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INSIDE

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IRS Notice on self-employment tax for CRP payments

The uncertainty in handling conservation reserve program (CRP) payments existing since 2003[1] has been partially reduced, in a manner adverse to taxpayers, by the issuance of *Notice 2006-108* in early December, 2006.[2] The Internal Revenue Service response to the controversy was to – (1) issue *Notice 2006-108*;[3] (2) announce that a revenue ruling is forthcoming; (3) obsolete *Rev. Rul. 60-32*,[4] a key ruling in this area for nearly 50 years; and (4) invite comments on the Notice through March 19, 2007.

The action taken by the Internal Revenue Service is in direct opposition to what was well-settled law dating back to 1988[5] and will mean a significant tax increase for retired and disabled taxpayers and for investors whose CRP land does not bear a "direct nexus" to a trade or business of farming.[6]

IRS Guidance being relied on by taxpayers

In 1988, the Internal Revenue Service issued a private letter ruling[7] indicating that payments received by a retired landowner who bid land into the conservation reserve program were not subject to self-employment tax.[8] Various statements from both IRS and the Social Security Administration indicated that where the farm operator or owner was materially participating in the farm operation, CRP payments were properly includible in net earnings from self-employment, subject to self-employment tax.[9]

Additional guidance came from a 1996 Tax Court case[10] involving a Texas farmer who bought land already under a CRP contract. The Tax Court held that the CRP payments were subject to self-employment tax because of the "direct nexus" or connection with the farming operation.[11] The farmer used the equipment and employees from the farming operation to maintain the seeding on the CRP acreage and to clip the weeds and admitted that, at the end of the 10-year CRP contract, the land would be part of the regular farming operation. Under that case, retired landowner who had land enrolled in the CRP would not have SE income from the payments and neither would a mere investor who had land in the CRP.[12]

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

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 equity[3] challenging the Township's authority to enact these restrictions and asserting

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A 1998 Tax Court case held that CRP payments were "rent" and not subject to self-employment tax[13] but that decision was overturned on appeal.[14] The appellate court, in dictum, specifically rejected the application of "material participation" to CRP contracts (pointing out that material participation was applicable only to landlord-tenant relationships). It is important to note that the Sixth Circuit Court of Appeals reversed the Tax Court decision without articulating a clear test as to the line between what is and what is not a trade or business as required by the statute.[15]

The 2003 "bomb shell"

On June 23, 2003, IRS issued a Chief Counsel's Office letter ruling, stating that all CRP payments should be reported on a business schedule, not a Form 4835 (for non-material participation landlords) or Schedule E (rents).[16] That meant that all CRP payments would be subject to the 15.3 percent self-employment tax, including payments to retired or disabled landowners as well as to mere investors with land under CRP contracts.[17] Moreover, the language also appeared to apply to other federal conservation-oriented programs such as the conservation security program, the wetlands reserve program, and the grasslands reserve program.

The CCA letter ruling triggered several responses. Legislative bills that had been introduced earlier[18] were dusted off and reintroduced.[19] And Rep. Earl Pomeroy of North Dakota commenced a crusade to convince IRS that their position was not in accord with established tax law. A meeting in Bismarck, North Dakota, on March 26, 2004, produced little in the way of results so Pomeroy arranged a meeting on June 8, 2004 in Washington, D.C. with IRS Commissioner Mark Everson and several senior IRS staff members. At both meetings, this author laid out a history of the controversy and urged IRS to harmonize the 1988 and 2003 rulings.

At the request of Commissioner Everson, a file of materials was submitted in late June of 2004. In October of 2005, IRS admitted to losing the file so a replacement file was submitted. The IRS response came on December 5, 2006.[20]

Notice 2006-108

The IRS response, *Notice 2006-108*,[21] indicated that a revenue ruling was anticipated with an opportunity for comments through March 19, 2007.

The *Notice* examined two fact situations– a farmer carrying on a farming operation who bids part of the land into the CRP; the other fact situation involved a situation where the landowner rented out part of the land and bid the rest into CRP, with the work on the CRP land done by a third party. In both instances, the payments were subject to self-employment tax.

