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AGRICULTURAL AND RURAL ZONING IN PENNSYLVANIA: CAN YOU GET THERE FROM HERE?

JOHN M. HARTZELL†

“Land spreading out so far and wide; keep Manhattan just give me that countryside!” Eddie Albert, as Mr. Oliver Wendell Douglas, a neophyte farmer and transplanted urbanite, in the 1960’s situation comedy “Green Acres.”

I. INTRODUCTION

RESIDENTS of rural Pennsylvania feel an inexorable pressure which affects not only their lifestyle and environs, but also the state’s leading industry: agriculture.¹ The pressure is, of course, development, which is especially difficult to manage or plan for because of its insidious nature. Unnoticed for years, individual communities have suddenly realized the existence of the problem and have commenced piecemeal efforts to prevent further development; unfortunately, these efforts often come too late or are too costly.² The industry most directly affected is agriculture, and the locations of this ongoing battle are Pennsylvania’s rural and suburban communities, particularly in the south east and south central regions.

Pennsylvania’s farms and agricultural industries have a profound economic role in the Commonwealth. Almost 800,000 people in the state are employed in some aspect of farming or related business, and the Commonwealth exports over \$923 million of agricultural products annually.³ The annual harvest exceeds \$3 billion, and Pennsylvania’s family farms generate \$35 billion in economic activity each year, ranking Pennsylvania fourteenth in the

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1. See *Agricultural Facts and Figures* (last modified Feb. 1, 1999) <http://www.state.pa.us/PA_Exec/Agriculture/numberone.htm>. This website is maintained by the Pennsylvania Department of Agriculture.

2. See *id.*

3. See *id.*

country for total farm market.⁴ The 1992 Census of Agriculture determined that 44,780 farms in Pennsylvania cover nearly 7.2 million acres of harvested cropland.⁵

Despite the major role of agriculture in Pennsylvania, the state has recently lost significant amounts of agricultural lands. Approximately 125,000 acres of farmland are converted to non-agricultural uses annually.⁶ In the seventeen month period from November 1996 through March 1998, more than 25,000 acres of farmland in the eight-county Harrisburg region were subdivided for development.⁷ This amount of acreage being lost to development equates to approximately 290 farms, or 52 acres of land per day.⁸ Some local residents have noted that once a farm is developed, it never goes back to farming.⁹

This loss of farmland, however, is not merely a local problem. Over the past forty years most new development in Pennsylvania has

4. See Vivian Quinn, *Preserving Farmland with Conservation Easements: Public Benefit or Burden?*, ANN. SURV. AM. L. 235, 254 (1994). Senator Arlen Specter of Pennsylvania reported these statistics in a statement for the Congressional Record. See *id.* He also noted that Pennsylvania ranks sixteenth in the country regarding the number of farms within a state. See *id.*

5. See THE CENTER FOR RURAL PENNSYLVANIA, ZONING FOR FARMING 3 (1995) [hereinafter ZONING FOR FARMING]. The average farm size of these farms was 160 acres and the total value of these farmlands was approximately \$174 billion. See *id.* This was cited as support for reasons to protect farmland from development encroachment. See *id.* Pennsylvania farms have the ability to provide fresh produce to Philadelphia, Baltimore, and Pittsburgh, as well as other urban markets both in Pennsylvania and the northeast. See *id.* The freshness of Pennsylvania produce cannot be matched by distant suppliers. See *id.* Protecting the farms in Pennsylvania may help maintain strong cultural traditions and provide a tangible connection between the production and consumption of food. See *id.* at 4. "The continuation of extensive areas in farming also protects many natural systems: replenishment of ground water, maintenance of natural stream flow, the conservation of prime soils, and other environmental amenities." *Id.*

6. See Christopher P. Markley, *Agricultural Land Preservation: Can Pennsylvania Save the Family Farm?*, 87 DICK. L. REV. 595, 595 (1984). Highway easements, water storage reservoirs and commercial shopping centers were some nonagricultural uses of farmland. See *id.* at n.6.

7. See Garry Lenton, *Scarce Land Prompts Unique Developments*, HARRISBURG PATRIOT-NEWS, Apr. 16, 1998, at B1. The state data center at Pennsylvania State University, Harrisburg, reported these statistics. See *id.* One commentator noted that "[i]f we're not careful you will be able to go from Lancaster to York to north of Harrisburg without any open space, any farmland, any natural stuff." *Id.*

8. See *id.* These statistics caught the attention of community leaders in several Pennsylvania counties. In March 1998, a 150 member task force comprised of public officials, corporate leaders, and residents recognized this issue and identified goals designed to foster economic development. See *id.*

9. See Barbara Miller, *Proposals to Preserve Farmland Would Hurt Owners, Some Say*, HARRISBURG PATRIOT-NEWS, Dec. 12, 1997, at B4. A farmer, Jeffrey Hackran, and his fellow planning commission members of South Annville Township proposed zoning amendments in their township to restrict development of farmland. See *id.*

taken place in rural parts of the state, which threatens the viability of both rural communities and the agricultural sector.¹⁰ National organizations, such as the American Farmlands Trust, have mobilized forces in order to deal with this problem. These groups, charged with identifying endangered farmland, have included areas within Pennsylvania as among the most severely threatened prime farmland in the nation.¹¹

Part II of this Article outlines the efforts Pennsylvania state and local governments are using to combat the threats to Pennsylvania's farmland.¹² Part III provides an in-depth analysis of agricultural zoning as a tool to control or mitigate agricultural land loss.¹³ This analysis also examines Pennsylvania case law which interprets the validity of agricultural zoning in Pennsylvania. Part IV examines future threats to agriculture and agricultural zoning and outlines possible solutions to these threats.¹⁴ The Conclusion recommends general proposals that may help ensure that agricultural zoning is structured to effectively confront the problems anticipated in an increasingly industrialized agricultural sector.¹⁵

II. STATE AND LOCAL GOVERNMENT RESPONSES TO AGRICULTURAL LAND LOSS

The loss of agricultural lands to development is perceived as primarily a state, and especially a local, problem, inasmuch as land use and other controls are created by state legislative and other processes and applied by local governments.¹⁶ While the federal

10. See ZONING FOR FARMING, *supra* note 5, at 2. Development threatens rural communities because agriculture is a key factor in lifestyle, institutional, environmental, and aesthetic qualities of the area. See *id.* A survey conducted by the Pennsylvania State University in 1991, revealed that the general population of Pennsylvania supported protecting farmlands. See *id.* This support also was reflected when a referendum passed in 1987, by two-thirds of the voters, favoring a \$100 million bond issue to fund a major protection initiative. See *id.*

11. See A. Ann Sorensen et al., *Farming on the Edge in* CENTER FOR AGRICULTURE IN THE ENVIRONMENT 8 (1997). Specifically, the Northern Piedmont region, which includes parts of Maryland, New Jersey, Pennsylvania and Virginia, is listed as the second of the twenty most threatened major land resource areas. See *id.*

12. For a discussion of Pennsylvania state and local governmental action, see *infra* notes 16-90 and accompanying text.

13. For a detailed discussion of agricultural zoning, see *infra* notes 91-127 and accompanying text.

14. For an analysis of future threats, see *infra* notes 128-52 and accompanying text.

15. For a discussion of proposals for effective agricultural zoning, see *infra* notes 153-59 and accompanying text.

16. See Teri E. Popp, *A Survey of Agricultural Zoning: State Responses to the Farmland Crisis*, 24 REAL PROP. PROB. & TR. J. 371, 376 (1989). States have most of the regulatory control, but, as a practical matter, local municipalities govern most

government has played a major role in the identification of the problem and has offered some solutions,¹⁷ the problem is seen as particularly suited to local and state responses.¹⁸ Pennsylvania legislators have heeded this call by enacting many statutes aimed at protecting agricultural activities and farmland.

A. The "Right to Farm" Act

All fifty states have adopted some form of the right to farm ordinance, intending to protect farmers by making it difficult for neighboring landowners or tenants to stop typical farm operations through the use of nuisance suits.¹⁹ In 1982, the Commonwealth of Pennsylvania enacted a statute designed to protect farmers and agricultural operations from neighboring changes in land use.²⁰ Although the Act was entitled "Protection of Agricultural Opera-

land-use control. *See id.* As a result of this structure of regulatory control and political and economic consideration, rural land-use management can lead to tensions between the local and state governments. *See id.* at 376-77.

17. *See* Sam Sheronick, *The Accretion of Cement and Steel onto Prime Iowa Farmland: A Proposal for a Comprehensive State Agricultural Zoning Plan*, 76 IOWA L. REV. 583, 585-87 (1991) (noting federal response started in 1976 with United States Department of Agriculture (USDA) urging other federal agencies to refrain from placing federal projects on prime farmland, and in 1981, with USDA and President's Council on Environmental Quality (CEQ) and National Agricultural Lands Survey (NALS), noting effects that federal agencies would have on farmlands).

The Clinton Administration has included the protection of farmlands from development as part of their Fiscal Year 2000 budget "Lands Legacy Initiative." *See President Clinton's Lands Legacy Initiative* <<http://www.pub.whitehouse.gov/uri-res/I2R?urn:pdi://oma.eop.gov.us/1999/1/12/11.text.1>>.

