

**FOURTEENTH ANNUAL REPORT OF THE  
ATTORNEY GENERAL TO THE GENERAL ASSEMBLY  
PURSUANT TO SECTION 318 OF ACT 38 OF 2005  
AGRICULTURE, COMMUNITIES AND RURAL ENVIRONMENT - “ACRE”**

**October 25, 2019**

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## I. INTRODUCTION

Promoting agriculture is an important state policy. The Commonwealth is home to approximately 53,000 farms, covering 7,300,000 acres, with an average farm size of 138 acres,<sup>1</sup> across Pennsylvania's 2561 distinct municipalities (townships, cities, boroughs).<sup>2</sup> The Pennsylvania Department of Agriculture and Team Pennsylvania<sup>3</sup> commissioned an analysis of the economic value of Pennsylvania agriculture - the direct and indirect economic impact of agriculture within the Commonwealth result in an agriculture industry which "generates approximately \$135.7 billion in total economic impact each year and supports 579,000 jobs within \$26.9 billion in earnings."<sup>4</sup>

The Right to Farm Act ("RTFA") declares that it is the "policy of the Commonwealth to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products [and] [i]t is the purpose of this act to reduce [loss of] agricultural resources by limiting the circumstances under which agricultural operations may be the subject matter of...ordinances." 3 P.S. § 951 (1982). Similarly, the Municipalities Planning Code ("MPC") requires that zoning ordinances "shall encourage the continuity, development and viability of agriculture operations." 53 P.S. § 10603(h) (2000). The MPC exists "to accomplish coordinated development," "promote the preservation of...prime agricultural land," and ensure that zoning ordinances "facilitate the present and future economic viability of existing

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<sup>1</sup> USDA, National Agricultural Statistics Services ("NASS"); and the 2018 State Agricultural Overview for Pennsylvania. [https://nass.usda.gov/Quick\\_Stats/Ag\\_Overview/stateOverview.php?state=PENNSYLVANIA](https://nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=PENNSYLVANIA)

<sup>2</sup> 959 Boroughs; 1,546 Townships; 56 Cities. <https://whyy.org/articles/explainer-cities-boroughs-and-townships-oh-my-pa-municipalities-clarified/>

<sup>3</sup> "Team Pennsylvania is a non-partisan, 501(c)(3) nonprofit established in 1997 to connect private and public sector leaders to achieve and sustain progress for Pennsylvania." <https://teampa.com/about/>

<sup>4</sup> *Pennsylvania Agriculture, A Look at the Economic Impact and Future Trends, Executive Summary*, January 2018, p. 4. <https://teampa.com/wp-content/uploads/2018/01/Team-PA-Agriculture-EXECUTIVE-SUMMARY.pdf>

agricultural operations in this Commonwealth and do not prevent or impede the owner or operator's need to change or expand their operations in the future in order to remain viable....” 53 P.S. § 10105.

The General Assembly's Historical and Statutory Notes to ACRE coincide with the policies articulated in the RTFA and the MPC. They affirm the vitality of a strong agricultural community to the Commonwealth, declaring that the Commonwealth has a “vested and sincere interest in ensuring the long-term sustainability of agriculture and normal agricultural operations.” 3 Pa.C.S. § 311, *Historical and Statutory Notes*. The Legislature acknowledged that to further this goal it “has enacted statutes to protect and preserve agricultural operations for the production of food and agricultural products.” *Id.*

Since taking office in 2017, Attorney General Shapiro has made strengthening and improving the ACRE program a priority for the office. He has personally visited rural communities across the Commonwealth to hear directly from both farmers and township officials about their concerns and input. Based on that feedback, the Office of Attorney General has brought transparency to the ACRE process by posting all pending cases and past decisions on the office's website, [www.attorneygeneral.gov/resources/acre/](http://www.attorneygeneral.gov/resources/acre/) so that both municipalities and landowners can look to previous decisions to help them resolve disputes.

## **II. ACRE**

Mixing billions of dollars, millions of acres, tens of thousands of farms, and several thousand municipalities inevitably results in disagreements, misunderstandings, and friction. ACRE, also referred to as Act 38, took effect on July 6, 2005. The ACRE statute helps balance the dynamic nature and impact of Commonwealth agricultural operations, while at the same time furthering the Legislature's explicit goal of promoting agriculture.

The central purpose of ACRE is to protect “normal agricultural operations” (“NAO”) from unauthorized local regulation.<sup>5</sup> Under ACRE, a local ordinance that exceeds, conflicts with, or duplicates state law is “unauthorized,” and its enforcement is prohibited. ACRE also confers upon the Office of Attorney General (“OAG”): (1) the power and duty to review local ordinances for compliance with State law upon the request of an owner or operator of an NAO; and (2) the authority, in the Attorney General’s discretion, to sue a local government to invalidate or enjoin enforcement of an unauthorized local ordinance. 3 Pa.C.S. §314.