In its reasoning, IRS tossed out material participation, citing *Wuebker v. Commissioner*,[22] as applicable only to landlord-tenant relationships, disregarded the "direct nexus" concept of *Ray v. Commissioner*,[23] and interpreted the statutory language of "trade or business" as interpreted by the U.S. Supreme Court as requiring that a taxpayer be ". . . involved in the activity with continuity and regularity and . . . the taxpayer's primary purpose for engaging in the activity must be for income or profit."[24] The *Notice* baldly asserts, without support, that "[p]articipation in a CRP contract is a trade or business" and that the 10-year term during which a CRP participant has duties to perform in "tilling, seeding, fertilizing, and weed control" assures the "continuity and regularity" necessary to be a trade or business.[25] The *Notice* obsoletes *Rev. Rul. 60-32*[26] which posed an embarrassing obstacle to the reasoning in *Notice 2006-108*.[27]

The *Notice* does not mention other federal conservation programs but at least some of those programs are also likely to fall within the scope of the *Notice* with the expansive interpretation employed of "trade or business."

—Neil E. Harl, Professor of Economics, Iowa State University. Reprinted by permission from 18 Agric. L. Dig. 1 (2007)

[1] See CCA Ltr. Rul. 200325002, May 29, 2003.

[2] Notice 2006-108, I.R.B. 2006-51. See generally 4 Harl, *Agricultural Law* §§ 27.03[4][e], 37.03[3][b] (2006); Harl, *Agricultural Law Manual* § 4.02(1)(e) (2006). See also Harl, "Comments Sent to the IRS On Notice 2006-108, I.R.B. 2006-51," 18 *Agric. L. Dig*. 2 (2007); Harl, "Developments in CRP Payment Reporting," 14 *Agric. L. Dig*. 97 (2006).

[3] I.R.B. 2006-51.

[4] 1960-1 C.B. 23.

[5] Ltr. Rul. 8822064, March 7, 1988.

[6] See Ray v. Comm'r, T.C. Memo. 1996-436.

[7] Ltr. Rul. 8822064, March 7, 1988.

[8] *Id*.

[9] E.g., Letter from Peter K. Scott, Associate Chief Counsel, Technical, March 10, 1987.

[10] *Ray v. Comm'r*, T.C. Memo. 1886-436.

[11] *Id*.

[12] *Id*.

[13] Wuebker v. Comm'r, 110 T.C. 431 (1998).

[14] *Commissioner v. Wuebker*, 205 F.3d 897 (6th Cir. 2000).

[15] I.R.C. § 1402(a).

[16] CCA Ltr. Rul. 200325002, May 29, 2003.

[17] *Id*.

[18] S. 2422, S. 2344, H.R. 4212, 106th Cong., 2d Sess. (2000).

[19] S. 665, S. 1316, 108th Cong., 1st Sess. (2003).

[20] Notice 2006-108, I.R.B. 2006-51.

[21] *Id*.

[22] 205 F.3d 897 (6th Cir. 2000).

[23] T.C. Memo. 1996-436.

[24] *Commissioner v. Groetzinger*, 480 U.S. 23, 35 (1987).

[25] Notice 2006-108, I.R.B. 2006-51.

[26] 1960-1 C.B. 23.

[27] I.R.B. 2006-51.

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Letters and editorial contributions are welcome and should be directed to Linda Grim McCormick, Editor, 2816 C.R. 163, Alvin, TX 77511, 281-388-0155.

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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

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—Drew L. Kershen, Professor of Law, The University of Oklahoma, Norman, OK

Breach of contract action involving Conservation Reserve Program dismissed

In *Barrientos v. United States*, No. L-05-163, 2006 WL 2414348 (S.D. Tex. Aug. 14, 2006), the United States District Court for the Southern District of Texas held that a plaintiff enrolled in the Conservation Reserve Program had failed to exhaust all administrative remedies in his claim for breach of contract against the United States Department of Agriculture. *Id.* at *1-3. The court also held that the government had not waived its sovereign immunity as it related to the plaintiff's tortious interference claim because under 28 U.S.C. § 2680(h) the government does not waive its sovereign immunity for "interference with contract rights." *Id.* at *3. In addition, the court rejected the plaintiff's request for a declaratory judgment that "the manner in which the Contract was administered . . . and breached" was "unconstitutional as a violation of Plaintiff's due process rights under the Fourteenth Amendment." *Id.* at *3. Finally, the court rejected the plaintiff's Motion for Leave to File Second Amended Complaint so that he could add claims for negligence and fraud. *Id.* at *1-4

