage ponds or tanks
- permanent stacking and composting pads
- containment structures under confinement buildings
- reception pits
- transfer pipes

Animal confinement areas of the following are not considered to be manure storages:

- poultry houses
- horse stalls
- bedded packs

The designer of the manure storage facility must conduct an on-site investigation to evaluate the site suitability for a facility. For liquid or semisolid manure storage facilities, the facility must be designed by a professional engineer and the construction of the facility must be signed off by the engineer and contractor as meeting the design and construction standards. Two weeks before construction of these liquid or semisolid manure storage facilities, the engineer must submit verification that the design and location meet *Pennsylvania Technical Guide* specifications and Act 38.

The repair of existing manure storage and handling facilities is to meet the same criteria as for new and expanded storages with the exception of the location standards explained below.

Manure Storage Setbacks

Manure storage facilities (except reception pits and transfer pipes) being built under an Act 38 nutrient management plan may not be constructed in the following locations:

- within 100 feet of a stream, river, spring, lake, or reservoir
- within 100 feet of a private water well or open sinkhole
- within 100 feet of a wetland delineated on the National Wetlands Inventory maps, if the wetland is within the 100-year floodplain of an exceptional value stream
- within 100 feet of an active public drinking water well, water source surface intake, or both, unless other state or federal laws require a greater distance
- within 100 feet (200 feet for new operations) of a property line, unless the landowners agree and execute a waiver
- within 200 feet of any perennial stream, river, lake, pond, reservoir, wetland (as described above), or any water well where such facilities (except permanent stacking and composting facilities) are located on slopes exceeding 8 percent or have a capacity of 1.5 million gallons or greater
- within 200 feet (300 feet for new operations) of any property line where such facilities (except permanent stacking and composting facilities) are located on slopes exceeding 8 percent where the slope is toward the property line or have a capacity of 1.5 million gallons or greater, unless the landowners agree and execute a waiver

Manure Storage Setback Waivers

These distance restrictions may be waived by the SCC or delegated conservation district if the operator can adequately demonstrate the need for the waiver and also can demonstrate that the facility will protect water quality to the satisfaction of the commission or district.

Property line setbacks can only be waived by the affected neighboring property owner.

STORMWATER MANAGEMENT

Stormwater Runoff Control

In the preparation of a plan, the nutrient management specialist or specialist and other individuals with nutrient management runoff experience must conduct a review of the adequacy of the existing field runoff control practices on the farm.

Conservation Plan Requirements

- The operation must have a current agricultural erosion and sedimentation control plan (in accordance with 25 PA Code Chapter 102).
- The nutrient management plan must be consistent with the Ag Erosion and Sedimentation Plan, including issues such as:
  - crop rotation
  - tillage system
  - planned conservation BMPs
- The nutrient management plan must identify any critical runoff problem areas on the operation.
- The nutrient management plan must include a list of specific runoff-control BMPs to address critical runoff problem areas.
  - The BMP designs are to be kept on record at the operation and are not required to be included in the plan. However, the operator is responsible for obtaining the necessary designs upon BMP implementation.

EMERGENCY RESPONSE PLAN

A written, site-specific emergency response plan must be developed and maintained on the operation before approval of an Act 38 nutrient management plan. The emergency response plan must provide necessary contact information for those who need to be immediately contacted in case of a manure leak or spill. Also, the emergency response plan will outline practices to be taken in case there is a manure leak or spill relating to the implementation of this plan.

The emergency response plan needs to be provided to the local emergency management agency for their files in case they are called to assist with an incident on the site.

NUTRIENT MANAGEMENT PLAN REVIEW AND APPROVAL

Plan Review and Approval

Plans must be submitted to the local conservation district or SCC for review and approval. Approved plans must be implemented as planned and records are required to verify implementation and to provide information for subsequent plan updates and amendments.

Submission Time Frame

Plans must be submitted according to the following time frame:

- Operations defined as CAOs before the October 1, 2006, regulation changes should have an approved plan at this time.
- Existing operations on October 1, 2006, that become CAOs because of the changes in the CAO definition in these regulations had until October 1, 2008, to submit a plan for approval.
- New CAOs must get an approved plan before the start of manure operations.
- Existing operations that are expanding and as a result will be classified as CAOs must get an approved plan before the expansion.
- Existing operations that become a CAO because of the loss of land suitable for manure application must submit a plan within 6 months of the loss of land.
- Volunteers may submit a plan at any time.

Plan Review and Approval

Conservation districts and the State Conservation

Commission have 90 days to act on a plan or plan amendment.

If the plan is not acted on by the reviewing agency within 90 days, the operator is authorized to implement the plan. If the reviewing agency fails to act on the plan within a second 90-day period (therefore a total of 180 days), the plan shall be deemed approved.

NUTRIENT MANAGEMENT PLAN IMPLEMENTATION AND RECORD KEEPING

Plan Implementation Requirements

A plan must be implemented within 3 years of the date that it is approved unless the deadline is extended by the SCC or conservation district. Management BMPs must be implemented immediately after approval.

Plans can be transferred to subsequent owners of an operation if the transfer does not result in operational changes.

An amendment is required to make significant changes to the originally approved plan.

Plan Implementation Reviews

The operator must ensure that the plan remains consistent with the operation. Plan updates or amendments are needed to address operational changes that will result in a change to the nutrient management plan.

Plans must be formally reviewed every 3 years by a certified nutrient management specialist. If the agricultural operation is still consistent with the approved plan, the specialist will notify the reviewing agency of this consistency; if not, a plan update or amendment is to be submitted to the reviewing agency. As part of this 3-year review, the P Index must be rerun with current soil test results.

On-Site Status Reviews by Conservation Districts

Conservation district or SCC staff will conduct periodic on-site plan implementation reviews for all approved nutrient management plans.

Plan Amendments

Plan amendments are required when there is a significant change made at the operation. These plan amendments must be developed by a certified individual or commercial nutrient management specialist and be submitted to the reviewing agency for review and approval.

When Are Plan Amendments Required?

- If an operation has significantly changed from that described in the original approved plan, a plan amendment is required. Significant changes that require the approval of a plan amendment include the following:
  - net increase of greater than 10 percent in AEUs/acre
  - change in crop management that results in a farmwide reduction of greater than 20 percent in N necessary for realistic expected crop yields
- A change in excess manure use arrangements, except when
  - loss of an importer will not impair the operator's ability to properly management manure generated on the operation.
  - a new importer is added, as long as the signed agreement and nutrient balance sheet are provided to the reviewing agency by the time of the manure transfer. These new importers will be formally acted on by the district or commission at the 3-year review time.
- When calculation errors or incorrect figures are found in the original plan
- When a different BMP, other than that in the approved plan, is proposed
- When after the first 3 years of implementation of the plan, actual yields average less than 80 percent of the expected crop yields
- The P Index requires a change in manure application rates
- Alternative organic sources will replace all or some of the nutrient sources listed in the plan
- Additional lands are brought into the operation (purchased or rented)
- A change is made in the manure management system that will result in a change in the nutrient content of the manure and thus results in a change in the manure application rates

Changes Due to Unforeseen Circumstances

Changes in plan implementation due to unforeseen circumstances (such as outbreaks of contagious disease, equipment failures, etc.) shall be documented by a certified nutrient management specialist and submitted to the district within 30 days of implementation. These amendments do not require the review and approval of the commission or delegated conservation district, but shall temporarily become part of the plan until normal operations are resumed.

Record Keeping

Records of plan implementation must be kept by the operator. However, unless otherwise specified, necessary records are not required to be submitted to the State Conservation Commission or conservation district, but shall be retained by the agricultural operation complying with the act for a minimum of 3 years.

Required Records

The operator shall keep the following accurate records:

- records of soil testing results
- records of analysis of manure and other nutrient sources
- nutrient application records:
  - location, date, and rate of nutrient application by crop management unit
- annual crop yield levels for each crop management unit
- annual manure production
- for each pasture:
  - number of animals on the pasture
  - number of days grazed
  - hours per day grazed

- copies of completed manure export sheets
- records of the amount and use of manure on the operation for uses other than land application

Record Keeping for Manure Transfers

A manure export sheet is required to document all manure-exporting activities from the operation. This form contains an identification of the exporter and importer plus other information related to the nutrient content and the amount of manure. The exporter is required to provide a copy of the completed manure export sheet to the importer.

ADMINISTRATIVE

Enforcement

Although the commission intends to work with farmers to encourage voluntary compliance, the commission is provided the authority to take legal steps if that approach does not succeed. Act 38 allows the commission, or an authorized agent of the commission, such as a conservation district, to conduct investigations of agricultural operations thought to be in violation of Act 38.

Penalties

Civil penalties are limited to not more than $500 for the first day of each offense and $100 for each additional day of continuing violation. The amount of the penalty will be determined by the gravity of the violation, potential harm to the public, potential effect on the environment, willfulness of the violation, previous violations, and economic benefit to the violator for failing to comply.

Protections

If an operator is found to be causing nutrient pollution while fully implementing a valid nutrient management plan consistent with Act 38 and these regulations, the implementation of the plan will be used as a mitigating factor in determining whether any enforcement action is appropriate.

