

**FIFTEENTH 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 2020**

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## I. INTRODUCTION

Promoting agriculture is an important state policy. The Commonwealth is home to approximately 52,700 farms, covering 7,300,000 acres, with an average farm size of 139 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 with \$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 2019 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.*

## **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,

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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*.

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](http://www.attorneygeneral.gov).<sup>6</sup> When the OAG receives a request to review an ordinance, it sends an acknowledgement of receipt to both the complainant 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, prior to filing a complaint it first affords the municipality an opportunity to discuss and voluntarily correct the legal problems identified in its review. The goal of this interactive process is two-fold. First, 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

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<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.

<sup>7</sup> This practical, problem solving approach is working. *See e.g. below:* Wayne Township, Schuylkill County; Codorus Township #1, York County; Longswamp Township, Berks County; Pennsbury Township, Chester County; Lower Milford Township #1, Lehigh County; Clay Township, Lancaster County; Todd Township, Huntingdon County; Salem Township, Luzerne County; Pocono Township, Monroe County; Kidder Township, Carbon County; Upper Milford Township #1, Lehigh County; Upper Milford Township #2, Lehigh County; Upper Macungie Township, Lehigh County; East Nottingham Township, Chester County; Middletown Township, Delaware County; East Earl Township, Lancaster County; Upper Saucon Township, Lehigh County; Willistown Township, Chester County; Lower Milford Township #2, Lehigh County; Providence Township, Lancaster County; South Strabane Township, Washington County; and East Cocalico Township, Lancaster County.

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](http://www.attorneygeneral.gov) 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.

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, 2019, and July 5, 2020, the OAG:

- Received 20 new ACRE requests;
- Closed (*i.e.* Denied, Settled, Withdrew) 14 cases;<sup>8</sup> and
- Continued working on 9 of the cases received 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 194 requests for review of local ordinances;
- Closed (*i.e.* Denied, Settled, Withdrawn) 154 cases; and
- Continues working on 39 open cases (*i.e.* Accepted, Negotiating, Ordinance Review Ongoing);
- Brought 7 legal actions against municipalities to invalidate or enjoin enforcement of unauthorized local ordinances;

The OAG ACRE program continues to grow. The twenty (20) cases filed this reporting year represents the most ACRE requests for review that the OAG has received since the passage of ACRE in 2005. This continues the trend of past reporting years where the number of cases has steadily increased.

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

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<sup>8</sup> These 14 cases are: Salem Township, Luzerne County; Carroll Township, Perry County; East Nottingham Township, Chester County; Swarthmore Township, Delaware County; Middletown Township, Delaware County; East Earl Township, Lancaster County; Upper Saucon Township, Lehigh County; Fairview Township, York County; Peters Township, Washington County; Williston Township, Chester County; Providence Township, Lancaster County; South Strabane Township, Washington County; Abington Township, Montgomery County; and East Cocalico Township, Lancaster County.

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**

Cases listed in last year's Fourteenth Annual Report covering the time frame of July 6, 2018 to July 5, 2019 are listed in subsection A. Cases received during this year's reporting term (July 6, 2019 to July 5, 2020) are covered in subsection B.

### **A. Status of Cases Listed in the Fourteenth Annual Report**

#### **1. 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 Concentrated Animal Operation ("CAO") nor a Concentrated Animal Feeding Operation ("CAFO").<sup>9</sup> 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 was 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 Court ruled in the farmer's favor, holding that the Nutrient

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<sup>9</sup> 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*.



Management Act<sup>10</sup>, 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. Now that the state court litigation has ended, the OAG will restart negotiations based on the ordinance amendments the Township had proposed earlier. **Status – In Negotiation**

## **2. 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 applicants had been denied permits; rather, the primary reason behind the challenged ordinances is to protect the nature of the Agricultural Transition Zone as well as the water in the wellhead protection zones. The OAG, the Township solicitor, and the Township engineer continue to engage in negotiations concerning the CAO ordinances. **Status – In Negotiation**

## **3. 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 there are no current issues with the farmer. 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 are working cooperatively with the OAG to guarantee that its ordinances comply with state law. The OAG is in the process of drafting

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<sup>10</sup> 3 Pa.C.S. §§ 501-522.

proposed amended ordinances. Once complete, these proposals will be forwarded onto the Township for its review. **Status – In Negotiation**

#### **4. 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 drafting a proposal on the 14 remaining issues. Negotiations will continue. **Status – In Negotiation**