—Chuck Munson, National AgLaw Center Graduate Assistant, Fayetteville, AR

Summary of selected provisions in the Tax Relief and Health Care Act of 2006

By Roger A. McEowen

One of the last acts of the 109th Congress was to pass H.R. 6111, the Tax Relief and Health Care Act of 2006 (Act).[1] The President signed the Act on December 20, 2006. The Act extends some provisions of the Code that had either expired or were set to expire soon, and makes key modifications to Health Savings Accounts. This article summarizes selected provisions of the Act.

Extension of various tax provisions (Title I of the Act)

The Act extends the following provisions through 2007:

- The deduction for qualified tuition and related expenses for higher education;[2]
- The deduction for state and local sales taxes;[3]
- The research and development credit[4] (the Act also makes other changes, including increasing the rates for the alternative incremental credit[5] and creating an alternative simplified credit);[6]
- The work opportunity tax credit and welfare-to-work tax credit (the Act also consolidates the two credits);[7]
- The election to treat combat pay as earned income for the earned income tax credit;[8]
- The above-the-line deduction of up to $250 for out-of-pocket classroom expenses of school teachers;[9]
- The provision allowing brownfield remediation costs to be expensed (the Act also extends the provision to the cleanup of petroleum products);[10]
- The provision allowing 15-year straight-line cost recovery for qualified leasehold improvements;[11]
- The enhanced charitable contribution deduction for corporate donations of computer technology equipment;[12]
- The authority for Archer medical savings accounts;[13]
- The suspension of the percentage depletion method's income limitation for oil and natural gas produced from marginal properties;[14]

The Act extends the following selected provisions beyond 2007:

- The new markets tax credit is extended through 2008, and the deadline for placing certain Gulf Opportunity Zone property in service to be eligible for bonus depreciation is extended through 2010.[15]

Energy tax provisions (Title II of the Act)

The Act extends several temporary energy tax provisions through 2008:

- The renewable energy credit;[16]
- The clean renewable energy bonds credit.[17]
- The deduction for energy-efficient commercial buildings;[18]
- The credit for energy-efficient homes;[19]
- The credit for residential energy-efficient property;[20]
- The energy credit;[21] and
- The rule contained in I.R.C. § 4041 that lowers the fuel excise tax rate on qualified methanol and ethanol fuel.[22]

Title II also includes several non-extender provisions. For example, for cellulosic biomass ethanol plant property placed in service prior to January 1, 2013, the Act provides an additional first-year depreciation deduction equal to 50 percent of the taxpayer's adjusted basis in the property.[23] Also, the bill increases the types of expenditures that may be made from the Leaking Underground Storage Tank Trust Fund,[24] and amends the I.R.C. § 45K credit for producing fuel from a nonconventional source so that the credit phaseout, which occurs when the reference price of oil exceeds $23.50 per barrel (adjusted for inflation), does not apply to facilities producing coke and coke gas.[25]

Health Savings Accounts (Title III of the Act)

The Act allows a one-time tax-free transfer of funds from a flexible spending arrangement or health reimbursement arrangement to a health savings account (HSA).[26] An employee who fails to remain an eligible individual (e.g., fails to be covered by a high-deductible health plan) during the 12-month period following the distribution is subject to tax on the distribution and a 10 percent penalty tax.[27] An employer who offers the distribution to some, but not all, eligible individuals is also subject to an excise tax.[28]

The Act also allows a one-time, tax-free distribution (roll-over) from an individual retirement account to an HSA, subject to several limitations.[29] An individual who does not remain an eligible individual during the 12-month period following the distribution is subject to tax on the distribution and a 10 percent penalty tax.

