

**OFFICE OF ATTORNEY GENERAL
COMMONWEALTH OF PENNSYLVANIA**

**Sixth Annual Report Of The
Attorney General To The General Assembly
Pursuant To Section 318 Of Act 38 Of 2005
“ACRE”
Agriculture, Communities And Rural Environment**



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The Agriculture, Communities and Rural Environment (ACRE) statute, Act 38, took effect on July 6, 2005. The central purpose of Act 38 of 2005 is to protect normal agricultural operations from unauthorized local regulation. The Act furthers that purpose by conferring upon the Attorney General: (1) the power and duty, upon the request of an owner or operator of a normal agricultural operation, to review local ordinances for compliance with State law; and (2) the authority, in the Attorney General's discretion, to bring a legal action against a local government unit in Commonwealth Court to invalidate or enjoin the enforcement of an unauthorized local ordinance.

In response, the Office of Attorney General (OAG) developed and implemented a process for receiving requests for review of ordinances, for completing such reviews within the 120-day time period prescribed by the Act, and for bringing legal action when such action is warranted. Consistent with Act 38, all requests for review received during the year ending July 6, 2011, were completed within 120 days (or required an extension of the 120-day review period to obtain additional information or provide the time required to complete the review) or were still within the 120-day review period.

When the OAG receives a request for review of an ordinance, the OAG sends the owner/operator who requested the review an acknowledgement that the request was received, and the municipality whose ordinance is the subject of the request for review a notice that the request has been received and that the ordinance will be reviewed.

When the OAG completes its review, the OAG advises both the owner/operator and the municipality in writing whether or not it intends to bring legal action to invalidate or enjoin the enforcement of the ordinance. If the OAG advises the municipality that it intends to bring legal action, it affords municipal officers an opportunity to discuss the legal problems identified in the review and to correct such problems before a legal action is brought.

I. ANNUAL DATA

Between July 6, 2010, and July 6, 2011, the OAG:

- Received 11 requests for review of local ordinances;
- Completed review of 4 ordinances (two additional reviews were withdrawn prior to a decision by the OAG due to a resolution between the owner/operator and the municipality (one of those reviews was withdrawn after July 6, 2011));
- Sent 4 responses to owner/operators advising that no legal action would be filed;
- Sent 5 notices to municipalities explaining that additional time was necessary to complete the review;
- Re-opened a request for review that was resolved in 2009 after the OAG was notified and confirmed that the municipality enacted new ordinance provisions in 2010 that have legal problems.

II. AGGREGATE DATA

Between July 6, 2005, and July 6, 2011, the OAG:

- Received 78 requests for review of local ordinances (one request was submitted, but withdrawn in 2006 and is excluded from the AGGREGATE DATA);
- Completed review of 68 ordinances;
- Sent 37 responses to owner/operators advising that no legal action would be filed;
- Sent 31 notices to municipalities of legal problems with ordinances;
- Three requests for review of a local ordinance were withdrawn due to a resolution between the owner/operator and the municipality while the OAG's review was pending (includes one review withdrawn after July 6, 2011);
- Brought 7 legal actions against municipalities to invalidate or enjoin the enforcement of an unauthorized local ordinance (four of those legal actions remain active);
- Resolved 23 out of the 31 reviews that were accepted due to legal problems with ordinances (includes two reviews that were resolved after July 6, 2011).

III. REQUESTS FOR REVIEW, NATURE OF COMPLAINTS AND ACTION TAKEN

A. Status of 7 Legal Actions

1. Locust Township, Columbia County

The owner/operator requested review of Ordinance No. 4-2001, which regulates “intensive animal agriculture.” The owner/operator complained that the ordinance conflicts with State law. The OAG notified the Township of legal problems with the ordinance and offered the Township an opportunity to discuss and correct them. After the Township failed to correct the problems, the OAG filed a lawsuit in Commonwealth Court to invalidate and enjoin the enforcement of the ordinance. On preliminary objections, the Commonwealth Court held that Act 38 does not apply to a pre-existing ordinance unless the municipality acts to enforce it. The OAG appealed that decision to the Pennsylvania Supreme Court. On April 29, 2009, in a published opinion, the Supreme Court reversed the Commonwealth Court’s ruling and held that the Attorney General is explicitly empowered to bring action to invalidate enacted local ordinances without regard to enforcement. The case was remanded to the Commonwealth Court. The OAG filed a Motion for Summary Judgment, which is currently pending with the Court.