18. *See* Sheronick, *supra* note 17, at 586 (citing Farmland Protection Policy Act of 1981, 7 U.S.C. §§ 4201-4209 (1982)); *see also* Steven C. Bahls, *Preservation of Family Farms - The Way Ahead*, 45 DRAKE L. REV. 311, 320 (1997) (noting Congress's use of Internal Revenue Code to provide preferential treatment of farms and closely held businesses by permitting lower estate tax valuations of land).

19. *See* Laura Thompson, *The Conflict at the Edge*, ZONING NEWS, Feb. 1997, at 3. Although right to farm laws do not eliminate complaints, local governments hope the laws will limit the changes made by urban residents in agricultural areas. *See id.*

20. PA. STAT. ANN. tit. 3, §§ 951-957 (West 1995 & Supp. 1998). The purpose of the Act is stated as follows:

It is the declared policy of the Commonwealth to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. When nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits and ordinances. As a result, agricultural operations are sometimes forced to cease operations. Many others are discouraged from making investments in farm improvements. It is the purpose of this act to reduce the loss to the Commonwealth of its agricultural resources by limiting the circumstances under which agricultural operations may be the subject matter of nuisance suits and ordinances.

Id. § 951.

tions from Nuisance Suits and Ordinances,” it has come to be known as the “Right to Farm” Act.

Case law from states other than Pennsylvania emphasize the nature of the farm operation, focusing specifically on whether it has changed appreciably and which of the conflicting land uses existed first.²¹ Despite varying interpretations, right to farm laws protect farmers from nuisance suits related to noise, odor, pesticide drift, as well other as typical farm activities.²²

In contrast, appellate courts have rarely reviewed Pennsylvania’s version. In 1993, the Commonwealth Court in *Burger v. Northampton Township Zoning Hearing Board*²³ affirmed a Bucks County Court of Common Pleas decision which determined that the protection against nuisance ordinances provided by the “Right to Farm” Act²⁴ did not extend to zoning ordinances regulating farm structures.²⁵ In that case, a farmer sold his farm for development, yet retained a less than two acre parcel upon which he tried to erect a farm equipment storage building.²⁶ He was prevented from building this structure by a zoning ordinance that required at least five acres for such construction.²⁷ The zoning ordinance was upheld.²⁸

21. See *Shatto v. McNulty*, 509 N.E.2d 897 (Ind. Ct. App. 1987) (holding Indiana’s right to farm law protected preexisting hog operation against odor complaints from new neighbors); *Herrin v. Opatut*, 281 S.E.2d 575 (Ga. 1981) (holding that Georgia’s right to farm law did not protect large scale egg operation from complaints by neighbors where site of egg farm had historically been farm but where use changed from general farm operation to large scale egg farm operation after neighbors had established nearby residence).

22. See *Thompson*, *supra* note 19, at 3.

23. 637 A.2d 1377 (Pa. Commw. Ct. 1993) (unpublished table decision) *aff’g In re Appeal of Burger*, 17 Pa. D. & C.4th 280 (1992).

24. See PA. STAT. ANN. tit. 3, §§ 951-957. For a discussion of the declared purpose of the Act, see *supra* note 20 and accompanying text.

25. See *Burger*, 637 A.2d at 1377.

26. See *id.*

27. See *In re Appeal of Burger*, 17 Pa. D. & C.4th at 282 (holding township was not precluded by PA Right to Farm Act and could enforce its zoning ordinance). The Bucks County Court of Common Pleas noted that neither the Right to Farm Act nor the legislative history defined “nuisance ordinances.” See *id.* The court, therefore, looked to the Municipalities Planning Code and held that zoning ordinances could not be regarded as nuisance ordinances. See *id.* at 283. The court also concluded that the Planning Code statute provided for an “array of ‘zoning purposes’” and therefore held that the power to zone was in no way limited to the suppression of nuisances. *Id.* at 284.

28. See *id.* at 285. The court noted it did not believe that the state legislature which passed the Right to Farm Act intended the Act to preclude the township from enforcing its zoning ordinances, particularly when the public health, welfare and safety were involved. See *id.*

More recently, another Commonwealth Court case supported a similar finding in evaluating the statute's interplay with zoning ordinances. In *Wellington Farms, Inc. v. Township of Silver Spring*,²⁹ the court determined that the protection afforded by the "Right to Farm" Act did not prevent a township from prohibiting a poultry slaughterhouse from operating in an area that was not zoned for such operations.³⁰ In *Wellington Farms*, the operator was permitted to slaughter poultry raised on the farm even though the importation of chickens for slaughter was a violation of the zoning ordinance, which allowed only chickens raised on the premises to be slaughtered.³¹

Interestingly, in these two cases farmers or agricultural operators attempted to use the statute against municipalities and their zoning powers, and not as protection from neighbors having disparate land uses. These arguments could evidence creative lawyering, attempts to expand the statute's authority, or both.³²

The legislature enacted substantive changes to the statute in 1998 to broaden the scope of activities included within "normal agricultural operations," both as to the type of operation and the technology used.³³ The existing agricultural operation's time requirement is removed when an approved Nutrient Management Plan exists. While these changes suggest more favorable treatment for more technologically advanced, larger scale agricultural operations, the determination of the Iowa Supreme Court that a similar

29. 679 A.2d 267 (Pa. Commw. Ct. 1996) (holding Act did not preclude township from enforcing zoning ordinance).

30. *See id.*

31. *See id.* The Silver Springs Township notified the Wellington Farms that its practice of slaughtering was violating the Township's zoning ordinance. *See id.*

32. The purpose of the Act was to "reduce the loss . . . of . . . agricultural resources by limiting the circumstances under which agricultural operations may be the subject matter of nuisance suits and ordinances." PA. STAT. ANN. tit. 3, §951 (West 1995 & Supp. 1998). The limitation concerning ordinances, however, applies to ordinances concerning public nuisances, with only one exception. *See id.* This protection is further limited by its application to only agricultural activities that are "in accordance with normal agricultural operations so long as the agricultural operation does not have a direct adverse effect on the public health and safety." *Id.* § 953(a). The one exception prohibits the application of zoning to "[d]irect commercial sales of agricultural commodities upon property owned and operated by a landowner" where at least 50% of the products sold were produced by the landowner. *Id.* § 953(b).

33. 1998 Pa. Legis. Serv. Act 1998-58, § 2, amending PA. STAT. ANN. tit. 3, §§ 951-957. Examples of "type of operation" include forestry and food preparation, and examples of "technology used" include "new activities, practices, equipment and procedures, consistent with technological development within the agricultural industry." *See id.*

right to farm law was unconstitutional may cast Pennsylvania's version of the "Right to Farm" Act in a new light.³⁴

B. Agricultural Security Areas

Agricultural Security Areas (ASAs) provide farmers with a voluntary method to gain greater protection from development.³⁵ Under this program, a farmer or group of farmers owning 250 or more acres of land combined and having a minimum of ten acres individually or a specified income from the land may petition the local government for inclusion of the land in an ASA.³⁶ Provided the parcels meet a satisfactory review,³⁷ the landowners enjoy the protection of an ASA for up to seven years.³⁸ The local municipal-

34. See *id.*; see also *Bormann v. Board of Supervisors in and for Kossuth County*, 584 N.W.2d 309 (Iowa 1998), *cert. denied sub nom. Ginres v. Bormann*, 119 S. Ct. 1096 (1999) (holding that Iowa statute providing protection against private nuisance suits was unconstitutional taking of private property interest in that statute granted uncompensated easement over lands of those abutting protected farms).

35. See Agricultural Area Security Law, Act. No. 1981-43 (amended and codified at 3 PA. CONS. STAT. ANN. §§ 901-915 (West 1995 & Supp. 1998)). The text of the Agricultural Area Security Law provides:

The purpose of this law is to provide means by which agricultural land may be protected and enhanced as a viable segment of the Commonwealth's economy and as an economic and environmental resource of major importance. It is further the purpose of this Act to:

- (1) Encourage landowners to make a long-term commitment to agriculture by offering them financial incentives and security of land use,
- (2) Protect farming operations in agricultural security areas from incompatible nonfarm land uses that may render farming impracticable,
- (3) Assure permanent conservation of productive agricultural lands in order to protect the agricultural economy of this Commonwealth,
- (4) Provide compensation to landowners in exchange for their relinquishment of the right to develop their private property,
- (5) Leverage State agricultural easement purchase funds and protect the investment of taxpayers in agricultural conservation easements.

Id. § 902.