The OAG has a process by which it receives requests to review ordinances and brings legal action when warranted. That process is set forth on its website at [www.attorneygeneral.gov/resources/acre/](http://www.attorneygeneral.gov/resources/acre/).<sup>6</sup>

When the OAG receives a request to review an ordinance, it sends an acknowledgement of receipt to both the requestor and the municipality whose ordinance is the subject of the review. After completing its review, the OAG advises the parties, in writing, whether it intends to bring legal action. Where the OAG does not bring its own legal action, the Office informs the ACRE complainant that he /she may bring a private action under ACRE if desired. 3 Pa. C.S. §315(b). The OAG also directs the complainant to other government resources that may be of assistance (*e.g.* the State Conservation Commission, Conservation Districts, Pennsylvania State University Extension).

Where the OAG intends to bring its own legal action, it first affords the municipality an opportunity to discuss the legal problems the OAG identified in its review and correct them voluntarily before legal action commences. The goal of this interactive process is two-fold. First,

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<sup>5</sup> The RTFA defines a NAO as an agricultural activity that is “not less than ten contiguous acres in area,” or if less than ten contiguous acres, then an agricultural activity that has “an anticipated yearly gross income of at least \$10,000.” 3 P.S. § 952, *Definitions*.

<sup>6</sup> Click on the “Resources” tab to see the link for “Agricultural Communities and Rural Environment/ACRE.” Click on that link to proceed to the ACRE Resources Center.

to resolve the immediate problem so the ACRE complainant can proceed with the farming plans without further delay.<sup>7</sup> Second, the OAG wants to work cooperatively with the municipality to bring its ordinances into compliance with state law. While the OAG hopes to resolve these disputes through a cooperative and interactive process with the municipalities, if the dispute cannot be resolved amicably, the OAG will file suit in the Commonwealth Court.

The OAG provides easy and transparent access to its ACRE program resources on its public website at [www.attorneygeneral.gov/resources/acre/](http://www.attorneygeneral.gov/resources/acre/) as noted above. This resource center includes a description of the ACRE law, a link to a printable ACRE brochure, and a list of all ACRE cases received by the OAG. The “docket” includes copies of all ACRE complaints, municipalities’ responses, and ordinance(s) in question, as well as the status of the OAG’s review for cases filed from 2017 to the present. The website also provides a U.S. mail address and email link through which users can initiate their own complaints.

The website includes all of the “Acceptance Letters” the OAG has sent to municipalities since the inception of the ACRE program in 2005. “Accepted” cases are those in which the OAG determines there are legal problems with the local ordinances. An “Acceptance Letter” is a letter brief notifying the municipality why its ordinance violates state law, as well as the specific steps the municipality must take to come into compliance with state law. Letters are listed by year, township, and major agricultural issues addressed. These letters serve as a public resource to educate and guide citizens and municipalities as to how the OAG has previously handled ACRE issues.

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<sup>7</sup> This practical, problem solving approach is working. *See e.g. below:* Woodward Township, Clinton County; Maxatawny Township, Berks County; Codorus Township # 1, York County; Ferguson Township, Centre County; Longswamp Township, Berks County; Lower Saucon Township, Northampton County; Lower Milford Township, Lehigh County; Clay Township, Lancaster County; Todd Township, Huntingdon County; Pocopson Township, Chester County; Paradise Township, Monroe County; Dunkhard Township, Fayette County; South Londonderry Township, Lebanon County; East Nottingham Township, Chester County.

The OAG is committed to educating the public about the ACRE program. In addition to its website, the OAG has implemented a community program through which it gives presentations about ACRE throughout the Commonwealth to people and organizations involved in Pennsylvania agriculture. To request such a presentation one can contact the OAG via email or U.S. mail at the email and regular mail addresses found on the ACRE website.

### **III. ANNUAL DATA**

Between July 6, 2018, and July 5, 2019, the OAG:

- Received 19 new ACRE requests;
- Closed (*i.e.* Denied, Settled, Withdrew) 12 cases;<sup>8</sup> and
- Continued working on 15 cases from the previous year that remained open during this reporting period (*i.e.* Accepted, Negotiating, Ordinance Review Ongoing);

### **IV. AGGREGATE DATA**

Between July 6, 2005, when ACRE went into effect, and July 5, 2019, the OAG:

- Received 174 requests for review of local ordinances;
- Closed (*i.e.* Denied, Settled, Withdrawn) 141 cases; and
- Continues working on 33 open cases (*i.e.* Accepted, Negotiating, Ordinance Review Ongoing);
- Brought 7 legal actions against municipalities to invalidate or enjoin enforcement of unauthorized local ordinances;

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<sup>8</sup> These 12 cases include 8 cases listed on last year's Annual Report (Lehigh Township, Northampton County; Woodward Township, Clinton County; Buffalo Township, Union County; Hamilton Township, Adams County; Hereford Township, Berks County; Little Britain Township, Lancaster County; Lamar Township, Clinton County; and Oley Township, Berks County) and 4 cases received during this year's Annual Report timeframe (Pocopson Township, Chester County; Hatfield Borough, Montgomery County; Paradise Township, Monroe County; and Dunkhard Township, Fayette County)

This year saw a dramatic increase in the number of new requests for review. During the Thirteenth Annual Report time frame (July 2017 to July 2018), the OAG received 8 new requests for review. This reporting year (July 2018 to July 2019) the OAG received 19 new requests – an increase of 138%.