Nutrient Management Specialist Certification Program

The Pennsylvania Department of Agriculture administers the Nutrient Management Specialist Certification Program for the purpose of certifying persons who have demonstrated the competency necessary to develop and/or review nutrient management plans.

For additional information on the Nutrient Management Specialist Certification Program, please contact the Pennsylvania Department of Agriculture, Nutrient Management Program, 2301 N. Cameron Street, Harrisburg, PA 17110-9408 or call 717-787-8821.

Types of Certification

The certification program recognizes four types of nutrient management specialists (NMSs):

- Individual (farmer), commercial, public review, and public dual
  - — Individual NMSs are certified to prepare plans for their own agricultural operation.
  - — Commercial NMSs may prepare plans for others.
  - — Public review NMSs are authorized to review plans for approval.
  - — Public dual NMSs are authorized to write and review plans for approval.
- Public specialists may not review plans that they have written.

Certification Requirements

NMS candidates are required to complete precertification training course work and pass an examination. In addition, commercial and public specialists are required to demonstrate their competency by correctly completing several actions, namely:

- commercial specialists are required to correctly prepare three plans
- public review specialists must correctly prepare one plan and successfully review two plans
- public dual specialists must correctly prepare two plans and successfully review two plans

Continuing Education Requirements

At 3-year intervals, NMSs are required to complete continuing education credits to remain certified.

Financial Assistance

To the extent that funds are available, operators who develop a nutrient management plan under these regulations may be eligible of financial assistance to develop and implement the nutrient management plan.

For additional information on plan development incentives and financial assistance for plan implementation, contact your local county conservation district or the State Conservation Commission, Nutrient Management Program, 2301 N. Cameron Street, Harrisburg, PA 17110-9408 or call 717-787-8821.

Plan Development Incentives Program

To the extent that funds are available, the operator of a CAO or other agricultural operation planning under the act may apply for funding to develop an Act 38 compliant nutrient management plan. The Plan Development Incentive Program (PDIP) is designed to assist existing operations by offsetting the cost of developing a nutrient management plan meeting the Act 38 criteria.

Plan Maintenance Program Funding

In addition to the plan development assistance provided by PDIP for initial Act 38 plan development, additional assistance may be available to the extent that funds are available to support continual plan amendments and updates to ensure that the plan remains current with the farm operation.

Plan Implementation Financial Assistance

To the extent that funds are available, an owner or operator of an existing agricultural operation may apply for financial assistance to implement nutrient management plans including alternate technology projects. A special nutrient management fund has been established for this purpose. The SCC and the Pennsylvania State Treasury provide financial assistance in

the form of grants or low-interest loans for implementation of nutrient management plans.

The Pennsylvania State Treasury, in cooperation with the SCC, issues loans and sets applicable terms and conditions it deems appropriate under the Agriculture Linked Investment Program (AgriLink). A grant will be considered when the commission determines that the financial condition of the recipient is such that repayment of a loan is unlikely and that the recipient will be financially distressed by the implementation of BMPs without a grant.

Eligibility for Financial Assistance

The criteria to allow a farm to be eligible to receive financial assistance for the implementation of a nutrient management plan under Act 38 are as follows:

- A farm must have an approved nutrient management plan.
- A farmer must be the owner or operator of the operation as of October 1, 2006.
- Eligible BMPs must be listed in the approved nutrient management plan.
- For the grant program, applicants must demonstrate a need for financial assistance.

PERSPECTIVE

The criteria outlined in this act are required of a small but important sector of the farm community in Pennsylvania. However, all farmers and agricultural industries have a stake in protecting the environment from potential agricultural nutrient pollution. Although a formal, approved nutrient management plan is not required of most farmers under this law, all farmers use a nutrient management program that guides their nutrient management activities, and all farmers are encouraged to develop an approved nutrient management plan. Most of these informal nutrient management programs are based on optimizing the economics of their production system. An effort should be made to regularly review such nutrient management programs from an economic and agronomic as well as an environmental perspective. Nutrient management programs should be appropriately modified to reduce potential environmental damage.

For complete information on the Pennsylvania Nutrient Management program, visit **panutrientmgmt.cas.psu.edu**.

Pennsylvania Nutrient Management Program Cooperating Agencies: Pennsylvania State Conservation Commission, Pennsylvania Department of Environmental Protection, Pennsylvania Department of Agriculture, USDA Natural Resources Conservation Service.

Prepared by Douglas Beegle, Distinguished Professor of Agronomy, in cooperation with and with funding from the Pennsylvania State Conservation Commission.

Code UC111 02/17pod

655 Pa. 137
Supreme Court of Pennsylvania.

Russell **BERNER** and Donna **Berner**, Kendall Dobbins, Nathan Roberts, Roberts Realty, LLC, Robert D. Clark and Robert W. Webber
v.
MONTOUR TOWNSHIP ZONING HEARING BOARD and Scott Sponenberg
Appeal of: Scott Sponenberg

No. 39 MAP 2018
|
Argued: March 5, 2019
|
Decided: September 26, 2019

Synopsis

Background: Objectors sought review of township zoning hearing board's grant of special exception to farmer for proposed swine nursery barn and under building for manure storage as an intensive agricultural use in agricultural district. The Court of Common Pleas, Columbia County, No. 2014-CV-0684, denied appeal. Objectors appealed. The Commonwealth Court, No. 881 C.D. 2015, 2016 WL 464225, remanded. Following remand, objectors sought judicial review. The Court of Common Pleas, Columbia County, No. 2014-CV-0684, David E. Grine, Senior Judge, affirmed. Objectors appealed. The Commonwealth Court, No. 448 C.D. 2017, 176 A.3d 1058, reversed. Farmer petitioned for review, which was granted.

Holdings: The Supreme Court, No. 39 MAP 2018, Baer, J., held that:

[1] Nutrient Management Act preempts local regulation of agricultural operations not subject to the Act's requirements to the extent that the local regulation is more stringent than, inconsistent with, or in conflict with those requirements, and

[2] the Act preempted adverse impact requirement in zoning ordinance concerning hog raising operations and manure management.

Order of Commonwealth Court reversed.

Dougherty, J., filed a dissenting opinion.

Procedural Posture(s): Petition for Discretionary Review; On Appeal; Review of Administrative Decision.

West Headnotes (12)

[1] Zoning and Planning ⇐ Nature and necessity in general

A "special exception" is a use which is expressly permitted in a given zone so long as certain conditions detailed in the ordinance are found to exist.

1 Case that cites this headnote

[2] **Appeal and Error** ⇦ Statutory or legislative law

An issue of statutory interpretation presents a question of law for which Supreme Court's standard of review is de novo and its scope of review is plenary.

1 Case that cites this headnote

[3] **Statutes** ⇦ Plain Language; Plain, Ordinary, or Common Meaning

Generally, a statute's plain language provides the best indication of legislative intent.

7 Cases that cite this headnote

[4] **Statutes** ⇦ In general; factors considered

When statutory language is ambiguous, the Supreme Court looks to various factors listed in the Statutory Construction Act to ascertain the meaning of statute. 1 Pa. Cons. Stat. Ann. § 1921(c).

5 Cases that cite this headnote

[5] **Municipal Corporations** ⇦ Conformity to constitutional and statutory provisions in general

With "express preemption," the state enactment contains language specifically prohibiting local authority over the subject matter.

[6] **Municipal Corporations** ⇦ Conformity to constitutional and statutory provisions in general

"Conflict preemption" acts to preempt any local law that contradicts or contravenes state law.

1 Case that cites this headnote

[7] **Municipal Corporations** ⇦ Conformity to constitutional and statutory provisions in general

For "field preemption," the state regulatory scheme so completely occupies the field that it appears the General Assembly did not intend for supplementation by local regulations.

1 Case that cites this headnote

[8] **Statutes** ⇦ Statute as a Whole; Relation of Parts to Whole and to One Another

In engaging in statutory interpretation, Supreme Court is to give effect to every provision in a statute whenever possible.

[9] **Statutes** ⇦ Giving effect to entire statute and its parts; harmony and superfluousness

It is presumed that the legislature did not intend any statutory language to exist as mere surplusage.

1 Case that cites this headnote

[10] **Zoning and Planning** ⇦ Agriculture, farming, and rural uses

Nutrient Management Act preempts local regulation of agricultural operations not subject to the Act's requirements to the extent that the local regulation is more stringent than, inconsistent with, or in conflict with those requirements. 3 Pa. Cons. Stat. Ann. § 519.

1 Case that cites this headnote

[11] **Zoning and Planning** ⇦ Agriculture, farming, and rural uses

Nutrient Management Act preempted township's zoning ordinance requiring hog raising operation within township's agricultural district to submit legally binding assurances that its manure would be managed without adverse impact upon adjacent properties in order to obtain a special exception for the operation as an intensive agricultural use, even though the operation was not a nutrient management plan (NMP) operation; Act set forth the minimum standards for manure storage facilities but did not impose an adverse impact requirement on those facilities, and Act provided preemption protection to both NMP operations and non-NMP operations. 3 Pa. Cons. Stat. Ann. § 519.