36. See *id.* § 905(a). This section sets forth the proposals for creating Agricultural security areas. See *id.*

37. See *id.* § 907(a). This section sets forth the evaluation criteria. See *id.* The planning commission must consider factors such as soil type, compatibility of the proposed ASA with local government comprehensive plans, the viability of agricultural use of the lands, improvements to the farms, trends in agricultural, economic and technological conditions, and any other relevant concerns. See *id.*

38. See *id.* § 908(e). The statute states:

[p]articipation in the agricultural security area shall be available on a voluntary basis to landowners within the jurisdiction of the governing body including those not among the original petitioners. The deletion of land in the agricultural security area shall only occur after seven years or whenever the agricultural security area is subject to review by the governing body.

ity must review each ASA every seven years, considering the development of the land within the ASA as well as recommendations of the local and county planning commissions.³⁹

The landowner receives significant benefits from the efforts made. First, the local municipality is restricted from enacting laws or ordinances that would restrict farm structures or practices unless there existed a "direct relationship to the public health or safety."⁴⁰ A prohibition also exists for local ordinances related to public nuisances with a similar escape clause or exception for public health and safety concerns.⁴¹

Second, inclusion in an ASA provides protection from eminent domain actions. Before condemnation of any property included in an ASA may occur, prior approval must be garnered from the Agricultural Lands Condemnation Approval Board.⁴² The Board requires the condemnor to prove that there exists "no reasonable and prudent alternative" for the proposed use of the condemned land located within the ASA.⁴³ Such a standard is extremely

Id.

39. *See id.* § 909. This section sets forth the details governing review of the area. *See id.*

40. PA. CONS. STAT. ANN. tit. 3, § 911 (a). This section states: Every municipality or political subdivision within which an agricultural security area is created shall encourage the continuity, development and viability of agriculture within such an area by not enacting local laws or ordinances which would unreasonably restrict farm structures or farm practices within the area in contravention of the purposes of this Act unless such restrictions or regulations bear a direct relationship to the public health or safety.

Id.

41. *See id.* § 911(b). This section states: Any municipal or political subdivision law or ordinance defining or prohibiting a public nuisance shall exclude from the definition of such nuisance any agricultural activity or operation conducted using normal farming operations within an agricultural security area as permitted by this Act if such agricultural activity or operation does not bear a direct relationship to the public health and safety.

Id.

42. *See id.* § 912. The Act sets forth: It shall be the policy of all Commonwealth agencies to encourage the maintenance of viable farming in agricultural security areas and their administrative regulations and procedures shall be modified to this end insofar as is consistent with the promotion of public health and safety, with the provisions of any Federal statutes, standards, criteria, rules, regulations, or policies, and any other requirements of Federal agencies, including provisions applicable only to obtain Federal grants, loans or other funding.

Id.

43. *See id.* § 913(d)(2)(i). Section 913 (d)(2)(i) provides: In the case of condemnation for highway purposes (but not including activities relating to existing highways such as, but not limited to, widen-

difficult to meet and requires proof of the unsuitability of the alternatives reviewed.⁴⁴ This hurdle prevented a school district from building a new school adjacent to a current school⁴⁵ and likewise prevented a county-incorporated historic railroad authority from extending a narrow gauge railroad, proposed as an historic attraction, to where it had previously existed.⁴⁶ Inclusion

ing roadways, the elimination of curves or reconstruction, for which no approval is required) and in the case of condemnation for the disposal of solid or liquid waste material, the Agricultural Lands Condemnation Approval Board or other appropriate reviewing body shall approve the proposed condemnation only if it determines there is no reasonable and prudent alternative to the utilization of the land within the agricultural security area for the project.

Id.

44. *See id.*

45. *Northwestern Lehigh Sch. Dist. v. Agricultural Lands Condemnation Approval Bd.*, 559 A.2d 978 (Pa. Commw. Ct. 1989). In *Northwestern*, the Northwestern Lehigh School District wanted to build a middle school next to its high school. *See id.* at 979. To accomplish this goal, the District petitioned the Agricultural Lands Condemnation Approval Board for condemnation approval. *See id.* The Board denied the application for condemnation because the School District did not show (1) that the proposed condemnation would not have "an unreasonable adverse effect upon the preservation of agricultural services within the area" and (2) that no reasonable alternative location existed for building the school. *Id.* The evidence showed that the District did not seek out other locations nor did it study the environmental effect of its condemnation decision. *See id.* The District chose the site because of the availability of a sewage system, convenience of transportation and the close proximity to the high school and staff facilities. *See id.*

46. *See Maryland and Pennsylvania R.R. Preservation Auth. v. Agricultural Lands Condemnation Approval Bd.*, 704 A.2d 1149 (Pa. Commw. Ct. 1998). In *Maryland and Pennsylvania*, the court determined that a preservation authority board may not condemn property "for historical, educational and recreational purposes that has been found would adversely impact the farming in an agricultural security area." *Id.* The Maryland and Pennsylvania Railroad Preservation Authority requested a condemnation of property for historical, educational and recreational purposes. *See id.* at 1150. The Authority sought to run a small diesel engine on an eight mile track to preserve the railroad and local village. *See id.* In order to accomplish this task, a forty-foot right-of-way across the landowners' property, which was part of an agricultural security area, had to be condemned. *See id.* During the hearing, the Authority offered evidence showing (1) that no unreasonable adverse impact would befall the landowners and (2) that no reasonable alternative existed. *See id.* Conversely, the landowners showed that this project would attract between 15,000 and 20,000 tourists and that this additional traffic would adversely affect their ability to move their farming equipment in the area. *See id.* The landowners also voiced concern regarding a higher probability of fire due to the diesel train's operation because of a past history of fire. *See id.* The Authority asserted that since the land had never been farmed in the past, the Board abused its discretion in denying the condemnation. *See id.* at 1151. The court disagreed with this argument and placed little weight on whether the land had been used for farming in the past. *See id.* The court stated, "[w]here non-farm uses are proposed which would impede the operation of farms within an agricultural security area, not merely the individual farms proposed to be condemned, the Law must be interpreted in a manner that will preserve the economic viability of farming throughout the agricultural security area." *Id.* A party seeking condemnation, therefore,

in an ASA provides additional opportunities, as noted in the next section.⁴⁷

C. Purchase of Agricultural Conservation Easements

Pennsylvania has attempted to preserve choice farmlands through the development of a program known as "Purchase of Agricultural Conservation Easements" (PACE).⁴⁸ It removes the incentives for farmers to sell their land in order to receive the developed value of the land.⁴⁹ In Pennsylvania the program is

must show that regional farming itself will not suffer an adverse impact, not just the land sought to be condemned. *See id.* Since the Authority did not show that there was no risk of fire to the local property, the condemnation application was denied. *See id.* at 1152.

47. For a further discussion of other opportunities provided by an ASA, see *infra* note 55 and accompanying text.

48. *See* PA. STAT. ANN. tit. 3, §§ 914.1-4 (West 1995 & Supp. 1998). The PACE consists of a State Agricultural Land Preservation Board. *See id.* § 914.1. The Act bestows on the State board specific powers, as illustrated by the following language:

It shall be the duty and responsibility of the State board to exercise the following powers:

- (i) To adopt rules and regulations pursuant to this act: . . .
- (ii) To adopt rules of procedure and bylaw governing the operations of the State board and the conduct of its meetings.
- (iii) To review, and accept or reject, the recommendation made by a county board for the purchase of an agricultural conservation easement by the Commonwealth.
- (iv) To execute agreements to purchase agricultural conservation easements in the name of the Commonwealth if recommended by a county and approved by the State board . . .
- (v) To purchase in the name of the Commonwealth agricultural conservation easements if recommended by a county and approved by the State board . . .
- (vi) To purchases agricultural conservation easements . . .
- (vii) To allocate State moneys among counties for the purchase of agricultural conservation easements . . .

Id. § 914.1(3).

The Purchase of Development Rights (PDR) also permits the establishment of a program at the county level and provides the county board with powers similar to those possessed by the state board. *See id.* § 914.1(b). This delegation of power to the local level indicates a current movement to return the power to the local level. *See* Joseph Sabino Mistick, *Recent Developments in Pennsylvania Land Use Planning*, 34 DUQ. L. REV. 533 (1996).

49. *See* PA. STAT. ANN. tit. 3, § 914.1. Many farmers are selling their land for an aggregate of reasons, one being the ability of the farmer to get a high price for the land from a willing buyer. *See* Jacqueline P. Hand, *Right-To-Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. PITT. L. REV. 289, 291 (1984). Population pressures force a willing buyer to pay a high price for farmland. *See id.* This price is weighed against other economic considerations the farmer faces, such as the farmer's commodities, transportation and energy costs, assessed property

known as PACE, while in general land use planning it is known as "PDR" (Purchase of Development Rights). PDR pays a sum of money to farmers which represents the difference between the land's value as farmland and its development value.⁵⁰ The program provides farmers with the opportunity to reinvest in their farms, plan for retirement, or use the windfall for some other purpose.⁵¹

The Pennsylvania PDR provides for a State Agricultural Land Preservation Board that acts on the recommendations of similar county boards.⁵² The state board reviews and accepts certain recommended properties for the purchase of a perpetual conservation easement.⁵³ PDR also permits the County Agricultural Land Preservation Board to purchase agricultural conservation easements separately or jointly with the state.⁵⁴ PDR mandates that land from

taxes, and state and federal inheritance taxes imposed at death. *See id.* The state tries to remove these incentives with the implementation of the PDR, giving the farmer a viable alternative to selling to developers. *See id.*

50. *See* PA. STAT. ANN. tit. 3, § 914.1(f). The state or the county board selects an "independent State-certified general real estate appraiser to determine market value and farmland value." *Id.* If the owner disagrees with the appraisal, an appeals process is available to him or to her. *See id.* The agricultural value shall be equal to the farmland value determined by the seller's appraiser. *See id.* If the farmland value determined by the state or county exceeds the farmland value determined by the seller, then the agricultural value is equal to one-half of the difference between the state's and the seller's determined value. *See id.* The nonagricultural value is determined in a similar manner. If there is no dispute over the value, the price is equal to the state or county appraiser's value. *See id.* If there is a dispute, the nonagricultural value is the difference between the farmers estimated value and the state's or county's estimated value. *See id.* The act also provides:

The entire acreage of the farmland shall be included in the determination of the value of an agricultural conservation easement, less the value of any acreage which was subdivided prior to the granting of such easement. The appraiser shall take into account the potential increase in the value of the subdivided acreage because of the placement of the easement on the remaining farmland.