2. Lower Oxford Township, Chester County

The owner/operator requested review of Ordinance No. 2004-1, which regulates composting activities. The owner/operator complained that the ordinance unlawfully restricts mushroom compost preparation. The OAG notified the Township of legal problems with the ordinance and offered the Township an opportunity to discuss and correct them. After the Township failed to correct the problems, the OAG filed a lawsuit in Commonwealth Court to invalidate and enjoin the enforcement of the ordinance. On preliminary objections, the Commonwealth Court held that Act 38 does not apply to a pre-existing ordinance unless the

municipality acts to enforce it. The OAG appealed that decision to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court issued a per curiam order affirming the Commonwealth Court's ruling, and the OAG filed a Petition for Reargument, which the Court ordered held pending the outcome of *Locust Township*. On November 10, 2009, the Supreme Court granted the petition and vacated its per curiam order based on its reversal of the Commonwealth Court's decision in *Locust Township*. Following negotiations, Lower Oxford Township enacted ordinance amendments to resolve the legal problems with the ordinance and the OAG withdrew the lawsuit in July 2011.

3. Heidelberg Township, North Heidelberg Township, Robesonia Borough, Womelsdorf Borough, Berks County

The owner/operator requested review of the Joint Township Ordinance, which regulates "intensive raising of livestock or poultry." The owner/operator complained that the ordinance conflicts with state law. The OAG notified the municipalities of legal problems with the ordinance and offered the municipalities an opportunity to discuss and correct them. After the municipalities failed to correct the problems, the OAG filed a lawsuit in Commonwealth Court to invalidate and enjoin the enforcement of the ordinance. On preliminary objections, the Commonwealth Court held that Act 38 does not apply to a pre-existing ordinance unless the municipality acts to enforce it. The OAG appealed that decision to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court issued a per curiam order affirming the Commonwealth Court's ruling. The OAG filed a Petition for Reargument, which the Court ordered held pending the outcome of *Locust Township*. On November 10, 2009, the Supreme Court granted the petition and vacated its per curiam order based on its reversal of the Commonwealth Court's decision in *Locust Township*. The Township filed an Answer to the Petition for Review and the litigation is ongoing.

4. Richmond Township, Berks County

The owner/operator requested review of Ordinance No. 81-2000, which regulates “intensive agricultural activity.” The owner/operator complained that the ordinance conflicts with state law. The OAG notified the Township of legal problems with the ordinance and offered the Township an opportunity to discuss and correct them. After the Township failed to correct the problems, the OAG filed a lawsuit in Commonwealth Court to invalidate and enjoin the enforcement of the ordinance. The Township filed a Motion for Judgment on the Pleadings, which the Commonwealth Court denied in its entirety in a published opinion on May 22, 2009.

The OAG filed a Motion for Summary Judgment. On May 28, 2010, the Commonwealth Court granted the Motion for Summary Judgment on all six counts of the Petition for Review and enjoined Richmond Township from enforcing the provisions of the ordinance relating to intensive agriculture. On August 10, 2010, the Commonwealth Court granted the OAG’s motion to designate the summary judgment decision as a reported opinion. Following the Commonwealth Court’s grant of summary judgment, the OAG negotiated with Richmond Township on amendments to the ordinance to resolve the legal problems. The OAG approved Richmond Township’s proposed ordinance amendments and Richmond Township is currently in the process of enacting those amendments.

5. East Brunswick Township, Schuylkill County

The owner/operator requested review of Ordinance No. 1 of 2006, which regulated land application of biosolids and prohibited land application of biosolids by corporations. The owner/operator complained that the ordinance conflicted with state law. The OAG notified the Township of legal problems with the ordinance and offered the Township an opportunity to discuss and correct them. After the Township failed to correct the problems, the OAG filed a

lawsuit in Commonwealth Court to invalidate and enjoin the enforcement of the ordinance, along with an Application for Summary Relief. The Township filed preliminary objections to the lawsuit.