The vast majority of accepted cases throughout the history of the ACRE program have been successfully resolved to the satisfaction of the municipality, the ACRE complainants, and the OAG without litigation. As noted above, just 7 cases have gone to litigation. In this way, the ACRE program furthers the Commonwealth's declared policy of supporting agriculture while at the same time saving the Commonwealth, local governments, and individual farmers millions of dollars by working together to solve complex issues related to agriculture, communities, and the rural environment.

## **V. STATUS OF CASES AND ACTION TAKEN**

Open cases listed in last year's Thirteenth Annual Report covering the time frame of July 6, 2017 to July 5, 2018 are listed in subsection A. Cases received during this year's reporting term (July 6, 2018 to July 5, 2019) are covered in subsection B.

### **A. Cases Unresolved in the Thirteenth Annual Report**

#### **1. Lehigh Township, Northampton County**

The OAG accepted a request for review of an ordinance that regulated "commercial livestock operations." Several years ago, the Township enacted amendments resolving the legal problems with the ordinance; however, the OAG received notification that the Township enacted new ordinances to regulate Concentrated Animal Feeding Operations ("CAFOs").<sup>9</sup> Reconsideration of the case was declined as the newer ordinances are consistent with state law.

**Status - Closed.**

#### **2. Woodward Township, Clinton County**

A farmer engaged in both crop and animal operations requested review of the Township's zoning ordinance provisions prohibiting animal agriculture in a zoning district that allowed other forms of agricultural operations. He also complained about impermissible set-back requirements. The OAG notified the Township of legal issues with the ordinance. The Township agreed to accept and enact the OAG's proposed amendments allowing the farmer to proceed with his swine

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<sup>9</sup> Another type of agricultural operation is referred to as a Concentrated Animal Operation ("CAO"). Under Pennsylvania law, agricultural operations fall into one of three categories: (1) small/non-CAO/CAFO; (2) CAO; and (3) CAFO, and those categories are determined by the number of Animal Equivalent Units ("AEU's") on the land. See 25 Pa. Code §§ 83.201, 83.701, 91.36, 92a.1. An AEU is defined as "[o]ne thousand pounds live weight of livestock or poultry animals, on an annualized basis, regardless of the actual number of individual animals comprising the unit." 25 Pa. Code § 83.201, *Definitions*. A CAO is defined as "an agricultural operation with eight or more animal equivalent units where the animal density exceeds two AEUs per acre on an annualized basis." 25 Pa. Code §§ 83.201 & 262. In addition, 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 § 92.1.



operation. In light of the OAG's ACRE activity, the parties discontinued a related case in the Clinton County Court of Common Pleas. **Status – Closed.**

### **3. Montour Township, Columbia County**

The farmer requested review of ordinances requiring a special exception for a proposed swine operation located in an agricultural zoning district and on a property included in the Township's Agricultural Security Area; this particular operation is neither a CAO nor a CAFO. The farmer requested review of the Township's conditions for the special exception, including well testing at the owner's expense, annual reports to prove that the AEUs on the operation remain below 2 AEUs, and setback and odor control requirements. The OAG accepted the case and sent the Township a detailed Acceptance Letter. In response, the Township proposed amendments which were deficient; however, the Township and the farmer reached agreement on proceeding with the project and the Township issued the applicable permits.

Concurrent with the ACRE matter, a private citizens' group has been litigating this matter against the farmer and the Township in state court. That case is currently before the Pennsylvania Supreme Court and the OAG filed an amicus curiae ("friend of the court") brief with the Supreme Court supporting the farmer. The OAG is awaiting the Supreme Court's decision before deciding how to proceed with the ACRE matter. **Status - Open**

### **4. Heidelberg Township, Lebanon County**

Two citizens requested review of the Township ordinance provisions regulating CAOs. The OAG notified the Township of legal problems with the ordinance and offered the Township an opportunity to discuss and correct them. The Township informed the OAG that neither of the ACRE applications had been denied permits; rather, the primary reason behind the challenged ordinances is to protect the nature of the Agricultural Transition Zone and to protect the water in

the wellhead protection zones. Next steps are to schedule a meeting between the OAG, the Township solicitor, and the Township engineer in an attempt to resolve the case. **Status - Open.**