[12] **Zoning and Planning** ⇦ Agriculture, farming, and rural uses

Nutrient Management Act provides preemption protection from local regulation to both nutrient management plan (NMP) operations subject to the Act's requirements as well as non-NMP agricultural operations that are free from them. 3 Pa. Cons. Stat. Ann. § 519.

**240 Appeal from the Order of the Commonwealth Court at No. 448 CD 2017 dated January 4, 2018, Reversing the Order of the Columbia County Court of Common Pleas, Civil Division, at No. 2014-CV-684 dated March 7, 2017, David E. Grine, Senior Judge

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SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

OPINION

JUSTICE BAER

*141 The Nutrient Management Act (Act), 3 Pa.C.S. §§ 501-522, requires certain agricultural operations to comply with various standards regarding the management of livestock manure, among other "nutrients." [1] The Act also contains a provision outlining the manner in which the Act, as well as the regulations and guidelines promulgated pursuant to it, preempt local regulation of nutrient management. *See id.* § 519, *infra* at page 242. In this appeal, we are tasked with determining whether, and if so, to what extent, the Act preempts local regulation of nutrient management **241 by agricultural operations that are not otherwise subject to the Act's requirements. For the reasons discussed below, we hold that the Act preempts local regulation of agricultural operations not subject to the Act's requirements to the extent that the local regulation is more stringent than, inconsistent with, or in conflict with those requirements. Because the Commonwealth Court reached a contrary result, we reverse the order of that court.

I. Legal Background

A. State Law

In order to facilitate a better understanding of the issue before us, we begin by expanding upon our brief statements on the Act made above. At the heart of the Act is the mandate that certain agricultural operations adopt a "nutrient management plan" or "NMP." *See Burkholder v. Zoning Hearing Bd. of Richmond Twp.*, 902 A.2d 1006, 1008 (Pa. Cmwlth. 2006) (observing that "[t]he preparation and implementation of [an NMP] is the centerpiece" of the Act). An NMP is "[a] written site-specific plan which incorporates best management practices to manage the use of plant nutrients for crop production and water quality protection consistent with the criteria established in [certain sections of the Act]." 3 Pa.C.S. § 503.

*142 Under the Act, operators of "concentrated animal operations" or "CAOs" must develop and implement an NMP. [2] *Id.* § 506(b). In contrast, smaller agricultural operations that are not intensive enough to meet the definition of a CAO may develop an NMP voluntarily. [3] *Id.* § 506(h). Non-CAOs that have voluntarily submitted an NMP are called "voluntary agricultural operations" or "VAOs." 25 Pa. Code § 83.201 (defining VAO, in relevant part, as "[a]ny operation that voluntarily agrees to meet the requirements of this subchapter even though it is not otherwise required under the [A]ct or this chapter to submit a nutrient management plan"). "CAOs, VAOs and operations required to develop compliance plans under section 506(j) of the [A]ct" are collectively referred to as "NMP operations." *Id.*

NMP operations must meet the NMP requirements set forth in various regulations promulgated pursuant to the Act. *Id.* § 83.261. Among these regulations is the one at the center of this dispute, Section 83.351, which provides "[t]he minimum standards [for] new manure storage facilities and the expansion of existing manure storage facilities, as part of a plan developed for an NMP operation." *Id.* § 83.351(a). While these standards need not be set forth in detail for purposes of **242 this appeal, it is worthwhile to note that they are aimed at protecting water quality and preventing migration of nutrients offsite. *143 *See, e.g.*, *id.* § 83.351(a)(1) (explaining that "[m]anure storage facilities shall 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 water and groundwater quality, and prevents the offsite migration of nutrients").

With respect to preemption, Section 519 of the Act sets forth the preemptive effect the Act, its regulations, and its guidelines have on local regulation of nutrient management. Section 519 provides, in relevant part, as follows:

> (a) **General.**--This chapter and its provisions are of Statewide concern and occupy the whole field of regulation regarding nutrient management ... to the exclusion of all local regulations.

(b) **Nutrient management.**--No ordinance or regulation of any political subdivision or home rule municipality may prohibit or in any way regulate practices related to the storage, handling or land application of animal manure or nutrients or to the construction, location or operation of facilities used for storage of animal manure or nutrients or practices otherwise regulated by this chapter if the municipal ordinance or regulation is in conflict with this chapter and the regulations or guidelines promulgated under it.

* * *

(d) **Stricter requirements.**--Nothing in this chapter shall prevent a political subdivision or home rule municipality from adopting and enforcing ordinances or regulations which are consistent with and no more stringent than the requirements of this chapter and the regulations or guidelines promulgated under this chapter. No penalty shall be assessed under any such local ordinance or regulation under this subsection for any violation for which a penalty has been assessed under this chapter.

3 Pa.C.S. § 519.[4] We must determine whether, pursuant to Section 519, the Act and its attendant regulations and guidelines *144 preempt the local ordinance at issue here, discussed below.

B. Local Law

[1] The municipality involved in this dispute is **Montour** Township (Township), Columbia County. The Township has a zoning ordinance (Ordinance) under which the Township has been divided into different districts, including agricultural districts. **243 **Montour** Township, General Codes, Ch. 27 (Zoning), § 300(1). The Ordinance further permits several "Intensive Agriculture and Agricultural Support" uses, including "hog raising," in agricultural districts by special exception.[5] *Id.* §§ 401(3), 402(1)(E). While the Ordinance sets forth various criteria an applicant must meet to obtain special exception approval for hog raising, the criterion most relevant to this appeal requires the applicant to:

> submit facility designs and legally binding assurances with performance guarantees which demonstrate that all facilities necessary for manure and wastewater management, materials storage, water supply and processing or shipping operations *145 will be conducted without adverse impact upon adjacent properties.

Id. § 402(1)(E) (further explaining that "adverse impacts may include, but are not limited to, groundwater and surface water contamination, groundwater supply diminution, noise, dust, odor, heavy truck traffic, and migration of chemicals offsite").[6] While the Ordinance contains this adverse impact requirement, it is undisputed that there is no such requirement contained in the Act or its regulations. It is this circumstance that forms the basis of the dispute herein.

II. Factual Background and Procedural History

Scott Sponenberg (Applicant) owns property used as a livestock and crop farm that lies in an agricultural district in the Township. In April 2013, Applicant filed an application for a special exception with the **Montour** Township Zoning Hearing Board (ZHB) based on his desire to build a swine nursery barn with under building concrete manure storage (*i.e.*, a manure storage facility) on his property. Notably, Applicant's proposed use does not constitute an NMP operation, as it does not meet the criteria of an agricultural operation that is required to have an NMP, and Applicant has not voluntarily created an NMP for his proposed use. Thus, Applicant's planned use is not subject to the various requirements established under the Act, which apply to NMP operations.

A prolonged procedural history involving litigation of various issues, most of which are irrelevant to this appeal, followed the filing of the special exception application. In short, the ZHB initially granted Applicant's special exception application subject to conditions. Following two appeals filed by various objectors, including Russell **Berner**, Donna **Berner**, Kendall Dobbins, Robert D. Clark, and Robert W. Webber (Objectors), the matter returned to the ZHB by way of order from the Commonwealth Court for the ZHB to render necessary findings regarding Applicant's compliance with the Ordinance's special exception requirements.

***146** On remand, the ZHB permitted the parties to file proposed findings of fact and conclusions of law, and it ultimately adopted those submitted by Applicant. Included in the findings and conclusions were determinations regarding the preemptive effect of the Act and its regulations on the Ordinance's adverse impact requirement. Specifically, the ZHB observed that the Act's regulations comprehensively set forth the standards regarding ****244** the design, construction, location, operation, and maintenance of manure storage facilities. The ZHB further explained that those regulations, and Section 83.351 in particular, do not include an adverse impact requirement as the Ordinance does. Relying upon Subsection 519(b), part of the Act's preemption provision, *supra* at page 242, and making no distinction between NMP and non-NMP operations, the ZHB thus concluded that the adverse impact requirement was more restrictive than, and in conflict with, the Act and its regulations. As a consequence, the ZHB concluded that the Act and its regulations preempted the Ordinance's adverse impact requirement, rendering it unnecessary for Applicant to comply with that requirement.

Objectors appealed, and the trial court affirmed the ZHB's decision without taking additional evidence. Objectors further appealed to the Commonwealth Court, which concluded in a unanimous, published opinion that the ZHB erred in finding the Ordinance's adverse impact requirement preempted by the Act and its regulations. ***Berner v. Montour Twp. Zoning Hearing Bd.***, 176 A.3d 1058, 1078 (Pa. Cmwlth. 2018). The Commonwealth Court first observed that, under Subsection 519(a) of the Act, the General Assembly clearly intended to occupy the whole field of nutrient management. *Id.* at 1077 (quoting *Office of Atty. Gen. ex rel. Corbett v. Locust Twp.*, 49 A.3d 502, 506 (Pa. Cmwlth. 2012)). The court further explained that, under Subsections 519(b) and (d), the Act prohibits local regulation that conflicts with the Act, its regulations, and its guidelines, but allows local regulation that is consistent with and no more stringent than the state law. *Id.* (quoting *Locust Twp.*, 49 A.3d at 506-07).