3 PA. CONS. STAT. ANN. § 914.1(f)(3).

51. *See* PA. STAT. ANN. tit. 3, § 951.

52. *See id.* §§ 914.1-4. The PDR establishes a program that works from the county up. *See id.* The county has similar authority to the State board. *See id.* For a further discussion of sections 914.1-4, see *supra* note 48.

53. *See* 3 PA. CONS. STAT. ANN. §§ 914.1(a)(3)(i)-(vii).

54. *See id.* § 914.1(b). An "agricultural conservation easement" is:

[A]n interest in land, less than fee simple, which interest represents the right to prevent the development or improvement of the land for any purpose other than agricultural production. The easement may be granted by the owner of the fee simple to any third party or to the Commonwealth, to a county governing body or to a unit of government. It shall be granted in perpetuity as the equivalent of covenants running with the land.

Id. § 903. The PDR places many restrictions, conditions and limitations on the agricultural conservation easement: (1) the term is perpetual; (2) the easement cannot be sold, conveyed, leased, encumbered or restricted in whole or in part for

which a conservation easement has been purchased be included within an ASA.⁵⁵ As an additional benefit, land which has been subject to a conservation easement receives preferential annual real estate tax rates.⁵⁶ Hence, the benefit of a PDR conservation easement to the owner is not solely of a short duration.⁵⁷

D. Preferential Tax Assessment

Upon approval of a constitutional amendment in 1974, Pennsylvania adopted the Clean and Green Act.⁵⁸ The Clean and Green Act provides a preferential tax assessment for agricultural or forest lands in active or reserve use.⁵⁹ Property owners may be eligible for

a period of twenty five years unless otherwise authorized; and (3) the "easement shall not be subdivided for any purpose which may harm the economic viability of the farmland for agricultural production." *Id.* § 914.1(c). In addition, the State or local board can sell, convey, extinguish, lease, encumber or restrict the easement if the land is no longer viable agricultural land. *See id.*

55. *See id.*; *see also* PA. STAT. ANN. tit. 3, § 914.1(b). For a more complete treatment of this program, see Markley, *supra* note 6; Quinn, *supra* note 4, at 255. The county determines from which farms it should purchase an easement and then submits its findings to the state board. *See* Quinn, *supra* note 4, at 256. The state board then determines whether to purchase the easement. *See id.* The state can reject the county's recommendation whenever: (1) the recommendations are not in compliance with the county program; (2) clear title cannot be conveyed; (3) the farmland is not located within an agricultural security area (ASA) of five hundred or more acres; (4) the county has over expended its allocation of money the state granted; and (5) creation of the easement would affect or eliminate compensation to owners of surface mineable coal. *See* PA. STAT. ANN. tit. 3, § 914.1(e). The state board has only sixty days to make its decision. *See id.* § 914.1(e)(2). If the State board fails to act within the sixty day period, the county recommendations are deemed approved. *See id.* § 914.1(e)(5).

56. *See* PA. STAT. ANN. tit. 71, §§ 5491.1-6. Under the Preserved Farmland Tax Stabilization Act, land which has an agricultural conservation easement should be assessed at its restricted farmland market value for the duration of the easement. *See id.* The purpose of this provision was to encourage farmers to continue to farm their land. *See id.* Under this tax law, the land is always taxed on the lowest assessment value of the land. *See id.* Initially, it is taxed at the restricted market farmland value. *See id.* If this rate is higher, however, the farmer is not subject to this Act. *See id.* § 5491.4. Without this Act, the farmer may be subject to higher taxes since the government bases its taxes on the best use and highest value of the land. *See* Markley, *supra* note 6, at 602.

57. *See* Preserved Farmland Tax Stabilization Act, Act. No. 1994-91, 1994 (codified at PA. STAT. ANN. tit. 72, §§ 5491.1-5491.6) (West 1995 & Supp. 1998).

58. *See* John C. Becker, *Preferential Assessment of Agricultural and Forestland Under Act 310 of 1974: Entering the Second Decade*, 90 DICK. L. REV. 333, 334 (1983). Article 8, section 2(b)(i) of the Pennsylvania Constitution was amended to permit the general assembly to "establish standards and qualifications for agricultural reserves and land actively devoted to agricultural use, and to make special provisions for the taxation of such land." *Id.* The Clean and Green Act was passed under this act under the name of "Pennsylvania Farmland and Forestland Assessment Act." *Id.* at 335.

59. *See* PA. STAT. ANN. tit. 72, § 5490.3(a)(1) (West 1995 & Supp. 1998). Agricultural use is defined as, "[u]se of the land for the purpose of producing an agri-

an assessment for tax purposes based upon the value of the land for its agricultural or forestry use if (1) the property owner is involved in forestry or agriculture and (2) the property is of sufficient size or generates a certain income.⁶⁰

This tax privilege comes with a number of limiting provisions: (1) the land must be used for an agricultural purpose for the three previous years;⁶¹ (2) the transferring of the land from the preferentially taxed parcel to a different use is severely limited;⁶² and (3) any violation of these provisions related to transfer of the land will lead to a "roll-back" tax.⁶³ The roll-back tax is equal to the difference between the entire parcel's normal tax rate and the preferential tax rate for the previous seven years plus annual interest.⁶⁴

The preferential tax assessment has been strictly construed.⁶⁵ For example, in *Hydrusko v. County of Monroe*, a bed and breakfast operator was subject to a roll-back for her entire 63 acre parcel after she built a bed and breakfast on one acre of the parcel but retained the remaining 62 acres for an agricultural use.⁶⁶ Similarly, in

cultural commodity or when devoted to and meeting the requirements and qualifications for payments or other compensation pursuant to a soil conservation program under an agreement with an agency of the Federal Government." *Id.* § 5490.2. In addition to the requirement that the land was devoted to an agricultural use for the preceding three years, the land must also be more than ten contiguous acres or have an anticipated yearly gross income \$2,000. *See id.* § 5490.3(1).

60. The amount stipulated (10 acres or \$2,000 gross income) is the same for both the preferential tax assessment and for inclusion in an ASA. *Compare* PA. STAT. ANN. tit. 72, § 5490.3(a)(1) with PA. STAT. ANN. tit. 3, § 905(a).

61. *See* PA. STAT. ANN. tit. 72, § 5490.3 (a)(1).

62. *See id.* § 5490.6. The owner may transfer his or her land if: (1) the tract of land transferred does not exceed two acres annually and, if during that time, the land is only used for residential, agricultural, or forest reserve, and (2) the transferred land does not exceed ten acres or ten percent (whichever is lesser) of the entire tract of land. *See id.* Separation of the land is permitted. *See id.* "When separation occurs, all tracts formed thereby shall continue to receive preferential use assessment, unless a subsequent abandonment of preferential use occurs within seven years of the separation." *Id.*

63. *See id.* §§ 5490.6 & .8. A roll-back tax will result if the land is used for something other than agricultural purposes or if the land is for any reason removed from the category of land preferentially assessed and taxed. *See id.* § 5490.8. The land removed and the entire tract of land will then be subject to the roll-back tax. *See id.* The roll-back tax will become payable on the date of change of use of the property. *See id.* § 5490.8(d). Failure to pay the roll-back tax will result in a lien upon the property. *See id.*

64. *See id.* §§ 5490.8(a)-(c).

