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Planning for Agriculture

Second Edition
December 2006

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NOTE: These publications are periodically revised or updated to reflect changes in Pennsylvania planning law.

Planning for Agriculture was prepared by the PA Department of Agriculture and the staff of The Agricultural Law Research and Reference Center at The Pennsylvania State University's Dickinson School of Law, under the Direction of Phyllis J. Marquitz, MS, JD, with legal researcher Abby Christine Foster (2008 JD candidate). www.dsl.psu.edu/centers/aglaw.cfm

Preparation of this publication was financed from appropriations of the General Assembly of the Commonwealth of Pennsylvania.

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I. Introduction

Importance of Agriculture to Pennsylvania

The roots of Pennsylvania's economy are embedded in the soil of an agricultural community dating back to the founding of the Commonwealth. Agriculture was Pennsylvania's first dominant economic sector, and it remains the largest industry today at an estimated $4.3 billion per year.[1]

Currently, the Commonwealth contains more than 58,000 farms, each an average size of 133 acres.[2]

The total market value of farm goods produced in Pennsylvania was $4.3 billion in the most recent USDA census.[3] These goods are exported both domestically to every state and many countries, including Japan, Russia and the United Kingdom.[4]

Powers of Local Governments in Pennsylvania

The Commonwealth of Pennsylvania has always emphasized local control as part of its philosophy of small governments. In a 2004 report from the Center for Rural Pennsylvania, approximately 3,132 local governments — including counties, municipalities, and school districts — were counted in Pennsylvania. Title 53 of Pennsylvania's Consolidated Statues outlines the powers of local governments given by the State. Local governments are "creatures" of the State, and thus their powers are derived from the State.

Three hallmark powers delegated to local governments are land use, taxation and eminent domain. Often, these three powers are strongly connected. To encourage particular types of land use, the State authorizes certain tax incentives and options. Eminent domain can be used to implement plans and promote long-term public good. The Commonwealth has specifically given municipalities the general police powers, which include creating ordinances "necessary for the proper management, care and control of the township and its finance and the maintenance of peace, good government, health and welfare of the township and its citizens, trade, commerce and manufacturers."[5] Local governments hold the valuable power of determining use of land through ordinances and zoning. Those powers are passed from the State to municipalities and are outlined in the Municipalities Planning Code.[6] Along with this power comes the ability to use eminent domain to condemn properties and further the development and goals of a community. Those takings are tempered with the right of a citizen to receive just compensation for such a taking.

In all cases of local government law, State law must be acknowledged and coordinated with community goals.

Home Rule

Home Rule[7] is an alternate form of organization of local government powers guaranteed by the Pennsylvania Constitution. Home Rule gives municipalities flexibility to adopt ordinances consistent with state laws that clarify and further the goals of the legislation. However, it does not create an increase in local government powers above what has been given by the State. State law is applicable as an umbrella of power and therefore can supersede municipal ordinances – even those adopted by home rule municipalities. (For background on Home Rule, See Appendix A.)

Emerging Trends and Their Impacts on Agriculture

Although agriculture's value to the Commonwealth has remained constant over the decades, the Commonwealth itself has seen significant change. Two recent trends in Pennsylvania have affected the economy and the agricultural sector's role in the economy: shifting land use patterns and increasing public concern for the environment.

Land Use

The dominant land use trend in Pennsylvania over the last several decades has been the shift of growth from urban centers to suburban and rural counties and an increasingly common pattern of decentralized land uses. The continuing shift of population from Pennsylvania's urban areas and older suburbs to more rural areas consumes large amounts of land. Between 1990 and 2000, Pennsylvania's rural areas had a four percent population increase while urban areas had a three percent population increase. Across the United States, census data show that rural counties had a 12 percent increase in population between 1990 and 2000.[8] Pennsylvania ranks fifth in the nation for change in the amount of land developed.[9] Much of this development occurred on land that was once farmland.

In the modern American job market, career change has become more common and past restrictions on mobility have decreased. These factors make it possible for families to move more frequently and to live farther from their place of employment. A natural response to this social change has been a change in land use. Increased housing markets across the country reflect that change. In the past, rural municipalities promoted and encouraged development based on the idea that more development created more tax revenues.

However, research shows that the cost of developing and providing services to newly developed areas outweighs tax income benefits. Sprawl development patterns can create hidden costs that are borne by the people in the regions where the sprawl occurs, and in some cases, by all of the people of Pennsylvania. Five possible costs that are incurred with development are:

(1) increases in the costs of roads, housing, schools, and utilities;

(2) increases in the costs of transportation;

(3) consumption of agricultural lands, natural areas and open spaces;

(4) concentration of poverty and acceleration of socio-economic decline in cities, towns, and older suburbs;

(5) increases in pollution and stress.[10]

Understanding the costs and benefits that come with development is important for promoting good land use.

Another Pennsylvania census indicates that much of this growth occurred in areas that were not traditionally urban at the expense of traditionally urban areas. Philadelphia County lost 68,027 people (or 4.3 percent of its population); at the same time, the surrounding counties of Bucks, Montgomery and Chester each grew by more than 10 percent. Similarly, Allegheny County (in which Pittsburgh is located) lost 4.1 percent of its population while adjoining Butler County grew by 14.5 percent.[11]

The pattern of this growth may be even more important than its volume. Suburban expansion is land-intensive, often requiring large parcels to accommodate multi-home subdivisions, shopping centers and industrial parks. These large parcels are most often found at the rural fringe of communities. When developed, they create a "leap-frog" development pattern in which farms are interspersed with non-farm uses.

The Environment

The trend toward decentralized land use has been matched by a growing concern for the integrity of the environment. The public and its elected officials have become increasingly concerned about the state of the natural environment within Pennsylvania, particularly the quality of its water resources.[12] The State addresses the issue with regulations for the addition of nutrients to soil (through traditional manure application and fertilizer), soil conservation, and water quality. These regulations continue to develop over time with science-based findings and policy restrictions.

Impact on Agriculture

Shifting land patterns and growing concern for the environment on Pennsylvania's agricultural economy affect agriculture. In recent years, social and economic pressures have increased the challenges inherent in successfully managing an agricultural operation. Though interrelated, these social pressures and economic pressures each present a distinct set of obstacles to agricultural operations.

Social pressures are those related to the non-farm community building up around agricultural operations. The unfamiliar public often defines agriculture in a very traditional and picturesque sense rather than through a practical business-oriented view. Agriculture is a part of Pennsylvania history and culture, but it has always been an evolving industry. Agriculture is often the leader in science-based technology, and those technologies are put into practice for higher yields and competitive profitability. As development expands into traditionally agricultural areas, more citizens are coming into contact with farms and farming practices. These citizens sometimes express concerns about farming practices and their impact on the homes, residents and surrounding environment.

Economic pressures are those that impact the costs of managing an agricultural operation. These include the higher taxes that often accompany land in the path of development and the diminishing economies of scale – including the desire to produce more and increased restrictions on farming practices – that force agricultural operators to do more with less.

Legislative Response

It is often difficult for state and municipal agencies to chart a course that manages growth, protects the local and statewide environment and preserves the Commonwealth's valuable agricultural base. Nevertheless, in pursuit of these goals, the Pennsylvania General Assembly has passed several pieces of legislation designed to improve the environment, as well as to mitigate the effect of the pressures on the Commonwealth's agricultural community. Most importantly, the General Assembly has given the agriculture industry, local governments, and citizens statewide a clearer definition of "normal agriculture operation" that promotes its agenda for protecting a valued part of our economy and landscape. The General Assembly and the Administration also promote strategies for harmonizing agricultural uses with good planning so that local governments can achieve their goals.

Organization of this Document

Understanding the effects of these statutes – as well as the interplay between state and local powers– can be difficult and time-consuming. The purpose of this document is to provide a summary of each piece of legislation that impacts agricultural operations within Pennsylvania.

The first step toward understanding agriculture in Pennsylvania is to define agriculture. The Right to Farm Law and several other laws that affect local government ordinances and regulation of agriculture practices

define agriculture. Becoming familiar with this definition will give a clearer understanding of the laws that were designed to protect agriculture from unauthorized regulations. This section will also explain the Agriculture, Communities and Rural Environment Act (ACRE) and its significance for local governments.

The publication will also explain tools that municipalities can use to grow and protect agriculture within their boundaries. It will also describe the formation and benefits of Agricultural Security Areas and the Commonwealth's conservation easement program. Both of these tools are creatures of the Agricultural Area Security Law. In addition, this section explains amendments to the Municipalities Planning Code. The section will explain agricultural zoning, a planning tool that has long been used to protect valuable agricultural soils. This section will also discuss trends in planning and Conservation by Design. These tools are varied and will include property tax reduction through "Clean and Green" that are available to citizens, as well as promotion of farmland preservation benefits that can benefit the community as well as the individual farmer.

The final section will describe environmental regulations that monitor and control agriculture. The Nutrient Management Act, water monitoring, and other regulations were created in response to state and federal concerns about nutrient discharge into water. It is important for local governments to understand what these laws and regulations measure, and how they address local government concerns about agriculture impacting the environment.

II. Defining and Protecting Agriculture

The Right to Farm Act

The Right to Farm Act (RTF) is actually entitled Protection of Agricultural Operations from Nuisance Suits and Ordinances, but is known by its more popular nickname. This section will discuss the law in detail below, but it is important to become familiar with the definitions in the RTF law. The broad nature of the RTF definitions applies to smaller production facilities, larger operations and hobby operations. The law protects specialty businesses that may be uncommon, but still involve agricultural practices. These definitions are part of other laws (such as ACRE) and include agricultural uses that may be broader than the average citizen's views on agriculture.

It is also important for all parties to understand the planning and land use laws as they relate to the RTF Law and the limitations on agricultural protection laws placed on local government. To improve better understanding of the interrelationships among the varied statutes, the following comparative chart is offered.

Comparison Definitions

Right to Farm Act (RTF) from §952[13].	**Act 247 (MPC)**
Normal agricultural operation.	**Agricultural Operation**
The customary and generally accepted activities, practices and procedures that farmers adopt, use or engage in year after year in the production AND *preparation for market or poultry,* livestock and their products and in the production and harvesting of *agricultural, agronomic, horticultural, silvicultural and aquicultural crops and commodities* and is: (1) not less than ten contiguous acres in area; or (2) less than ten contiguous acres in area but has an anticipated yearly gross of at least $10,000.	An enterprise that is actively engaged in the *commercial production and preparation for market of crops,* livestock and livestock products and in the production, harvesting *and preparation for market or* use of agricultural, agronomic, horticultural, silvicultural and *aquacultural* crops and commodities. The term includes an enterprise that implements changes in production practices and procedures or types of crops, livestock, livestock products or commodities produced consistent with practices and procedures that are normally engaged by farmers or are consistent with technological development within the agricultural industry."
Agricultural commodity. Any of the following transported or intended to be transported in *commerce*:	**Commercial Production and Preparation of Agricultural Products**
(1) Agricultural, aquacultural, horticultural, floricultural, viticultural or dairy products. (2) Livestock and the products of livestock. (3) Ranch-raised fur-bearing animals and the products of ranch-raised fur-bearing animals. (4) The products of poultry or bee raising. (5) Forestry and forestry products. (6) Any products raised or produced on farms intended for human consumption and the processed or manufactured products of such products intended for human consumption.	An enterprise that is actively engaged in the commercial production and preparation for market of crops, livestock and livestock products and in the production, harvesting and preparation for market or use of *agricultural, agronomic, horticultural, silvicultural and aquacultural* crops and commodities. The term includes an enterprise that implements changes in production practices and procedures or types of crops, *livestock, livestock products* or commodities produced consistent with practices and procedures that are normally engaged by farmers or are consistent with technological development within the agricultural industry."

It should be noted that the Municipalities Planning Code's Definition of "Agricultural Operation" does not use the exact same language. ACRE refers to the RTF definition for Attorney General and subsequent Commonwealth Court review.

Nuisance suits – both public and private – are often a part of neighbor or community conflicts throughout the Commonwealth. (See Appendix B for information on Nuisance in Pennsylvania.) At times, normal farming practices have given rise to nuisance suits from surrounding landowners who find these practices bothersome. These suits could have jeopardized farms' financial viability by preventing farmers from conducting operations, requiring large payouts or liquidating investments in equipment.

In response to these circumstances, the General Assembly enacted the Pennsylvania Right to Farm Act in 1982. Under this statute, it is Pennsylvania's policy to "…conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products."[14] Nuisance suits, the General Assembly stated, contravene this policy by causing agricultural operators to cease operations or to forego making investments in farm improvements.

The purpose of the legislation was to reduce the loss of agricultural operations in Pennsylvania by limiting the circumstances under which these operations could be the subject of nuisance suits. To that end, the Right to Farm Act does three things. First, it prevents municipalities from including "normal agricultural operations" within their nuisance ordinances. Second, it limits municipalities from restricting sales of agricultural commodities on the farm in their zoning ordinances. Third, it limits nuisance suits against agricultural operations.

Limitation on Municipal Nuisance Ordinances

The Right to Farm Act requires municipalities within Pennsylvania to encourage the "continuity, development and viability" of agricultural operations within its municipal boundaries. If the municipality has a nuisance ordinance, it must exclude normal agricultural operations from its definition of public nuisance. This would include any activity fitting the aforementioned definitions.

However, the operator remains subject to the legitimate requirements of other municipal ordinances. For example, the Act does not exempt agricultural operations from all the restrictions that might be imposed by zoning ordinances.