#### **5. Buffalo Township, Union County**

The farmer requested review of the Township's interpretation of the ordinance definition for "Agricultural Operation." The farmer wanted to build a 120' by 450' building (54,000 square feet or nearly 1¼ acres under a roof) to process municipal sewage sludge. The proposed processing building would accept up to 600 tons per day of municipal sewage sludge resulting in approximately 37,000 tons of dry product a year after processing; the resulting biosolids,<sup>10</sup> however, were not to be used for agriculture land application. The OAG denied the ACRE complaint. **Status – Closed**

#### **6. Wayne Township, Schuylkill County**

The farmer requested review of the Township's zoning ordinance provisions regulating "intensive agriculture." The OAG notified the Township of legal problems with the zoning ordinance provisions and offered the Township an opportunity to discuss and correct them. The Township reports that it is unaware of any current issues with the farmer, so it appears the immediate situation has been resolved locally. The Township has a mix of small non-CAO/CAFO, CAOs, and CAFOs' farms. The Township solicitor and Township officials will review the ACRE case and respond to the OAG. **Status – Open.**

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<sup>10</sup> "Biosolids are mostly organic solids resulting from the treatment of wastewater that have undergone additional treatment to kill pathogens and that have been approved by the U.S. Environmental Protection Agency (EPA) for land application as a fertilizer and soil amendment." <https://www.pwea.org/docs/biosolids-facts-2.pdf>

**7. East Nantmeal Township, Chester County**

A landowner requested review of the Township's zoning ordinance provisions for forestry activities. The OAG notified the Township of legal problems with the zoning ordinance and offered the Township an opportunity to discuss and correct them. The OAG identified 43 shortcomings with the challenged ordinances. The Township drafted various ordinance amendments. 29 appropriate changes were made leaving 14 outstanding issues to be resolved. The OAG is in the process of drafting a response to the Township's proposed amendments. When the OAG receives the Township's response, negotiations will continue. **Status – Open.**

**8. Maxatawny Township, Berks County**

A chicken farmer requested review of the Township's ordinances regulating agricultural operations and the requirement of a conditional use approval to engage in "intensive agriculture." The OAG accepted the case and outlined for the Township the legal deficiencies in the ordinances. The Township initially declined the OAG's offer to engage in negotiations but has since changed course. The Township and the OAG have exchanged extensive proposed amendments. The OAG recently completed its review of the Township's proposed revisions and is in the process of finalizing a response to the Township's proposals.

The Township and the farmer have a proposed agreement allowing the farmer to proceed with his agricultural expansion. The Township Board will present this proposed agreement for discussion and action at a public meeting as soon as the plans relating to the agricultural operations expansion are completed and attached to the proposed settlement agreement. **Status - Open.**

**9. Hamilton Township, Adams County**

The owner of a crop and animal farm filed an expansive ACRE complaint requesting review of the Township's zoning ordinance provisions pertaining to three issues: 1) structures on

the property reportedly used in animal production; 2) certain requirements for greenhouses and agricultural roadside stands; and 3) sign ordinances dealing with roadside stands. Investigation revealed that the proposed building projects fell within the purview of legally supportable ordinances as when customers enter a building to shop additional requirements are properly enforced, and finally, the local ordinances mandating permits for signage do not violate ACRE.

**Status – Closed.**

**10. Hereford Township, Berks County**

A farmer requested review of the Township’s zoning ordinance provisions regarding fencing. The ACRE complainant sold the property and moved out of the area. **Status – Closed.**

**11. Upper Saucon Township, Lehigh County**

The complainant, who has horses and chickens on her property, requested review of the Township’s denial of a permit to build a barn to house her animals. Ordinance review ongoing.

**Status - Open.**

**12. Codorus Township #1<sup>11</sup>, York County**

A CAFO farmer requested review of the Township’s zoning, land development, and health ordinance provisions regulating CAFO’s. The farmer and the Township arrived at an accommodation. The farmer submitted the requisite plans for the proposed expansion and Codorus approved those plans. The immediate problem, whether the farmer could proceed or not, has been resolved. OAG review of the CAO/CAFO ordinances, however, continues. **Status - Open.**

**13. Ferguson Township, Centre County**

A landowner requested review of the Township’s zoning ordinance provision prohibiting livestock on parcels less than 50 acres and requiring conditional use approval for riding stables. The

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<sup>11</sup> The OAG received a second Codorus Township ACRE complaint dealing with CAOs/CAFOs. That case is listed below.