65. *See Hydrusko v. County of Monroe*, 699 A.2d 828, 831 (Pa. Commw. Ct. 1997) (citing *Deigendesch v. County of Bucks*, 482 A.2d 228 (Pa. 1984)). Tax provisions exempting individuals or property from taxation are strictly construed. *See id.*

66. *See id.* In *Hydrusko*, the landowner argued that the Act provides an exception to the roll-back provisions when the use is secondary to agriculture. *See id.*

Weikert v. Adams County Board of Assessment Appeals, an owner who split off a parcel that exceeded the size limitation allowed for separation was subject to roll-back taxes, even when the split-off was a small percentage of the entire parcel, and the split-off portion would be retained in a natural or farm setting as part of an historic National Park.⁶⁷ Such holdings indicate the rigidity with which this benefit is interpreted.⁶⁸

E. Agricultural Zoning

Agricultural zoning is a tool that municipalities use to distinguish between conflicting land uses, to promote the protection and continuation of agricultural activities in suitable areas, and to protect prime agricultural soils.⁶⁹ Inclusion of land within a district zoned for agriculture is often considered recognition that agricultural operations are the highest and best use of that land.⁷⁰

She claimed that since her bed and breakfast only encompassed one acre of her 63 acre farm, she should still receive the tax preference. *See id.* The court disagreed with this argument and held that the Act did not provide for such an exception. *See id.* The court further noted that the language of the Act was clear and the bed and breakfast did not fall within a qualifying use for preferential assessment. *See id.* at 830. The court affirmed the lower court's order that she pay roll-back taxes for the preceding seven years in the amount of \$8,853.50. *See id.*

67. *See Weikert vs. Adams County Board of Assessment Appeals*, 39 ADAMS CO. L.J. 133, 133 (1996). In *Weikert*, Mr. Weikert sold over six acres of his 30 acres of land to a non-profit organization. *See id.* The transferred land was to become part of Gettysburg National Military Park. *See id.* at 134. The court held that Mr. Weikert was subject to the roll-back provision because split off transfers of land greater than two acres in one year are subject to the roll-back provision. *See id.* Since Mr. Weikert transferred over six acres of land to the non-profit organization, he violated the act. *See id.*

68. For a discussion of this benefit, see *supra* notes 59 and 60.

69. *See Tom Daniels, Agricultural Zoning: Managing Growth, Protecting Farms*, ZONING NEWS, Aug. 1993, at 1. Agricultural zoning designates in a legally binding way the purposes for which land may be used. *See Hand, supra* note 49, at 295. Local governments use zoning to separate farming and residential use which promotes the continuation of agricultural activities while limiting residential land uses that are incompatible with farming. *See Daniels, supra*, at 1. Although it seems as though agricultural zoning would be far outside metropolitan areas, it is usually found within 15 miles of city life. *See id.* "Agricultural zoning has become popular as a low-cost approach to growth management." *Id.* In many areas it also provides a line of defense in farmland protection. *See id.*

The validity of agricultural zoning depends on how much nonresidential development the zoning will allow. *See id.* This determination consists of a balance between farmland protection and allowing the landowner the potential for non-farm development. *See id.* Three factors weigh into this balancing test: (1) local politics, (2) how the state courts regard agricultural zoning, and (3) the expectations of farmland owners concerning what they can or cannot do with their land. *See id.* In Pennsylvania, local politics and the courts support agricultural zoning. *See id.*

70. *See Daniels, supra* note 69, at 1; *see also ZONING FOR FARMING, supra* note 5, at 13.

There are two basic forms of agricultural zoning: exclusive and non-exclusive.⁷¹ Exclusive agricultural zoning prohibits construction of non-farm dwellings and is used extremely rarely.⁷² Nonexclusive agricultural zoning is more permissive, allowing a limited amount of non-farm development.⁷³ Nonexclusive agricultural zoning is much more common and is itself divided into two types: large minimum lot size zoning and area-based allocation.⁷⁴ Typical large minimum lot size zoning requires an extremely large lot size, ranging from ten to 320 acres.⁷⁵ In contrast, area-based allocation zoning limits the amount of development based on the total size of the parcel.⁷⁶

In comparison with large minimum lot size zoning, an area-based allocation system requires that dwellings be constructed on smaller building lots, typically of an acre or less.⁷⁷ The area based allocation system allows a greater contiguous, unbroken parcel of land to remain for agricultural use.⁷⁸ Whereas large minimum lot size zoning often does not bear any relation to the amount of land required to support a commercial farming operation in that type of climate and soils, an area-based allocation system enables continua-

71. See generally Robert E. Coughlin, *Formulating and Evaluating Agricultural Zoning Programs*, 57 J. AM. PLAN. ASS'N 183 (1991) (explaining two forms of agricultural zoning).

72. See *id.* Exclusive agricultural zoning helps eliminate the potential problems the other zoning approaches face: potential subdivision of the land and mitigation of potential conflicts between non-farm residents and the farmer. See Hand, *supra* note 49, at 296. Due to exclusive agricultural zoning's effectiveness in limiting uses to farming, it has gained little popular support. See *id.* Furthermore, these ordinances have been determined not to constitute a taking because reasonable use of the land remains. See *id.* at 296 n.40 (citing *Cole v. Board of Zoning Appeals for Marion Township*, 317 N.E.2d 65, 68-69 (Ohio Ct. App. 1973)).

73. See Coughlin, *supra* note 71, at 183. Non-exclusive agricultural zoning is much more common in the United States. See Hand, *supra* note 49, at 295. Approximately 270 state and local jurisdictions have adopted this type of zoning. See *id.* The non-exclusive zoning program's potential is "limited by the fact that if political pressure results in the setting of population densities at too high a level, the program may allow the land to be subdivided into unproductive small parcels." *Id.* at 296. This type of zoning program also fails to mitigate potential conflicts between non-farmers and farmers. See *id.*

74. See Coughlin, *supra* note 71, at 183. In both the large minimum lot size zoning and the area-based allocation zoning the lot sizes are usually relatively small so that the non-farm homes can be clustered together leaving large contiguous land for farming. See Hand, *supra* note 49, at 296.

75. See Coughlin, *supra* note 71, at 183. The sizes of lots under the large minimum lot size range from 10 to 320 acres. See *id.*

76. See *id.* For a discussion of area-based allocation zoning, see *infra* note 78 and accompanying text.

77. See *id.*

78. See *id.* at 184. The area-based allocation system allows for the preservation of suitable farmland and place dwellings on the lower quality soil. See *id.*

tion of a commercial operation and potentially provides for the existence of both the farm and a local lifestyle.⁷⁹

There are two types of area-based allocation zoning methods: the fixed system and the sliding scale system.⁸⁰ In a fixed system, landowners may build one dwelling per specified acreage amount (e.g. one dwelling per 30 acres) while a sliding scale area-based allocation system provides that the number of dwelling units per acre decreases as the size of the parcel increases.⁸¹ Hence, sliding scale ordinances require more acreage per dwelling for larger tracts than are required for smaller tracts.⁸²

Use of a sliding scale area-based allocation system provides greater developmental opportunities for smaller parcels. Such a higher developmental rate is appropriate for a number of reasons: (1) the land has already effectively moved out of the agricultural land market and into the residential land market because such tracts are economically difficult to farm; (2) the rate allows for some development; and (3) the method is more legally defensible.⁸³ Many planners see the sliding scale zoning methods as the most appropriate for allowing limited growth but providing for agricultural land preservation. Additional methods of agricultural zon-

79. *See id.*

80. *See* Coughlin, *supra* note 71, at 183.

81. *See id.* at 184. "Because sliding-scale area-based allocation ordinances allow owners of smaller tracts somewhat more development, they are more palatable politically in areas where urban development pressures are beginning to be felt than are fixed area-based allocation ordinances or large-lot ordinances." *Id.* The sliding scale ordinances have the most desirable characteristics. *See id.* It is flexible in site planning and "[i]ts area-based feature makes it capable of protecting the extensive land base necessary for the continuation of agriculture." *Id.* The sliding scale is also legally defensible because Pennsylvania courts have specifically upheld it. *See id.*

82. *See* ZONING FOR FARMING, *supra* note 5, at 15. The Shrewsbury Township and York County ordinance is an example of the sliding scale area-based ordinance. *See id.*

Size of Parcel	Number of Dwellings Permitted
0 - 5 acres	1
5 - 15 acres	2
15 - 30 acres	3
30 - 60 acres	4
90 - 120 acres	5
120 - 150 acres	6

Id. (reproduction of table).

83. *See id.* at 16. The higher densities satisfy the legal mandate of permitting economically beneficial use on the smaller tracts where the farming is less economically feasible. *See id.*

ing exist, including quarter/quarter zoning, percent of land zoning, and limiting the number of subdivisions within the agricultural zone.⁸⁴

Pennsylvania's method of zoning is non-integrated,⁸⁵ thus granting local governments great autonomy in all matters of zoning, including agriculture.⁸⁶ Many municipalities with large numbers of farms have not adopted agricultural zoning or have adopted programs that are only marginally beneficial to agriculture.⁸⁷ While Pennsylvania zoning statutes require that zoning ordinances provide for "preserv[ing] prime agriculture and farmland," the same statutes indicate that zoning ordinances shall "accommodate

84. See ZONING FOR FARMING, *supra* note 5, at 16 & Appendix B (Agricultural Protection Zoning Ordinances in Pennsylvania by local Municipalities as of November 1993); see also Anthony R. Arcaro, Comment, *Avoiding Constitutional Challenges to Farmland Preservation Legislation*, 24 GONZ. L. REV. 475, 480-81 (1988-89). Quarter Zoning is similar to sliding scale zoning because it tries to retain the agricultural use of the land while permitting commercial development. See *id.* "Under this plan one non-farm building is allowed per each forty acres. In order to be approved, lots must also meet several other standards, such as having one acre minimums and access to public roads." *Id.* Another technique is to place single limits on all subdivisions within the ASA. See *id.* The farmer's lots must be on soils marginal for farming in order to be developed. See *id.* This type of zoning allows the farmer to create a certain number of lots regardless of the original lot size. See *id.*

85. See Popp, *supra* note 16, at 395. A non-integrated state plan gives local governments a degree of autonomy in matters such as zoning. See *id.* Comprehensive plans, on the other hand, require a great deal of state government intervention in local government decisions. See *id.* Many criticize Pennsylvania's land preservation statutes because they are not part of an integrated plan. For example, "[o]ne commentator complain[ed] that the program offer[ed] participants inadequate incentives to participate." *Id.* at 397. The same commentator also complained that "the state has failed to articulate strong policy in favor of zoning to protect agricultural land and has not mandated or even encouraged comprehensive planning by localities." *Id.* Others disagree and believe that Pennsylvania has expressed strong policy objectives to protect farmland. See *id.* Statewide measures and local measures are different. See Rosadele Kauffman, Comment, *Agricultural Zoning in Pennsylvania: Will Growth Pressure Prevail?*, 91 DICK. L. REV. 289, 295 (1986) (explaining that state measures are voluntary whereas local measures are mandatory).

