

2006 Litigation Update:

Re: Act 38 of 2005: “A State Solution to Resolving Conflicts That Involve Agriculture, Communities and the Rural Environment”

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In the past 30 years, public policy measures in most states addressed promotion of the continued development and successful operation of agricultural production facilities. Passage of “Right to Farm” laws, Agricultural Districts or Security Area laws, Sale or Donation of Conservation Easement programs, promotion of effective Agricultural Zoning programs and Pre-emption of conflicting local laws by uniform state laws are common examples of how these policy measures have been put into practice.¹ Despite these measures, however, community objections to production facilities, large scale animal feeding operations in particular, have continued.² In some cases, local communities adopted measures that seemingly flew in the face of local authority that was affected by these policy measures. Producers who were adversely affected by such local government action could challenge these measures, but the cost of doing so would be prohibitive. Here are some examples.

A) In 1998, Granville Township, Bradford County, enacted an ordinance that imposed restrictions on site selection for concentrated animal feeding operations and their manure storage facilities. A number of Township farmers filed a complaint in equity³ challenging the Township’s authority to enact these restrictions and asserting that the Township’s authority was preempted by the state Nutrient Management Act. The farmers complained that the ordinance’s restrictions were in conflict with and imposed more stringent requirements than the Nutrient Management Act which was passed in 1993. In this case, the Court agreed that the inconsistent ordinance was preempted and ordered it to be null and void.

B) In 2001, two Fulton County, Pennsylvania farmers challenged a variety of ordinances that Belfast Township passed in 2000.⁴ Among these ordinances is a Farm Ownership Ordinance that prevents farmers raising corporate owned livestock from building additional structure to house livestock raised under new or existing contracts; an Environmental Protection Ordinance that restricts those who have been “consistent violators” from doing or continuing to do business in the Township; and a Residential Well and Spring Protection Act that prevents water withdrawals of more than 300 gallons without a Township Water Use Authorization and a Water Impact Study. The Fulton County farmers challenged these measures on a variety of grounds, including lack of Township authority, preemption by state law and a violation of the dormant commerce clause under federal constitutional law. In the farmers’ minds these measures prohibited them from expanding their operations and from forming new business relationships which affected their economic interests. In September 2005, The Court of Common Pleas of Fulton County ruled on a series of plaintiffs’ motions for summary judgment. The ruling granted the farmers summary judgment in the case of the Well and Spring

Protection Act, but denied summary judgment in the case of the other two ordinances citing material issues of fact regarding these ordinances.

C) Under the terms of the Richmond Township (Berks County) Zoning Ordinance of 1998, a proposed expansion of an agricultural production facility can be considered an "Intensive Agricultural Activity" if the area of the tract and the number of animals to be raised on it exceed established numbers in the ordinance. To engage in this type of activity in the R-A zoning district, landowners are required to obtain a special exception under the ordinance. Section 804.7 of the ordinance sets forth five criteria an applicant must satisfy to obtain a special exception for an intensive agricultural activity. The section establishes a variety of requirements, including 1,500 feet setbacks from any other property and from any other zoning district.

In October 2002, Stephen Burkholder and his wife owned Township land on which an agricultural conservation easement was placed. They filed an application with the Richmond Township Zoning Hearing Board (ZHB) seeking a special exception for a proposed intensive agriculture facility pursuant to Section 804.7. It was the Burkholders' intent to build new facilities that would allow them to expand their "partial all in/out" hog raising operation to a "total all in/out" operation. In order to build these facilities, they need to have the setback requirement reduced because of the physical configuration of their land. In their application, the Burkholders asserted the 1,500-foot setback requirement was invalid because it conflicted with the NMA's less stringent setback requirements of up to 300 feet. The ZHB issued a 2-1 decision rejecting all of the landowners' requested relief. The landowners appealed. Without taking additional evidence, the trial court affirmed in part and reversed in part. The trial court addressed Landowners' contention that the NMA preempts the 1,500-foot setback requirement contained in Section 804.7 a. Accordingly, the trial court determined that to the extent Section 804.7 a. regulates manure storage facilities, it is more restrictive than the NMA, and it is in conflict with the NMA and its regulations. On appeal to Commonwealth Court, the majority opinion affirmed the trial court's determination that the NMA preempted the Township's local setback requirement.