Agricultural Zoning will be discussed in more detail later in this piece, but it should be noted that definitions within zoning ordinances are open for scrutiny, particularly by an ACRE claim alleging that an ordinance limits "normal agricultural operations" as defined by the RTF law. Municipalities are therefore often encouraged to define agricultural uses broadly when drafting ordinances, by using definitions in line with the MPC or RTF. In other words, listing very specific types of agriculture can often be construed as restrictive or exclusive of a legal agricultural use that drafters may not have included. For example, bee-keeping and honey production would be considered agriculture under the RTF definition if the operation met the 10 acre size or the financial criteria.

The Right to Farm Act also states that a municipality may not restrict direct commercial sales of agricultural commodities through its zoning ordinances. However, two conditions must be present for an agricultural operator to enjoy this privilege:

(1) the farmer must own and operate the agricultural operation; and

(2) a minimum of 50 percent of the commodities must be produced by the farmer.

Limitation on Nuisance Suits

The Right to Farm Act also precludes nuisance suits against agricultural operations under certain circumstances. First, the law prohibits a neighboring landowner or the municipality from bringing a nuisance suit against an agricultural operation engaged in "normal agricultural operations" if the operation has been operating lawfully for one year and the conditions or circumstances on the agricultural operation have not substantially changed.[15] Thus, the law acts as a shortened statute of limitations for nuisance lawsuits against operations that have been in business for a year or more without having substantially changed their facilities.[16]

Second, even if the facility has been substantially altered, a nuisance suit may not be brought if one year has passed since the alteration or if the substantially altered facility has been addressed in a nutrient management plan approved **before** the alteration pursuant to the requirements of the Pennsylvania Nutrient Management Act.

The Right to Farm Act does not protect a nuisance-like agricultural activity if it has a direct adverse effect on the public health and safety.[17] Additionally, damages suffered from the pollution of or change in the condition of the waters of any stream can be recovered through a public or private nuisance suit. Similarly, damages resulting from any flooding caused by an agricultural operation can be recovered through a public or private nuisance suit.

Upholding the Right to Farm Act

The Superior Court of Pennsylvania has upheld provisions in the Right to Farm Act through precedent-setting case law. (See Appendix C for case summary.) The General Assembly addressed circumstances in which municipalities were knowingly passing ordinances that would be in violation of the Right to Farm Act by passing Act 38 of 2005, which allows further legal action against unauthorized ordinances.

Agriculture, Communities and Rural Environment (ACRE)/Act 38 of 2005

In 2005, the Pennsylvania Legislature passed the Pennsylvania Act 38, commonly referred to as ACRE. ACRE addresses two issues: (1) matters between unauthorized local ordinances and agricultural operations and (2) odor management for concentrated animal feeding operations. It also increased setback requirements that will be discussed in the Nutrient Management Section of this publication. (See Appendix D.) Act 38 incorporates other Nutrient Management Laws and adds some changes. ACRE seeks to balance agricultural operations with the nuisance concerns of the community.

This Act was passed in response to pressures of development in conventionally rural areas, specifically issues between unauthorized local ordinances that attempted to regulate agriculture in areas preempted by the State through law or regulation. The Pennsylvania Right to Farm Act protects agricultural operations by limiting the circumstances under which agricultural operations may be the subject matter of nuisance suits and ordinances. However, ordinances were passed in some municipalities, even after the Right to Farm Act was in effect, that require farmers to engage in litigation that could be financially crippling or have no satisfactory resolution. ACRE seeks to address this issue by providing a more cost-effective process to address these conflicts.

Complaint Reviews by Attorney General

ACRE places a ban on unauthorized local ordinances and the injured farmer or any person affected by an unauthorized ordinance can forward his grievance to the state's Attorney General for review. After the ordinance is reviewed, the Attorney General decides, within 120 days, whether to bring an action against the local government in Commonwealth Court. The Attorney General does not have the right to declare outright an ordinance void; a court must make that decision. All cases will be heard in Commonwealth Court, setting

statewide precedent rather than requiring each Court of Common Pleas to take cases. ACRE allows for the Court to appoint masters to investigate, make findings and forward recommendations in writing for the courts and the involved parties to follow.

Attorney Fees and Costs

ACRE also allows for the shifting of attorney's fees and litigation costs if certain conditions are met. The fee shifting may go the defendant (municipality defending the ordinance) if the court determines that the local ordinance was enacted with "negligent disregard" of the limitation of authority of the local government. The fee shift may take effect against the plaintiffs (party bring suit against the unauthorized ordinance) if the Court determines the suit was frivolous or brought without substantial justification that the ordinance was unjustified.

Odors and Setbacks

The second part of ACRE makes additions to the Pennsylvania nutrient management law, and creates regulations for the implementation of an "odor management plan." The management plan is "a written site-specific plan identifying the practices, technologies, standards and strategies to be implemented to manage the impact of odors generated from animal housing or manure management facilities located of to be located on the site."[18] The requirement of an odor management plan applies only to concentrated animal feeding operations (CAFOs) and concentrated animal operations (CAOs). (See Appendix D for definitions.) The law only applies to new CAFO and CAO operations; existing operations are only required to implement an odor plan when they expand existing operations by adding a new animal housing facility or a manure management facility.

CAO and CAFO operations that were previously not considered CAO/CAFO operations, but by virtue of their expansion are required to implement a plan, only the newly constructed or expanded part of the operation is regulated under the required odor management plan. Odor management regulations do not create plan requirements for manure application. All manure application regulations are covered under the Nutrient Management section, and are based on environmental concerns.

The State Conservation Commission's role is to establish "practices and technologies, standards, strategies and other requirements for odor management plans."[19] When creating regulations, the State Conservation Commission is required to consider site-specific standards such as proximity of adjacent landowners, land use character, and directions of prevailing winds; reasonably available technology practices; and strategies bearing in mind practical and economic viability.

The Pennsylvania Department of Agriculture is required to establish an Odor Management Certification Program to "certify individuals who have demonstrated the competence necessary to develop odor management plans."[20]

The Department of Agriculture is required to develop all standards and disseminate information necessary to ensure compliance and adequacy of all odor management programs. The odor management plan is required to be fully devised and implemented before the expansion or new construction of a CAO or CAFO. Existing facilities are not required to have odor management plans, only new construction. The regulations are scheduled to be finalized in 2007 after the standard public comment period and review. The Plans must be certified by an odor management specialist and must be submitted to the Commission for review and approval.

Once approved, plans can be transferred with ownership of the land. Subsequent purchasers can be exempt from nuisance suits by following the same plan. Failure to comply with the odor management plan or any regulation changes to the Nutrient Management Act under ACRE is illegal. Failure to implement an odor management plan is unlawful and there is a civil penalty of up to $500 for the first day of each offense and up to $100 for each additional offense. If the offense does not endanger human health or adversely affect the

environment, a warning can be issued that requires immediate action to attend to the violation. Finally, full implementation of an odor management plan shall be considered a mitigating factor in any civil action for damages.

Once odor management regulations are created and implemented, local governments will be preempted from creating odor regulations that are stricter than the state regulations for nuisance purposes.

III. Municipal Tools for Growing and Protecting Agriculture

Agricultural Security Areas

Introduction

The Pennsylvania General Assembly passed the Agricultural Area Security Law (AASL) to assist farmers in handling the economic and social pressures that impact farming operations. This law enables municipalities and individuals to cooperatively create Agricultural Security Areas. These officially designated areas provide certain benefits to participating agricultural operators and to the surrounding community.

In passing the Agricultural Area Security Law, the General Assembly cited several goals: to encourage landowners to make a long-term commitment to agriculture by offering financial incentives and security of land use; to protect farming operations from incompatible uses that make farming impracticable; and to ensure permanent conservation of productive farmland through creation of a conservation easement program.[21] The Legislature clearly understood the pressures created when "scattered development extends into good farm areas"[22] and designed the Agricultural Area Security Law as a response to those pressures.[23] (See Appendix I.)

Description

An Agricultural Security Area (ASA) is a tract of existing agricultural land that has been officially designated as an agricultural district. The legislation requires that a district be 250 acres or more. The district may be owned by more than one person, and may comprise agricultural tracts that are noncontiguous. Agriculture Security Areas can cross municipal and county boundaries, and will remain ASAs even after rezoning (unless the nonconforming use changes and the land is taken out of the Agriculture Security Area).

Creating an ASA is a collaborative effort between the landowner and the township in which the proposed district is located. As such, the decision to create a security area is both an individual decision to continue farming and a public expression of support for the land to remain in agricultural use. There is no cost to the landowner for enrolling in the program. Involvement in the program is at all times **voluntary**.

Creating a New Agricultural Security Area

Any tract or tracts of land that meets the criteria may be designated as an Agricultural Security Area. The criteria to be used by the governing body in considering the viability of an Agricultural Security Area include: viability of the site's soils for agriculture; the conformity of the site with the municipal comprehensive plan; the extent and nature of farm improvements on the site; and anticipated trends in agricultural, economic and technological conditions.

The current legislation does not require that the proposed Agricultural Security Area be zoned solely for agriculture. Land zoned for other purposes (and land within agricultural zones that allow other uses) may be included in security areas.

Any owner of viable agricultural land, of which a portion is used for commercial equine activity who owns at least 250 acres may apply for a creation of an Agricultural Security Area. The owner must also meet other ASA criteria. The area may be noncontiguous, but each parcel must be at least 10 acres or has an anticipated yearly gross income of at least $2,000 from agricultural activity from each noncontiguous parcel.

In addition to satisfying the statutory criteria, the landowner or owners must follow the procedure set forth in the legislation. The law outlines six necessary steps for creating a new Agricultural Security Area: proposal, notification, proposal review, hearing, decision and periodic review.

1. **Proposal:** The landowners must submit a proposal for the creation of a new Agricultural Security Area to a local government unit. The proposal must be submitted according to the regulations and requirements of the local governing body and must include a description of the proposed land and its boundaries.

2. **Notification:** The governing body must acknowledge the receipt of the landowner's proposal. The statute mandates several forms of acknowledgment, including an announcement at the next regular or special meeting of the governing body and a notice in a newspaper having general circulation within the proposed Agricultural Security Area.

3. **Proposal Review:** The governing body must submit the proposal and any proposed modifications to the county planning agency and the municipal planning agency. The county planning commission must report recommendations concerning the proposal to the governing body, but the municipal planning commission need only report the potential effects of the Agricultural Security Area on the local government.

   The Agricultural Area Security Law sets forth various evaluation factors and resource materials to be used by the planning commission or agency[24] and the advisory committee. These factors help these groups come to an informed decision regarding the creation of an Agricultural Security Area. Evaluation factors to be used by the Planning Commission or Advisory Committee include:

   - Land proposed for the inclusion shall have soils that are favorable to agriculture.
   - Use of land proposed for inclusion shall be compatible with municipal or multi-municipal comprehensive plans. Any zoning shall permit agricultural use but need not exclude other uses.
   - Additional factors to be considered are the extent and nature of farm improvements, anticipated trends in agricultural economic and technological conditions and any other relevant matter.

4. **Public Hearing:** Once the planning commission and advisory committee have submitted their reports to the local governing body, a hearing must be held. The statute requires that the hearing be held in a municipal building or other site that is easily accessible to the public within the municipality. The statute also requires that the local governing body publish a hearing notice in a newspaper with general circulation in the proposed area and in five prominent places throughout the area.

5. **Decision:** After the hearing, the local governing body must come to a decision regarding the creation of the Agricultural Security Area. If the proposal is rejected or modified, the local governing body must provide written notification of the decision to the landowner. If the local governing body accepts the proposal, the Agricultural Security Area automatically is created and becomes immediately effective.

   Once a security area is accepted, the local governing body must file a description of the area with the recorder of deeds and with both the local planning commission and county planning commission. The recorder of deeds, upon receiving the description of the area, must record the description in a manner that is sufficient to notify all people who may be affected or interested in the creation of the area.

   Once the description of the Agricultural Security Area has been recorded, the local governing body must notify the Secretary of Agriculture.[25] The notification must include – in writing – the number of landowners in the area, the total acreage of the area, the area approval date and the date of recording for the area. (See index for statistics on enrolled ASA acreage.)

6. **Periodic Review:** The local governing body must review the newly created Agricultural Security Area every seven years.[26] During this review, the governing body must request recommendations from the

municipal planning agency, the county planning commission and an advisory committee. Prior to conducting the review, the local governing body must provide notification. It should be noted that if the agency does not review the ASA [in its seven year review period] the Area is automatically renewed for an additional seven years.

The statute contains mechanisms by which the governing body may conduct a review before the passage of seven years.[27] Because the landowner's participation in the area is voluntary, there is no obligation on the landowner to refrain from using land within an Agricultural Security Area for a nonagricultural use.[28] However, if more than 10 percent of the Agriculture Security Area is diverted to residential or other nonagricultural uses, the local governing body may conduct an interim review.

Finally, any person who may be hurt by the creation, composition, modification, rejection or termination of an Agricultural Security Area may take an appeal to the Court of Common Pleas. Such an appeal must be brought within 30 days of the action of the governing body.

Benefits of Agricultural Security Area

As a landowner, there are a variety of benefits to enrolling land in an Agricultural Security Area. First, landowners are given limited protection against local regulations. Second, state agencies may not condemn a landowner's property without special permission. Third, landowners are eligible to participate in the state's agricultural conservation easement program. Finally, there are loan programs available through the Commonwealth with reduced interest for farms enrolled in ASAs. ASAs can cross municipal and county boundaries and can be utilized as part of a multi-municipal planning venture or a tool for multi-municipal or area-wide planning.

Limited Protection from Local Regulations

One benefit to creating an Agricultural Security Area is that the landowner receives limited protection from local regulations in two ways.