86. See Popp, *supra* note 16, at 395. Pennsylvania's only involvement in the PDR program is the adoption of legislation permitting zoning and conferring such zoning powers. See *id.* at 396.

87. See Barbara Miller, *Farm Preservation Eyed*, HARRISBURG PATRIOT-NEWS, Oct. 18, 1994, at 28 [hereinafter *Farm Preservation Eyed*]; see also Barbara Miller, *Township Considers Development Limits*, HARRISBURG PATRIOT-NEWS, Jul. 18, 1997, at B1. Frank Yeager, chairman of the supervisors in South Annville Township, said that when considering agricultural zoning, it is important to look at the sides of both the farmers and the developers. See *Farm Preservation Eyed*, *supra*, at 28. Yeager further notes that farms are traditionally handed down in a family, but today the children do not want to farm. See *id.* Limiting the children's right to sell to developers would prevent the children, as beneficiaries, from maximizing a return on their investment. See *id.*

reasonable overall community growth, including population and employment growth, and opportunities for development of a variety of residential dwelling types and nonresidential uses.”⁸⁸ Hence, planners and elected officials face an almost contradictory task.

In addition, zoning in Pennsylvania is not mandatory.⁸⁹ While counties have the authority to enact zoning ordinances to regulate land use in municipalities that have not adopted zoning ordinances, such action is not required.⁹⁰ Moreover, such zoning at a county level will naturally make it more difficult for planners to meet the unique needs of the varied municipalities.

III. AGRICULTURAL ZONING CASE LAW IN PENNSYLVANIA

The use of zoning powers should be restricted to the necessary goals of the zoning ordinance, and ordinance’s language should be interpreted in favor of property owners to provide the greatest use of the real estate.⁹¹ This creates a problem, however, in evaluating case law construing zoning powers because ordinances, comprehensive plans and definitions differ among municipalities, and appellate opinions are very specific as to both the facts of the dispute as well as the ordinances being contested or interpreted. Cases that have included an evaluation of what is “agriculture” provide examples of the factual uniqueness of each case as well as trends in Pennsylvania zoning law regarding agriculture.

88. PA. STAT. ANN. tit. 53, § 10604 (West 1995 & Supp. 1998). The zoning provisions are also required to: (1) promote the “public health, safety, morals, and the general welfare”; (2) prevent “overcrowding of land, blight danger and congestion in travel and transportation, loss of health, life or property”; and (3) provide use of land for residential housing of “various dwelling types encompassing all basic forms of housing, including single-family and two family dwellings.” *Id.*

89. *See id.* § 10601. Section 10601 states that “[t]he governing body of each municipality, in accordance with the conditions and procedures set forth in this act, may enact, amend and repeal zoning ordinances to implement comprehensive plans and to accomplish any of the purposes of this act.” *Id.* (emphasis added).

90. *See id.* § 10602. Section 10602 provides:

The powers of the governing bodies of counties to enact, amend and repeal zoning ordinances shall be limited to land in those municipalities wholly or partly within the county, which have no zoning ordinance in effect at the time a zoning ordinance is introduced before the governing body of the county and until the municipality’s zoning ordinance is in effect. The enactment of a zoning ordinance by any municipality, other than the county, whose land is subject to county zoning shall act as a repeal protanto of the county zoning ordinance within the municipality adopting such ordinance.

Id.

91. *See Kratzer v. Board of Supervisors of Fermanagh Township*, 611 A.2d 809, 813 (Pa. Commw. Ct. 1992). The court is required to interpret an ordinance in a manner that will not violate the Federal or State Constitutions. *See id.*

A. What is Agriculture?

In *Fidler v. Zoning Board of Adjustment of Upper Macungie Township*,⁹² the Pennsylvania Supreme Court evaluated whether a large-scale turkey farm, with 50,000 poults, on forty-two acres of land, was an agricultural use permitted within the agricultural district where the property was located.⁹³ The *Fidler* court determined that the farm had both a commercial and an agricultural operation.⁹⁴ Because the ordinance failed to define "agriculture" or "agricultural," the court interpreted these words by applying their "usual and general meaning" in accordance with the Statutory Construction Act.⁹⁵ The Pennsylvania Supreme Court found the activity within the scope of the definition.⁹⁶

One can best explore the evolutionary process of defining "agriculture" by comparing *Gaspari v. Board of Adjustment of Township of Muhlenberg*⁹⁷ and *Clout, Inc. v. Clinton County Zoning Hearing Board*,⁹⁸ which were decided thirty-seven years apart. In *Gaspari*, the Pennsylvania Supreme Court held, in 1958, that the production of synthetic compost for use on the premises and for sale to other

92. 182 A.2d 692 (Pa. 1962).

93. *See id.* at 693. In *Fidler*, the plaintiffs owned forty-two acres of farm land in Lehigh County, Pennsylvania. *See id.* The township zoning officer granted them a zoning permit for the construction of certain buildings necessary for the operation of a turkey farm. *See id.* An abutting landowner appealed the grant of the permit to the Township Board of Adjustment, who dismissed the appeal. *See id.* The landowner then appealed to the Common Pleas Court of Lehigh County, which revoked the permit. *See id.* The plaintiffs then appealed the revocation of the permit. *See id.*

94. *See id.* at 694-95. The *Fidler* court noted that the contemplated use was clearly commercial. *See id.* at 694. Determining whether the use was "agricultural," however, was more complicated. *See id.*

For an example of a later case concerning large scale commercial or industrial farming, see *Farmegg Prods., Inc. v. Humboldt County*, 190 N.W.2d 454 (Iowa 1971).

95. *See Fidler*, 182 A.2d at 694. The word "agriculture" derives from the Latin words "agri" and "cultura," meaning field and cultivation, respectively. *Id.* The Webster's New International Dictionary gives agriculture a broader definition, including activities such as farming, horticulture, forestry, dairying and sugar making. *See id.*

96. *See id.* at 695. The court also relied on the maxim that "restrictions imposed by zoning ordinances are in derogation of the common law and must be strictly construed." *Id.* The court found significant the use of the term "agriculture" instead of "farming," which might impose a far different connotation. *See id.*

97. 139 A.2d 544 (Pa. 1958). This case involved a challenge by a township building inspector to mushroom farmers' production of manure. *See id.* at 544. Faced with a shortage of horse manure, the industry invented a synthetic manure for the same purpose. *See id.* The Gasparis were ordered by the building inspector "to cease and desist in the production of synthetic manure and to dispose in 20 days of all stock of manure not required for your own immediate use." *Id.* at 546. The plaintiffs appealed this order. *See id.*

98. 657 A.2d 111 (Pa. Commw. Ct. 1995).

commercial mushroom growers was farming and not manufacturing, and therefore was not prohibited by an ordinance.⁹⁹ In evaluating the process of developing the compost, the *Gaspari* court determined that the process fell within the ordinance allowance for “farming in all its branches” and was thus allowed in the farming district.¹⁰⁰

In 1995, the Commonwealth Court took a different tack in determining whether a proposed facility, located within an agricultural district, used for the manufacture of compost from a variety of wastes, was an agricultural use of the land.¹⁰¹ In *Clout*, the court determined that the process, which used food processing wastes and treated sewage sludge among other materials, was not a permitted use within the agricultural district under the ordinance.¹⁰²

The *Clout* court found that both the permitted uses and the special exceptions in the ordinances did not apply to the compost production facility.¹⁰³ While permitted uses allowed “structures necessary to the proper operation of agricultural activities,” there

99. See *Gaspari*, 139 A.2d at 548. Instead of a manufacturing procedure, the court found:

[I]t parallels the case of an orchardist who plants and cultivates fruit trees of various kinds and, after they have attained a certain maturity, sells them to fruit growers; or the grower of tobacco plants, who sets out the seed in specially prepared beds and later removes the growing slips for plantings in his own fields, or sells them to other farmers. No one would contend that the individuals mentioned in the examples suggested are engaged in manufacturing.

Id.