#### **5. 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 Township and the farmer have a proposed agreement allowing the farmer to proceed with his agricultural expansion. The Settlement Agreement and the Settlement Plan Exhibit are complete. Before the case can be settled, Maxatawny’s and the farmer’s consultants are working on a checklist of items, including stormwater, driveway, Erosion and Sediment (“E&S”) Plan,<sup>11</sup>

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<sup>11</sup> An E&S Plan is a “site-specific plan consisting of both drawings and a narrative that identifies [best management practices] to minimize accelerated erosion and sedimentation before, during and after earth disturbance activities. 25 Pa.Code §102.1, *Definitions*.

and related improvements issues. The OAG continues to review Maxatawny's proposed ordinance amendments. **Status – In Negotiation**

**6. 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.**

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

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

**8. 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 OAG accepted the case and outlined for the Township the legal deficiencies in the ordinances. The OAG is waiting for a response from the Township on whether it intends to amend its ordinances. **Status – In Negotiation**

**9. 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.

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<sup>12</sup> The OAG received a second Codorus Township ACRE complaint dealing with CAOs/CAFOs. That case is listed below.

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 provision ordinances. Negotiations over this well provision part of the ACRE case continue; the OAG currently waits for the Township's response to its inquiry as to whether the Township will amend the well provision ordinances. **Status – In Negotiation**

#### **10. 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>13</sup> that remain after harvesting. The OAG accepted this case and sent to East Brandywine an extensive acceptance letter, including 100 pages of exhibits outlining in detail the deficiencies in its ordinances. The Township now proposes to enact the Brandywine Conservancy's model timber harvesting ordinance, which the Conservancy is currently drafting. The OAG ACRE attorney and Pennsylvania Department of Agriculture officials continue to work with Conservancy officials in drafting a legally sufficient model ordinance for the Township to enact. **Status – In Negotiation**

#### **11. 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

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<sup>13</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.

Township as well as to the farmer's lawyer. The farmer and the Township are also litigating this case in state Courts.

The Township, along with three other municipalities, enacted a comprehensive joint municipal ordinance (the "new ordinance") covering all aspects of local governance, including agriculture, despite the unresolved ACRE matter and the ongoing litigation. The OAG and the Township have agreed to work together to review the CAO/CAFO portions of the new ordinance and to revise any sections that violate state law. The OAG is currently reviewing the new ordinance to evaluate its compliance with state law. **Status – In Negotiation**

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

Landowners challenged the Township's ordinances concerning Natural Resource Protection Standards and Stormwater Management as they pertain to timber harvesting on their property. 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. The Township agreed to allow the landowners to proceed with the timber harvest, resolving the immediate issue. Moreover, the Township also contemplates enacting the Brandywine Conservancy's model ordinance referenced in the East Brandywine Township matter. Negotiations continue. **Status – In Negotiation**

## **13. 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. After a review of all relevant facts, the OAG denied the ACRE request. The 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.

After the OAG denied the case, the farmer requested reconsideration of its denial. That reconsideration is ongoing. **Status – Open.**

#### **14. Lower Milford Township #1,<sup>14</sup> Lehigh County**

The landowner believes that the Township is 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, and the timber harvest occurred. With the resolution of the immediate problem, the OAG continues to review other sections of the Township's timber ordinances. **Status - Open.**

#### **15. 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 states that it wants a productive dialogue with this Office, so negotiations continue to resolve the defective ordinances in an attempt to avoid litigation. The OAG has made it clear to the Township that it must use the model biosolids ordinance that East Brunswick Township enacted several years ago in order to be in compliance with ACRE.<sup>15</sup> The

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<sup>14</sup> The OAG received a second Lower Milford Township ACRE complaint dealing with wineries. That case is listed below.

<sup>15</sup> The East Brunswick ACRE case involved litigation in the Commonwealth Court. *Commonwealth of Pennsylvania, Office of the Attorney General v. East Brunswick Township*, 980 A.2d 720 (Pa.Cmwlt. 2009).

Township is currently reviewing the model biosolids ordinance, along with other relevant information, after which negotiations with the OAG will continue. In addition to the ACRE matter, the Township and the farmers are engaged in litigation in the Carbon County Court of Common Pleas. **Status – In Negotiation**

**16. 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. The OAG continues to consider its options moving forward. At this time, negotiations to resolve the case are ongoing. **Status – In Negotiation**

**17. 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. The OAG directed Clay Township to the ACRE website. After reviewing several of the timber harvesting Acceptance Letters found on the OAG ACRE website, the Township has drafted a proposed timber ordinance. The OAG confirmed that the proposed ordinance is in conformity with the Pennsylvania State University ("PSU") Extension's Model Ordinance; once this Office receives proof that the Township has enacted the new ordinance it will close this case. **Status – In Negotiation**