First, the law requires that local governments refrain from enacting ordinances and regulations that unreasonably restrict farming operations and farm structures. Rather, all municipal governments are encouraged to support the "continuity, development and viability" of agriculture within the Agricultural Security Area.

Second, local governments must provide exceptions for normal agricultural activities within an Agricultural Security Area when defining public nuisances. Municipal governments may continue to include agricultural operations within their definition of a public nuisance only if those operations directly impact the public health and safety.

It should be noted, however, that local governing bodies are not completely barred from passing regulations and ordinances that affect farm operations or farm structures if such regulation or restriction bears a direct relationship to the public health and safety. For instance, municipalities may continue to use their police power to regulate the size and bulk of farming structures through zoning. In fact, ALCAB has frequently ruled in favor of takings that had well-planned findings and reasoning.

Limited Protection from Condemnation of Land

A second advantage to placing land within an Agricultural Security Area is the heightened protection afforded security areas from eminent domain. Under the power of eminent domain, the government may transfer property from private ownership to public ownership. There are two requirements. First, the transfer must be for a public purpose. Second, the government must compensate the private landowner with the fair market value of the property.

Under the Agricultural Area Security Law, state and local agencies have limited power to exercise eminent domain over productive farmland within a security area. This limitation is not absolute; it simply adds another level of scrutiny to the takings process. In these cases, the entity doing the taking must prove that there are no other reasonable options.[29]

Limitation on Eminent Domain by State Agencies

The Agricultural Area Security Law requires that the Commonwealth of Pennsylvania and its political subdivisions, agencies and authorities bring all condemnation requests that impact productive agricultural lands within a security area before the Agricultural Land Condemnation Approval Board (ALCAB).

For most eminent domain requests, ALCAB may approve a condemnation request only if:

(1) the proposed condemnation would not have an unreasonably adverse affect upon the preservation and enhancement of agriculture or municipal resources within the area, or

(2) there is no reasonable and prudent alternative to using the lands within the Agricultural Security Area for the project.

ALCAB may condemn land within a security area for highway or sewer purposes only if it determines there is no reasonable and prudent alternative to using the productive land within the Agricultural Security Area for the project. If ALCAB determines there is no feasible alternative, or if it fails to act within 60 days, the condemnation may proceed.

The state agency seeking condemnation has the burden of proving that the Agricultural Security Area will not be substantially impacted by the proposed condemnation. ALCAB must interpret the Agricultural Area Security law in a manner that will preserve the economic viability of farming throughout the entire Agricultural Security Area.[30]

Limitation on Eminent Domain by Local Governments and Others

If a local jurisdiction, private authority or public utility seeks to condemn land within an Agricultural Security Area, it must receive approval from ALCAB and several other bodies, including the governing bodies of all local jurisdictions encompassing the Agricultural Security Area, the governing body of the county and the Agricultural Security Area Advisory Committee. Each of these bodies, as well as ALCAB, must give permission before a local government can exercise eminent domain over property within a security area.

Eligibility for Agricultural Conservation Easements

A third and significant advantage to having land enrolled within an Agricultural Security Area is that the landowner is eligible to participate in the Pennsylvania Agricultural Conservation Easement Purchase program. This program, which allows farmers to sell agricultural conservation easements, is an important farmland preservation tool. It is discussed more fully below.

Agricultural Conservation Easements

Conservation easement programs are significant tools for the protection of farmland. Such programs protect farmland and retain the land for agricultural activities without placing any additional regulatory restrictions on farmers. At the same time, the easement generates money for the landowner because the easement is a sale of some of the development rights in the land.

The Agricultural Area Security Law created Pennsylvania's Agricultural Conservation Easement Program. The law defines an agricultural conservation easement as an "interest in land…which…represents the right to prevent the development or improvement of the land for any purpose other than agricultural production." When a farmer sells an agricultural conservation easement, he sells the right to develop his land for nonagricultural purposes. The land continues to be his private property, and the farmer retains all privileges of land ownership except the privilege to sell the land for nonagricultural development or to develop the land himself for a nonagricultural purpose. He can, however, expand his agricultural operation under the state program. In contrast, some private easement programs restrict all or most development of the agricultural enterprise.

This publication focuses on the conservation easement program administered by the Commonwealth and its municipalities. In addition to this publicly-funded program, there are several privately-funded programs that share the same objective of preserving agricultural land for agricultural purposes. These private programs are beyond the scope of this publication. Sometimes private easement programs may prove to be extremely beneficial because they can be used on land that does not meet the stringent quality requirements of the Commonwealth program or where the owner prefers not to receive public money for religious reasons. At other times, these private easements may become a barrier to flexibility when they are written as "open space" rather than true agricultural easements. Because the wording of the easement makes all the difference, a landowner should get legal advice before entering into the sale of any conservation easement.

Description of the Pennsylvania Agricultural Conservation Easement Purchase Program

The Pennsylvania Agricultural Conservation Easement Purchase Program, administered by the Commonwealth of Pennsylvania, requires cooperation and collaboration among state government, county government and individual landowners. Within the Department of Agriculture, the State Agricultural Land Preservation Board is charged with administering the agricultural conservation easement program. The board is composed of representatives from various Commonwealth agencies as well as private citizens.[31]

Each individual county has the responsibility of establishing its own county-level conservation easement purchase program. County boards can consist of five, seven or nine members who serve on a voluntary basis. The individual county board works closely with the state Agricultural Land Preservation Board to identify and purchase conservation easements.

Local governments may also participate in the purchase of conservation easements, but only in conjunction with the county board. A local government's primary duty is to recommend to the county board the location where conservation easements should be purchased, enabling the county board to purchase the easement. The local government board may purchase a conservation easement, but only if certain requirements within the legislation are met. Under these requirements, the farmland tract must:

- be located in an Agricultural Security Area of 500 acres or more;
- be 35 contiguous acres; (amended June 2006 from the previous 50 acre minimum)[32]
- contain at least 50 percent of soils that are within USDA classifications I, II, III or IV;
- contain at least 50 percent or 10 acres (whichever is greater) of harvested cropland, pasture or grazing land.[33]

If the local government board does purchase a conservation easement, cooperation with the county is still necessary in order to meet the requirements of the Agricultural Area Security Law.

An agricultural conservation easement is **permanent**. It cannot be sold, conveyed, extinguished, leased, encumbered or restricted in whole or in part for a period of 25 years from the date of purchase. After the 25-year period has expired, the state and county **may** terminate the conservation easement if the land is found to be no longer viable for agricultural purposes. An easement may be extinguished through condemnation after approval by ALCAB. If an easement is extinguished, the Commonwealth is to be compensated current fair market value of that easement to Farmland Preservation. Depending on which government entity owns the easement, either the state or county board must approve any termination or modification of a conservation easement. There has been no indication that the State, as owner of the easements, has any intention to sell back easements. In fact, all indicators point to an increase in preservation.

Pennsylvania's Agricultural Area Security Law empowers both the Commonwealth and individual counties to organize and administer conservation easement programs. A county is given considerable flexibility in administering its own program; it may provide recommendations to the state board concerning which easements to purchase or it may purchase those easements itself. A county may use state funds to purchase an easement or it may raise county funds consistent with the Local Government Debt Act.

Counties may develop individual procedures and standards for selecting agricultural conservation easements. However, the Commonwealth, in reviewing a county's program for approval, will require that county boards use at least the following standards to review potential conservation easements: the quality of the farmlands subject to the proposed easements, including soil classification and soil productivity ratings; the likelihood that the farmland may be converted to nonagricultural use, given the current market for development; proximity to other conservation easements; stewardship of the land and use of conservation practices (including consistency with nutrient management requirements); and other local equitable and nondiscriminatory procedures.

A farmer wishing to sell an agricultural conservation easement to the state must own the land in fee simple. This means that there cannot be any conditions or limitations upon the land. Proper releases from all mortgage holders and lien holders must be obtained in order to assure clear title.

The price for an agricultural conservation easement cannot exceed the difference between the nonagricultural value and the agricultural value. Payments for the easement may be made in either a lump sum, installments or in any other lawful manner. If payment is to be made in installments, the landowner is entitled to interest. Pennsylvania's Installment Purchase Program allows the county to pay for the conservation easements with a municipal bond. A landowner should consult a tax advisor before entering into an easement agreement, so as to determine which method of payment results in the most favorable tax treatment.

Once the government buys the easement, the property owner loses the right to develop the property for nonagricultural uses. In effect, the farmer has sold this right to the government. Pennsylvania's agricultural conservation easement program allows limited exceptions to the statute's ban on development. The owner may grant leases to companies to mine underground gas and coal and may grant rights-of-way for utility lines. The owner may also construct structures for personal or employee residential use. However, only one residential structure may be built, and the structure must be on less than two acres. Again, before entering into an agreement to sell such an easement, a landowner should familiarize himself with the requirements of the easement program and seek tax and legal advice.

Some Equine Activities now Eligible[34]

Any owner of at least 250 acres of viable agricultural land, of which a portion is used for commercial equine activity, may apply for a creation of an Agricultural Security Area. The area may be noncontiguous, but each parcel must be at least 10 acres or has an anticipated yearly gross income of at least $2,000 from agricultural activity from each noncontiguous parcel. The owner must also meet other ASA criteria.

After establishing an Agricultural Security Area by the governing board, the county board may authorize an agricultural conservation easement purchase program. It is the duty of the county board to adopt rules and regulations for the administration of the agricultural conservation easement. The county board is charged with establishing standards of eligibility of viable agricultural land, a portion of which is used for commercial equine activity, and establishing standards and procedures for the selection and purchase of agricultural conservation easements.

Advantages and Disadvantages

As a tool for agricultural preservation, a conservation easement program has both advantages and disadvantages. The landowner, as well as the county that sponsors the program, may find that a conservation easement program meets some, but not all, of their needs.

First, there is financial advantage for the farmer because the sale of the easement mitigates the economic pressures affecting the farm industry. After a successful sale, the farmer receives cash that he can use to reinvest in farm infrastructure, pay off existing debts or plan for retirement. The program provides another financial advantage to participating farmers by revaluing their property for tax or estate planning purposes to a value that more accurately reflects the agricultural value of the property.

In a larger sense, the sale of agriculture conservation easements can be used by the farmer as a flexible tool for tax planning. A farmer who sells a conservation easement has several methods for reporting the tax gains of the sale. Each farmer may choose the option that best serves his needs.

Another advantage is that the program very successfully removes valuable farmland from potential development without additional regulation. The conservation easement program is entirely voluntary for the landowner, and its success is based on the individual and the governmental entity entering into a cooperative and mutually beneficial agreement. This enables the county to regulate its land use and curb sprawl in a proactive and positive manner.

A disadvantage to the easement program can be its permanence. While zoning restrictions are temporary, easements are permanent. This inflexibility can sometimes be an obstacle to land planning, particularly when circumstances change in the areas surrounding conservation easements. This is particularly true for farms that produce livestock as well as crops.

Perhaps the largest disadvantage to the conservation easement program is its cost. The conservation easement program can be very expensive. The government pays the landowner for the value of the easement and this can be costly. Particularly in counties where agricultural land has retained a good deal of its value, payment for development rights can be very expensive. Though the public receives a significant benefit from the program, it may pay a price. There are cost solutions, however. The difference between the appraised value of the easement and the actual purchase price may be “donated” and used as a charitable contribution for tax purposes. The State also pays incidental costs associated with enrolling lands in farmland preservation through private trusts. For example, survey and deed costs can be reimbursed by the program for lands enrolled through other means.

Conclusion

Ultimately, a landowner’s decision whether to enter into a conservation easement is a reflection of his priorities. Landowners who intend to maintain their land in agricultural use who require assistance with the burdens of shouldering a disproportionately valued property may want to consider entering into an easement sale. Communities can especially benefit by incorporating farmland preservation into their future goals and plans.

IV. Land Use Planning Under the Municipalities Planning Code

Introduction

The Municipalities Planning Code (MPC)[35] empowers local governments to plan and regulate land use within their borders. The MPC is enabling legislation, which means that it not only grants the power to engage in comprehensive planning, but it also gives municipalities considerable flexibility in developing the land use policies and plans that best achieve local priorities.

This flexibility has limits, however. Through the MPC, the Pennsylvania General Assembly requires municipalities to consider certain policies of statewide importance when creating land use plans and ordinances. For example, the MPC requires that all municipal zoning ordinances endeavor to preserve prime agricultural land. (See Appendix E.)

The General Assembly initially adopted the Municipalities Planning Code in 1968, and has amended the document periodically. The MPC was again amended in 2000 through the passage of Act 67 and Act 68. Several of the amendments may impact the manner in which municipalities regulate agricultural operations. The following sections describe some of the recent amendments and highlight their impact on agriculture in Pennsylvania.

Multi-municipal Comprehensive Planning

Acts 67 and 68 are not primarily focused on agriculture. Rather, the primary purpose of the amendments is to enable and encourage municipalities to enter into joint planning activities. The MPC now allows cooperating municipalities to enter into intergovernmental agreements in order to create and implement a comprehensive plan. Creating a multi-municipal comprehensive plan allows the municipalities to exercise additional intergovernmental powers. For example, municipalities that have entered into such agreements may:

- provide for sharing of tax revenues;
- enter into agreements for transfer of development rights;
- develop small-area plans for non-residential areas;
- respond to curative amendment challenges by providing for the challenged use on a regional basis;
- designate valued resource areas and designate growth areas.

This improved ability of municipalities to enter into joint planning agreements may have an impact on agriculture in Pennsylvania. These agreements may enhance the ability of cooperating local governments to accommodate non-farm development while at the same time protecting their agricultural resources.