In each of these cases, individual farmers were faced with the often greater financial resources of local communities, including their revenue raising capability. Would these individual farmers be forced to accept measures that some would say exceeded the limits of municipal authority?⁵ In July, 2005, the Pennsylvania Legislature fashioned a solution to this problem by enacting Act 38 of 2005.

The main purposes of Act 38 were to: a) Ensure that local governments enact ordinances regulating normal agricultural operations that are consistent with authority given them by the laws of the Commonwealth to protect citizens' health, safety and welfare; b) Provide timely review of potentially unauthorized local ordinances; c) Replace the Nutrient Management Act (Act 6) by retaining most of the current law and regulations, and adding manure setback and buffer requirements; and d) Require certain farms to develop odor management plans. Under this statute, the State Attorney General was authorized to use discretion to bring actions to invalidate unauthorized local ordinances or enjoin the enforcement of unauthorized local ordinances. If the Attorney

General chose not to bring an action against these municipalities, any person aggrieved by the enactment or enforcement could do so without the Attorney General's participation

In regard to municipal authority, ACRE provided that local government can not adopt or enforce an ordinance limiting normal agricultural operations if it is not authorized to do so or it is prohibited or preempted from doing so under state law. Some of the laws that are involved in determining whether a local government is authorized to address a problem include the "Right to Farm" law, the Nutrient Management Act (as amended by Act 38), the Municipalities Planning Code which gives local government the authority to pass zoning and subdivision laws and the Agricultural Security Area Laws.

For ACRE purposes, an "unauthorized local ordinance" also includes one that restricts or limits the ownership structure of a normal agricultural operation.⁶ This would seem to be a direct reference to the Farm Ownership Ordinance that Belfast Township adopted from the South Dakota model it followed. ACRE is now before the Commonwealth Court in several cases brought by the Attorney General.

In 2006, the Attorney General filed petitions with Commonwealth Court to challenge a number of municipal ordinances that he alleged were "unauthorized" under ACRE. Some municipalities challenged the Attorney General action by filing preliminary objections that charged the Attorney General's action is unwarranted as authority under ACRE regarding ordinances on the books on July 6, 2005 is limited to enforcement of those ordinances⁷

Two of the cases involving municipal preliminary objections were decided in mid-December, 2006. In each decision⁸ Commonwealth Court ruled in favor of the municipalities and concluded for the Attorney General to have authority to challenge ordinances passed before July 6, 2005 the Township must have attempted to enforce the challenged ordinances. The Township must take action to compel compliance with the ordinance or penalize noncompliance with it. In the petitions filed with Commonwealth Court, the Attorney General did not allege that the ordinances were enforced. It was on the failure to allege township enforcement that the municipalities challenged the legal sufficiency of the Attorney General petitions.

Neither of these decisions affects the ACRE law's validity, only a point concerning its interpretation and application. Neither of these decisions upholds the challenged Township ordinance(s) and that matter is undecided at this point. Each of the December, 2006 decisions dismissed the Attorney General's petition without prejudice to take other action against the Townships involved.

In late December the Attorney General announced he had filed an appeal to the Supreme Court from these Commonwealth Court decisions. Stay tuned.

¹ For a more detailed discussion of these measures and their use to promote agricultural development see, J. Becker, "Promoting Agricultural Development Through Land Use Planning Limits," 36 Real P. Pro. Trust J. 619, (2002).

² For a more detailed discussion of the nature of community objections, see C. Abdalla, et al. “*Community Conflicts Over Intensive Livestock Operations: How and Why Do Such Conflicts Escalate?*” 7 Drake J. Ag. L. 7 (2002).

³ McClellan, Brubaker et al. v. Granville Township Bd. of Supervisors, Bradford County Court of Common Pleas, 99EQ000016.

⁴ Leese and Swope v. Belfast Township and the Belfast Township Board of Supervisors, Fulton County Court of Common Pleas, No. 304 of 2001C.

⁵ It has been rumored that these farmers received support from various organizations and did not pursue this litigation alone. The details of this support are not known to the writer, but it is his belief that support of some kind was given.

⁶ Act 38, 2005, section 312, 3 Pa.C.S.A. 312.

⁷ *see section 313(b)*, “*This chapter shall apply to the enforcement of local ordinances existing on the effective date of this section ...*”.

⁸ Commonwealth v. Lower Oxford Township No. 359, M.D. 2006 and Commonwealth v. Heidelberg and North Heidelberg Townships, et al No. 357 M.D. 2006.