On September 23, 2008, the Commonwealth Court issued a published Opinion denying the OAG's request for summary relief and denying the Township's Preliminary Objections. Also in September 2008, the Township repealed Ordinance No. 1 of 2006, and enacted a new ordinance regulating land application of biosolids, which also had legal problems. The OAG filed an Amended Petition for Review to challenge the new ordinance. The Township filed Preliminary Objections. On August 21, 2009, the Commonwealth Court, in a published opinion, denied the Township's preliminary objections in their entirety.

After the Commonwealth Court denied the Township's preliminary objections, the OAG negotiated with the Township on amendments to the Ordinance to resolve the legal problems. The Township enacted the amendments and the OAG withdrew the lawsuit in November 2009.

6. Peach Bottom Township, York County

The owner/operator requested review of an existing ordinance that regulates concentrated animal operations and concentrated animal feeding operations (CAOs/CAFOs), a proposed amendment to the existing CAO/CAFO ordinance, and an ordinance regulating below ground manure storage facilities. The owner/operator complained that the ordinances conflict with state law and impede normal agricultural operations. The OAG notified the Township of the legal problems with the existing and proposed ordinances and offered the Township an opportunity to discuss and correct them. After the Township failed to correct the problems, the OAG filed a lawsuit in Commonwealth Court to invalidate and enjoin the enforcement of the ordinance in

August 2009. The Township filed an Answer to the Petition for Review and the litigation is ongoing.

7. Packer Township, Carbon County

The owner/operator requested review of the Packer Township Local Control, Sewage Sludge and Chemical Trespass Ordinance, which regulates biosolid land application and prohibits biosolid land application by corporations. The owner/operator complained that the ordinance conflicts with state law. The OAG notified the Township of legal problems with the ordinance and offered the Township an opportunity to discuss and correct them. After the Township refused to engage in negotiations to resolve the legal problems, the OAG filed a lawsuit in Commonwealth Court to invalidate and enjoin the enforcement of the ordinance in August 2009.

The Township filed preliminary objections and the OAG filed an Application for Summary Relief. On January 6, 2010, the Commonwealth Court denied all of the Township's Preliminary Objections. The Court denied the OAG's Application for Summary Relief. The Township filed an Answer to the Petition for Review and litigation is ongoing.

B. Matters Unresolved as of 2010 Report

The following is an update on matters listed in our 2010 Report to the General Assembly, but unresolved as of the date of that Report, which, with respect to each such matter, identifies the ordinance submitted for review; the complaint about the ordinance asserted by the owner/operator who requested the review, the actions taken by the OAG, and the current status.

1. Hartley Township, Union County

The owner/operator requested review of the Township Zoning Ordinance, which regulates commercial livestock and concentrated animal operations. The owner/operator complained that setback and permit requirements impede the operation and expansion of normal agricultural

operations. The OAG notified the Township of legal problems with the ordinance and offered the Township an opportunity to discuss and correct them. After negotiations, Hartley Township amended its ordinance in October 2011 to bring it into compliance with Act 38.

2. Fayette County

The owner/operator requested review of the application of a County ordinance requiring the removal of truck trailers used for hay storage from the farm property. The owner/operator complained that the ordinance violates state law and impedes normal agricultural operations. The owner/operator and County submitted additional information to the OAG and the ordinance review is pending.

3. Heidelberg Township, Lebanon County

OAG received requests from two separate owners/operators requesting review of Township ordinance provisions regulating concentrated animal operations (CAOs). The owners/operators complained that the ordinance provisions conflict with state law and impede the ability to engage in normal agricultural operations. The OAG notified the Township of legal problems with the ordinance and offered the Township an opportunity to discuss and correct them. The OAG and Township are currently in negotiations seeking to resolve the matter without resorting to litigation.