Turning to the facts of this case, the Commonwealth Court reasoned that Section 83.351 applies only to certain manure ***147** storage facilities that are "part of a plan developed for an NMP operation."[7] *Id.* at 1078 (quoting 25 Pa. Code § 83.351(a)). The Commonwealth Court reasoned that Applicant's proposed use was not an NMP operation, as it did not have a mandatory or voluntary NMP; thus, the court concluded that Section 83.351 was inapplicable to the proposed use. According to the Commonwealth Court, because Section 83.351 did not apply to Applicant's proposed use, it was subject to the Ordinance's adverse impact requirement. In other words, the Court concluded that the Act and its regulations did not preempt the Ordinance's adverse impact requirement under the circumstances presented, where there was no NMP subjecting Applicant's use to the state law requirements. Accordingly, and for other reasons not relevant to this appeal, the Commonwealth Court reversed the trial court's decision affirming the ZHB's grant of Applicant's special exception application. Applicant then filed a petition for review with this Court.

III. Issue

We granted discretionary review to address the following question, as stated by Applicant:

> Whether the Commonwealth Court erred by holding that the [Act] only preempts local ordinances as applied to farms that have an approved [NMP] and that small farms that are not required to submit [NMPs]

> can be subjected to more stringent regulation than larger more intensive agricultural operations that are required to obtain approval of a[n NMP] under the [Act].

**245 *Berner v. Montour Twp. Zoning Hearing Bd.*, 190 A.3d 593 (Pa. 2018) (*per curiam*).

IV. Analysis

A. Standard of Review

[2] [3] [4] The issue before us requires us to engage in statutory interpretation. An issue of statutory interpretation presents *148 a question of law for which our standard of review is *de novo* and our scope of review is plenary. *Thomas Jefferson Univ. Hosps., Inc. v. Pa. Dep't of Labor & Indus.*, 640 Pa. 219, 162 A.3d 384, 389 (2017). We are guided in our analysis by the Statutory Construction Act, 1 Pa.C.S. §§ 1501-1991, which provides that the object of all statutory interpretation is to ascertain and effectuate the intent of the General Assembly. *Id.* § 1921(a). Generally, a statute's plain language provides the best indication of legislative intent. *Miller v. County of Centre*, 643 Pa. 560, 173 A.3d 1162, 1168 (2017). When the statutory language is ambiguous, however, we look to the various factors listed in 1 Pa.C.S. § 1921(c) to ascertain its meaning. *LTV Steel Co. v. Workers' Comp. Appeal Bd. (Mozena)*, 562 Pa. 205, 754 A.2d 666, 674 (2000). Further, in matters of statutory interpretation, "[e]very statute shall be construed, if possible, to give effect to all its provisions." 1 Pa.C.S. § 1921(a). We also presume that "the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable," and that "the General Assembly intends the entire statute to be effective and certain." *Id.* § 1922(1)-(2).

B. Arguments

Applicant argues that the Act preempts the Township's attempt to regulate nutrient management through the Ordinance.[8] With respect to the Act's preemption provision, Applicant *149 contends that the Act expressly and unambiguously preempts the field of nutrient management to the exclusion of all other local regulation pursuant to Subsection 519(a). While the Act does not define "nutrient management," Applicant argues that the General Assembly intended the term to mean "anything regulating the manner or method that manure is managed," and encompass the land application and storage of animal manure and related activities. Applicant's Brief at 25, 28 (relying upon the Act's definition of "nutrient," *supra* at page 240 n.1, and "best management practice").[9] Applicant further reads Subsections 519(b) and (d) to reserve the ability of municipalities to adopt ordinances and regulations **246 concerning zoning and land use matters traditionally in its purview, or what Applicant calls "non-operational and non-nutrient aspects" of a proposed manure management operation, provided that there is no conflict with the Act.[10] *Id.* at 29. Applicant argues that the Ordinance is preempted because it both regulates nutrient management and otherwise conflicts with the Act.

Applicant additionally claims that, through the enactment of various statutes, the General Assembly has created a comprehensive system of state regulation governing all agricultural operations and the field of nutrient management. According to Applicant, these statutes include the Act, as well as the Clean Streams Law, 35 P.S. §§ 691.1-691.1001; the Agricultural Area Security Law, 3 P.S. §§ 901-915; the Right to Farm Act, 3 P.S. §§ 951-957; and the Municipalities Planning Code (MPC), *150 53 P.S. §§ 10101-11202. Applicant contends that the Act should be read *in pari materia* with these statutes, which were all enacted to protect Pennsylvania's agricultural operations from unreasonable local regulation and provide uniform standards throughout the state. Applicant's Brief at 19-24 (relying upon 3 Pa.C.S. § 521 (providing, in relevant part, that the Act "shall not be construed as modifying, rescinding or superseding any other statute ... and shall be read in pari materia with other statutes")). Applicant contends that preemption plays an integral role in advancing these purposes.

Applicant also argues that the Commonwealth Court erred in holding that the Act and its regulations did not preempt the Ordinance's adverse impact requirement because Applicant's farm lacked an approved NMP. Applicant contends that the Commonwealth Court's interpretation would allow local regulation of nutrient management and the imposition of more burdensome restrictions on lower intensity agricultural operations like Applicant's that are not required to submit an NMP than the Act imposes on higher intensity agricultural operations.

Applicant claims that the General Assembly did not intend for lower intensity agricultural operations, which make up the vast majority of agricultural operations in the Commonwealth, to face more stringent regulation than larger agricultural operations subject to the Act's requirements. Applicant argues that the Commonwealth Court's interpretation goes against the Legislature's intent to create a statewide ceiling for regulation of nutrient management, does not give effect to all of Section 519's provisions, and permits the Township to exceed the traditional scope of zoning by allowing it to regulate the operational details of manure management facilities.

Finally, Applicant contends that the Commonwealth Court's decision is not supported by case law. Applicant's Brief at 39-45 (relying upon, *inter alia*, *Locust Twp.*, 49 A.3d at 510-12 (Pa. Cmwlth. 2012) (explaining that the distinction between larger and smaller farms made by the Legislature in the Act was intentional and finding preemption of a local setback ***151** requirement because, *inter alia*, it applied to small farms that were excluded from the Act's lesser setback requirements)).

****247** Objectors counter that this case is to be analyzed under principles of conflict preemption, which requires Applicant to demonstrate an irreconcilable conflict between the Act and the adverse impact requirement of the Ordinance, making it impossible to comply with both. Objectors argue that Applicant fails to identify such a conflict. Objectors further assert that the Commonwealth Court correctly found no preemption on the basis that Applicant's proposed use lacked an NMP, rendering the requirements of the Act and its regulations inapplicable to it. Objectors claim that, if Applicant wants the benefit of preemption protection under the Act, then he may file a voluntary NMP.

Objectors additionally challenge Applicant's claim that the Ordinance's adverse impact requirement is more restrictive than Section 83.351 of the Act's regulations and goes beyond the permissible scope of zoning by imposing specific substantive requirements and regulating operational details of manure storage facilities. Further, Objectors argue that interpreting the Act *in pari materia* with other statutes pertaining to agricultural operations does not change the outcome in this case, as there is likewise no conflict between the adverse impacts requirement of the Ordinance and those statutes. Finally, Objectors argue that the Commonwealth Court's decision in this case is consistent with precedent from that court. Objector's Brief at 30-34 (citing, *inter alia*, *Locust Twp.*, 49 A.3d at 508-09 (concluding that an ordinance's requirement that an applicant for land use approval submit a site plan was not preempted by the Act, which mandated that site plans be included with NMPs, on the basis that the requirements served different purposes and the ordinance did not regulate nutrient management); *Walck v. Lower Towamensing Twp. Zoning Hearing Bd.*, 942 A.2d 200, 207-08 (Pa. Cmwlth. 2008) (holding that, in the absence of an NMP, the Act and its regulations did not apply to preempt the local ordinance at issue)).

***152** C. Discussion

[5] **[6]** **[7]** Generally, this Court has discussed preemption in terms of three forms: (1) express preemption, (2) conflict preemption, and (3) field preemption. *See, e.g.*, *Nutter v. Dougherty*, 595 Pa. 340, 938 A.2d 401, 404 (2007). With express preemption, "the state enactment contains language specifically prohibiting local authority over the subject matter." *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 600 Pa. 207, 964 A.2d 855, 863 (2009). [11] Here, the Act contains an express preemption provision, Section 519, the relevant portions of which we set forth again here:

> **(a) General.**--This chapter and its provisions are of Statewide concern and occupy the whole field of regulation regarding nutrient management ... to the exclusion of all local regulations.

(b) **Nutrient management.**--No ordinance or regulation of any political subdivision or home rule municipality may prohibit or in any way regulate practices related to the storage, handling or land application of animal manure or nutrients or to the construction, location or operation of facilities used for storage of animal manure or nutrients or practices otherwise regulated by this chapter if the municipal ordinance or regulation is in conflict with this chapter and the ****248** regulations or guidelines promulgated under it.