100. See *id.* The *Gaspari* court stated that it was not necessary for it to determine whether the production of synthetic compost was a valid extension of a non-conforming use since the activity here never entered into the category of a non-conforming use. See *id.* Instead, the use fell well within the ambit of “farming in all its branches.” *Id.*

101. See *Clout*, 657 A.2d at 113.

102. See *id.* at 115-16. In *Clout*, the landowner owned 1,700 acres of land in Clinton County, Pennsylvania, which was zoned in an “Agricultural District.” See *id.* at 112. The landowner requested a zoning officer to render an opinion regarding a compost facility as a potential use on the land. See *id.* The zoning officer said that it would not be a permitted use, resulting in the landowner’s appeal to the zoning hearing board (ZHB). See *id.* An organization known as Citizens and Landowners Outraged United Together (CLOUT) actively opposed the landowner’s proposal. See *id.*

The ZHB found composting to be allowable under the special exception to the ordinance. See *id.* CLOUT appealed to the trial court, which reversed the decision of the ZHB. See *id.* The landowner appealed, claiming that composting was a permitted use within the “Agricultural District” under section 501.1 of the ordinance. See *id.*

103. See *id.* at 114-15. The landowner argued that making compost was an agricultural activity and was therefore a permitted use under a broad interpretation of the ordinance, which permits any use related to the tilling of the land or the raising of farm products. See *id.* at 114. CLOUT argued that compost manu-

was no use of the compost in any farming activity on the 1700 acre tract.¹⁰⁴ The special exception provisions of the ordinance did provide latitude in agriculturally zoned areas, allowing, among other things, sawmills and “resource uses of the land.”¹⁰⁵ In finding neither a connection between the land and the farm, nor an ability to expand other special exception uses to include this undertaking, the *Clout* court opined that these categories did not include a synthetic compost production facility.¹⁰⁶

These cases illustrate how each unique factual situation played an important role in the individual court’s interpretation of agricultural zoning language and issues. Moreover, they illuminate two concepts of continued importance in analyzing agricultural zoning issues. First, the terms of the ordinances and the definitions are strictly construed; even though analogous definitions may exist, the court will not make any extensions unless these definitions can be naturally extended to include the questioned use without causing harm to the ordinance and definition. Second, courts place considerable weight upon a nexus between the questioned use and the land. In *Clout*, the court distinguished *Gaspari*, finding it inapplicable because none of the compost would be used on the land.¹⁰⁷ In *Fidler*, the court did not rely on its holding because the farmer grew

facturing for off-premise use was not an agricultural use; rather, it was an industrial use not permitted in an agricultural district. *See id.*

104. *Id.* The *Clout* court determined that since none of the compost made by the landowner would be a product of his land nor applied to fertilize and condition his land, it could not be deemed an agricultural activity. *See id.* That is, according to the court:

The words excavate, quarry or mine all relate to the digging, exposing and harvesting of material originally located upon the land itself. While “processing” may connote something not directly related to the land, this term modifies five geological terms directly followed by the phrase “or other formulation.” Remembering that this facility was to be completely contained within a structure with no connection to the land, and in the absence of any evidence within the record demonstrating how this use is similar to a natural resource use of the land, we believe the court correctly reversed the decision of the ZHB.

Id. at 115-16.

105. *Id.* at 115. Some of the other activities allowed included excavating, quarrying, mining, and processing of topsoil, sand and gravel. *See id.*

106. *See Clout*, 657 A.2d at 115. The *Clout* court found no evidence demonstrating how the facility will make actual use of the land in a manner consistent with the examples described in section 501.2(13) of the ordinance. *See id.* The court reasoned that “[t]he words excavate, quarry or mine all relate to the digging, exposing and harvesting of material originally located upon the land itself.” *Id.*

107. *See id.* at 114. In *Gaspari*, the mushroom farmer made and used compost to raise his own mushrooms, whereas in *Clout*, the landowner was importing the compost materials and exporting 100% of the finished product. *See id.*

only part of the grain for the turkey operation on the farm.¹⁰⁸ That fact was used, however, to distinguish *Fidler in Farnegg Products, Inc. v. Humboldt County*,¹⁰⁹ an Iowa Supreme Court case. In *Farnegg Products*, an egg producer was prevented from including his large scale brooder operation within the definition of an “agricultural purpose” because his operation did not use the land for production of grain, feed, or any produce.¹¹⁰ This distinction prevented the company from benefitting from Iowa’s agricultural zoning exception.¹¹¹

B. When is Agricultural Zoning Too Restrictive Regarding Development

As one of the states that has cultivated a strong preference for agricultural land preservation, Pennsylvania has developed a line of cases interpreting both what is within and what is outside the limit of municipal zoning authority regarding agricultural land preservation. In *Hopewell Township Board of Supervisors v. Golla*,¹¹² the Pennsylvania Supreme Court held that a township zoning ordinance violated the state constitution because it limited the conversion of prime agricultural lands to other uses.¹¹³ The township regulation limited residential development in prime agricultural lands to subdivisions with a maximum of five one and one half acre plots, regardless of the original tract’s size.¹¹⁴ The landowners in *Hopewell*

108. See *Fidler v. Zoning Bd. of Adjustment of Upper Macungie Township*, 182 A.2d 692 (Pa. 1962). For a discussion of *Fidler*, see *supra* notes 92-96 and accompanying text.

109. 190 N.W.2d 454 (Iowa 1971).

110. See *id.* at 459. The landowner argued that his proposed structures and operations for raising chicks from the time they were one-day old until the time they reached 22 weeks old, prior to the time they were transferred to egg-laying houses, should be considered an “agricultural use.” See *id.* at 456.

111. See *id.* at 459. Iowa has a unique statute that provides that no regulation or ordinance under county zoning authority may apply to land, buildings, structures or erections which are used for agricultural purposes. IOWA CODE ANN. § 335.2 (West 1994); see also Sheronick, *supra* note 17, at 587-89 (discussing superficial character of agricultural preservation statute); Neil D. Hamilton, *Freedom to Farm! Understanding the Agricultural Exemption to County Zoning in Iowa*, 31 DRAKE L. REV. 565 (1981-82) (discussing interpretation of “freedom to farm” exception creating possibility of significant disruption of agricultural sector).

112. 452 A.2d 1337 (Pa. 1982).

113. See *id.* at 1343. Specifically, by “limiting residential subdivisions in the prime agricultural zone of the Township to a maximum of five [individual] 1½ acre plots regardless of the size of the original tract, an unreasonably severe limitation is placed upon permissible land uses.” *Id.*

114. See *id.* at 1338-39. The ordinance essentially required a landowner either to use the undivided tract as a farm having not more than one single-family dwelling or to establish as many as five contiguous residential lots, each containing a

would be allowed to develop seven and one half acres of their 140 acre parcel, leaving a 132 1/2 acre agricultural tract.¹¹⁵ The *Hopewell* court determined that this method had an unjustifiably “arbitrary and discriminatory impact on different landowners,” since it allowed owners of smaller tracts of land to devote a greater percentage of their total acreage to development than owners of larger tracts.¹¹⁶

Utilizing a substantive due process analysis, the *Hopewell* court stated that “an ordinance must bear a substantial relationship to the health, safety, morals or general welfare of the community.”¹¹⁷ The court concluded that, to be valid, an ordinance must serve a public purpose which adequately outweighs the landowner’s right to use the property as the landowner prefers.¹¹⁸ While the *Hopewell* court recognized the “worthwhile nature” of agricultural land preservation, the restrictions here were considered “too severe to be regarded as ‘clearly necessary’.”¹¹⁹

The ordinance that the court upheld three years later in *Boundary Drive Associates v. Shrewsbury Township Board of Supervisors*¹²⁰ did not provide for a linear relationship, as the court had suggested in *Hopewell*, but was a sliding scale ordinance. In *Boundary Drive*, the Pennsylvania Supreme Court distinguished *Hopewell*, noting that the ordinance in *Boundary Drive* related residential development to the tract size.¹²¹ The *Boundary Drive* court did not read *Hopewell* as

single-family dwelling and having a maximum size of one and one half acres. See *id.* at 1339.

115. See *id.* at 1343.

116. *Id.* The *Hopewell* court noted that such an “arbitrary designation of tract size is argued to be consistent with the goal of maintaining tracts as large as possible with the auxiliary benefit being a likelihood that the tracts will continue to be used for agricultural purposes.” *Id.* It also observed that a more equitable solution would be an ordinance permitting the dedication of an individual one and one half single-family residence lot per a fixed number of acres and then applying that rule to the entire lot. See *id.* at 1344.

117. *Hopewell*, 452 A.2d at 1341 (citing *National Land and Inv. Co. v. Easttown Township Bd. of Adjustment*, 215 A.2d 597, 607 (Pa. 1965)).

118. See *Hopewell*, 452 A.2d at 1342 (citing *National Land*, 215 A.2d at 608). Specifically, the *Hopewell* court stated that “[a]lthough zoning almost always has a worthwhile objective, since it is a restriction on and a deprivation of a property owner’s Constitutionally ordained rights of property, it can be sustained only if it is clearly necessary to protect the health or safety or morals or general welfare of the people.” *Id.* (citing *Cleaver v. Board of Adjustment*, 200 A.2d 408, 411-12 (Pa. 1964)).

119. *Hopewell*, 452 A.2d at 1343. Therefore, these restrictions “do not meet the standard constitutionally required of municipal zoning ordinances.” *Id.*

120. 491 A.2d 86 (Pa. 1985).