4. Douglass Township, Montgomery County

The owner/operator requested review of a Township ordinance regulating biosolid land application. The owner/operator complained that the ordinance conflicts with state law and prohibits normal agricultural operations. The OAG notified the Township of legal problems with the ordinance and offered the Township an opportunity to discuss and correct them. The OAG

and Township are in negotiations seeking to resolve the matter through ordinance amendment without resorting to litigation.

5. Colerain Township, Lancaster County

The owner/operator requested review of the Township's action in refusing to issue a building permit for the expansion of a dairy barn on his concentrated animal operation due to a neighbor's appeal of the zoning hearing board's decision granting the owner/operator a special exception to build the barn. The owner/operator also requested review of the provisions of the Township ordinance regulating intensive agricultural operations and the requirements for a special exception. The owner/operator obtained all state approvals for the dairy barn expansion; thus the owner/operator complained that the Township's refusal to issue a building permit and the provisions of the ordinance conflict with state law and prohibit normal agricultural operations. The OAG notified the Township that its refusal to issue the building permit unlawfully prohibited a normal agricultural operation in violation of Act 38. The OAG also notified the Township of legal problems with the ordinance provisions regulating an "intensive agricultural production facility" and offered the Township an opportunity to discuss and correct them. The Township issued the owner/operator a permit to build the dairy barn and submitted proposed amendments to its ordinance to resolve legal problems. After negotiations, Colerain Township amended its ordinance in July 2011 to bring it into compliance with Act 38.

6. Maiden Creek Township, Berks County

The owner/operator of a greenhouse operation located in the Township's commercial zone requested review of the Township's action in enforcing its ordinance requiring mandatory connection and use of public water and prohibiting the owner's/operator's use of a well on the property to irrigate horticultural crops. The owner/operator complained that the ordinance

conflicts with state law and prohibits and limits his normal agricultural operation. The OAG is engaged in discussions and an exchange of information with the Township regarding the legal issues implicated in this review. The ordinance review is pending.

7. West Fallowfield Township, Chester County

The owner/operator requested review of the Township ordinance provisions for signs at roadside stands and restrictions on the keeping of livestock. The owner/operator complained that the ordinance prohibits or limits normal agricultural operations. The OAG notified the owner/operator and the Township that it would not file a lawsuit. The owner/operator requested reconsideration of the OAG's decision and submitted additional information. After considering the additional information, the OAG again notified the owner/operator that it would not file a lawsuit.

8. Hilltown Township, Bucks County

The owner/operator requested review of a Township ordinance restricting sales of agricultural products at a roadside stand. The owner/operator also requested review of the Township ordinance requirements for land development, including stormwater management requirements. The OAG notified the Township of legal problems with the ordinance provisions for sales at agricultural roadside stands and offered the Township an opportunity to discuss and correct them. The OAG and the Township are in negotiations seeking to resolve the matter through ordinance amendment without resorting to litigation. The OAG is engaged in discussions and an exchange of information with the Township and counsel for the owner/operator regarding the remaining issues on the requirements for land development. The ordinance review with respect to land development requirements is pending.

9. Drumore Township, Lancaster County

The owners/operators requested review of the Township's interpretation of the definition of agriculture to preclude a licensed Cervidae Livestock Operation from an agricultural zone. The owner/operator complained that the Township's action violated state law and prohibited a normal agricultural operation. The OAG notified the Township that a normal agricultural operation includes a licensed Cervidae Livestock Operation; therefore, the Township's application of its ordinance violated state law. After negotiations, Drumore Township agreed to recognize that the term agriculture includes Cervidae Livestock Operations.

C. New Matters

The following is a summary of the requests for review of local ordinances received by the OAG between July 6, 2010, and July 6, 2011, which, with respect to each request, identifies the ordinance submitted for review; the complaint about the ordinance asserted by the owner/operator who requested the review, and the actions taken by the OAG up to the date of this Report.

1. Lower Milford Township, Lehigh County

The owner/operator requested review of Lower Milford Township's Historic Preservation Ordinance. The owner/operator complained that the ordinance precluded his ability to demolish a barn building. The OAG notified the owner/operator and the Township that it would not file a lawsuit.