* * *

(d) Stricter requirements.--Nothing in this chapter shall prevent a political subdivision or home rule municipality from adopting and enforcing ordinances or regulations which are consistent with and no more stringent than the requirements of this chapter and the regulations or guidelines promulgated under this chapter. No penalty shall be assessed under any such local ordinance or regulation under ***153** this subsection for any violation for which a penalty has been assessed under this chapter.

3 Pa.C.S. § 519. [12]

[8] **[9]** In Subsection 519(a), the General Assembly states its intent for the Act to occupy the entire field of regulation regarding nutrient management to the exclusion of all local regulations. Read in isolation, this provision appears to indicate that the General Assembly intended to prohibit all local regulation of nutrient management. In engaging in statutory interpretation, however, this Court is to give effect to every provision in a statute whenever possible, as it is presumed "that the legislature did not intend any statutory language to exist as mere surplusage." *Commonwealth by Shapiro v. Golden Gate Nat'l Senior Care LLC*, — Pa. —, 194 A.3d 1010, 1034 (2018). Thus, we turn to Subsection (b), which provides that municipalities are barred from regulating practices related to, *inter alia*, the storage of animal manure, the construction of facilities used for storage of animal manure, and practices otherwise regulated by the Act to the extent the local regulation is in conflict with the Act or its regulations. Further, under Subsection (d), municipalities are permitted to adopt regulations to the extent that they are consistent with and no more stringent than the requirements of the Act and its regulations.

[10] **[11]** Taken together, the provisions of Section 519 of the Act do not evidence an intent on behalf of the Legislature to preclude all local regulation in the field of nutrient management. Instead, viewed in its entirety, Section 519 of the Act reveals the Legislature's intent to prohibit local regulation of nutrient management only to the extent that it is more stringent than, inconsistent with, or in conflict with the Act or its regulations. [13] Thus, we agree with the Commonwealth ***154** Court's analysis as to Section 519 of the Act's preemption framework. We therefore proceed to address that court's application of that framework to the Ordinance's adverse impact requirement.

As stated previously, the Ordinance's adverse impact requirement mandates that applicants seeking a special exception for hog raising "submit facility designs and legally binding assurances with performance guarantees which demonstrate that all facilities necessary for manure and wastewater management, materials storage, water supply and processing or shipping operations will be conducted without adverse impact upon adjacent properties." **Montour** Township, General Codes, Ch. 27 (Zoning), § 402(1)(E). As determined by the ZHB, Section 83.351 of the Act's regulations, ****249** which sets forth the minimum standards for manure storage facilities, does not impose this adverse impact requirement on those facilities. By imposing these obligations, which clearly regulate nutrient management and are in addition to those set forth in the Act and its regulations, the Ordinance's adverse impact requirement is in conflict with the Act and its regulations. Accordingly, under Section 519 of the Act, the Act and its regulations preempt the Ordinance's adverse impact requirement.

In reaching its contrary conclusion, the Commonwealth Court reasoned that the Ordinance's adverse impact requirement was not preempted under the circumstances presented because Applicant's use, in any case, is not an NMP operation subject to the requirements set forth in the Act and its regulations. In so doing, the Commonwealth Court determined that because non-NMP operations like Applicant's proposed use are free from the requirements imposed pursuant to the Act, they do not get the benefit

of the Act's preemption protection. We conclude that this determination is in contravention of the legislative intent underpinning the Act and, thus, respectfully, was made in error.

*155 One of the purposes for which the Legislature enacted the Act was to "establish criteria, nutrient management planning requirements and an implementation schedule for the application of nutrient management measures on certain agricultural operations which generate or utilize animal manure." 3 Pa.C.S. § 502(1). In furtherance of this purpose, the Act and its regulations impose nutrient management requirements on NMP operations, those being CAOs, VAOs, and operations otherwise required to implement NMPs under Subsection 506(j) of the Act. *See* 3 Pa.C.S. § 506(b); 25 Pa. Code §§ 83.201, 83.261. In contrast, the Act does not impose those requirements on non-NMP operations, but rather gives them the choice to comply with the requirements through submission of a voluntary NMP. *See* 3 Pa.C.S. § 506(h). [14]

As the Commonwealth Court aptly explained in *Locust Township*, "[t]he reason for the distinction is obvious" given that the development and implementation of NMPs is costly and burdensome, circumstances readily recognized by the Legislature. [15] *Locust Twp.*, 49 A.3d at 511 (further observing that "[t]he cost of compliance appears to have been such a significant concern to the General Assembly that it expressly authorized the [State Conservation Commission] to provide financial assistance ... to existing agricultural operations to implement the mandated plans"); *see* also 3 Pa.C.S. § 511 (relating to the provision of financial assistance for implementation **250 *156 of NMPs); *id.* § 502(3) (requiring the State Conservation Commission and other entities "to develop and provide ... financial assistance for nutrient management" as another purpose of the Act). [16] Thus, like the *Locust Township* court, we view the Legislature's distinction between NMP operations and non-NMP operations to be a deliberate one made for purposes of sparing lower-intensity non-NMP operations from the complex and expensive burden of adoption of an NMP. *See Locust Twp.*, 49 A.3d at 511.

In light of the Legislature's intent to spare non-NMP operations from mandatory compliance with the onerous requirements imposed pursuant to the Act, it would indeed be ironic if we found no preemption to exist under the circumstances presented, thus permitting local municipalities to impose upon small agricultural operations standards more burdensome than those placed upon large agricultural operations under the Act. This "irony" runs afoul of basic principles of statutory construction. A finding of no preemption would be unreasonable, if not absurd, and would in fact defeat the legislative purpose of establishing statewide criteria which simultaneously protects the public and encourages this important agrarian industry to thrive in Pennsylvania.

[12] Accordingly, we hold with little difficulty that Section 519 of the Act provides preemption protection from local regulation to both NMP operations subject to the Act's requirements as well as non-NMP operations that are free from them. More specifically, we conclude that the Act preempts any local regulation of nutrient management to the extent the local regulation imposes requirements that are stricter than, inconsistent with, or in conflict with the state law requirements, irrespective of whether a particular agricultural operation has an NMP mandating compliance with the Act. [17] Here, as discussed *supra*, the Ordinance's adverse impact requirement *157 is inconsistent with the state law requirements because it imposes obligations that are in addition to those included in the Act and its regulations. That is, the Ordinance's adverse impact requirement imposes additional requirements on both NMP operations subject to the state law requirements and non-NMP operations that the Legislature has deemed to be exempt from those lesser requirements. Therefore, the Act and its regulations preempt the Ordinance's adverse impact requirement. [18]

**251 Based on the foregoing, we respectfully disagree with the Commonwealth Court's conclusion that Applicant was required *158 to comply with the Ordinance's adverse impact requirement because the Act and its regulations did not preempt that requirement. Accordingly, we reverse the order of the Commonwealth Court.

Chief Justice Saylor and Justices Todd, Donohue, Wecht and Mundy join the opinion.

Justice Dougherty files a dissenting opinion.

JUSTICE DOUGHERTY, dissenting

Respectfully, I disagree with the majority's conclusion the Nutrient Management Act (NMA), 3 Pa.C.S. §§ 501-522, preempts **Montour** Township's zoning ordinance, which requires hog raising operations within the Township's delineated agricultural districts to submit legally binding assurances their manure will be managed without adverse impact upon adjacent properties. *See* **Montour** Township, General Codes, Ch. 27 (Zoning), § 402(1)(E). In reaching its conclusion, the majority determines Scott Sponenberg's (Applicant's) proposed lower-intensity agricultural operation, consisting of 4,800 swine, is both excused from the requirements of the NMA by virtue of its size, [1] and, paradoxically, also immune from local regulation regarding the impacts of the farm's manure management activities on surrounding properties. *See* Majority Opinion at 250. The majority's construction of the NMA's preemption provision thereby effectively leaves the localized health and environmental impacts of the manure practices of such farms — which Applicant and his *amici* contend comprise the vast majority of farms across the Commonwealth — outside of any regulation. In my view, not only is this result untenable, but it is based upon a flawed statutory construction analysis that undermines this Court's jurisprudence with regard to preemption principles, and curtails long-established municipal authority to "make such additional regulations" in furtherance of state law as are reasonable and ***159** appropriate to the needs of the particular locality. *See Hoffman Mining Co. v. Zoning Hearing Bd. of Adams Twp.*, 612 Pa. 598, 32 A.3d 587, 595 (2011), *quoting Mars Emergency Med. Servs., Inc. v. Twp. of Adams, Cambria Cty.*, 559 Pa. 309, 740 A.2d 193, 195 (1999) (citations omitted). Accordingly, I dissent.

