



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

MICHELLE A. HENRY
ATTORNEY GENERAL

September 27, 2023

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

Earl Township
ATTN: Board of Supervisors
517 North Railroad Avenue
New Holland, PA 17557

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
Via email at [REDACTED]

Re: ACRE Complaint – Earl Township – Lancaster County
[REDACTED]

Dear Board of Supervisors and [REDACTED]

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 the law. ACRE 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] filed on behalf of his client [REDACTED]. [REDACTED] attach a copy of the ACRE request for your review. [REDACTED] and [REDACTED] contend that Earl Township is “operating outside the scope of Act-38 applying more stringent requirements to [REDACTED] application.” [REDACTED] “is complying with state standards” and has received all necessary state approvals but the Township is saying “that these approvals do not super[s]ede [its] authority” to impose its own standards and to require its own approvals. If Earl Township 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 appears that one problem [REDACTED] and [REDACTED] are having is manure setback distances. I enclose for your review the Penn State Extension’s publication *Agronomy Facts 40, Nutrient Management Legislation in Pennsylvania: A Summary of the 2006 Regulations*. 100, 200, and 300 feet manure setbacks, no others, apply to larger farms, that is, Concentrated Animal Operations (“CAOs”) and Concentrated Animal Feeding Operations (“CAFOs”). *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 number of Animal Equivalent Units ("AEUs") on the property determines whether a farm is a CAO or CAFO. *Agronomy Facts* 40, pp. 1-2.¹ If a farm is not a CAO or CAFO, what I will refer to as a "small farm" for ease of explanation, setbacks do not apply. 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.

The OAG has an ACRE website. <https://www.attorneygeneral.gov/resources/acre/>. Therein you will see a list of the ACRE cases that have come into this Office along with what we call "Acceptance Letters." If the OAG believes that certain ordinances violate ACRE we draft these Acceptance Letters explaining why the ordinances violate ACRE and what the municipality must do to remedy the situation. We put those letters in the "Disposition" Box of the matrix. Just click on the hyperlink that says "View Letter." This Office has consistently concluded that setback requirements for CAOs and CAFOs are 100, 200, and 300 feet. This Office has also consistently concluded that manure setbacks do not apply to small farms. See e.g. *South Strabane Township* (April 2020). If [REDACTED] proposed operation rises to the level of a CAO/CAFO, the 100/200/300 feet setbacks, and no other, apply. If the operation is a "small farm," the setbacks do not apply.

[REDACTED] wrote a letter to [REDACTED] of the Planning Commission on July 7, 2023. Therein he mentions the term "Intensive Agriculture." There is no such term under the law. The OAG has dealt many times with what townships refer to as "Intensive Agriculture" and how they try to impose requirements in excess of, or in conflict with, or duplicative of already existing state standards. This they cannot do. You can review some of the Letters the OAG has drafted on this issue at our website. See e.g. *Elk Township*, pp. 1-4 (August 2019); *Todd Township*, pp. 2-3 (July 2018).

[REDACTED] also ponders whether larger farms are "normal" because if they are not then the well-established limitations on characterizing farms as nuisances under the Right to Farm Act ("RTFA") would not apply. See 3 P.S. § 953(a), **Limitations on local ordinances.** There is no doubt - CAOs and CAFOs are **NORMAL** Agricultural Operations ("NAOs") (emphasis added) as that term is defined in the RTFA, *Id.*, § 952, **Definitions, Normal agricultural operation.** There is no doubt that the proposed [REDACTED] duck farm would be a **NORMAL** Agricultural Operation as the farm would be "engage[d] in the production and preparation for market of poultry, livestock and their products" as required under the RTFA. See *Horne v. Haladay*, 728 A.2d 954, 958 (Pa.Super. 1999) (farm of 122,000 egg laying hens "clearly is a 'normal agricultural operation' as defined by the Right to Farm Act."). A NAO complying with all applicable state regulations, by definition, cannot constitute a nuisance.

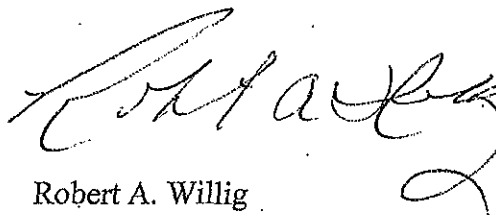
Earl Township talks of possible odors/smells/gases associated with the proposed duck farm. The OAG has repeatedly addressed that issue as well in prior ACRE cases. See *Walker*

¹ A CAO is an agricultural operation with eight or more AEUs where the animal density exceeds two AEUs per acre on an annualized basis. 25 Pa.Code §§ 83.201, 262. A CAFO is a CAO with greater than 300 AEUs, any agricultural operation with greater than 1,000 AEUs, or any agricultural operation defined as a large CAFO under 40 CFR § 122.23. 25 Pa.Code § 92a.2. An Animal Equivalent Unit ("AEU") is "1,000 pounds of live weight of any animal on an annualized basis." *Agronomy Facts* 54, *Pennsylvania's Nutrient Management Act (Act 38): Who is Affected?*, p. 1; See 3 Pa.C.S. § 503, *Definitions*; 25 Pa.Code § 83.201, *Definitions*.

Township, pp. 7-8 (November 2016).² [REDACTED] has an already State approved, and extremely detailed, odor management plan. Earl Township cannot impose additional requirements.

In sum, it appears that [REDACTED] and [REDACTED] have the necessary state approvals to operate a duck farm. It appears that Earl Township is imposing additional local municipality requirements that exceed, or conflict with, or duplicate existing state standards which it cannot do. If that is the case and the OAG is correct, this constitutes an ACRE violation. If on the other hand, Earl Township disagrees and I am wrong then please correct me. If you can send me Earl Township's response to the ACRE complaint and its thoughts on this matter within thirty (30) days I would greatly appreciate it. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Willig', written over a horizontal line.

Robert A. Willig
Senior Deputy Attorney General

² The *Walker Township* Acceptance Letter is not included in the list/matrix. That list goes back to 2017. *Walker Township* is a 2016 case. In the upper right hand corner of the ACRE Website one sees in red font a link "2006 to Present ACRE Acceptance Letters." Click on that link. The *Walker Township* Acceptance Letter is found there. In addition to explaining in great detail the law of odor/smell/gases, the *Walker Township* case also extensively addresses the whole "Intensive Agriculture" matter.