Conservation by Design[36]

Conservation by Design is a Pennsylvania-wide program that encourages municipalities and developers to design residential subdivisions incorporating open spaces into the community. Some municipalities are choosing the conservation approach as a way to appeal to the buyer; others are concerned about the continuing loss and potential disappearance of resources that are valuable in maintaining the character of their municipality. For example, Lancaster County is known for its strong agricultural history, and is, therefore,

concerned with preserving agricultural lands.[37] The dwellings may be placed on smaller lots, but they have access to, or views of, the surrounding open lands. Municipalities may use Conservation by Design (sometimes referred to as Growing Greener) to protect agriculture and mature forests. The plan can be used to protect good quality soils for farms that could use them. The planned lots are uniquely adapted to the geography and surroundings, and often incorporate common natural areas that are valued by residents and the community.

Implementing Growing Greener begins with planning on a municipal level to preserve open spaces, greenways and natural resources the community enjoys, and then designing subdivisions around those areas. Conservation by Design prevents municipalities from becoming faceless seas of suburbia, and allows them to keep the identifying characteristics of their areas. The subdivision and land development ordinance is only one of the three planning documents necessary for implementing a conservation approach to development. The other necessary documents are the comprehensive plan and the zoning ordinance. The comprehensive plan should reflect the long-range conservation goals for the municipality while the zoning ordinance allows landowners and developers to minimize lot sizes and conserve open space. Provisions in each document should be consistent (e.g. floodplain management throughout the municipality). These documents, together with the subdivision and land development ordinance form the three necessary tools to implement conservation design successfully.[38]

Application procedures for a conservation subdivision take into consideration resources and environmental features of historic, scenic or environmental value. Noteworthy features are therefore noted in the plan and categorized for consideration.[39] For example, sensitive wetlands would take preference over man-made structures (this is a general analysis and not always the rule). The overall result is a holistic approach to valuable features being considered and sustained through the development process. The best results depend on the cooperation of the parties. Substantial preparation and sharing of information are key.

According to the Natural Lands Trust, "There are four main steps in designing a conservation subdivision. First, identify the primary conservation areas and determine how best to incorporate these areas into the plan. Second, once the lay of the land has been investigated, the house sites may be located. There are many creative ways to accomplish this, having the resources and character of the property in mind. Third, create access roads and driveways throughout the development. Fourth, the lot lines are drawn."[40]

Transfer of Development Rights (TDR) and Regional Development

The Transfer of Development Rights (TDR) Concept allows individuals to purchase and sell residential development rights from lands to concentrate development around planned areas. Such lands include farm, forest, open space, regional trails and habitat for threatened or endangered species. Landowners receive financial compensation without developing or selling their land, and the public receives permanent preservation of the land. Transferred development rights can be used to build additional units on other parcels in more appropriate areas. TDR's work well in areas with mixed land use, such as a town surrounded by farmland. It allows for populated areas to maintain their density and open areas to benefit from profits of development rights that are often the cause for developing farmland.

The underlying principle is that real property is a bundle of rights, including physical rights like the right to build, exploit natural resources, restrict access and farm. Other legally enforceable rights include the right to sell the land, subdivide it, rent it out or grant easements across it. The development right can be transferred from one site to another, from an area to be preserved or protected to an area where growth can be accommodated and is desirable. The property owner whose land is being restricted would therefore be fairly compensated and the takings issue would be avoided. TDR programs allow landowners to sever the building (a.k.a. development) rights from a particular piece of property and sell them. Purchasers are usually other landowners who want to increase the density of their developments. Local governments may also buy

development rights in order to control price, design details or restrict growth. This is done by creating a development rights "bank" where a farmer can sell a unit of development rights and a contractor or builder can purchase it at a later time.

TDR programs need to start with enough land to have sufficient sending (properties selling development rights) and receiving areas (properties through the purchase of development rights that wish to increase to development density). Communities without sufficient sending and receiving areas need to organize without other municipalities to have enough land to carry out such a program.

The Pennsylvania Municipalities Planning Code, section 619.1, authorizes the local governments to enact ordinances allowing the implementation of the transfer of development rights and in the absence of such ordinance, the transfer of development rights is prohibited. **Development rights cannot be transferred across municipal lines, except when there is a multi-municipal zoning ordinance between the municipalities where the sending and receiving parcels are located.**

Multi-municipal planning often goes hand-in-hand with TDR's. See MPC § 904.

Every municipality which has a zoning ordinance needs to create a zoning hearing board. Two or more municipalities may create a joint zoning hearing board instead of a separate board for each municipality. Act 67, the "Intergovernmental Cooperative Planning and Implementation Agreements," which authorizes intergovernmental cooperative agreements for the purposes of developing, adopting and implementing a comprehensive plan, establishes a process to achieve general consistency between the multi-municipal comprehensive plan, individual or joint zoning and land development ordinances that comply with the comprehensive plan and capital improvement plans. Municipalities working together can come to agreements about sharing tax revenues/fees and a multi-municipal transfer of development rights program.

Agricultural Issues

The Municipalities Planning Code amendments also addressed several issues directly related to agriculture. Many of these changes relate to the comprehensive planning and zoning processes, and affect the manner in which counties and municipalities can undertake to plan for and regulate agriculture within their land use plans and zoning ordinances.

First, the amended MPC contains additional requirements for county governing bodies when creating and implementing comprehensive plans. County bodies must now consider agricultural land in their comprehensive plans and must develop plans that preserve and enhance prime agricultural lands.[41] Counties must also ensure that land use regulations be compatible with existing agricultural operations.

Second, the MPC now contains requirements for municipalities when developing and adopting zoning ordinances. These ordinances must now "…encourage the development and continuing viability of agricultural operations."[42] The legislation forbids municipalities from discouraging the expansion of agricultural operations in areas where agriculture has traditionally been present, unless the health or welfare of the public is endangered.

These provisions have strengthened the position of agriculture within the planning and zoning processes. Agriculture must be considered and promoted by governing bodies at both the county and local levels when undertaking any significant planning activity. Even if found not to be feasible in a particular jurisdiction, the governing body must indicate that agriculture as a land use has been considered.

Forestry Issues

The MPC requires that forestry activities, including but not limited to timber harvesting, be a permitted use by right in **all** zoning districts. The language provides no exceptions. For example, a municipality would not be able to decide that it would restrict the harvesting of trees over six feet tall or more than eight inches in diameter arbitrarily. However, they may be able to use the reasoning behind police powers to create reasonable permit requirements, such as reseeding after clear cutting to limit erosion of soil.

Understanding the MPC in Context of the Statewide Agriculture Laws and MPC Amendments

There are often questions about municipal powers in the context of newer statewide regulation or promotion of agriculture. Since the adoption of ACRE, some of those questions have been answered.

V. Agricultural Zoning

Introduction

Zoning is a system that regulates the type and intensity of land use development that occurs within a community. To create a zoning system, a local government divides the municipality into districts and regulates the location and use of buildings within these districts. Regulations may differ among the districts, but within each individual district, the regulations must be uniform.[43]

A zoning system enables the community to conform its future growth to a set of goals and policies that reflect the community's vision for its future. For example, a municipality that sets a goal to strengthen the central business district would likely create a zone in its downtown into which only intensive commercial uses would be allowed. Similarly, a community that chooses to remain rural might create a zone that allows minimal development, and place a significant proportion of its land within this zone.

Agricultural zoning is a specialized form of zoning used by communities that seek to preserve their agricultural base. It reflects a community-wide policy that farmland is a valuable resource that should be preserved.

The basic building block of an agricultural zoning scheme is an agricultural zone with regulations that strictly limit the location of all buildings and structures and uses that are incompatible with agricultural land uses and activities. Most often, an agricultural zone is part of the community's overall zoning scheme.

Purpose

The purpose of agricultural zoning is to protect farmland from incompatible uses that would adversely affect the long-term economic viability of the area within the region. Zoning accomplishes this purpose in several ways.

First, effective agricultural zoning ordinances protect prime agricultural soils. Obviously, a dynamic agricultural sector requires soils amenable to food production for human and animal consumption. Not all communities contain such valuable soils, however, and many communities contain them in a limited supply. By preserving for agricultural use those soils that are most suitable for agriculture and directing development to areas that contain non-suitable soils, zoning protects from irreversible conversion perhaps the most vital ingredient of a healthy agricultural community – fertile land.

Second, agricultural zoning maintains the vitality of the agricultural sector by retaining a critical mass of agricultural land. Scattered development of nonagricultural structures and uses often interferes with an agricultural operation's ability to maintain an effective operation, not only by creating a physical obstacle to performing activities efficiently, but also because it diminishes the strength of the overall agricultural community. Additionally, large areas of farmland promote and assure the continued viability of agricultural service industries, like farm suppliers.

Third, zoning protects agricultural land by minimizing land use conflicts and preventing land use debate. As municipalities grow, the influx of nonagricultural land uses into former agricultural areas often creates conflict between the farming activities, such as spreading manure and non-farming activities. These conflicts sometimes cause community disputes and may even lead to adjoining landowners filing costly nuisance suits, which allege that the agricultural operation is interfering with the adjoining landowners' rights to use and enjoy their property. Agricultural zoning can help avoid these controversies by segregating agricultural lands from nonagricultural land uses and keeping agricultural activities at a distance from non-farming activities. The segregation of land uses minimizes the number of non-farming landowners impacted by farming activities and reduces the conflicts that arise between farming and non-farming neighbors.

Statutory Authority to Zone for Agriculture Uses

In Pennsylvania, the authority to zone for agriculture is found in the Municipalities Planning Code of 1968, as amended. Recent amendments to the MPC require municipalities to zone to preserve "prime agriculture and farmland."[44] The statute is silent on protecting farmland that is not prime. However, a 2003 Executive Order has provided clarity and direction on prime agricultural land (see Appendix H for a copy of Order 2003-2).

However, long before the MPC mandated agricultural zoning, municipalities were zoning to protect farmland by developing and adopting ordinances that contained agricultural zones. The authority for municipalities to create agricultural zones derives from its overall authority to create general-purpose zoning ordinances, which was also granted to municipalities through the MPC.[45]

As early as 1926, the U.S. Supreme Court endorsed zoning as a constitutional exercise of a municipality's police power to regulate for the health, safety, morals and welfare of the general population.[46] When the Pennsylvania General Assembly initially passed the MPC in 1968, it granted municipalities the authority to create zoning ordinances based on this police power. Many municipalities have used this authority to create zoning ordinances that protect farmland.

Types of Agricultural Zoning

Municipalities may choose one of two types of zoning to protect agriculture: exclusive agricultural zoning or non-exclusive agricultural zoning. Non-exclusive agricultural zoning is, by far, the more common of the two.

Effective agricultural zones are zones that may provide for services and facilities to support a township's agricultural and farming related businesses, permitting agriculturally related commercial uses that can be located among an area devoted to farming. Generally, effective agricultural zoning does not permit large residential developments or unrelated commercial or industrial uses.[47]

Exclusive Agricultural Zoning

Exclusive zoning prohibits all non-farm residences and most nonagricultural activities from an agriculture zone. Exceptions to this requirement may be granted for parcels of land that are not suitable for farming.

This type of agricultural zoning is rarely used. It is more vulnerable to legal challenge than non-exclusive agricultural zoning, and, when challenged, more likely to be struck down.

Non-exclusive Agricultural Zoning

Non-exclusive agricultural zoning allows non-farm (residential) dwellings to be located in the agricultural zone, but strictly limits the number of such dwellings. In addition, non-exclusive zoning often allows the construction of conditional uses if these uses are located on land of low quality for farming.

For example, the zoning ordinance of Peach Bottom Township (York County) allows four principal uses in its Agricultural Zone: farms, forests and wildlife preserves, greenhouses/nurseries and single-family dwellings. The zone also allows a number of uses by special exception, including houses of worship, cemeteries, schools, kennels, animal hospitals and trailer camps. These uses may be constructed only when authorized by the Zoning Hearing Board.

Non-exclusive agricultural zoning can be accomplished through two methods: large minimum lot size zoning and area-based allocation.

Large Minimum Lot Size Zoning

Large minimum lot-size zoning limits the number of dwelling units that can be constructed in an agriculture zone by requiring a very large minimum lot size. No parcel may be subdivided from an existing farm unless it is larger than the required minimum lot size.

Recently this type of zoning has been regarded as inadequate, opponents criticize large lot size zoning as inadequate because, although larger than the average subdivided parcel, the lots are not large enough to support the needs of a modern farm, particularly in its use of machinery. In addition, the subdivided lots often cut across various classes of soils in order to meet standardized lot size and development requirements. Municipalities are now encouraged to keep density in specific areas of a comprehensive plan, which would allow for a better use of soils and water, as well as work with the natural geographic features of the land.

Area-Based Allocation

Area-based allocation zoning determines the number of non-farm dwelling units that may be subdivided from an agricultural parcel by basing that number on the size of the original parcel. Area-based zoning establishes a formula that calculates the permitted number of non-farm dwellings. In general, a larger agricultural parcel will yield more permitted non-farm dwelling units.

Area-based allocation zoning requires that the non-farm dwelling units be built on small lots (e.g. two acres or less). By requiring small lots for the non-farm dwelling units, large areas are left intact for agricultural uses.

Proponents of area-based allocation zoning claim that it provides greater flexibility in the situating of non-farm dwellings. This flexibility allows landowners to preserve large parcels of valuable soils. In addition, the agricultural parcel from which the non-farm dwellings are subdivided retains more land than with minimum lot-size zoning.