****252** As an initial matter, I agree with the majority to the degree it determines local regulation of nutrient management is prohibited "only to the extent that it is more stringent than, inconsistent with, or in conflict with the [NMA] or its regulations." *See* Majority Opinion at 248. However, I depart from the majority with respect to its construction analysis and resulting application of Section 519, which provides the preemptive effect of the NMA. As a precursor to applying the principles of statutory construction, I note Section 519 of the NMA is unquestionably ambiguous. In interpreting this provision, the Commonwealth Court has observed, "[t]he [NMA's] preemption language is as perplexing as it is verbose[.]" ***Berner v. Montour*** *Twp. Zoning Hearing Bd.*, 176 A.3d 1058, 1076 (Pa. Cmwlth. 2018), *quoting Com., Office of Atty. Gen. ex rel. Corbett v. Locust Twp.*, 49 A.3d 502, 506-07 (Pa. Cmwlth. 2012). Both Applicant and Objectors rely upon this characterization. *See* Appellee's Brief at 11, *quoting Locust Twp.* at 506-07; *see also* Appellant's Brief at 32 ("[T]he varied preemption language used by the General Assembly in § 519 is 'perplexing,' and when viewed as a whole, unclear.... [T]he intent of the statute is not clear and free from all ambiguity based on its text[.]"); *but cf.* Appellant's Brief at 26 ("The General Assembly unambiguously preempted the field of nutrient management to the exclusion of all local regulation.").

Read in isolation, NMA subsection 519(a) appears to indicate the General Assembly intended to prohibit all local regulation of nutrient management. Majority Opinion at 247–48, *quoting* 3 Pa.C.S. § 519(a) ("This chapter and its provisions are of Statewide concern and occupy the whole field of regulation regarding nutrient management and odor management, to the exclusion of all local regulations."). However, the preemption provision goes on to undermine its all-encompassing, exclusionary statement by commanding in ***160** subsection (b), "no [local regulation] may prohibit or in any way regulate [nutrient management] **if the ... regulation is in conflict with this chapter** [and its regulations]" — a statement otherwise unnecessary if **all** local regulation of nutrient management is excluded pursuant to Subsection 519(a). 3 Pa.C.S. § 519(b) (emphasis added). Section 519 further contradicts itself with the following proviso in subsection (d): "**nothing in [the NMA] shall prevent** [a locality] from adopting and enforcing ordinances or regulations which are consistent with and no more stringent than the requirements of this chapter [and its regulations or guidelines]." 3 Pa.C.S. § 519(d) (emphasis added). Consequently, the preemption clause is facially contradictory and ambiguous, clouding the General Assembly's intent.

Despite its effort to construe these subsections together, *see* 1 Pa.C.S. § 1921, the majority's construction still excludes subsection 519(a) from the equation, determining the General Assembly did not intend to preclude all local regulation in the field of nutrient management. *See* Majority Opinion at 247–49. In my alternate view, subsection 519(a) is wholly irreconcilable with the subsequent provisions of Section 519. In such a case, our analysis is guided by other principles of statutory construction. Specifically, where a conflict between two provisions in a statute is irreconcilable, particular provisions prevail over the general ones. *See* 1 Pa.C.S. § 1933. Additionally, clauses last in order of position shall prevail. *See* 1 Pa.C.S. § 1934. Thus, the provisions

of Section 519 which operate to guide the interpretation of this matter are subsections (b) and (d).[2] Reading those ****253** provisions together, if a local regulation of nutrient management is more stringent than, or inconsistent with, or in conflict with the provisions of the NMA (or its regulations or guidelines), then the local government may not prohibit or regulate practices related to nutrient management. Stated otherwise, the local government **may** prohibit or regulate practices related to nutrient management if its regulation is not more stringent than, inconsistent with, or in conflict with the provisions of the NMA.

***161** However, the inquiry does not end at reaching this construction of Section 519, and my divergence from the majority stems from the remainder of its analysis. Initially, the majority determines the General Assembly did not, by enactment of Section 519, intend to preclude **all** local regulation in the field of nutrient management, but, rather, intended to prohibit such local regulation only if it "is more stringent than, inconsistent with, or in conflict with" the NMA or its regulations. Majority Opinion at 247–49. However, the majority then inconsistently proceeds to prohibit **Montour** Township's local regulation because it "clearly regulate[s] nutrient management" (which, the majority previously determined, is not a reason to preclude a local regulation) and imposes obligations "in addition to" the obligations set forth in the NMA and its regulations. *Id.* at 248–49. But, under the majority's construction of the preemption provisions, "additional" requirements **may** be adopted if they are consistent with the NMA. Accordingly, an ordinance's imposition of obligations "in addition to" those described within the NMA is not one of the delineated, express preemptive criteria contained in Section 519; neither is it, therefore, a valid basis for preemption. Furthermore, it is difficult to imagine the import of a local regulation that does not impose some "additional" local obligation, within any statutory framework.

Moreover, it does not necessarily follow, as the majority reasons, that the Ordinance's adverse impact requirement is in conflict with the NMA simply by nature of being "additional" to the minimum standards for manure storage facilities described in Section 83.351 of the NMA regulations. *See id.* at 248–49, *citing* 25 Pa. Code § 83.351(a) ("The minimum standards contained in this section apply to new manure storage facilities and the expansion of existing manure storage facilities, as part of a plan developed for an [Nutrient Management Plan (NMP)] operation."). Notably, because Section 83.351 applies only to NMP operations, it does not apply to non-NMP, lower-intensity agricultural operations, such as Applicant's. Thus, absent local regulation, Applicant's 4,800 swine facility operates without even minimum standards for its ***162** manure storage. As noted by the Commonwealth Court, where there are **no** applicable state-level standards for manure storage, there can be **no conflict** with additional obligations imposed by local manure storage regulation. *See* ***Berner***, 176 A.3d at 1078-79. This circumstance, however, underscores the wider problem posed by broadly applying Section 519's preemption criteria: where the NMA and its regulations contain **no** provisions regarding a type of farm, **no** ordinance would be in conflict with the NMA (and thus **is not** preempted), but also, **any** plausible ordinance at all would be more stringent by requiring more than nothing (and thus **is** preempted). In my view, this problem is a complex one, and to avoid potentially unduly severe restrictions on local regulation, the Section 519 preemption analysis requires more than a superficial determination ****254** that requirements additional to those imposed by the NMA regulations are preempted.

As previously noted, the NMA does not preempt the entire field of nutrient management, *see* Majority Opinion at 247–49; thus, a conflict preemption analysis is warranted. "[C]onflict preemption require[s] an analysis of whether preemption is implied in or implicit from the text of the whole statute, which may or may not include an express preemption clause." *Hoffman Mining*, 32 A.3d at 594, *citing Cellucci v. Gen. Motors Corp.*, 550 Pa. 407, 706 A.2d 806, 809 (1998).

Hoffman Mining is instructive regarding the long-standing principles, parameters, and wealth of authority supporting a conflict preemption analysis. "Under the doctrine of conflict preemption, a local ordinance that **irreconcilably** conflicts with a state statute is invalid." *Id.* at 602 (emphasis added). The analysis requires a determination not only that a conflict exists, but whether such conflict is irreconcilable. *See id.* at 603, *quoting City Council of the City of Bethlehem v. Marcincin*, 512 Pa. 1, 515 A.2d 1320, 1326 (1986) ("Where an ordinance conflicts with a statute, the will of the municipality as expressed through **an ordinance will be respected unless the conflict between the statute and the ordinance is irreconcilable.**") (emphasis added). Under this assessment, a conflict is irreconcilable, and thus the local regulation is invalid, if ***163** either of two conditions exist: (1) if simultaneous compliance with both the local ordinance and the state statute is impossible, *i.e.*, if an actor is placed in a position of having to decide which enactment to follow, or, (2) if the local ordinance "stands 'as an obstacle to the execution

of the full purposes and objectives' of a statutory enactment of the General Assembly." *Id.* at 594-95, 602-03, *citing Council 13, Am. Fed'n of State, Cty. & Mun. Employees, AFL-CIO ex rel. Fillman v. Rendell*, 604 Pa. 352, 986 A.2d 63, 81-82 (2009) (irreconcilable conflict existed between federal law and Pennsylvania Constitution as former required timely payment of wages to state employees but latter barred expenditures from state treasury during budget impasse), *Marcincin*, 515 A.2d at 1323, 1326 (ordinance limiting mayor to two consecutive terms not irreconcilable with a statute providing mayor shall be eligible for reelection), and *Fross v. Cty. of Allegheny*, 610 Pa. 421, 20 A.3d 1193, 1203-1207 (2011) (ordinance restricting where convicted sex offenders could reside was impediment to objectives of Sentencing and Parole Codes setting forth policy of rehabilitation, reintegration, and diversion from prison of offenders based on individually-tailored assessments); *quoting Fross* at 1203 n.12. Additionally, the *Hoffman Mining* Court acknowledged local authorities' responsibility to enact zoning ordinances for the "health, safety or general welfare of the community, giving 'consideration to the character of the municipality, the needs of the citizens and the suitabilities and special nature of particular parts of the municipality,' " *id.* at 603, 605, *quoting* 53 P.S. § 10603(a), and observed "the General Assembly must **clearly** evidence its intent to preempt.... [s]uch clarity is mandated because of the severity of the consequences of a determination of preemption[,]" that is, the complete preclusion of local legislation in that area. *Id.* at 593 (emphasis added).