The Act retools the limits on deductible annual contributions to an HSA.[30] HSA contributions are no longer limited to the annual deductible of the individual's high deductible health policy. Instead, for 2007, the maximum contribution limit is $2,850 for single coverage or $5,650 for family coverage. Individuals age 55 or over may make an additional catch-up contribution of $800 for 2007.[31]

In addition, an individual who is HSA-eligible for only part of a year, including during the last month of that year, can be treated as eligible for that entire year.[32] An individual who does not remain HSA-eligible during the following year is subject to tax on the contributions that would have exceeded the deduction limitations, had they applied, and a 10 percent penalty tax.[33]

The Act also provides that, for purposes of determining whether an employer is subject to the excise tax in I.R.C. § 4980G for failing to make comparable HSA contributions, highly compensated employees are not treated as comparable participating employees for non-highly compensated employees.[34]

Other provisions (Title IV of the Act)

For purposes of the manufacturer's deduction of I.R.C. § 199, the Act treats Puerto Rico as part of the United States, so long as the taxpayer's gross receipts from sources within Puerto Rico are subject to U.S. taxation.[35]

For alternative minimum tax purposes, the minimum tax credit that a taxpayer may carry forward to reduce regular income taxes in future years is made partially refundable for unused credits that have been carried forward.[36]

Under I.R.C. § 6039, corporations involved in a transfer of stock options to an individual must provide information about the transfer to the individual. The Act requires that the corporation file a return with the IRS in addition to providing information to the person involved in the transfer.[37]

The Act increases the maximum $500 penalty on individuals who file a frivolous income tax return to $5,000 and applies the penalty provision to all taxpayers and federal taxes.[38] IRS may impose a penalty of up to $5,000 on taxpayers who make frivolous submissions for collection due process hearings, installment agreements, offers-in-compromise, and taxpayer assistance orders, and the Act authorizes the IRS to disregard such submissions. The Act also requires IRS to publish a list of frivolous positions, arguments, requests, and submissions.

The Act makes qualifying settlement funds for the cleanup of hazardous waste sites tax-exempt on a permanent basis.[39]

During a corporate division such as a spin-off, a distribution of stock in a controlled subsidiary by a parent corporation to its shareholders is tax-free to both the distributing corporation and the shareholders if the requirements of I.R.C. § 355 are met. One requirement is that both the parent corporation and subsidiary must

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have engaged in the active conduct of a trade or business for at least five years. Under TIPRA, the "active conduct" test is determined by looking at the activities of the entire affiliated group, not just the parent and subsidiary. The Act makes the TIPRA provision permanent.[40]

Before amendment by TIPRA, the sale of self-created musical works resulted in ordinary income. TIPRA created a temporary rule that allows a taxpayer to treat the work as a capital asset and, therefore, to be taxed on the gain from the sale at the applicable capital gains rates. The Act makes the TIPRA provision permanent.[41]

Under I.R.C. § 143, mortgage revenue bonds are tax-exempt bonds used to finance below-market rate mortgages for low- and moderate-income homebuyers who have not owned a home for the past three years. The Act provides a one-time waiver of the three-year requirement for bonds used to finance residences for veterans.[42]

Under I.R.C. § 121, taxpayers may exclude from gross income up to $250,000 ($500,000 if married filing jointly) of the gain realized from the sale of a principal residence. The taxpayer must have used the property as a principal residence for at least two of the five years preceding the date of sale. A taxpayer may elect to suspend the 5-year period for up to 10 years during the time that the taxpayer or spouse is on qualified official extended duty as a member of the uniformed services or U.S. Foreign Service. The Act allows intelligence community employees to make the suspension election for sales made before January 1, 2011.[43]

The Act makes permanent the TIPRA rule contained in I.R.C. § 7872 that exempts loans made pursuant to a continuing care contract to a qualified continuing care facility from the below-market interest rate rules.[44]

Mortgage insurance premiums treated as interest.

The 2006 Act adds a new subparagraph to I.R.C. § 163(h)(3) (qualified residence interest):[45]

"(i) IN GENERAL- Premiums paid or accrued for qualified mortgage insurance by a taxpayer during the taxable year in connection with acquisition indebtedness with respect to a qualified residence of the taxpayer shall be treated for purposes of this section as interest which is qualified residence interest.

"(ii) PHASEOUT- The amount otherwise treated as interest under clause (i) shall be reduced (but not below zero) by 10 percent of such amount for each $1,000 ($500 in the case of a married individual filing a separate return) (or fraction thereof) that the taxpayer's adjusted gross income for the taxable year exceeds $100,000 ($50,000 in the case of a married individual filing a separate return).