OAG accepted the case and outlined for the Township the legal deficiencies in the ordinances. The OAG and Township are in negotiations. The Township is planning to take up this issue in a Board of Supervisor's Executive Session in October 2019. In the meantime, the Township has stayed the action it intended to bring against the farmer. **Status – Open.**

#### **14. Longswamp Township, Berks County**

A crop farmer requested review of the Township's application of its subdivision, land development and well drilling ordinances to the farmer's installation of a crop irrigation system. The OAG accepted the case, sending the Township an Acceptance Letter explaining how its ordinances violate ACRE. The Township permitted the farmer to drill his wells and irrigate his crops, solving the immediate problem. Through negotiations, the Township has agreed to amend its Subdivision and Land Development Ordinance consistent with the OAG's requirements; disagreement remains on the issue of the well provisions ordinances. Negotiations over this last part of the ACRE case continue. **Status - Open**

#### **15. East Brandywine Township, Chester County**

A land owner challenges the Township's ordinances as they apply to selling lumber harvested from her property, including the removal of the tops/slash<sup>12</sup> that remain after harvesting. The OAG accepted this case. The Township proposes to enact the Brandywine Conservancy's model timber harvesting ordinance which the Conservancy is in the process of drafting. The OAG ACRE attorney and Pennsylvania Department of Agriculture officials met with Conservancy

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<sup>12</sup> "Top' means the upper portion of a felled tree that is not merchantable because of small size, taper, or defect." "Slash' means the woody debris left in the woods after logging, including logs, chunks, bark, branches, uprooted stumps, and broken or uprooted trees or shrubs." *Forest Management and Timber Harvesting in Pennsylvania-Information for Citizens and Local Government Officials*, PSU College of Agricultural Sciences, 2019, p. 13.

officials and all agreed to work together in drafting a legally sufficient model ordinance which the Township will presumably enact. **Status - Open.**

**16. Walker Township, Schuylkill County**

A poultry farmer sought to expand egg-laying operations and challenges the Township's restrictions on what it defines as "intensive agriculture." The OAG sent an Acceptance Letter to the Township as well as to the farmer's lawyer. The farmer and the Township are also litigating this case in the Commonwealth Court.

The Township, along with three other municipalities, recently enacted a comprehensive joint municipal ordinance covering all aspects of local governance, including agriculture, despite the unresolved ACRE matter and the ongoing litigation. Once the Commonwealth Court issues its ruling and the OAG completes its review of the new ordinance, if the OAG concludes that the new ordinance also violates ACRE, the OAG and the Township have agreed to work together to further amend it. **Status - Open.**

**17. North Coventry Township, Chester County**

Landowner filed an ACRE complaint concerning timber harvesting on his land as well as road posting and bonding issues. The OAG sent an Acceptance Letter identifying problems with the Township's ordinances. During negotiations, the Township and landowner suggested they draft proposed amendments to the already existing ordinances for the OAG's review. The OAG received proposed amendments and is in the process of finalizing a response to the proposed amendments. **Status – Open**

**18. Lower Saucon Township, Northampton County**

Landowners and a timber harvesting company challenged the Township's ordinances as they applied to timber harvesting; specifically the right to charge consultant fees, the role of an

“Environmental Advisory Committee” in the permitting process, erosion and sedimentation control (“E&S”) requirements,<sup>13</sup> the required intervals on USGS<sup>14</sup> maps and the appropriateness of certain identified silvicultural<sup>15</sup> methods. The OAG accepted the case and issued an Acceptance Letter to the Township. The Township agreed to enact the Pennsylvania State University (“PSU”) School of Agriculture’s Model Timber Harvesting Ordinance as the OAG suggested. **Status - Closed.**

#### **19. Pennsbury Township, Chester County**

The farmer challenges the Township’s ordinances concerning Natural Resource Protection Standards and Stormwater Management as they pertain to timber harvesting. The OAG accepted this case and sent a detailed letter to the Township explaining why its ordinances violated ACRE and describing how to bring those ordinances into compliance. Disagreement continues on whether the farmer must comply with the ordinances as they currently exist. The OAG’s position is that he does not as those ordinances violate ACRE. Moreover, the Township is considering enacting the Brandywine Conservancy’s model ordinance mentioned in the East Brandywine Township matter. Negotiations continue. **Status – Open.**

#### **20. Little Britain Township, Lancaster County**

A landowner filed an ACRE complaint questioning the Township’s stocking rates and types of animals permitted on the land. The Township sent a response to the OAG. The owner and Township are also litigating the case in the state courts. The OAG denied the ACRE request. The

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<sup>13</sup> An E&S Plan is “[a] site-specific plan consisting of both drawings and a narrative that identifies BMPs (“Best Management Practices”) to minimize accelerated erosion and sedimentation before, during and after earth disturbance activities.” 25 Pa.Code §102.1, *Definitions*.

<sup>14</sup> United State Geographical Survey.

<sup>15</sup> “Silviculture is defined as the art and science of controlling the establishment, growth, com-position, health, and quality of forests and woodlands to meet the diverse needs and values of landowners and society on a sustainable basis.” USDA Forest Service, White Paper, F14-SO-WP-SILV-34, p.2.

property in question is located in the Township's Rural Residential District (R-1) and not the Agricultural Zoning District (Ag). The keeping of livestock in the R-1 district is permitted only by special exception. The Township granted an earlier special exception and its denial of a subsequent special exception request to add more livestock on the R-1 property is not an ACRE violation.