With regard to the matter *sub judice*, the General Assembly has not clearly established what it intended to preempt by enacting Section 519. Further, the consequence of preempting the Ordinance's adverse impact requirement, and any local regulations enacting additional manure storage requirements ***164** affecting non-NMP operations, is considerable: in the absence ****255** of state law to accomplish the task,[3] municipalities are without recourse to mitigate anticipated local health and safety impacts of manure storage operations on the lands immediately surrounding approximately 91 percent of the Commonwealth's animal-raising farms.[4]

Turning to application of the principles of conflict preemption, the first inquiry is whether Applicant's compliance with both laws is possible. As the majority observes, the NMA imposes nutrient management requirements on NMP operations only — those being CAOs, VAOs, and operations otherwise required to implement NMPs as part of a Clean Streams Law compliance plan; it imposes no requirements on non-NMP operations, but gives them the option to comply. Majority Opinion at 249, *citing* 3 Pa.C.S. § 506 and 25 Pa. Code §§ 83.201, 83.261. Consequently, as Applicant is a non-NMP operation, the NMA requires nothing of his farm. ***165** No conflict is apparent in this regard, as Applicant's compliance with the Ordinance will not violate the NMA.

The remaining inquiry is whether the adverse impact requirement of the zoning ordinance stands as an obstacle to the execution of the purposes of the NMA. Section 502 of the NMA, titled "Declaration of legislative purpose," provides, in pertinent part, "[t]he purposes of this chapter are as follows: [*inter alia*] (1) [t]o establish criteria, nutrient management planning requirements and an implementation schedule for the application of nutrient management measures **on certain agricultural operations** which generate or utilize animal manure."[5] 3 Pa.C.S. § 502(1)(emphasis added). As explained above, those "certain agricultural operations" regulated by the chapter include, expressly and only, NMP operations. Accordingly, local regulation impacting non-NMP operations presents no obstacle to the execution of the purposes of the NMA as articulated by the General Assembly.

Furthermore, although, as noted by the majority, the NMA's inclusion of voluntary provisions and financial assistance for lower-intensity ****256** operations to develop NMPs may reflect a legislative purpose to spare smaller farms from the onerous requirements of implementing an NMP, *see* Majority Opinion at 249–50, the NMA's silence with regard to non-NMP operations does **not** reflect a legislative intent to spare smaller farms from **all** nutrient management regulation. In my view, the Ordinance's adverse impact requirement does not pose an obstacle to this purpose. As a prerequisite to receiving a special exception for Applicant's intended hog-raising use, the contested portion of the Ordinance requires Applicant to provide "legally binding assurances with performance guarantees" demonstrating the operation's manure and wastewater management facilities "will be conducted without adverse impact upon adjacent properties." *Id.* at 243; **Montour** Township, General Codes, Ch. 27 (Zoning), § 402(1)(E). Applicant has made no attempt to submit such assurances, and, consequently, has not ***166** demonstrated the Ordinance's adverse impact requirement imposes obligations as burdensome as NMP implementation. Notably, the Commonwealth Court suggests the adverse impact requirement would be met by simply providing the performance

criteria or warranty information from Applicant's manure tank and equipment suppliers, and any proposed construction or operations contracts and workmanship warranties. ***Berner***, 176 A.3d at 1072-73. These minimal requirements suggested by the Commonwealth Court for compliance with the Ordinance appear to be much less burdensome than the NMP requirements imposed by the NMA. Thus, based on the record, or lack thereof, before the Court, I disagree with the majority's elevation of the Ordinance's requirements to "standards more burdensome" than NMP requirements. *See* Majority Opinion at 249–50, 250 n.17.

For the foregoing reasons, I discern no irreconcilable conflict between the Ordinance's adverse impact requirement and the NMA. Thus, I would conclude the NMA does not preempt **Montour** Township's zoning ordinance.

All Citations

655 Pa. 137, 217 A.3d 238

Footnotes

1 *See* 3 Pa.C.S. § 503 (defining "nutrient" to include livestock manure); *see also* 25 Pa. Code § 83.201 (same). We further note that the Act contains provisions relating to odor management, which are not at issue in this appeal and thus will not be addressed herein.

2 The definition of what constitutes a CAO is rather technical, but it suffices to say that they are larger, higher intensity agricultural operations. *See* 3 Pa.C.S. § 503 (defining CAO as "[a]gricultural operations meeting the criteria established under this chapter"); *id.* § 506(a) (providing a definition for CAOs while further requiring review of the criteria used to identify CAOs and the making of appropriate changes to the definition by regulation); 25 Pa. Code § 83.201 (defining CAOs as "[a]gricultural operations with eight or more animal equivalent units [(AEUs), defined as 1,000 pounds live weight of livestock or poultry animals, regardless of the actual number of animals, 3 Pa.C.S. § 503; *see also* 25 Pa. Code § 83.201,] where the animal density exceeds two AEUs per acre on an annualized basis").

3 Section 506(j) of the Act provides an exception to this general proposition: "Any agricultural operation found to be in violation of the act of June 22, 1937 (P.L. 1987, No. 394), known as The Clean Streams Law, may be required to submit a nutrient management plan within three months of notification thereof and implement the plan in order to prevent or abate such pollution." 3 Pa.C.S. § 506(j) (footnote omitted). Thus, in limited circumstances, it is possible that non-CAOs would have to submit an NMP.

4 While not cited by the parties or the lower tribunals, the Act's regulations also include a preemption provision. Section 83.205 of the Act's regulations provides:

> (a) The act and this subchapter are of Statewide concern and occupy the whole field of regulation regarding nutrient management to the exclusion of all local regulations.
>
> (b) After October 1, 1997, no ordinance or regulation of any political subdivision or home rule municipality may prohibit or in any way regulate practices related to the storage, handling or land application of animal manure or nutrients or to the construction, location or operation of facilities used for storage of animal manure or nutrients or practices otherwise regulated by the act or this subchapter if the municipal ordinance is in conflict with the act and this subchapter.

(c) Nothing in the act or this subchapter prevents a political subdivision or home rule municipality from adopting and enforcing ordinances or regulations which are consistent with and no more stringent than the requirements of the act and this subchapter.

(d) No penalty will be assessed under any valid local ordinance or regulation for any violation for which a penalty has been assessed under the act or this subchapter.

25 Pa. Code § 83.205.

5 "[A] special exception ... is a use which is expressly permitted in a given zone so long as certain conditions detailed in the ordinance are found to exist." *Broussard v. Zoning Bd. of Adjustment of City of Pittsburgh*, 589 Pa. 71, 907 A.2d 494, 499 (2006).

6 We will refer to this requirement as the "adverse impact requirement" throughout this Opinion.

7 Again, NMP operations are those operations that have an NMP, whether mandatory or voluntary, in place. *See supra* at pages 240–42.

8 The Commonwealth of Pennsylvania has filed an *amicus curiae* brief in support of Applicant. While the Commonwealth agrees with the Commonwealth Court's characterization of the Act's preemption framework as prohibiting local regulation to the extent that it is more strict than or inconsistent with the Act, the Commonwealth argues that the court incorrectly applied that framework in this case, advancing and expanding upon many of the arguments made by Applicant in support of its position.

The Pennsylvania Farm Bureau and PennAg Industries Association have also filed an *amici curiae* brief on behalf of Applicant. In furthering the arguments made by Applicant, these organizations highlight the challenges faced by Pennsylvania's farm families in sustaining their agricultural operations. *Amici* also note the burdens imposed upon both smaller agricultural operations and the Act's compliance system should the Commonwealth Court's decision stand, given that it would require those operations to submit voluntary NMPs in order to receive preemption protection under the Act.

9 The Act defines "best management practice" as "[a] practice or combination of practices determined by the [State Conservation Commission] to be effective and practicable ... to manage nutrients to protect surface and ground water." 3 Pa.C.S. § 503; *see also* 25 Pa. Code § 83.201 (same). The Act's definition includes a non-exhaustive list of items such as manure storage facilities. 3 Pa.C.S. § 503.

10 As examples of permitted local regulation, Applicant posits that municipalities can determine the location of zoning districts, the appropriate zoning districts where agricultural uses can be located, and whether such uses would be permitted as of right or upon special exception, so long as the municipality's action is not in conflict with the Act. Applicant's Brief at 29. While Applicant's argument is less than clear as it relates to concepts of field and conflict preemption, it is unnecessary for our purposes to discern its exact nature.

11 Conflict preemption "acts to preempt any local law that contradicts or contravenes state law." *Nutter*, 938 A.2d at 404. As for field preemption, "the state regulatory scheme so completely occupies the field that it appears the General Assembly did not intend for supplementation by local regulations." *Huntley*, 964 A.2d at 863.

12 *See also* 25 Pa. Code § 83.205 of the Act's regulations, *supra* at pp. 242, n.4.

13 It is worth noting that the Act and its regulations do not define "nutrient management." However, we find that the term clearly encompasses the activities listed in Subsection 519(b) of the Act, namely, "practices related to the storage, handling or land application of animal manure or nutrients or to the construction, location or operation of facilities used for storage of animal manure or nutrients or practices otherwise regulated by" the Act. 3 Pa.C.S. § 519(b).