"(iii) LIMITATION- Clause (i) shall not apply with respect to any mortgage insurance contracts issued before January 1, 2007.

"(iv) TERMINATION- Clause (i) shall not apply to amounts—

(I) paid or accrued after December 31, 2007, or

(II) properly allocable to any period after such date. . . ."

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[1] Pub. L. No. 109-432.

[2] Act, § 101, *amending* I.R.C. § 222(e). For 2006 and 2007, the above-the-line deduction is set at a maximum of $4,000 for married taxpayers filing jointly with adjusted gross income of $130,000 or less.

[3] Act, § 103, *amending* I.R.C. § 164(b)(5)(I). The deduction is calculated either in accordance with receipts or using the Optional State Sales Tax Tables contained in IRS Pub. 600.

[4] Act, § 104, *amending* I.R.C. § 41(h)(1)(B). The credit is generally equal to 20 percent of the taxpayer's "qualified research expenses" that exceed a base amount.

[5] The alternative incremental credit uses a "stated percentage" of qualified expenses that exceed the taxpayer's average research expenditures over four years. Beginning in 2007, the amount is 3 percent of qualified research expenses between 1 and 1.5 percent of average annual gross receipts, 4 percent of qualified expenses between 1.5 and 2 percent of average annual gross receipts, and 5 percent of qualified expenses exceeding 2 percent.

[6] Act, § 104, *amending* I.R.C. § 41(h)(1)(B), effective for 2007. Under the simplified method, the credit is 12 percent of the qualified research expenses that exceed 50 percent of the average qualified research expenses for the three preceding tax years. If the taxpayer has no qualified expenses in any one of the preceding three years, the credit is 6 percent of the current qualified research expenses.

[7] Act, § 105, *amending* I.R.C. §§ 51(c)(4)(B) and 51A(f).

[8] Act, § 106, *amending* I.R.C. § 32(c)(2)(B)(vi)(II).

[9] Act, § 108, *amending* I.R.C. § 62(a)(2). Eligible taxpayers must work at least 900 hours during the school year. No carryover of any unused portion of the deduction to a future year is allowed.

[10] Act, § 109, *amending* I.R.C. § 198(h).

[11] Act, § 113, *amending* clauses (iv) and (v) of I.R.C. § 168(e)(3)(E).

[12] Act, § 116, *amending* I.R.C. § 170(e)(6)(G). In addition, for contributions after 2005, the deduction is available for equipment "assembled by" the donor.

[13] Act, § 117, *amending* paragraphs (2) and (3)(B) of I.R.C. § 220(i).

[14] Act, § 118, *amending* I.R.C. § 613A(c)(6)(H), effective for tax years 2006 and 2007.

[15] Act, § 120. I.R.C. § 123 provides rules for making elections under the extended provisions to account for the fact that some provisions had expired in 2005.

[16] Act, § 201, *amending* I.R.C. § 45(d).

[17] Act, § 202, *amending* I.R.C. § 54. The Act also raises the caps on the amount of bonds that may be issued and the amount that may be used to finance projects of governmental bodies.

[18] Act, § 204, *amending* I.R.C. § 179(D)(h).

[19] Act, § 205, *amending* I.R.C. § 45L(g).

[20] Act, § 206, *amending* I.R.C. § 25(D)(g). The Act also replaces the term "qualified photovoltaic property expenditures" with "qualified solar electric property expenditures." Act, § 206(b).

[21] Act, § 207, *amending* I.R.C. § 48.

[22] Act, § 208, *amending* I.R.C. § 4041(b)(2).

[23] Act, § 209, *amending* I.R.C. § 168.

[24] Act, § 210, *amending* I.R.C. § 9508(c), effective upon enactment.

[25] Act, § 211, *amending* I.R.C. § 45K(g)(2), effective for fuel produced and used after December 31, 2005, in taxable years ending after such date.

[26] Act, § 302, *amending* I.R.C. § 106, applicable for distributions made on or after December 20, 2006. The maximum transfer amount is the lesser of the balance as of the date of the transfer or September 21, 2006. The transfer must be made before January 1, 2012. Enrollment in an FSA in 2006 will not affect eligibility to enroll in a high deductible health plan and have an HSA in 2007, if the balance in the FSA is zero on December 31, 2006, or if the balance in the FSA is transferred to the HSA.