When using this kind of zoning, municipalities generally select one of two types of area-based formulas: a fixed-system formula or a sliding scale formula. A fixed-system formula allows one dwelling for a specified number of acres. For example, a municipality may allow one non-farm dwelling unit for every 25 acres of an agricultural parcel. A 25-acre parcel would yield one non-farm dwelling; a 100-acre parcel would yield four non-farm dwellings. A sliding scale formula varies the number of allowed dwelling units based on the acreage of the parcel from which the units will be subdivided. As the size of the agricultural parcel changes, the number of severable parcels changes accordingly. Sliding scale formulas are rarely linear. Frequently, under these formulas, larger agricultural parcels may subdivide proportionally fewer non-farm dwelling units than smaller agricultural parcels. Such a non-linear sliding scale formula is based on the theory that smaller agricultural parcels are less viable than larger parcels. Allowing increased non-farm development on smaller parcels satisfies the demand for residential dwellings and shifts the demand away from large, valuable agricultural parcels towards the smaller parcels which are less valuable to the preservation of agriculture.

Advantages and Disadvantages of Agricultural Zoning

Like the other farmland protection tools, agricultural zoning has both advantages and disadvantages. One advantage of agricultural zoning is that it can be used to protect large tracts of land. Other protection tools such as agricultural security areas, Clean and Green and conservation easements protect farmland on a parcel-by-parcel basis. Agricultural zoning can be used to protect hundreds of acres of farmland within a municipality, simply by placing these acres within a carefully drafted agricultural zone that discourages non-farm development.

Another advantage to zoning is that it protects these large tracts of land at a relatively low cost. The largest cost associated with zoning is fees paid to a consulting firm. Other costs may include municipal staff time to manage the adoption process for the ordinance and to hold public meetings for review. There are very few other costs associated with this protection tool. Unlike conservation easements, which require significant public funds to purchase the development rights for each acre, costs to implement zoning are relatively modest.

A disadvantage to zoning is that it can be easily undone. Even the most effective agricultural zoning system is merely a policy statement of the current township governing body. A change in the political climate of the municipality or even of the point of view of one of the members of the governing body can lead to that zoning system being repealed and replaced by a significantly weaker system. Members of the governing body need not repeal the entire ordinance to weaken the zoning scheme in a particular township. Simply by changing the zoning on a particular parcel, members of the governing body can weaken the integrity of an agricultural zoning system. Compared to conservation easements, which protect farmland in perpetuity, agricultural zoning can be weakened significantly.

A zoning scheme can also be frustrated through the actions of a landowner or developer. In Pennsylvania, landowners may petition for a curative amendment to a municipal zoning ordinance, which alleges that a municipality has unconstitutionally failed to provide for its "fair share" of a particular land use.[48] If the petition is successful, the challenging party may have the zoning changed to conform to the development scheme.

As we highlighted on page four, definitions within zoning ordinances are open for scrutiny, particularly by an ACRE claim alleging that an ordinance limits "normal agricultural operations" as defined by the RTF law. Municipalities are therefore often encouraged to broadly define agricultural uses when drafting ordinances by using definitions in line with the MPC or RTF definitions. In other words, listing very specific types of agriculture can often be construed as restrictive or exclusive of a legal agricultural use that drafters may not have included. It is important to draft all ordinances carefully, particularly when trying to word an ordinance that has lasting power into the future.

Conclusion

The key to interpreting MPC powers in the context of state laws or regulations that are preemptive is to look at the reason for the more restrictive ordinance. If that reason is simply to be more restrictive of an activity that is unsavory to the community to ban a legal use, it may be subject to legal challenge. If it is another hidden means of exclusionary zoning, again it may be subject to legal challenge. However, if a municipal government has a legitimate and verifiable cause for enacting an ordinance that is more restrictive than state law and that cause is related to health, safety and welfare, it is more likely to hold firm under a challenge. (See Appendix E for case law related to interpreting the MPC.)

VI. Promoting Agriculture through Preferential Tax Assessment

The Clean and Green Program

Clean and Green is a land conservation program that lowers the property tax rate for the vast majority of landowners who enroll in the program. Landowners are obligated to devote their land to agricultural use, agricultural reserve use or forest reserve use to qualify for lower property taxes.[49] Landowners who exit the program may be required to pay up to seven years' worth of "roll back" taxes, plus interest.[50] Roll-back taxes are described in greater detail later in this document.

Value of the Program to Agriculture and the Commonwealth

Enrolling farmland or forestland in the Clean and Green program is an effective way of saving property taxes in Pennsylvania. (See Appendix H.) Many farmers in Pennsylvania are facing financial difficulty, and the answer for some has been to sell some or all of their land to developers. Clean and Green creates an incentive for landowners to continue to devote their land to agricultural use, agricultural reserve or forest reserve, by giving reduced property tax rates to those who enroll in the program. The Clean and Green program establishes the preferential assessment value (Clean and Green use values), whereby land that is enrolled in the program is taxed at the use value of the land rather than the fair market value. Furthermore, the program creates a disincentive for landowners to convert or sell their land or any portion of their land (with some exceptions) for development or commercial purposes, after it is enrolled in the program, by requiring that up to seven years of roll-back taxes be paid on the entire tract if the program's requirements are violated.

Eligibility for Clean and Green

To be eligible for enrollment in the Clean and Green program, land must be devoted to one of the following three qualifying uses: agricultural use, agricultural reserve use or forest reserve use. Counties must adopt a Clean and Green program for lands to be eligible. The following definitions are helpful.[51]

Agricultural Use – land which is used for the purpose of producing an agricultural commodity or is devoted to and meets the requirements for payments or other compensation under a soil conservation program under an agreement with an agency of the federal government. The term includes:

- any farmstead land on the tract;
- a woodlot; land that is rented to another person and used for the purpose of producing an agricultural commodity.

Agricultural Reserve Use – noncommercial open space lands used for recreational and outdoor enjoyment of the scenic or natural beauty and are also open to the public for that use, without charge or fee, on a nondiscriminatory basis. [Note: Agricultural reserve land is the only category of land under the Clean and Green program that must be open to the public for recreational use]. The term includes any farmstead land on the tract.

The regulation now allows landowners to place reasonable restrictions on the public's access to a tract of land that is enrolled in Clean and Green as Agricultural Reserve land.[52] These restrictions might include limiting access to the land to pedestrians only, prohibiting hunting or the carrying or discharging of firearms on the land, prohibiting entry where damage to the land might result or where hazardous conditions exist, or other reasonable restrictions.

Forest Reserve Use – land, 10 acres or more, stocked by forest trees of any size and capable of producing timber or other wood products. The term includes farmstead land on the tract.

Farmstead Land – any curtilage (enclosed land around a house or building) and land situated under a residence, farm building or other building which supports a residence, including a residential garage or workshop.

Woodlot – an area less than 10 acres, stocked by trees of any size and contiguous to or part of land in agricultural use or agricultural reserve.

In addition to restricting land to qualifying uses, the Clean and Green program has minimum requirements for each qualifying use that must be met before land can be enrolled. Land eligible under the agricultural use category must have been in agriculture or devoted to a soil conservation program with the federal government for three years preceding the application and be either 10 contiguous acres or more in area, or have an anticipated yearly gross income from the sale of an agricultural commodity of $2,000 or more.[53] For example, if a landowner owns 10 acres of land that has been in agricultural use for three years, he may enroll his land in Clean and Green no matter how much income the land produces. If a landowner owns less than 10 acres of land, he must gross at least $2,000 per year from the land in order to qualify for the Clean and Green program.[54]

The only requirement for both agricultural reserve use and forest reserve use is that the landowner must own at least 10 acres.[55] To meet the minimum acreage requirement for any of these uses, the regulations make clear that farmstead and woodlots are to be included and will be taxed at the use value for that particular subcategory.

Valuation of Enrolled Land

The use values that apply to Clean and Green are set by the Pennsylvania Department of Agriculture or Department of Conservation and Natural Resources, who then determines the land use subcategories and provides county assessors use values for each land use subcategory. Typically, these subcategories are based upon soil classifications (Class I – Class VII). The Department of Agriculture has until May 1st of each year to provide the county assessors with the use values.[56]

A county assessor may establish use values for land use subcategories that are less than the use values established by the Department of Agriculture. A county assessor may use these lower use values in determining preferential assessments under the Clean and Green program. A county may not, under any circumstances, establish or apply use values that are higher than those use values established by the Department of Agriculture.

In addition, counties may not require that a landowner reside in the county before enrolling his land in the Clean and Green program.[57] Further, county assessors are not permitted to add any other requirements or conditions of eligibility in addition to the ones given by statute and regulation. If the provisions of the statute and regulations are met, the county assessor must accept an owner's Clean and Green application.[58]

Farmstead or House Assessment

Whether farmstead (small portion of land used for residential purposes) land is included in the preferentially-assessed portion is dependent upon whether county commissioners make an ordinance addressing that farmstead's taxable status, for agricultural reserve use and forest reserve use land. Agricultural use land always includes the farmstead for preferential assessment.

Enrollment in the Clean and Green Program

Landowners wishing to enroll in the Clean and Green program must make their application on a current "Clean and Green Valuation Application" form. This is a uniform preferential assessment application form developed by the Pennsylvania Department of Agriculture. County assessors are required to keep a supply of these forms on hand.[59] Applications for the Clean and Green program are filed with the county board of assessment in which the land is located. If an application is filed with a county on or before June 1, the county must review and process the application for the next calendar year.[60]

For example, if a county receives an application on or before June 1, 2003, and the application is approved, the landowner must receive the Clean and Green tax rate for taxing years beginning in calendar year 2004. However, if an application is received on or after June 2, 2003, the landowner is not entitled to receive the Clean and Green tax rate until taxable year 2005. An exception exists if the county undergoes a countywide reassessment. When a countywide reassessment occurs, the application deadline is October 15, or 30 days after the final order of the county board for assessment appeals, whichever comes first.[61] The county board of assessment is limited to charging an application fee of no more than $50 for processing an application. This fee can be charged whether or not the application is approved. In addition to the application fee, the recorder of deeds may charge a fee for filing an approved application in a Clean and Green docket. The recording fee may only be charged if the Clean and Green application has been approved by the county board.[62]

Enrollment of Multiple Tracts of Land[63]

An additional requirement of the Clean and Green program is that all contiguous land described in one deed must be enrolled in the program. This means that if the deed describes two tracts of land that are next to each other and are part of one operational unit, both tracts of land must be enrolled in the program. However, if a landowner owns two tracts of land that are contiguous but are described in separate deeds, he does not have to enroll both tracts. If the landowner has a single deed that describes two tracts of land that are not contiguous, he does not have to enroll both of the noncontiguous tracts.

Multiple Uses of One Tract of Land[64]

If the landowner has several uses on a single tract of land but only some of the uses qualify for the Clean and Green tax rate, he may still enroll in Clean and Green. All of the tract must be included on the application, but only the portions of the tract that are devoted to a qualifying use will be given the Clean and Green tax rate. In such a case, the portion of land devoted to a qualifying use must meet the acreage and/or gross income requirements of the program.[65]

The only uses allowed for land enrolled in Clean and Green are the ones specified in the definitions of the different land uses allowed in the program. The definitions of agricultural use, agricultural reserve use and forest reserve use do not include things like charging fees for people to come and use the land. Landowners can make rules about public use of their land, but not charge fees.

Duration of Enrollment in Clean and Green[66]

The general rule of the Clean and Green program is that after land is enrolled, the landowner is obligated to continue using the land in a qualified use indefinitely or face the penalty of roll-back taxes for the most recent seven years, plus interest. The roll-back tax is the difference between the taxes paid based on the Clean and Green rate and the taxes that would have been paid if the land were not enrolled in Clean and Green. Roll-back taxes are due for the year of the change of use and the six previous tax years for a total of seven years. Land

that has been in Clean and Green for more than seven years is only subject to roll-back taxes for the seven most recent tax years, and land that has been in Clean and Green for less than seven years is subject to roll-back taxes only for the years it has been in the program. In addition to the tax, interest is imposed on each year's roll-back tax at the rate of six percent per year.

Triggering Roll-back Taxes: Sales, Separations and Split-Offs
Sales of Clean and Green Land

As stated, under Clean and Green, it is a change in the use of enrolled land that will trigger liability for roll-back taxes. Additionally, if a landowner separates or "splits-off" a portion of his land, these events may also trigger roll-back taxes.

A landowner whose land is enrolled in the Clean and Green program is able to sell his land without paying roll-back taxes or interest if he sells all of his land or follows the program's requirements for a "separation."[67] Similarly, if a landowner follows the program's requirements for a "split-off" of a portion of the land, roll-back taxes will only be due with respect to the portion that is split-off.[68] "Separations" and "split-offs" are described in greater detail in following paragraphs. If a landowner sells all of his land, the buyer will be obligated to continue using the land in a qualified use or pay roll-back taxes and interest.

If a landowner plans to change the use of his land or sells his land, he needs to notify the county assessor 30 days prior to the proposed change.[69] The change must be recorded in the Clean and Green docket at the landowner's expense. However, the county may not impose any additional fee, other than the recording fee, for amending the application for a split-off, a separation, a transfer or a change of ownership.

Certain transfers are exempt from roll-back taxes. These include land that is donated to school districts, municipalities, counties, volunteer fire companies, volunteer ambulance service companies, religious organizations or non-profit corporations.[70] For other transfers, counties have the option of not collecting roll-back taxes.

Separations[71]

A separation of land is the division of Clean and Green land into two or more tracts of land, each of which meets the minimum requirements of the program. In essence, each tract is capable of being enrolled in Clean and Green because each tract meets the program's requirements. Separation does not trigger roll-back taxes or the loss of Clean and Green status as long as all of the land continues to be used in a qualified use. However, if the owner of a separated tract changes the qualified use, the owner faces the obligation to pay roll-back taxes on the separated tract and the original tract from which it came if the change in use is made within seven years after the separation. Abandoning the qualified use more than seven years after the separation subjects only the separated tract to roll-back taxes.