### **18. 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>16</sup> which seeks to regulate what it characterizes as "industrial farming." Such CBRs violate state law and the OAG's Acceptance Letter explained that it had to be repealed; after review of the letter, the Township repealed the CBR. The Township is in the process of drafting a legally sufficient ordinance, which will be reviewed by the OAG for compliance with ACRE. **Status – In Negotiation**

### **19. 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**

### **20. Salem Township, Luzerne County**

Farmer contends that the Township's requiring mandatory hook-up to the public sewer system violates ACRE. The Board of Supervisors voted against mandating that the CAFO at issue connect to the public sewer. **Status - Closed**

### **21. Kidder Township, Carbon County**

Logger challenges the Township's timber harvesting ordinance and expresses particular concern with regard to the requirements pertaining to E&S Plans. The OAG explained in an acceptance letter that the Township's ordinance provisions concerning E&S requirements, permit fees, silvicultural standards, insurance matters, and penalties violated ACRE. After receiving the OAG acceptance letter, the Township permitted the harvest to proceed. The harvest is finished and

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<sup>16</sup> CBRs are locally drafted and enacted ordinances that seek to invalidate certain property rights. CBRs have been routinely invalidated by the courts. *See e.g. Pennsylvania Gen. Energy Co., LLC v. Grant Twp.*, 2018 WL 306679 at 10 (W.D. Pa. 2018) and cases listed therein.



the site retired. The OAG is awaiting the Township's formal response to the acceptance letter.

**Status – In Negotiation**

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

Farmer challenges the Township's stormwater management ordinances. All issues raised in the ACRE complaint with the exception of whether an operations and maintenance agreement is required have been resolved. The Township has changed the stormwater ordinance to increase the square footage of impervious areas which allows the farmer to proceed with constructing the covered animal heavy use area. The OAG's review of whether an operations and management agreement is required continues. **Status – Open**

**23. 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 has agreed to amend its ordinances to reflect the RTFA's definition of a NAO, to amend the distance of its setbacks to comply with state law, to more specifically delineate the applicability of NAOs to "farm-based businesses," and to add a definition of "agricultural products" in the Definition portion of the ordinances. The OAG continues to work on a proposal to resolve several remaining issues. **Status – In Negotiation**

**24. Pocono Township, Monroe County**

Timber harvesting company filed an ACRE complaint contending that the Township's forestry ordinance violated ACRE. The OAG accepted the case informing the Township that the ordinances related to mandatory buffer zones, basal area to remain after a harvest, times of harvest, fees and escrow, and E&S requirements violated ACRE. In light of the OAG acceptance letter, the Township permitted the harvest to proceed. The harvest is finished and the site retired. The OAG

recommended that the Township enact the PSU Model Timber Harvesting ordinance and is awaiting the Township's response. **Status – In Negotiation**

**25. 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 OAG accepted the case and sent the Township an acceptance letter. The Township's response agreed with some, but not all, of the OAG's positions regarding the ordinance. The OAG continues to work on a proposal to resolve several remaining issues. **Status – In Negotiation**

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

Farmers filed an ACRE complaint challenging the Township's ordinances regulating direct commercial sales of agricultural commodities. The Township agreed that its ordinances were in conflict with state law and issued all necessary permits to the farmers for the operation of their business, solving the immediate problem. The Township agreed to amend its improper ordinances; when amending its ordinances the Township typically waits until there are several amendments to various ordinances in order to process one comprehensive ordinance to save on costs. This amendment process usually occurs once a year. As soon as the Township provides proof that it has amended its ordinances, the OAG will close the case. **Status – In Negotiation.**

**27. 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**

**28. 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 OAG concluded that there were deficiencies in the ordinances and sent out an acceptance letter. The Township responded, conceding some points but contesting others. The OAG continues to work on a proposal to resolve several remaining issues.