[27] Act, § 305, effective for tax years beginning after 2006.

[28] Act, § 306, *amending* I.R.C. § 4980G.

[29] Act, § 307, *amending* I.R.C. § 408(d), effective for tax years beginning after December 31, 2006.

[30] Act, § 303, *amending* I.R.C. § 223(b), paragraph 2.

[31] The COLAs for determining the limitations are to be calculated and released by June 1 of each year. Act, § 304, amending I.R.C. § 223(g), paragraph 1.

[32] Act, § 305, effective for tax years beginning after 2006. Thus, enrollees may fund a full year's contribution to their HSA for partial year coverage as long as they remain enrolled in the high deductible health policy for 12 months. The previous rule permitted enrollees to only fund their HSA for the portion of the year in which they were enrolled in a high deductible health policy.

[33] *Id*.

[34] Act, § 306, *amending* I.R.C. § 4980F.

[35] Act, § 401, effective for the first two taxable years beginning after December 31, 2005, and before January 1, 2008.

[36] Act, § 402, effective upon enactment. The unused credit must be from taxable years beginning before January 1, 2013, and is phased out for higher-income individuals.

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in 2000.[4] Among these ordinances is a Farm Ownership Ordinance that prevents farmers raising corporate owned livestock from building additional structures 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 Burkolders' 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), and 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 ordinances.[7]

Two of the cases involving municipal preliminary objections were decided in mid-December, 2006. In each decision[8] 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.

—John C. Becker, Penn State, University Park, PA

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[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).

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Federal Register summary from December 27, 2006 to January12, 2007

CROP INSURANCE. The FCIC has adopted as final regulations amending the Common Crop Insurance Regulations, Nursery Crop Insurance Provisions by amending the definition of "liners." The regulations also finalize the Nursery Peak Inventory Endorsement to clarify that the peak amount of insurance is limited to 200 percent of the amount of insurance established under the Nursery Crop Insurance Provisions. The amendments will be applicable to the 2008 and succeeding crop years. **71 Fed. Reg. 74455 (Dec. 12, 2006)**.

The FCIC has issued proposed regulations amending the Common Crop Insurance Regulations, Millet Crop Insurance Provisions to remove the reduction in indemnity for any unharvested millet acreage to better meet the needs of insured producers. The changes will apply for the 2008 and succeeding crop years. **71 Fed. Reg. 77628 (Dec. 27, 2006)**.

DISASTER PROGRAMS. The FSA has adopted as final regulations establishing disaster relief programs for agricultural producers who suffered losses in Hurricanes Dennis, Katrina, Ophelia, Rita and Wilma in Alabama, Florida, Louisiana, Mississippi, North Carolina and Texas. The regulations also provide for grants to states to assist aquaculture producers who suffered losses from the hurricanes. **72 Fed. Reg. 875 (Jan. 9, 2007)**.

EXPORTS. The CCC has announced the availability of funding for the 2007 Technical Assistance for Specialty Crops (TASC) Program. The CCC is soliciting applications from the private sector and from government agencies for participation in the FY 2007 TASC Program. The TASC Program is administered by personnel of the Foreign Agricultural Service. The TASC program is designed to assist U.S. organizations by providing funding for projects that address sanitary, phytosanitary, and technical barriers that prohibit or threaten the export of U.S. specialty crops. U.S. specialty crops, for the purpose of the TASC Program, are defined to include all cultivated plants, or the products thereof, produced in the U.S., except wheat, feed grains, oilseeds, cotton, rice, peanuts, sugar, and tobacco. **72 Fed. Reg. 1311 (Jan. 11, 2007)**.

The CCC has announced the availability of $2.5 million in funding for the 2007 Quality Samples Program (QSP). The CCC is soliciting applications for participation in the FY 2007 QSP. QSP is administered by personnel of the Foreign Agricultural Service. The QSP is designed to encourage the development and expansion of export markets for U.S. agricultural commodities by assisting U.S. entities in providing commodity samples to potential foreign importers to promote a better understanding and appreciation for the high quality of U.S. agricultural commodities. **72 Fed. Reg. 1309 (Jan. 11, 2007)**.