For example, if a landowner owns 100 acres that is enrolled in the Clean and Green program and he sells 50 acres to his neighbor, neither the owner nor his neighbor owes any taxes on the transfer. However, if the neighbor changes the use of his 50 acres to a non-qualified use within 7 years of separation, the neighbor owes roll-back taxes on the entire 100 acres. If, however, the neighbor waits seven years to change the use, he owes roll-back taxes only on his 50 acres.

Split-Offs[72]

A "split-off" is a division of a tract of Clean and Green land into two or more tracts, where one or more of those tracts do not meet the program's requirements. For example, if a landowner sells four acres of land that will not gross $2,000 yearly of agricultural income for the buyer, this is a split-off because this four-acre tract could not be enrolled in Clean and Green. Split-offs generally subject both the split-off tract and the remaining tract to roll-back taxes. However, if the split-off tract results from condemnation, there is no liability for roll-back taxes. The Clean and Green program allows certain split-offs to be made without roll-back taxes being due on the entire tract. However, roll-back taxes are due on the split-off portion in most cases.

The regulations describe the authorized split-offs as follows:

1. Each year, a landowner may split-off a tract of up to two acres for agricultural use, agricultural reserve use, forest reserve use or for the construction of a residential dwelling to be occupied by the owner of the split-off tract. (In very limited circumstances, the owner may be able to split-off up to three acres for a residential lot.) A maximum of 10 percent of the original tract under Clean and Green, or 10 acres, whichever is less, can be split-off under this provision. For these transfers, roll-back taxes apply only to the split-off tract. The remaining portion of the land can remain enrolled in Clean and Green as long as it continues to meet the requirements of the program. However, if the remainder of the land no longer qualifies for the Clean and Green program, roll-back taxes are due on the entire parcel that was originally enrolled. Whenever a landowner is required to pay roll-back taxes, he has the option to terminate preferential assessment of the land with respect to which roll-back taxes are due.
2. A landowner may also split-off two acres or less of Clean and Green land for selling agricultural products or for a rural enterprise incidental to the operational unit. If two acres or fewer are used for the direct commercial sales of agriculturally related products or for a rural enterprise incidental to the operational unit, roll-back taxes are imposed only on the portion of the tract devoted to the commercial activity.
3. A special exception exists for a split-off for a wireless or cellular communication tower. Strict requirements must be met in order to qualify for this exception: first, the landowner may lease a maximum of one-half acre for this purpose; second, the tract of land leased may not have more than one communication tower; third, the tract of land must be accessible; and fourth, the tract of land cannot be sold or subdivided. In this situation, the owner must pay roll-back taxes on the tract of land that is leased for the communication tower; however the remaining land continues to be eligible for the Clean and Green tax rate as long as it continues to meet the program's requirements.

Penalties for Clean and Green Violations

A civil penalty of not more than $100 may be imposed for each violation of the Clean and Green law. The County Board of Assessment Appeals must notify the landowner by certified mail of the nature of the violation, the amount of the civil penalty and the right to contest the civil penalty. If the landowner does not notify the county, in writing, of intent to contest the penalty within 10 days, the penalty becomes final.[73] The roll-back taxes can also be assessed on the entire parcel (plus interest) as a result of a violation.

Summary and Conclusion

Clean and Green is both an effective and popular way to lower landowners' property taxes in Pennsylvania. The number of counties with landowners participating in Clean and Green grew from 46 counties in 1997 to 56 counties in 2000. In addition, the total amount of land under Clean and Green has also grown dramatically from 5.3 million acres in 1997 to more than 6.54 million acres in 2000.[74] The program is voluntary and

generally requires that the land remain in one of the three designated uses: agricultural use, agricultural reserve use, and forest reserve use. Land taken out of the permitted use becomes subject to a roll-back tax, imposed for up to seven years, and an interest penalty. Furthermore, a civil penalty of not more than $100 may be assessed against a person for each violation of the Clean and Green Act.

The Clean and Green program has the potential to provide landowners with substantial tax savings because under Clean and Green's preferential assessment structure, enrolled land is taxed according to its use value rather than its actual fair market value. In areas that are facing heavy pressure from developers, a tract of land's use value could be substantially different than its fair market value and the subsequent tax savings will be significant to the enrolled landowner. The 2001 regulations to the Clean and Green Act do not dramatically alter the old regulations but do provide a few important new changes. Again, these include:

1. The Pennsylvania Department of Agriculture now sets the maximum use values for the counties;
2. Farmstead land now qualifies for a preferential assessment (lower use values);
3. "Reasonable restrictions" may now be placed on the public's access to Agricultural Reserve land by enrolled landowners.

Pennsylvania's Clean and Green program is a forward-looking legislative act. With the program's continued support and success, we can rest assured that Pennsylvania's open spaces and agricultural industry will be preserved for future generations to use and enjoy.[75]

Act 4 of 2005 – Amends Open Space Lands Act and Act 153 of 1996

Act 4 of 2005 is another tool that taxing bodies may use to promote their planning and conservation goals. This Act explicitly allows taxing bodies to freeze millage rates on three types of property:

1. an open space easement in accordance with the Open Space Lands Act[77] including open space easements for farmland, forests, streams or wetlands;
2. lands that have Agricultural Conservation Easements[78];
3. land that has had development rights transferred and retired from it through a local government unit's use of Transferable Development Rights (TDR).

The available option for taxing bodies to freeze tax mill rates on these properties creates incentive for property owners to take advantage of conservation programs available in their communities. It also allows farming operations on preserved lands to remain economically viable.

For an Act 4 resolution to be passed, all three property taxing bodies in an area must approve: school districts, counties and municipalities. Such bodies are encouraged to look at the fiscal impact of residential development as it compares to forms of conservation use. Often, preservation, TDR programs or open space easements can prove to be community friendly and fiscally friendly by looking at the income to services-provided ratio.

VII. State and Local Environmental Regulation of Agriculture

Nutrient Management Act

Introduction

Agricultural Security Areas, conservation easements, land use planning and zoning are tools that can be used by counties and municipalities to grow a healthy and stable agricultural sector. These tools provide a mechanism by which governing bodies can enhance the atmosphere for agricultural operations within their jurisdictions, and each tool in some measure counterbalances the land use pressures increasingly placed on agricultural operations.

With this help come responsibilities. Just as the General Assembly has passed legislation that provides mechanisms for strengthening agriculture, the assembly has also passed legislation that places obligations on agricultural operators to respect and preserve the environment. One such piece of legislation is the Nutrient Management Act.

History

Pennsylvania has long been a leader in environmental legislation. In 1939, Pennsylvania passed the Clean Streams Law, which authorized the Department of Environmental Protection to adopt rules and regulations to prevent pollution of the waters of the Commonwealth.[79] The law controls the discharge of sewage and industrial waste and other pollutants into Pennsylvania's waterways. The law defines the discharge of any polluting substance as a public nuisance.[80]

Agricultural operators must carefully comply with the requirements of the Clean Streams Law. The Department of Environmental Protection enforces the Clean Water Act of 1972, administered by the Federal Environmental Protection Agency. The law does not exempt agricultural operators from its pollution ban. Unlawful pollution by an operator can result in a nuisance suit brought against the operator by the state, as well as civil penalties assessed against the operator. The careful operator should follow the practices recommended in the Department of Environmental Protection's publication "Manure Management for Environmental Protection."

In 1983, Pennsylvania signed the Chesapeake Bay agreement. Under this agreement, Maryland, Virginia, Pennsylvania, the District of Columbia, the United States Environmental Protection Agency and the Chesapeake Bay Commission agreed to take steps to improve the quality of the Chesapeake Bay by reducing the nonpoint source pollutant content.[81]

Purpose of the Nutrient Management Act

Pennsylvania was the first state in the Chesapeake Bay watershed and one of the first in the nation to adopt mandatory nutrient management controls on farm pollution by adopting the Nutrient Management Act. The Act was passed by the General Assembly and signed into law by the governor in the spring of 1993. By requiring operators to develop and follow nutrient management plans, the law seeks to reduce the amount of nonpoint source pollution that flows into the Bay from Pennsylvania's watersheds by controlling the handling and application of manure and fertilizers in Pennsylvania.

The Nutrient Management Act is the first law in Pennsylvania that requires regulatory oversight of the manure application practices of intensive agricultural operations. The Act controls nonpoint source pollutants by requiring that Concentrated Animal Operations (CAOs) develop and maintain a nutrient management plan. A concentrated animal operation is an operation whose animal density exceeds two animal equivalent units per acre on an annualized basis with eight or more AEU's, and now includes certain large horse boarding facilities.[82] Farms with fewer than two animal units per acre are not required to develop a nutrient management plan, but are encouraged to develop a plan voluntarily. An animal equivalent unit equals one thousand pounds of live animal weight.

The Act now regulates both nitrogen and phosphorus, in accordance with *Stephanie Adam v. Quail Ridge Farm*[83], a 2003 Pennsylvania Environmental Hearing Board case, where neighbors brought suit against Quail Ridge Farm over the pollution of Lake Ontelaunee. The farm was operating under a valid Nutrient Management Plan, which did not account for phosphorus leaching into surface water, because the Act did not require plans to account for phosphorus. The board decided this was an error and NMPs now need to account for both nitrogen and phosphorus. (See Appendix F.)

Nutrient management plans protect surface water and groundwater through the use of good management practices such as conservation tillage, crop rotation, soil testing, manure testing, manure storage facilities, enhanced storm water management practices and improved nutrient applications. The operator and his planner determine which practices are appropriate by undertaking a planning process in compliance with the requirements of the Nutrient Management Act. The Act requires the agricultural operator in his plan to:

- Identify the nutrients to be considered;
- Establish procedures to determine acceptable application rates for manure and other nutrient sources;
- Establish record-keeping requirements for land application and nutrient distribution;
- Identify best management practices for proper nutrient management;
- Establish minimum standards for manure storage;
- Establish the conditions under which the plan must be amended; and
- Establish criteria for manure handling under emergency situations.

Implementation

The State Conservation Commission is responsible for developing, evaluating and administering the regulations of the Nutrient Management Act.[84] The Commission is dedicated to ensuring the wise use of Pennsylvania's natural resources, and protecting and restoring the natural environment through the conservation of it soil, water and related resources. Perhaps the Commission's largest responsibility is overseeing the preparation of nutrient management plans. The Commission establishes criteria and planning requirements for nutrient management plans and enforces the plans. It implements the Act through agreements with local Conservation Districts. The local districts are responsible for reviewing and approving nutrient management plans within their districts pursuant to the requirements of the statute and the regulations.

The Act requires that the CAO operator consult with a Certified Nutrient Management Specialist. This specialist must prepare the plan.

The first point of contact for a farmer who wants or needs a plan should be his local Conservation District office. That office can provide the farmer with a list of certified planners and can guide him through the steps needed for plan approval. When the plan is completed, it is reviewed by a Public Nutrient Management Specialist prior to approval by the local Conservation District Board.

The regulations require operators to include written plans for emergency manure leaks and spills. The operator gives the emergency plan to the local emergency management agency, because those are the people who would be assisting in the cleanup, if such a situation arose.

The law includes new regulations for manure application and storage with regards to land near a wetland on the National Wetlands Registry, a database easily accessed online.

New rules require operations to test soils more frequently, and plans must be evaluated every three years to see if the operations have undergone any significant changes.

Operations now must create filtration mechanisms or vegetated buffers in the process of developing a plan. The buffers must be able to withstand a twenty-five year storm event with twenty-four hours of rain without allowing manure runoff to leak into surface waters.

Operators must plan their application of manure to keep it from leaching into surface waters. If nitrogen and phosphorus are likely to leach into surface waters, operators are not allowed to apply nutrients to their land at all.

Implications of the Nutrient Management Act for Local Planning

The Nutrient Management Act has a preemption clause that specifically limits local regulation of manure and nutrients produced by an animal operation. The law provides that "…no ordinance or regulation of any political subdivision or home rule municipality" may prohibit or regulate practices related "to the storage, handling or land application" of manure or the "construction, location or operation of facilities used for the storage of manure" if that ordinance is in conflict with or more stringent than the Act or the regulations promulgated under the Act.[85] The state has developed very extensive and detailed regulations and nutrient management plans must conform to those regulations. (For cases on the Act, see Appendix F.)

Municipalities may not prohibit or regulate farm practices that conflict with the Nutrient Management Act. They are not allowed to create stricter ordinances, but they can adopt additional ordinances consistent with the Act.

Nutrient Trading

The Pennsylvania Department of Environmental Protection instituted its Nutrient Trading Policy, effective October 2005, in an effort to control and minimize the nitrogen, phosphorus and sediment polluting the Susquehanna and Potomac watersheds and, consequently, the Chesapeake Bay. The policy is not a law, and remains in flux. As yet, the topic remains an important and unresolved aspect of environmental regulation in Pennsylvania.

Water Resources Planning Act

The Pennsylvania Legislature passed Act 220[86], the Water Resources Planning Act, in December 2002 with the purpose to conserve and protect the water resources in Pennsylvania by creating a new state water plan. The State's water plan had not been updated in twenty-five years, and there was no mechanism in place to know when water supplies were running low before the wells went dry. The Act requires the state to come up with a new State Water Plan by December 2007.[87]

Encroachment of suburbs and urban development has strained groundwater and surface water resources, and the Water Resources Planning Act will help local officials gauge their water supplies earlier, in time to remedy any problems that may arise.[88]

The Act does not regulate the use of ground water. It prohibits the Department of Environmental Protection from metering home wells and does not give DEP authority to regulate, control or require a permit for the

withdrawal of water. What the Act does do is create a statewide committee to plan water use and six regional committees with members representing different interests, including agriculture, to create regional water plans for submission to the state committee.