**Status – Closed.**<sup>16</sup>

## **21. Lower Milford Township, Lehigh County**

The landowner believed that the Township was placing overly restrictive and illegal requirements on his harvesting of timber - specifically, the Township's fee and escrow requirements. The OAG accepted the case and informed the Township that its escrow requirements violated ACRE. The Township eliminated the escrow fee from its fee schedule, returned the several thousand-dollar escrow fee back to the landowner, who proceeded to harvest the timber. With the resolution of the immediate problem, the OAG continues to review other sections of the Township's timber ordinances. **Status - Open.**

## **22. Lamar Township, Clinton County**

Farmer questioned ordinances concerning set-backs for poultry barns. The farmer ultimately decided not to proceed with building his poultry house. **Status – Closed.**

## **23. East Penn Township, Carbon County**

Farmers contend that the Township's Ordinance #77, which controls the agricultural use of biosolids, violates ACRE. The OAG issued an extensive acceptance letter concluding that the ordinance did violate ACRE. The Township is committed to a productive dialogue with this Office, so negotiations continue to resolve the defective ordinances. The Township and the farmers are engaged in parallel litigation in the Court of Common Pleas of Carbon County. **Status – Open.**

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<sup>16</sup> After the OAG denied the case, the farmer requested reconsideration of its denial. That reconsideration is ongoing.



#### **24. Oley Township, Berks County**

Landowner farms 65 acres and requested OAG review of the Township's wellhead ordinances for compliance with ACRE. The OAG denied the ACRE request. Prevention of water source contamination, especially in situations involving public water source wells, is of the utmost importance. The Township's restrictions within the Zone I & II wellhead areas complied with state law and regulations and were reasonable to protect the water supply. **Status – Closed.**

#### **25. Eldred Township, Monroe County**

Landowner requested ACRE review of the Township's timber harvesting ordinances. The OAG accepted the case, and sent a detailed Acceptance Letter explaining why the ordinances were flawed and the measures the Township needs to take to bring them into compliance with ACRE. The Township disagrees and negotiations to resolve the case are ongoing. **Status – Open**

#### **26. Clay Township, Lancaster County**

A timber harvester challenged the Township's forestry ordinances. After the filing of the ACRE complaint, the Township issued the harvesting permit allowing the ACRE complainant to commence harvesting, solving the immediate problem. After reviewing several of the timber harvesting Acceptance Letters found on the OAG ACRE website, the Township agreed to draft a proposed timber ordinance in conformity with the PSU Model Ordinance. The OAG awaits the Township's proposed ordinance. **Status - Open.**

#### **27. Todd Township, Huntingdon County**

A township supervisor, who is also a farmer, filed an ACRE complaint concerning the Township's enactment of an ordinance entitled a "Community Bill of Rights" ("CBR")<sup>17</sup> which

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<sup>17</sup> CBRs are locally drafted and enacted ordinances that seek to invalidate certain property rights. CBRs also attempt to preclude state and federal law from preempting local ordinances all in the name of "community self governance." *Pennsylvania Gen. Energy Co., LLC v. Grant Twp.*, 2018 WL 306679 at 10 (W.D. Pa. 2018). In short, CBRs are a municipality's attempt to permit it to do whatever it wants regardless of what state and federal laws require.

seeks to regulate what it characterizes as “industrial farming.” Such CBRs violate state law and the OAG’s Acceptance Letter explained that the CBR had to be repealed, which the Township did on June 10, 2019. The OAG and the Township are working cooperatively to draft a legally sufficient CAO/CAFO ordinance. **Status – Open.**

**B. Cases Received During the Fourteenth Annual Report Time Frame (July 6, 2018 to July 6, 2019)**

**1. Pocopson Township, Chester County**

A timber harvesting company filed an ACRE complaint contending the Township’s timber harvesting ordinances violated state law. In particular, the ACRE complainant argued that the Township could not charge him thousands of dollars in fees, escrow, and expert consultant costs. The Township reviewed prior timber harvesting Acceptance Letters on the OAG’s ACRE website, agreed that this money was improperly charged and returned it. The Township also agreed to remove the requirement for a professional services agreement and escrow fees from its ordinances. **Status - Closed**

**2. Hatfield Borough, Montgomery County**

Beekeeper challenged a recently enacted beekeeping ordinance. While beekeeping is an agricultural commodity, this particular beekeeper did not appear to be operating an NAO as defined in the RTFA; regardless, the ordinance did not violate the Bee Law, 3 Pa.C.S. § 2101, *et.seq.*, nor was it inconsistent with best management practices for beekeeping found in the *Pennsylvania Pollinator Protection Plan* (“P4”). The OAG denied the ACRE complaint. **Status - Closed.**