HORSES. The APHIS has issued proposed regulations amending the regulations pertaining to the importation of horses to establish standards for the approval of permanent, privately owned quarantine facilities for horses. This proposed rule replaces a previously published proposed rule, which was withdrawn, that contained substantially different restrictions on ownership and substantially different requirements for the physical plant, operating procedures, and compliance date. **71 Fed. Reg. 74827 (Dec. 13, 2006)**.

MEAT AND POULTRY PRODUCTS. The FSIS has announced the receipt of a petition from Hormel Foods to establish a definition for the voluntary claim "natural" and to delineate the conditions under which the claim can be used on the labels of meat and poultry products. The FSIS is inviting comments on the issue generally and on the petition and, to facilitate the comment process, is announcing that it will hold a public meeting to discuss the petition. After the comment period closes, FSIS will initiate rulemaking on the claim "natural." **71 Fed. Reg. 70503 (Dec. 5, 2006)**.

SUGAR. The CCC has announced eligibility criteria and application procedures that will be used to implement Section 3011 of the Emergency Agricultural Disaster Assistance Act of 2006 which authorizes the 2005 Louisiana Sugarcane Hurricane Disaster Assistance Program. The 2005 Program required the CCC to provide compensation totaling $40 million to Louisiana sugarcane producers and processors who suffered economic losses from the cumulative effects of Hurricanes Katrina and Rita in August and September of 2005. CCC will make $29 million in payments for 2005-crop (Fiscal Year 2006) losses to affected sugarcane processors, who shall share these payments with affected producers in a manner reflecting current contracts between the two parties. In addition, CCC will make payments of $10 million to compensate affected sugarcane producers for losses that are suffered only by producers, including losses due to saltwater flooding, wind damage, or increased planting, replanting, or harvesting costs. The funds for "producer-only losses" will be paid to processors, who will then disburse payments to affected producers without regard to contractual arrangements for dividing sugar revenue. CCC is reserving $1 million in the event of appeals and will disburse the residual, if any, to processors, who will then disburse payments to producers in a manner reflecting current contracts between the two parties. **71 Fed. Reg. 70735 (Dec. 6, 2006)**.

TUBERCULOSIS. The APHIS has adopted as final regulations amending the bovine tuberculosis regulations regarding state and zone classifications by raising the designation of Texas from modified accredited advanced to accredited-free. **72 Fed. Reg. 247 (Jan. 4, 2007)**.

—Robert P. Achenbach, Jr., AALA Exec. Dir.

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[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.

Selected provisions/Cont. from page 5

[37] Act, § 403, effective upon enactment.

[38] Act, § 407, effective for submissions made and issues raised after the date on which the Secretary first prescribes a list under I.R.C. § 6702(c).

[39] Act, § 409, effective May 17, 2006.

[40] Act, § 410, effective for distributions occurring after May 17, 2006.

[41] Act, § 412, effective for sales or exchanges in tax years beginning after May 17, 2006.

[42] Act, § 416, effective for bonds issued after December 20, 2006, and before January 1, 2011.

[43] Act, § 417, effective for sales or exchanges after date of enactment and before January 1, 2011.

[44] Act, § 425, effective for calendar years beginning after December 31, 2005.

[45] Act § 419. The amendments made by this section apply to amounts paid or accrued after December 31, 2006, and before January 1, 2008.

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2007 Membership Renewals

Many thanks to all the members who have promptly sent in their dues to renew their memberships for 2007. For those who have not yet done so, please take a few minutes and send in your membership renewal forms and dues. This will save us the cost of paper and postage for reminders which will be sent in February.

Future Annual Conference Locations

The AALA Board of Directors will soon begin consideration of the location city for the 2009 Annual Agricultural Law Symposium. Note: the 2007 symposium will be in San Diego and the 2008 symposium will be in Minneapolis. I will be sending out a questionnaire by e-mail to all members in February for your ideas about what makes a good location city for the symposium. The costs for the hotels, both for guest rooms and the conference facilities and food, have been rising dramatically in the last few years and may soon lead to increased registration fees unless various aspects of the location and symposium are changed. We need your ideas so that the symposium is your annual choice for CLE and learning about agricultural law developments.

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