The Act requires commercial, industrial, agricultural or individual users who use upwards of 10,000 gallons of water per day, as averaged over a 30-day month, to register and report their water usage to DEP.[89] Those using less water are encouraged to report their usage also, to help create a more accurate portrayal of water use in the state, but it is not required. Registration and reporting are free.

Users of more than 50,000 gallons of water per day are already required to meter their water use, and for most agricultural water users who withdraw much less than 50,000 gallons per day, DEP has alternative ways to estimate water use, like multiplying the rate a pump expels water by the time the pump was running to find the amount of water used.

There is no water conservation requirement in the Act, although conservation is encouraged.

Erosion and Sedimentation Control

The purpose of the Erosion and Sedimentation Control Plan is to minimize the potential for accelerated erosion and sedimentation and to maximize water quality throughout the state. Accelerated erosion is exactly what it sounds like: human activities in combination with natural processes cause the ground to erode faster than it would without the human activities.

For agricultural tilling or plowing areas of less than 5,000 square feet, best management practices must be used to prevent accelerated erosion, and for areas of greater than 5,000 square feet, operators need a written Erosion and Sediment Control Plan for plowing and tilling activities.

The function of the written plan is to minimize the potential for accelerated erosion and sedimentation resulting from the runoff of disturbed earth. The plans must contain soil maps, locations of bodies of water, drainage patterns and descriptions of BMPs including tillage systems, schedules and conservation measures. The plan must be on hand and available for inspection whenever an operator conducts a large earth-disturbing activity, like plowing or tilling.

DEP or the county conservation district may approve alternative management practices to maintain existing water quality and uses. These organizations may also inspect a plan or review it if there is a complaint regarding water quality to ensure compliance with the regulations.

When an operator wants to plow or till near exceptionally valuable water, as defined by the water quality standards in Ch. 93, he must also have a written plan, and there are other strict regulations when runoff is likely to drain into high quality water. Plans are prepared by a person trained and experienced in sedimentation control, often the county conservation districts.

Farmers need to inspect their erosion and sedimentation controls weekly, and after each measurable rainfall.

Anyone proposing twenty-five acres or more of timber harvesting or road maintenance causing earth disturbance will have to get an Erosion and Sedimentation Control Permit. Other than plowing or tilling, more than five acres of earth disturbance will require a permit also.

The erosion management practices must be continued under the regulations until the land is permanently stabilized with vegetative cover.

National Soil and Erosion Contacts[90]

USDA researches and provides soil analysis through the National Resources Conservation Service (NRCS). The NRCS has regional offices at the state level and often works with Conservation Districts to develop analysis or planning for erosion issues.[91]

References

1. USDA NASS Census 2002
2. *Id.*
3. USDA NASS Census 2002
4. PA Department of Agriculture, International User's Guide to PA Agriculture
5. 53 P.S. §66506
6. 53 P.S. §10101 et seq.
7. Home Rule in Pennsylvania, 7th ed. March 2003. Distributed by the Dept. of Community and Economic Development.
8. Center for Rural Pennsylvania on line report, last accessed June 2006, Citing U.S. Census Bureau Statistics
9. 10,000 Friends of Pennsylvania, "January 31, 2001, News Update," citing U.S. Department of Agriculture, National Resources Inventory, "State Rankings by Acreage and Rate of Non-Federal Land Developed," December 2000.
10. 10,000 Friends of Pennsylvania, Executive Summary, survey conducted by Clarion, Inc. 2000
11. *Id.*
12. Governor's Center for Local Government Services, PA Department of Community and Economic Development, Pennsylvanians Speak: Sound Land Use Forums Report, January 2000
13. 3 P.S. §951 et seq.
14. 3 P.S. §951 et seq.
15. 3 P.S. §951 et seq.
16. 3 P.S. §§ 1701 et seq.
17. 3 P.S. §902
18. Act 38 of 2005 PA also H.B. 1646 § 503
19. Act 38 of 2005 PA also H.B. 1646 § 504
20. Act 38 of 2005 PA also H.B. 1646 § 508(a)
21. 3 P.S. § 902
22. *Id.*
23. 3 P.S. §905(a)
24. The Agricultural Area Security Law does not specify that these bodies have to be in the form of a Planning Commission. It mentions both "planning commission or agency". However, the agency that is most frequently designated the duty of land management is a Planning Commission in Pennsylvania.
25. 3 P.S. § 907
26. *Id.*
27. 3 P.S. §909(b)
28. As mentioned above, the underlying zoning of an Agricultural Security Area need not allow only agricultural uses. Thus, a farmer can easily convert existing agricultural land to other uses permitted by the zoning ordinance, even when that agricultural land is within a security area. 3 P.S. § 907
29. 3 P.S. § 913-914
30. Maryland and Pennsylvania Railroad Preservation Authority v. ALCAB, 704 A.2d 1149 (1998)
31. The Agricultural Lands Condemnation Review Board consists of the following members: Representatives from the Governor's Policy Office, Department of Environmental Protection, Department of Transportation and two appointed farm members, chaired by an appointee of the Secretary of Agriculture.
32. Act 46 of 2006, Formerly SB 723
33. 7 Pa Code § 138e.16(a)
34. H.B. 619 §1 (2005)
35. 53 P.S. 10101 et seq.
36. Growing Greener: Conservation by Design, Natural Lands Trust. Sept. 2001.
37. Natural Lands Trust www.natlands.org/home/default.asp (accessed Sept 2005)
38. *Id.*
39. *Id.*

40. Natural Lands Trust, www.natlands.org/categories/subcategory.asp?fldSubCategoryID=26 (accessed September 2006)
41. Prime agricultural land is land used for agricultural purposes that contains soils of the first, second, or third class as defined by the US Department of Agriculture Natural Resource and Conservation Services County Soil Survey.
42. 53 P.S. § 10603(h)
43. For additional information on zoning, see Planning Series #4: Zoning, Governor's Center for Local Government Services, PA Department of Community and Economic Development, 2003.
44. 53 P.S. § 10604 (3). The statute defines "prime agricultural land" as land used for agricultural purposes that contains soils of the first, second or third class as defined by the US Department of Agriculture Natural Resource and Conservation Services County Soil Survey.
45. 53 P.S. § 10603(a): "Zoning ordinances should reflect the policy goals of the statement of community development objectives required in section 606, and give consideration to the character of the municipality, the needs of the citizens and the suitabilities and special nature of particular parts of the municipality."
46. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)
    1. The Water Resources Planning Act, Bryan Swistock, Extension Associate, School of Forest Resources and Harry Blanchet, Extension Agent, Forest County Cooperative Extension. Penn State College of Agricultural Sciences, Cooperative Extension.
    2. PA Water Resources Planning Act (Act 220), Assembled by Alyssa Dodd, Virginia Ishler and Bryan Swistock, Penn State College of Agricultural Sciences, Cooperative Extension.
    3. Will You Have Enough Water Tomorrow? What Farmers Need To Know About The Water Resources Planning Act. 3920-PA-DEP3103. August 2004.
    4. PA Water Resources Planning Act (Act 220) Frequently Asked Questions, Assembled by Alyssa Dodd, Virginia Ishler and Bryan Swistock, Penn State College of Agricultural Sciences, Cooperative Extension. 25 Pa. ADC §102
47. Natural Lands Trust (accessed Sept 2006)
48. *Ellick v. Board of Supervisors of Worcester Township*, 333 A.2d 239, 17 Pa.Cmwlth. 404, 1975. , 53 P.S. § 10609.1.
49. 72 P.S. § 5490.339
50. 72 P.S. § 5490.5a
51. Note: Definitions can be found at 72 P.S. § 5490.2 and 7 Pa. Code § 137b.2
52. 7 Pa. Code § 137b.64
53. 7 Pa. Code § 137b.12
54. Note: Contiguous tracts of land are tracts of land that are beside each other and are part of the same operational unit. If a landowner has two tracts of land that are separated by a road and uses both tracts of land to support the farm, the tracts are considered contiguous.
55. 7 Pa. Code §§ 137b.13 and 137b.14
56. 7 Pa. Code § 137b.51
57. 7 Pa. Code § 137b.16
58. 72 P.S. § 5490.4 (a.1)
59. 7 Pa. Code § 137b.41
60. 7 Pa. Code § 137b.44
61. 72 P.S. § 5490.4 (b.1)
62. 72 P.S. § 5490.4 (e) and 7 Pa. Code § 137b.46
63. 72 P.S. § 5490.3 (a.1)(1) and 7 Pa. Code § 137b.19
64. 7 Pa. Code § 137b.24
65. See generally 72 P.S. § 5490.3
66. 7 Pa. Code § 137b.52
67. 72 P.S. § 5490.6 and 7 Pa. Code § 137b.87
68. *Id.*
69. 7 Pa. Code § 137b.63
70. 7 Pa. Code § 137b.74
71. See 72 P.S. § 5490.6 (a.2), 7 Pa. Code § 137b.2, 7 Pa. Code § 137b.87, and 7 Pa. Code § 137b.88
72. See 72 P.S. § 5490.6, 7 Pa. Code § 137b.2, 7 Pa. Code §§ 137b.82-86
73. 72 P.S. § 5490.5b and 7 Pa. Code § 137b.131
74. 2000 Clean and Green Act 319 Summary of Participation, The Pennsylvania Department of Agriculture (2000).
75. For an article summarizing Pennsylvania Clean and Green cases, see http://www.dsl.psu.edu/aglaw/newcleangreen.html or contact the Agricultural Law Research and Education Center at (717) 241-3517.
76. Open Space Lands Act 442 of 1967 and Act 153 of 1996
77. Act 442 of 1967
78. Act 4 of 2006 / HB 87, P.N. 81

79. 35 P.S. § 691.1-691.611
80. 35 P.S. § 691.503
81. A nonpoint source of pollution is a source that creates pollution through surface water runoff normally associated with rainfall. Nitrogen, phosphorus and other nonpoint source pollutants cause a variety of water problems including diminished sunlight, reduced dissolved oxygen content, changes in heat radiation and the retention of organic materials, sediment and other substances that blanket the bottoms of the bodies of water.
82. CAOs should not be confused with CAFOs, Concentrated Animal Feeding Operations. A CAO is an animal operation, which may or may not confine its animals; the emphasis in the law is on the number of animal units (an animal unit is approximately 1,000 pounds of live weight) per acre of land suitable for receiving the manure. Without sufficient acreage to absorb the nutrients, such operations can become nonpoint source polluters. In contrast, CAFOs by virtue of being confined animal feeding operations can become point source polluters and are governed by federal law. Many CAFO operators need federal permits. In Pennsylvania, the first step in obtaining a federal permit is a Nutrient Management Plan. See 33 USC 1251 et seq. (Also See Appendix D)
83. The regulations are found at 25 Pa.Code § 83.201 et seq.
84. 3 P.S. § 1717
85. It should be noted that this case does not have precedential effect except in Bradford County. It is discussed here because of its reasoning.
86. Water Resources Planning Act 3920-PA-DEP3103. August 2004
87. PA Water Resources Planning Act (Act 220) Frequently Asked Questions, Assembled by Alyssa Dodd, Virginia Ishler and Bryan Swistock, Penn State College of Agricultural Science, Cooperative Extension.
88. *Will You Have Enough Water Tomorrow? What Farmers Need to Know About the Water Resources Planning Act.* 3920-PA-DEP3103. Aug. 2004.
89. PA Water Resources Planning Act (Act 220), Assembled by Alyssa Dodd, Virginia Ishler and Bryan Swistock, Penn State College of Agricultural Science, Cooperative Extension.
90. 25 Pa. ADC §102
91. see www.soils.usda.gov for more information on NRCS

Appendix A

An article addressing local government powers in the Pennsylvania Constitution in 1968 guaranteed the right of home rule to Pennsylvania counties and municipalities. A municipality's decision to adopt home rule transfers governing authority from state law to a local charter, adopted and amended by the voters. Home rule municipalities have the same rights and responsibilities as conventional municipalities. A conventional municipality is a creature of state government — its authority comes from the State. A home rule municipality's authority comes directly from the voters. Local governments without home rule can only act where specifically authorized by state law, but home rule municipalities can act anywhere except where they are specifically limited by state law.

There are four major restrictions on home rule powers.

1. The Home Rule Law, 53 Pa. C.S. §§2901-3171 lists subject areas in §§2962(a), (b), and (f) where home rule municipalities are limited to powers granted by state law.
2. Laws that are uniform and applicable throughout Pennsylvania supersede municipal ordinances on the same subject. §2962(c).
3. Sometimes the legislature makes a law that by its terms preempts home rule powers, not leaving the meaning open to judicial interpretation. This is a clear restriction on home rule powers.
4. Statutes that implement constitutional provisions also can preempt home rule powers, because a home rule ordinance to the contrary would be a municipal violation of a constitutional provision.

Philadelphia adopted home rule before it was guaranteed in the Constitution. The Pennsylvania Supreme Court ruled that the city's civil service regulations could supersede a state law, and let the city regulate disability compensation for police and firemen, saying it was not a substantive matter of statewide concern. *Ebald v. Philadelphia*, 7 D.&C.2d 179 at 183, 1956.

Appendix B

Background to Nuisance Law

A nuisance occurs when one property owner makes use of his property in a way that interferes with another property owner's ability to use or enjoy his property. Activities that produce excessive noise, light, dust or odor have at times been found to be nuisances depending, of course, on the facts of each situation. Nuisances are commonly classified as private or public.