**3. Windsor Township, York County**

Timber harvesting company filed an ACRE complaint contending that the Township’s forestry ordinance violated ACRE. Ordinance review continues. **Status – Open**

**4. Salem Township, Luzerne County**

Farmer contends that the Township's ordinance requiring mandatory hook-up to the public sewer system violates ACRE. Ordinance review ongoing. **Status - Open.**

**5. Kidder Township, Carbon County**

Logger challenges Township's timber harvesting ordinance, in particular, the requirements pertaining to E&S Plans. Ordinance review ongoing. **Status - Open**

**6. Upper Milford Township #1, Lehigh County**

Farmer challenges the Township's stormwater management ordinances. Ordinance review ongoing. **Status - Open.**

**7. Upper Milford Township #2, Lehigh County**

Farmer contends that the Township's ordinances concerning minimum acreage, various setback distances, requirements for "farm based businesses," and what constitutes "agricultural products" violates ACRE. The Township proposed numerous amendments to its ordinances as well as expressing its commitment to respecting the rights of those running NAOs. The OAG is reviewing the Township's proposals and once that review is complete negotiations will continue. **Status - Open.**

**8. Pocono Township, Monroe County**

Timber harvesting company filed an ACRE complaint contending that the Township's forestry ordinance violated ACRE. Ordinance review continues. **Status - Open**

**9. Middle Smithfield Township, Monroe County**

Timber harvesting company complains of the Township's requirements with respect to E&S Plans, no cut buffer zones around water bodies, disposal of tops and slash, and remaining canopy

minimums. The Township responded to the ACRE complaint and the ordinance review is ongoing.

**Status - Open.**

**10. Upper Macungie Township, Lehigh County**

Owners of an orchard and family farm challenge the Township's ordinances dealing with retail sales of agricultural products grown primarily on the premises. Ordinance review ongoing.

**Status – Open**

**11. Paradise Township, Monroe County**

Lumber company challenged the Township's timber harvesting ordinances. The OAG, the Township, and the company worked cooperatively to settle the case. The harvest proceeded and the Township amended the ordinance. **Status - Closed.**

**12. Rice Township, Luzerne County**

Logger challenges the Township's professional licensure requirements for foresters, the prohibitions on clear cutting, and the mandate that certain percentages of the forest canopy remain after the harvest. The Township has responded to the ACRE complaint and the ordinance review is ongoing. **Status - Open.**

**13. Fairview Township, Luzerne County**

Timber company challenges the Township's E&S and timber harvesting plan requirements, the necessity of a written service agreement, and road posting and bonding costs, in addition to the insurance and workers' compensation mandates. The Township responded to the ACRE complaint conceding some points but contesting others. Ordinance review ongoing. **Status - Open.**

**14. Dunkhard Township, Fayette County**

ACRE challenge to road posting and bonding requirements. Township agreed to waive unlawful \$7,000.00 nonrefundable fee. Case settled. **Status - Closed.**

**15. Carroll Township, Perry County**

This is a case involving farmers wanting to renovate or reconstruct existing structures on their property to establish a food store/retail market as well as a bakery/food preparation on site. The Township has responded to the ACRE complaint and the ordinance review is ongoing. **Status - Open.**

**16. South Londonderry Township, Lebanon County**

Forestry company filed an ACRE complaint challenging numerous portions of the Township's timber harvesting ordinance. The Township responded that it was in the process of reviewing its ordinances and intended to amend certain sections in the near future. The OAG provided the Township with resources to assist it in amending its ordinances. The OAG is monitoring the case and is awaiting the Township's proposed amendments. **Status - Open.**

**17. Codorus Township #2, York County**

Farmer contends that the Township's CAO/CAFO ordinances violate ACRE. This case is being reviewed in conjunction with Codorus Township #1 listed above. Ordinance review is ongoing. **Status - Open.**

**18. East Nottingham Township, Chester County**

Logging company challenges the Township's E&S and escrow requirements, fee structure, tops and slash removal, and mandatory engineer review of the timber harvesting plan. The Township responded that it was in the process of replacing its current forestry ordinances with the PSU Model Timber Harvesting Ordinance. The OAG is monitoring the progress the Township is making and negotiations will continue after receipt of the Township's proposed amendments. **Status - Open.**

## **19. North Middleton Township, Cumberland County**

Landowners disagree with the Township's actions as it pertains to their winery and proposed agritainment activities. Ordinance review ongoing. **Status - open**

### **C. Completed Legal Actions Since 2005**

#### **1. Lower Oxford Township, Chester County – completed July 2011**

The farmer requested review of Ordinance No. 2004-1, which regulates composting activities. He complained that the ordinance unlawfully restricts mushroom compost preparation. The OAG accepted the case and offered the Township an opportunity to discuss and correct the ordinance. The Township declined this offer and the OAG filed a lawsuit in Commonwealth Court to invalidate and enjoin the enforcement of the ordinance just as it had in the *Locust Township* case. The Commonwealth Court once again ruled against the OAG and the Office appealed that decision to the Pennsylvania Supreme Court. The 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*. 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.