2. Fairview Township, Erie County

The owners/operators requested review of Fairview Township's ordinance and actions in re-zoning an agricultural zone to a residential zone and precluding a pre-existing agricultural operation. The owners/operators complained that the ordinance prohibits or limits normal agricultural operations. The OAG notified the owner/operator and the Township that it would

not file a lawsuit. The owners/operators requested reconsideration of the OAG's decision and submitted additional information to prove they are engaged in a normal agricultural operation. The OAG is considering that additional information and the Township's written response.

3. Upper Bern Township, Berks County

The owner/operator requested review of Upper Bern Township's enforcement of a special exception requirement to dispose of wastes in a manner to avoid creating insect and rodent problems. The owner/operator complained that this requirement was preempted by the Nutrient and Odor Management Act and an impermissible regulation of manure management practices. The OAG discovered that the owner/operator and the Township resolved the matters at issue through agreement prior to the OAG completing the review. Thus, the owner/operator formally withdrew the request for review.

4. Earl Township, Lancaster County

The owner/operator requested review of Earl Township's action in requiring the owner/operator to comply with the Uniform Construction Code to build a barn addition that would contain a feed shop business. The owner/operator complained that the barn addition was an agricultural building exempt from the Uniform Construction Code. The OAG notified the owner/operator and the Township that it would not file a lawsuit.

5. East Allen Township, Northampton County

The owner/operator requested review of East Allen Township's application of the Uniform Construction Code to barn renovations and zoning requirements to engage in wine promotion events on the property. The owner/operator complained that East Allen Township's actions prohibit or limit the normal agricultural operations. The OAG requested that the

owner/operator provide additional information necessary to conduct the review. The request for review is pending.

6. Butler Township, Butler County

The owner/operator requested review of Butler Township's ordinance regulating the burning of wastes in an Agricultural Security Area. The owner/operator complained that the ordinance prohibits or limits a normal agricultural operation and violates State law. The OAG notified the owner/operator and the Township that it would not file a lawsuit.

7. Upper Makefield Township, Bucks County

The owner/operator requested review of a joint municipal ordinance that regulates on-site events at wineries. The owner/operator complained that the regulation prohibits or limits a normal agricultural operation. The ordinance review is pending.

8. Buffalo Township, Union County

The owner/operator requested review of Buffalo Township's interpretation of the ordinance definition for "Agricultural Operation" to exclude the practice of processing biosolids through the addition of lime to produce agricultural lime for application to farm fields. The owner/operator complained that the Township's action violates State law and prohibits and limits a normal agricultural operation. The ordinance review is pending.

9. Fairview Township, Erie County

The owner/operator requested review of Fairview Township's stormwater management ordinance requirements. The owner/operator complained that the stormwater management requirements prohibit or limit a normal agricultural operation. The ordinance review is pending.

10. Tinicum Township, Bucks County

The owners/operators requested review of Tinicum Township's ordinance provisions precluding the use of deer fencing to protect their agricultural crops. The owners/operators complained that the ordinance prohibits or limits their normal agricultural operation. Shortly after the OAG notified the Township of the request for review, the Township submitted proposed amendments to the ordinance to allow agricultural operations to utilize deer fencing. The OAG facilitated the negotiations between the owners/operators and the Township. Tinicum Township enacted the ordinance amendments and the owners/operators withdrew the request for review while the OAG's review was pending.

11. Shrewsbury Township, York County

The owners/operators requested review of Shrewsbury Township's building permit requirements and fees. The owners/operators complained that the building permit requirements and fees prohibit or limit normal agricultural operations. The ordinance review is pending.

D. Re-Opened Matters

1. Lehigh Township, Northampton County

The OAG accepted a request for review of an ordinance that regulated "commercial livestock operations." In 2009, after negotiations, Lehigh Township enacted amendments that resolved the legal problems with the ordinance. In 2011, the OAG was notified that Lehigh Township enacted new ordinances in 2010 to regulate Concentrated Animal Feeding Operations. The OAG notified Lehigh Township of legal problems with the ordinances and offered the Township an opportunity to discuss and correct them. The OAG and Township are currently in negotiations seeking to resolve the matter without resorting to litigation.