**Status – In Negotiation.**

**29. 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 ACRE complainant decided to place her business in another municipality and had no further interest in the property in Carroll Township. **Status – Closed**

**30. 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 Township has been preparing a comprehensive Zoning Ordinance amendment that will remedy any potential issues with ACRE. Once the Zoning Ordinance amendment is in a form that is ready for the Board of Supervisors to review and potentially adopt, the Township will forward the same to the OAG for review. **Status – In Negotiations**

**31. 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**

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

Logging company challenged the Township's E&S and escrow requirements, fee structure, tops and slash removal, and mandatory engineer review of the timber harvesting plan. After correspondence between the Township and the OAG, the Township removed the offending ordinance provisions. **Status - Closed**

**33. North Middleton Township, Cumberland County**

Landowners disagree with the Township's actions as it pertains to their winery and proposed agritainment activities. Since receipt of the ACRE complaint, the Cumberland County Court of Common Pleas found in favor of the farmers' making and selling wine in the Rural Resource Zoning District. Lot access, setback, screening/buffering and parking requirements remain unresolved concerning the farmers' intent to operate a private party/special event facility in the rural Resource Zoning District. OAG ordinance review is ongoing. **Status – Open**

**B. Cases Received During the Fifteenth Annual Report Time Frame (July 6, 2019 to July 6, 2020)**

**1. Salem Township, Luzerne County**

Farmers challenge an ordinance that purports to establish health, safety, and welfare regulations for CAOs and CAFOs in the Township. OAG review of the ordinance is ongoing. **Status-Open**

## **2. Swarthmore Township, Delaware County**

A township resident filed an ACRE complaint contending that the Township improperly prohibited him from selling produce from his front yard. The ACRE complainant was not operating a NAO and did not satisfy the RTFA requirements for direct sales from his property. The OAG denied the ACRE complaint. **Status - Closed**

## **3. Elk Township, Chester County**

Farmer wanted to build a poultry barn housing approximately 3,200 chickens. The Township denied his permit application based on its “intensive agriculture” ordinance. The OAG accepted the case, informing the Township that the use of the term “intensive agriculture” must comply with state standards concerning CAOs and CAFOs. The Township’s various acreage requirements also violated state law. In light of the OAG’s acceptance letter, Elk Township allowed the farmer to build his poultry barn. The Township and the OAG are negotiating on an amendment to the ordinance provisions concerning acreage requirements and annual gross income. The OAG continues to work on a proposal to resolve those two issues. **Status – In Negotiation**

## **4. Middletown Township, Delaware County**

Lumber company and landowner filed an ACRE complaint challenging the Township’s timber harvesting ordinance. The Township agreed to return all escrow and professional fees charged, totaling over a thousand dollars, and committed to charging no further escrow or fees. The timber harvest is expected to occur in the Fall of 2020. The OAG informed the Township that if it agrees to change its ordinances and provides proof that those changes have been enacted, the OAG will close this matter. The final resolution is still pending. **Status – In Negotiation**

**5. The City of Philadelphia**

This case involves urban farming. City resident filed an ACRE complaint challenging Philadelphia's requirements to engage in urban farming. OAG review continues. **Status – Open.**

**6. 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 and is reviewing the proposed amendments. While this case was listed in the Fourteenth Annual Report, the landowner has subsequently filed a new ACRE complaint which elaborates on his earlier claims. Review is ongoing. **Status – Open**

**7. East Earl Township, Lancaster County**

Timber harvester challenged various requirements of the Township's timber harvesting ordinance. The OAG accepted the case recommending that the Township enact the PSU Extension's model timber harvesting ordinance. The Township agreed to do so thereby bringing its timber harvesting ordinance into compliance with state law. Once the Township provides proof that it has amended its ordinances the OAG will close the case. **Status-In Negotiation**

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

Timber company filed an ACRE complaint challenging the legality of the Township's requirement that a forestry stewardship plan be submitted prior to issuance of harvesting permit. The complainant also argued that mandatory, blanket buffer zones and setbacks applicable to all situations violated ACRE. The OAG accepted the case. After receipt of the OAG acceptance letter, the Township issued the timber harvesting permit and the harvest proceeded. The Township has

also agreed to amend its ordinances. Once the Township provides proof that it has amended its ordinances the OAG will close the case. **Status – In Negotiation**

**9. Fairview Township, York County**

Landowner applied for a permit to build a large structure to use in a proposed winery operation. The ACRE complainant wanted to use the building in various ways: to manufacture the wine; as a tasting room; as a storefront to sell the wine; and as an event destination. The OAG denied the ACRE complaint because the proposed building was not an accessory use that would be subordinate to an already existing tree farm on the property nor would the building be excluded from the requirements of the Uniform Construction Code. 35 P.S. §§ 7210.101, *et.seq.* **Status – Closed**

**10. Peters Township, Washington County**

Farmer contended that the Township’s ordinance requiring him to cut down weeds and tall grass at a road intersection violated ACRE. He further stated that the Township was not in compliance with the Agricultural Area Security Law (“AASL”)<sup>17</sup>. The OAG denied the ACRE complaint. The ordinance was not specific to agriculture; the Township has authority to require a citizen to comply with an ordinance of general applicability designed to make a roadway safe. Review of the farmer’s claim that the Township was violating the AASL showed that these claims were unfounded. **Status-Closed**