#### **2. Heidelberg Township, North Heidelberg Township, Robesonia Borough, Womelsdorf Borough, Berks County – completed September 2016**

A citizen requested review of the Joint Municipal Ordinance, which regulates "intensive raising of livestock or poultry" in four municipalities. The OAG accepted the case and offered the Townships an opportunity to discuss and correct the ordinance. The Townships declined this offer and the OAG filed a lawsuit in Commonwealth Court to invalidate and enjoin the ordinance's enforcement. The same litigation that occurred in the *Locust* and *Lower Oxford Townships* cases

occurred here: the Commonwealth Court ruled against the OAG, the OAG appealed, and the Supreme Court ultimately ruled consistent with its *Locust Township* opinion.

Following negotiations, the four municipalities enacted joint ordinance amendments to resolve the legal problems with the ordinance and the OAG withdrew the lawsuit in September 2016.

**3. Richmond Township, Berks County** – completed January 2012

The farmer requested review of Ordinance No. 81-2000, which regulates “intensive agricultural activity.” The OAG accepted the case and offered the Township an opportunity to discuss and correct the problems with the ordinance. The Township declined this offer and the OAG filed a lawsuit in Commonwealth Court. The Court denied the Township’s Motion for Judgment on the Pleadings but did grant in its entirety the OAG’s Motion for Summary Judgment. 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 they were enacted.

**4. East Brunswick Township, Schuylkill County** – completed November 2009

A tree farmer requested review of Ordinance No. 1 of 2006, which generally regulated land application of biosolids and specifically prohibited land application of biosolids by corporations. The OAG accepted the case and offered the Township an opportunity to discuss and correct the problems with the ordinance. The Township declined this offer and the OAG filed a lawsuit in Commonwealth Court. The parties filed various cross motions.

During the pendency of the litigation, 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. These amendments are being utilized throughout the Commonwealth as a model biosolids ordinance.

**5. Peach Bottom Township, York County – completed January 2011**

Two farmers wanted to start a CAFO. The Township required a special exception and denied the request. The farmers requested review of an existing ordinance regulating CAOs and CAFOs, a proposed amendment to the existing CAO/CAFO ordinance, and an ordinance regulating below ground manure storage facilities. The OAG accepted the case and offered the Township an opportunity to discuss and correct the problems with the ordinance. The Township declined this offer and the OAG filed a lawsuit in Commonwealth Court.

During the pendency of the litigation, several years of extensive negotiations resulted in Peach Bottom Township enacting amendments to bring the ordinance in compliance with state law. The OAG withdrew the lawsuit.

**6. Packer Township, Carbon County – completed February 2013**

The farmer requested review of the Packer Township Local Control, Sewage Sludge and Chemical Trespass Ordinance, which generally regulated biosolid land application and specifically prohibited biosolid land application by corporations. The OAG accepted the case and offered the Township an opportunity to discuss and correct the problems with the ordinance. The Townships declined this offer and the OAG filed a lawsuit in Commonwealth Court.

The Court denied both parties' pretrial motions and scheduled a trial date. Prior to trial, Packer Township repealed the ordinance. The Court held that the lawsuit was moot and dismissed the case for want of jurisdiction.



## **D. Currently Open Legal Actions**

### **7. Locust Township, Columbia County**

Both the Pennsylvania Supreme Court and the Commonwealth Court accepted almost in their entirety the OAG's arguments concerning state law preempting local ordinances. The Supreme Court case, *Commonwealth v. Locust Township*, 968 A.2d 1263 (Pa. 2009), has been cited 147 times in various legal resources (trial court orders, administrative decisions, secondary sources, appellate court dockets, and trial court documents). On remand from the Supreme Court, the Commonwealth Court issued a favorable ruling in the case at *Commonwealth v. Locust Township*, 49 A.3d 502 (Pa.Cmwlth. 2012) wherein the Courts once again accepted most of the OAG's preemption arguments. The Commonwealth Court's *Locust Township* opinion has been cited a total of 26 times in various legal resources (cases, secondary sources, appellate court documents). *Locust Township* is one of the seminal cases in the ACRE law area. The OAG is currently deciding on what next steps to take in this case.

## **VI. CONCLUSION**

Agriculture is vitally important to the Commonwealth's way of life and economy. The OAG's ACRE program furthers the declared state policy of conserving, encouraging, and growing agriculture throughout the Commonwealth. Through the ACRE program, the OAG has been able to resolve the individual farmer's specific concerns while at the same time addressing legal issues that have far-reaching, statewide implications.