Private Nuisance

A private nuisance is an activity that interferes with an individual's reasonable use or enjoyment of his or her property. Private suits brought against a farmer require the court to balance the homeowner's right to use and enjoy his property against the farmer's right to reasonably use his own property for his benefit.

In Pennsylvania, a property owner is subject to liability for a private nuisance if his conduct "encroaches" upon another's interest in the private use and enjoyment of his property, the conduct causes significant harm and the conduct is either:

- intentional and unreasonable, or
- unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct or for abnormally dangerous conditions or activities.

In deciding whether conduct causes significant harm, courts require more than slight inconvenience or petty annoyance. There must be a real and appreciable interference with the owner's use or enjoyment of his land, as viewed by a "normal person." If a normal person living in the community would regard the encroachment of property in question as definitely offensive, seriously annoying or intolerable, courts will generally find the harm to be significant.

Public Nuisance

A public nuisance is an activity that threatens the public health, safety or welfare, or does damage to community resources. For example, polluting a town's water supply is a public nuisance. A public nuisance suit against the polluter can be brought by the government or by a class of people harmed by the activity.

In Pennsylvania, courts define a public nuisance as an unreasonable interference with a right common to the general public. Circumstances that a court will consider in determining whether an activity is a public nuisance include:

- whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort, or the public convenience, or
- whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
- whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect.

The Pennsylvania Legislature has criminalized public nuisances. However, the statute criminalizing public nuisances does not define a public nuisance. Consequently, decisions involving criminal prosecutions for maintaining a public nuisance are highly contextual and depend to a very large degree on the circumstances of each case.

Local governments can also control nuisances through their ordinances, usually through the imposition of civil fines or penalties.

18 P.S. § 6504. “Whoever erects, sets up, establishes, maintains, keeps or continues, or causes to be erected, set up, established, maintained, kept or continued, any public or common nuisance is guilty of a misdemeanor of the second degree. Where the nuisance is in the existence at the time of the conviction and sentence, the court, in its discretion, may direct either the defendant or the sheriff of the county at the expense of the defendant to abate the same.”

Appendix C

Case law for Right to Farm

In a recent case, the Superior Court of Pennsylvania upheld the "no suits after one year" provision of the Right to Farm Act. In the case of Horne v. Haladay, Horne, a property owner, sued a neighboring poultry operation in November of 1995. He stated that the operation interfered with the use and enjoyment of his property. In November of 1993, the agricultural operators had stocked their poultry house with 122,000 laying hens. In August of 1994, the operators constructed a decomposition building for chicken waste. Except for the decomposition building, the facility had otherwise been unchanged.

Horne alleged that the farmers failed to take reasonable steps to control the flies, strong odor, excessive noise and chicken waste of the operation. The owners of the poultry operation stated that they operated their business in a reasonable manner in order to minimize the flies, odor, noise and waste.

The poultry operators raised the one-year provision of the Right to Farm Act as a time bar to the lawsuit, stating that their operation had remained substantially unchanged since August of 1994, more than one year before the filing of the lawsuit in November of 1995. The Court of Common Pleas of Columbia County agreed, holding that the Right to Farm Act barred the nuisance claim.

The property owner appealed to the Pennsylvania Superior Court. He argued that his residence pre-dated the poultry operation which the Right to Farm Act did not apply to private nuisance suits because the title of the section limiting nuisance suits mentions only public nuisance suits, and that the poultry operation had not been lawfully operated for the requisite one year before he filed his suit. For these reasons, the landowner stated that the Right to Farm Act did not preclude his lawsuit.

The Pennsylvania Superior Court ruled in favor of the poultry operation. The court found no merit in the landowner's allegations. First, the court determined that the order in which the land uses are constructed is not a factor in determining the applicability of the Right to Farm Act. The court noted that the language of the Act clearly expressed a desire to "encourage the development…of agricultural land." The one-year provision of the Act thus encompasses even those operations that are pre-dated by nonagricultural uses. Neighbors to these nonagricultural uses may still file a nuisance suit against these agricultural operations, but they must file it within one year of the construction of or any significant change of the operation.

Second, the court determined that the Right to Farm Act limited both public and private nuisance suits. The court used a "well-established rule" of statutory construction that the title of a statute cannot control the plain words of the statute. The plain words of the Right to Farm Act, the court determined, clearly indicated that both private and public nuisance suits were to be limited by the legislation.

Third, the court found no evidence to support the argument that the operation was being unlawfully run. In fact, a report from a Pennsylvania Department of Agriculture veterinarian stated that the operation had taken an aggressive, proactive management approach to controlling flies and farm odors.

Accordingly, the Superior Court found that the plaintiff was barred by the one-year provision in the Right to Farm Act from filing a private nuisance suit against the poultry operation and upheld the lower court's dismissal of the case.

An appeal to the Supreme Court of Pennsylvania was denied.

Appendix D

Defining CAFO's and CAO's

A **CAO** is an agricultural operation whose animal density exceeds two animal equivalent units per acre on an annualized basis. Farms with fewer than two animal units per acre are not required to develop a nutrient management plan, but are encouraged to develop a plan voluntarily.

A concentrated animal operation is now an operation where the animal density exceeds two animal equivalent units per acre on an annualized basis with eight or more AEU's, and now includes certain large horse boarding facilities.

A **CAFO,** or Concentrated Animal Feeding Operation, is defined by federal definitions under the Clean Water Act. CAFO's are not density measured, but are measured according to the number of Animal Units per operation, not per acre. DEP implements CAFO regulations and plans, and these plans are separate from the Nutrient Management plan regulations on CAO's. They are similar in objective.

ACRE new setbacks: CAFO and CAO operations will be prohibited from spreading animal manure within 100 feet of streams, lakes and ponds, or within 35 feet of streams, lakes and ponds if the farm establishes a qualified vegetative buffer next to the waterway. Farmers can still perform many farming practices in the buffer areas.

Appendix E

MPC Cases

Developers, Inc. v. Bedminster Township Zoning Hearing Board, the court affirmed a lower court's denial of a substantive challenge to the ordinance's constitutional validity. The Bedminster Township (Bucks County) Board of Supervisors adopted an ordinance that protects 50 percent of "farmland of statewide importance" and 50 percent of "farmland of local importance" on any 10±-acre site located within an Agricultural-Preservation (AP) zone. These categories include non-prime Class II, Class III and Class IV soils.

C&M Developers challenged the ordinance, stating that it does not allow the reasonable use of land in an AP zone. The Zoning Hearing Board denied the challenge and the Court of Common Pleas of Bucks County affirmed. The developers appealed.

The Commonwealth Court stated that the Municipalities Planning Code clearly supports agricultural preservation as a legitimate governmental goal and affirmed the lower court. On appeal, the Pennsylvania Supreme Court found that a township may enact zoning regulations to preserve its agricultural lands and activities. The court, however, reversed stating that, while the ordinance's requirements setting aside agricultural land were reasonable, its restrictions on the development of the remaining property were unreasonable and needed to be revised.

Legal Challenges to Agricultural Zoning

There may be as many legal challenges that can be mounted against zoning ordinance provisions as there are creative lawyers. However, following is a description of the three most commonly used: a "lack of authority" challenge, a "takings" challenge and finally, a "substantive due process" challenge.

The "Lack of Authority" Challenge

Local governments are "creatures" of the state. As such, they have no independent power, but instead derive all of their authority to regulate from the state legislature. As explained above, a local government receives its power to regulate the use of land from the Municipalities Planning Code. Consequently, one of the most commonly used challenges against a zoning ordinance is that the municipality lacks the power, that is, is not authorized by the Code to legislate in the way that it has.

For example, in the case of Naylor v. Township of Hellam, the township had imposed a one-year moratorium on certain new types of subdivision and land development while it revised its zoning and subdivision land development ordinances. Naylor and other landowners brought suit, contesting the townships power to impose such a moratorium. The Township argued that the Municipalities Planning Code and the Second Class Township Code authorized the reenactment of the moratorium. Both the trial court and the Commonwealth Court agreed with the township; however, the Supreme Court of Pennsylvania did not.

The Supreme Court began its analysis by recognizing that zoning enabling legislation, as opposed to zoning ordinances, must be liberally construed and the legislature is presumed to favor the public interest over any private interest. Nevertheless, after carefully analyzing the Municipalities Planning Code, the court decided that the Code while granting townships the power to regulate land development, neither explicitly nor impliedly granted municipalities the power to suspend land development. The court thus reversed the decisions below.

The "Takings" Challenge

A takings challenge occurs when a landowner claims that his property has been taken by the government without due compensation, in violation of the Fifth Amendment of the U.S. Constitution. Property can be taken by the government through direct action, such as eminent domain, or through regulation, such as a zoning ordinance or environmental regulations.

The U.S. Supreme Court has developed a two-tiered test to determine when a citizen's property has been taken by government action. The first tier was constructed by the Court in Lucas v. South Carolina Coastal Council. In Lucas, the Court determined that an act by the government that denies a property owner all economically beneficial or productive use of his land is a categorical taking, and is thus unconstitutional.

Even if a governmental action does not rise to the level of a categorical taking, as determined by the Lucas test, it may nevertheless be a taking if it fails the second tier of the Court's test, as developed in Penn Central Transportation Company v. New York City. In Penn Central, the Court stated that a governmental act constitutes a taking if it interferes with a property owner's "reasonable, investment-backed expectations."

In reviewing government action under a non-categorical takings claim, the Pennsylvania Supreme Court has supplemented the Penn Central test by taking into account three considerations:

1. The interest of the general public, rather than a particular class of persons, must require the governmental action;
2. The means must be necessary to effectuate that purpose;
3. The means must not be unduly oppressive upon the property holder, considering the economic impact of the regulation, and the extent to which the government physically intrudes on the property.

Because zoning generally – and agricultural zoning in particular – is often considered to further the general welfare, and because most agriculture zones allow some minimal development of the site, it is difficult to bring a successful takings suit against a governmental entity that engages in agricultural zoning.

The "Substantive Due Process" Challenge

A third challenge to government action is brought under the legal theory of substantive due process. When reviewing a substantive due process claim, a court determines whether the government's act, such as the passing of legislation, is so fundamentally unfair that it cannot be remedied, even by procedural due process (e.g. even by an opportunity to be heard at a fair administrative hearing). A government act that does not violate substantive due process is one that:

1. Addresses a public purpose;
2. Is reasonably related to that public purpose, and
3. Does not unfairly impact the property owner.

In 1985, the Pennsylvania Supreme Court used a substantive due process analysis to uphold the validity of agricultural zoning. In Boundary Drive Associates v. Shrewsbury Township Board of Supervisors, a landowner challenged a sliding-scale zoning ordinance that limited the number of parcels he could subdivide from his agricultural land. The court found that the township's sliding scale formula did not violate the landowner's substantive due process rights. The formula, the court stated, was substantially related to the goal of preserving farmland and was not too restrictive.

However, the court suggested that there may be instances when a zoning ordinance is invalid. A zoning ordinance that is arbitrary, unreasonable, or unrelated to the public, health, safety, morals and welfare could violate due process.

The Boundary Drive court went on to refer to a previous case, Hopewell Township Board of Supervisors v. Gollain, in which an ordinance had been found to violate due process. In the Hopewell Township case, in contrast, the court had invalidated a fixed-system zoning ordinance that allowed only a certain number of dwelling units to be split off regardless of the size of the original parcels. Thus the court validated a sliding scale formula in Boundary Drive after having rejected a fixed number system in Hopewell Township. The lesson from these cases is that the court will look to the fairness and reasonableness of the zoning system chosen.

Appendix F

Cases for Nutrient Management

Thus far, only one court in Pennsylvania has been asked to interpret the preemption clause. On April 6, 2000, the Court of Common Pleas of Bradford County handed down its decision in the case of McClellan v. Granville Township Board of Supervisors. The case is significant in that it is the first time that a court has considered the interplay between the Nutrient Management Act and a local ordinance.

> "An ordinance for the purpose of imposing certain restrictions upon site selection for concentrated animal feeding operations [CAFO] and their manure storage facilities; providing for certain definitions, a procedure for a permit to carry on such operations, providing for review by the Township Planning Commission and imposing certain penalties for violation thereof."

The six plaintiffs, who were owners and operators of a hog finishing operation located in the township, filed suit asking the court to declare that the ordinance was void because it was preempted by the Nutrient Management Act. The township replied by asserting that the ordinance was passed under the authority of the Municipalities Planning Code, and was therefore valid.

The court decided in favor of the plaintiffs. In its opinion, the court made several major points. First, the court placed hog finishing operations within the purview of the Nutrient Management Act. Granville Township had argued that that law applies only to operations that apply manure to the land, not to operations that merely "catch" manure, as in the instant case. The court explained that the law's legislative intent makes clear "that hog finishing operations which generate and store animal manure are subject to the provisions of the Act." Consequently, as the regulations promulgated under the authority of the Act make clear, the design, construction, location, operation, maintenance and removal from service of manure storage facilities must be conducted in accordance with the statewide regulations.

Next, the court reviewed the law's preemption clause. The court decided that the municipal ordinance was in conflict with and more stringent than the regulations, pointing out, for example, that the setback requirements and the penalties in the township's ordinance were more stringent than those provided for in the state regulations. Consequently, the court held that the ordinance was preempted by the Act.

The court noted that there were areas of regulation still available to the township. The township could enact a comprehensive plan and include rules for land development that "properly and legitimately regulate land use in the township, including CAFOs that might wish to locate in the township in the future," so long as those "plans, rules and zoning have not been legitimately preempted by laws of higher authority than the township." The township is not appealing this decision.

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