14 Notably, there are incentives to implementing a voluntary NMP, including its use "as a mitigating factor in any civil action for penalties or damages alleged to have been caused by the management or utilization of nutrients ... pursuant to the implementation." 3 Pa.C.S. § 515.

15 In *Locust Township*, the Commonwealth Court was tasked with determining whether the Act preempted various provisions of a local ordinance. Most importantly, the court in *Locust Township* found a setback requirement in the local ordinance to be preempted by the Act because, *inter alia*, the local requirement exceeded the maximum setback requirement provided in the Act for CAOs and "applie[d] to farming operations that the General Assembly has deemed to be so small as to justify their exclusion from the lesser [Act] setback requirements for larger farming operations." *Locust Twp.*, 49 A.3d at 512. Thus, contrary to the holdings by the Commonwealth Court both in this case and in *Walck*, *supra* at page 247, the Commonwealth Court in *Locust Township* did not base its preemption determination on whether smaller farms subject to the local ordinance had an NMP.

16 The Act's regulations also include various provisions relating to financial assistance for implementing NMPs. *See* 25 Pa. Code §§ 83.221-83.233.

17 We reiterate that the Act provides that it "shall be read in pari materia with other statutes." 3 Pa.C.S. § 521. In this regard, Subsection 10603(b) of the MPC provides that zoning ordinances may regulate the location and construction of structures, *inter alia*, except to the extent "that regulation of activities related to commercial agricultural production would exceed the requirements imposed under [the Act] regardless of whether any agricultural operation within the area to be affected by the ordinance would be a" CAO. 53 P.S. § 10603(b). Thus, our conclusion is further supported by the MPC.

18 The dissent suggests that our decision today prohibits any local regulation of nutrient management by lower-intensity non-NMP operations. *See, e.g.*, Dissenting Op. at 251–52. Respectfully, that is not the case. As explained herein, we hold that the Act preempts local regulation of nutrient management by those operations to the extent that the local regulation is more stringent than, inconsistent with, or in conflict with the Act's requirements. To be clear, nothing in our decision prohibits a municipality from regulating lower intensity non-NMP operations outright.

With respect to the particular local provision at issue here, the dissent concludes that Subsection 402(1)(E)'s adverse impact requirement is not in conflict with and thus preempted by the Act because, *inter alia*, it does not impose standards more onerous than those contained in the Act for NMP operations and presents no obstacle to the execution of any legislative purpose behind the Act. *Id.* at 255–56. We disagree. The Act's mandates are indeed onerous, a point the dissent does not dispute, and yet they do not require larger, higher-intensity agricultural operations and other NMP operations to submit "legally binding assurances with performance guarantees" demonstrating that manure storage facilities "will be conducted without adverse impact upon adjacent properties" as Subsection 402(1)(E) does. Given the Legislature's objective to spare lower-intensity non-NMP operations from the burden of mandatory compliance with the Act's onerous requirements, allowing municipalities to impose obligations that go beyond those requirements, in our view, clearly presents an obstacle to that objective. Further, given that the imposition of the adverse impact requirement alone is an obstacle to that objective, contrary to the dissent's position, Applicant need not attempt to comply with that local requirement to demonstrate that he is entitled to protection of the Act's preemption provision.

1 As explained in greater detail herein, I do not dispute the NMA places no obligations on Applicant, whose farm is not a concentrated animal operation (CAO) or voluntary agricultural operation (VAO), or otherwise required to implement a nutrient management plan (NMP).

2 Subsection 519(c) is not implicated or addressed in this case. *See* 3 Pa.C.S. § 519(c).

3 I note the Clean Streams Law, 35 P.S. §§ 691.1-691.1001, does subject lower-intensity agricultural operations to some regulation with regard to manure pollution control, for which violations a farm "may" be required to develop and implement an NMP. 3 Pa.C.S. § 506(j). However, the extent to which the Clean Streams Law regulates Applicant's

manure management activities appears, based on this record, limited in two respects. First, though he must develop and keep on file a Manure Management Plan, such a plan is not a document reviewed or approved by any authority, but a workbook document which can be prepared by the farmer or by a person certified to write such plans. ***Berner***, 176 A.3d at 1078 (quoting testimony of state-certified nutrient management specialist Todd Rush, who prepared Applicant's Manure Management Plan). Applicant does not suggest his Manure Management Plan in any way provides assurances against adverse impacts to his surrounding properties. *Id.* at 1072. Second, on review of the Clean Streams Law regulation Applicant asserts governs his farm, it is questionable whether he is in fact subject to any of its enforcement provisions, which apply to illegal pollutant discharges by an operation "that meets the definition of ... [a concentrated animal feeding operation (CAFO).]" *See* 25 Pa. Code § 91.36(c)(2). It is undisputed Applicant's farm does not meet the definition of a CAFO. ***Berner***, 176 A.3d at 1079 ("[Applicant] is not a CAO or a CAFO.").

4 In its brief supporting Applicant, the Commonwealth relates, "[o]f the 59,000 farms in the Commonwealth, approximately 23,000 raise animals. The vast majority of those farms — approximately 91% — are like [Applicant's], too small to necessitate a nutrient management plan under the NMA." Commonwealth's Amicus Curiae Brief at 17.

5 The additional four purposes enumerated in NMA Section 502 have no bearing on the circumstances of this case. *See* 3 Pa.C.S. § 502(2)-(5).

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

JOSH SHAPIRO
ATTORNEY GENERAL

May 7, 2020

Office of the Attorney General
ATTN: Senior Deputy AG Robert A. Willig
1251 Waterfront Place
Mezzanine Level
Pittsburgh, PA 15222
[redacted]

South Strabane Township Board of Supervisors
550 Washington Road
Washington, PA 15301

[redacted]

Re: ACRE Complaint – South Strabane Township, Washington County – [redacted]

Dear Board of Supervisors and [redacted]

Act 38 of 2005, 3 Pa.C.S. § 311, *et.seq,* the Agricultural Communities and Rural Environment ("ACRE") law, requires that the Office of Attorney General ("OAG"), upon request of a farm owner or operator, review a local government ordinance for compliance with Act 38. We write to inform you that we received an ACRE request from [redacted] A copy of the ACRE request is attached for your review. [redacted] raises two issues: 1) setbacks; and 2) fencing.

The OAG has an ACRE Resource Center on its website (https://www.attorneygeneral.gov/resources/acre/) which contains a list of cases the OAG has handled since 2006. Included in that list are links to PDFs of our "Acceptance Letters." When the OAG receives an ACRE Complaint, we review the case and decide whether we think an ACRE violation has occurred. If the OAG does so conclude, we draft an Acceptance Letter explaining to the Township in detail why its ordinances violate state law and what it must do to avoid litigation. I request that South Strabane Township respond to [redacted] ACRE complaint within thirty (30) days of receipt of this letter. I respectfully suggest that the Township may want to refer to the OAG ACRE website before drafting its response. The OAG has repeatedly addressed in earlier ACRE cases the setback issue. What follows is a list of prior OAG Acceptance Letters where the setback issue has been thoroughly analyzed: *Woodward Township,* April 2017; *Cumberland Township,* November 2016; *Gratz Township,* November 2016; *Salem Township,* July 2016; *Montour Township,* April 2015; *Heidelberg Township,* December 2014; *Locust Township,* February 2011; *Colerain Township,* April 2010; *Elizabeth Township,* September 2009; *Hartley Township,* August 2008; *Lewis Township,* August 2008; *Montour Township,* June 2008; and *Lower Towamensing Township,* July 2008. I have also attached for your review a Penn State

Extension publication, *Agronomy Facts 40, Nutrient Management Legislation in Pennsylvania: A Summary of the 2006 Regulations.*

[redacted] wants to build a horse barn. [redacted] will not be operating a Concentrated Animal Operation ("CAO") nor a Concentrated Animal Feeding Operation ("CAFO"). As one can see on page 1 of the *Agronomy Facts 40* as well as in several of the Acceptance Letters just cited, the setbacks apply only to CAOs and CAFOs. They do not apply to a small horse farm. Moreover, the only time a 300 feet setback applies is when the building is "located on slopes exceeding 8 percent where the slope is toward the property line" or when the building has a "capacity of 1.5 million gallons or greater...." of waste. *Agronomy Facts 40,* p. 5. [redacted] informs me that the proposed barn is not to be built on a slope exceeding 8% running toward [redacted] neighbor's property line and of course the horse barn will not produce 1.5 million gallons or more of waste. On the fencing issue, it is unclear why South Strabane requires a permit for fencing when its own ordinances state that a fencing "[p]ermit shall not be required for farm fences." §245-172.3.b.

Once you have reviewed the Acceptance Letters and *Agronomy Facts 40*, can you please include in your response whether the Township's will permit [redacted] to build her barn. Thank you very much for your assistance and please stay safe during these trying times.

Sincerely,

Robert A. Willig

Senior Deputy Attorney General