**11. Willistown Township, Chester County**

Willistown has a height limitation ordinance for new construction which specifically excludes agricultural buildings. The Township denied the ACRE complainant’s permit application to build a horse barn and riding ring based on the height limitation ordinance. The OAG accepted the case informing the Township that equine activities constitute a NAO, the proposed stable/riding

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<sup>17</sup> 3 Pa.C.S. §§ 901-915.

ring was an agricultural building, therefore, its own height limitation ordinance did not apply. The Township agreed and issued the building permit. **Status-Closed**

#### **12. Lower Milford Township #2, Lehigh County**

Landowner hoping to start a winery challenged the Township's ordinance requiring a minimum of five acres in which to operate a winery. The OAG accepted the case, informing the Township that with property in an agricultural zoning district a landowner can meet the requirements for a NAO under the RTFA without consideration of an acreage requirement if the anticipated yearly gross income from the property is \$10,000 or more. The Township agreed to amend its ordinance to bring it into compliance with the RTFA. Once the Township provides proof that it has amended its ordinances the OAG will close the case. **Status-In Negotiation**

#### **13. Providence Township, Lancaster County**

A forestry company filed an ACRE complaint wherein it challenged the Township's requirement that an already completed and Department of Environmental Protection ("DEP") approved E&S Plan must also be reviewed and approved by the local County Conservation District before issuing a timber harvesting permit. Furthermore, the complainant challenged ordinance provisions concerning mandatory setbacks/buffer zones applicable in all circumstances as well as several stream crossing requirements. The OAG accepted the case. Upon receipt of the OAG's acceptance letter, the Township has agreed to amend its ordinances to bring them into compliance with state law. Once the Township provides proof that it has amended its ordinances the OAG will close the case. **Status-In Negotiation**

#### **14. Hopewell Township, Beaver County**

Farmer filed an ACRE complaint concerning various ordinances dealing with CAOs/CAFOs and what the Township refers to as "intensive agriculture." The OAG accepted the case. The



Township agreed to amend its setback requirements, but issues remain, including numerous concerns about how the Township's defines "intensive agriculture," acreage requirements, and wellhead protection amongst others. The OAG continues to work on a proposal to resolve the remaining issues. **Status – In Negotiation**

**15. South Strabane Township, Washington County**

Landowner wanted to build a horse barn, but the Township denied the permit application based on setback distances found in the ordinances. The OAG accepted the ACRE complaint informing the Township that its setback requirements exceeded state standards. The OAG and the Township worked collaboratively to amend the offending ordinances and allow the landowner to build the barn. **Status-Closed**

**16. Abington Township, Montgomery County**

ACRE complainant grew vegetables on .12 acres in his backyard. The property is located in a residential zoning area. Complainant started a farmer's market in his driveway where the produce he grew constituted a very small portion of all items sold. The Township ordered him to close this market and the complainant subsequently found another location to operate his business. The OAG denied the ACRE complaint. **Status-Closed**

**17. East Cocalico Township, Lancaster County**

Timber harvester challenged the Township's forestry ordinance provisions concerning wetland certification, forest regeneration and stewardship plans, stormwater management, E&S requirements, no cut buffers, and road posting and bonding. The OAG directed the Township's attention to the various timber harvesting cases found on the OAG's ACRE website. After reviewing those cases, the Township agreed to enact the PSU Model Ordinance. Once the Township provides proof that it has amended its ordinances the OAG will close the case. **Status – In Negotiation**

## **18. Upper Oxford Township, Chester County**

Farmers grow aloe that they use in making skincare products, soaps, lotions, and hand sanitizer. The Township has closed the business as it contends that the farmers are improperly manufacturing in an agricultural zoning district. OAG review is ongoing. **Status-Open**

## **19. Butler Township, Luzerne County**

Hemp grower claims that the Township's ordinance "To Regulate the Growing, Processing, and Production of Hemp" is too restrictive, that it unfairly targets hemp growers, and effectively ends the grower's operation. The Township officials and the OAG are working together to draft a legally sufficient hemp ordinance. The OAG has enlisted the aid of the PSU School of Agriculture, the PSU School of Law, and the Pennsylvania Department of Agriculture to draft the ordinance. **Status-In Negotiation**

## **20. Hellam Township, York County**

ACRE complainant contends that the township's road posting and bonding ordinances as they pertain to agriculture products violate state law. OAG review is 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 it’s 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**

**1. 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.Cmwlt. 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 upon the best course of action with 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.