121. See *id.* at 91. In *Boundary Drive*, the landowner of thirty-nine acres of undeveloped prime farmland challenged the agricultural preservation provisions of a zoning ordinance which did not employ a fixed area-based allocation method

“requiring a perfectly linear relationship between residential lots and acreage.”¹²² The court retreated from its proposal in *Hopewell*, noting that a strictly linear development plan might prevent meaningful agricultural land preservation if the overall acreage per residential lot was too small or that it may potentially be too restrictive if the acreage requirement granting a residential development allocation was too great.¹²³

The *Boundary Drive* court devoted considerable coverage in its opinion to Shrewsbury Township’s comprehensive plan, agricultural land preservation goals and related ordinances.¹²⁴ The opinion stated that “it is the Township’s policy not to consider agricultural land as ‘undeveloped farmland awaiting another use’” but rather that “[f]armland must be considered as ‘developed land.’”¹²⁵ In addition, the “agricultural zone should not be considered as a holding zone, but as a zone having a positive purpose . . . for the benefit of the entire community.”¹²⁶ It is apparent that the *Boundary Drive* court valued both the depth of research as well as the correlation between prime agricultural lands and the restrictions on development.¹²⁷

IV. WHERE HAVE WE BEEN, AND WHERE ARE WE GOING: ISSUES CONFRONTING RURAL PENNSYLVANIA

Pennsylvania appellate opinions illustrate that state appellate courts give municipalities great discretion in decisions affecting ag-

of regulating residential development within designated agricultural districts. *See id.* at 87-88. The provisions of the zoning ordinance designated agricultural districts within the Township and regulated their use. *See id.* at 88. A further division of agricultural districts was made based upon soil capability. *See id.*

122. *Id.* at 91. The *Boundary Drive* court considered such a scheme, requiring absolute density equality, to frustrate the objective of farmland preservation. *See id.* The court further stated, “[f]or example, under a zoning scheme employing a strict linear proportion of one dwelling per acre, maximum allowable development would result in the location of 100 houses on every 100 acre tract. Clearly, meaningful preservation of agricultural land could not be achieved under this type of regulatory scheme.” *Id.*

123. *See id.* at 92.

124. *See id.* at 88-89. The *Boundary Drive* court also provided a detailed explanation of the three classifications of agricultural districts based on soil capability. *See id.*

125. *Boundary Drive*, 491 A.2d at 88.

126. *Id.* The court noted that the agricultural preservation provisions of Shrewsbury’s zoning ordinance were designed to effectuate these township policies regarding farmland. *See id.*

127. For a detailed analysis of *Boundary Drive*, see Thomas C. Buchanan, *Zoning and Planning - Innovative Zoning for the Preservation of Agricultural Land — Boundary Drive Associates v. Shrewsbury Township Board of Supervisors*, 59 TEMP. L.Q. 861 (1986).

gricultural land preservation. Provided that municipalities do not restrict development of agricultural lands too severely and that the municipalities are able to illustrate a basis for the distinctions between different types of agricultural lands and their limitations, the preservation schemes will be upheld. Despite such holdings and the weight of *Boundary Drive*, the uncoordinated nature of land use in the over 2,000 municipalities of Pennsylvania limits the opportunity for preserving agricultural lands.

A. Fragmented Municipal Policies

Where strong zoning exists in tandem with the predicate findings regarding soil types, limitations upon development can be severe. In *Henley v. Zoning Hearing Board of West Fallowfield Township*,¹²⁸ the Pennsylvania Commonwealth Court determined that a township preservation plan was appropriate because of the plan's relationship to soil types and the language in the Pennsylvania Municipal Planning Code providing for agricultural protection.¹²⁹ The fact that the 18.9 acre farm would allow for only one residential lot under the fixed size zoning ordinance (ten acres per residential lot) and the question of the dairy farm's profitability on such a limited parcel either were not germane or were not argued.¹³⁰ The opinion noted that ten acre "farmettes" composed the highest form of agricultural land preservation in that township.¹³¹

128. 625 A.2d 132 (Pa. Commw. Ct. 1993).

129. *See id.* at 135. Specifically, the *Henley* court concluded that, "[t]his ordinance cannot be considered arbitrary when the General Assembly has directed municipalities to enact ordinances which preserve land for agricultural uses and which permit the classification of these prime agricultural soils as the means of preserving this land." *Id.*

130. *See id.* at 133. The *Henley* court summarized:

In 1990, Henleys requested a special exception under Section 402.2(c)(2) of the ordinance from the 10-acre minimum lot size to allow them to subdivide their property into approximately 15 single-family building lots, ranging in size from 1.1 acres to 1.6 acres. The ZHB denied the request for a special exception because Henleys did not meet their burden of showing that the subdivision would meet the specific conditions for a special exception set forth in the ordinance. The ZHB also denied Henleys' procedural and constitutional challenges to the ordinance.

Id.

131. *See id.* Recent cases have upheld agricultural zoning based on a correlation of the soil type to the zoning scheme used. *See Kirk v. Zoning Hearing Bd. of Honey Brook Township*, 713 A.2d 1226, 1226-28 (Pa. Commw. Ct. 1998). In *Kirk*, the Pennsylvania Commonwealth Court stated:

The Board found that the Kirks' land consists of prime agricultural soils, Classes I, II and III, and that the same or similar soil types are also found throughout the A-Agricultural zoning district. The Board concluded that

Despite language indicating that agricultural land was a fully developed use, as shown in *Boundary Drive*, municipalities still use language which implies that farms are seen as undeveloped land awaiting the attention of developers. In *Hempfield Township v. Hapchuk*,¹³² a farmer's use of sewage sludge on his farm was upheld as an historic, prior agricultural use.¹³³ The language of the zoning ordinance describing the agricultural district, however, was particularly noteworthy: "Districts designated for Agricultural A-1 are to be used for farming, residential and accessory uses until logical demand occurs for urban-type development in general conformance to the current Comprehensive Plan."¹³⁴ While Hempfield Township certainly has the authority to plan and zone in this manner, it is also evident that this attitude and the plan's permissive nature will place pressure on neighboring townships as well as create more rapid development and a more suburban Hempfield Township.

Other dangers may exist when well-meaning ordinances are not properly buttressed by the plans they attempt to implement. In *Hock v. Board of Supervisors of Mount Pleasant Township*,¹³⁵ for example, a Pennsylvania Commonwealth Court determined that a three-acre minimum lot size requirement for the development of single-family residences was unconstitutionally restrictive.¹³⁶ Although the ordinance noted preservation of open spaces as a purpose, the township board claimed that agricultural preservation was a basis

the larger minimum lot sizes for single-family homes in the agricultural zoning district than the residential zoning districts serve the goal of preserving the prime agricultural land and that such requirements are neither arbitrary nor unreasonable.

Id.

132. 620 A.2d 668 (Pa. Commw. Ct. 1993).

133. *See id.* (stating "Hapchucks argue that their utilization of the R-1 portion of their property for sewage sludge disposal is 'agricultural' and thus, within the historical use of the property. With this, we can also only agree.").

134. *Id.* at 672 n.7 (quoting section 87-13 of zoning ordinance). In addition, the language of the zoning ordinance states:

This district is established in areas where agriculture is the most prominent use, in areas where no utilities exist, accessibility is difficult, in areas of unique natural beauty or in areas which are presently undeveloped, to conserve the existing character of such areas and to provide for suburban residential and agricultural uses and to guide more substantive land development through proper location and site characteristics.

Id.

135. 622 A.2d 431 (Pa. Commw. Ct. 1993).

136. *See id.* at 435. In *Hock*, the Pennsylvania Commonwealth Court stated: "This court concludes that maintaining the rural character of the township does not constitute a sufficient justification for the minimum lot requirement. Thus, none of the township's justifications are sufficient to support the three-acre lot requirement, and therefore, the ordinance is unconstitutionally restrictive." *Id.*

for the denial of a more intensive development plan.¹³⁷ The township board made this claim despite the purpose statement's failing to note agriculture as a reason for the existence of such open space districts.¹³⁸ The *Hock* court also determined that the claim failed because the restriction requiring a three acre lot size in the open space district was more confining than the restriction requiring a two acre lot size in the agricultural district.¹³⁹ This case illustrates that merely invoking the purpose of agricultural land preservation, without more, will fail.

B. Industrial Agriculture

Large scale agri-business operations are seen as a threat in many areas of Pennsylvania and other areas of the United States.¹⁴⁰ Many fear the potential harms these operations pose, such as noise, odors, fumes and congestion.¹⁴¹ Some believe that such operations tend to exist where state regulations are the least restrictive. Even though Pennsylvania's Nutrient Management Act requires detailed

137. *See id.* (stating that "[t]he prime purpose of the Agricultural Residential district is to ensure the preservation of prime farmland and the practice of farming").

138. *See id.* (reasoning that township was not seeking to promote agriculture or practice of farming because stated purpose of open space districts did not mention interests).

139. *See id.* The court stated:

The township's proffered agricultural justification for requiring a larger minimum lot size for single family dwellings in Open Space Districts, as compared to Agricultural Residential Districts, is negated by the provisions that a landowner may develop a single-family dwelling on a lot that is only two acres in an Agricultural Residential District, which the township has designated as having the best land for farming purposes.

Id.

140. *See* Deborah J. Miller, *Residents Raise Stink About Proposed Hog Farm*, HARRISBURG PATRIOT-NEWS, August 3, 1993, at A3. One commentator states:

On June 21, 1995, the eight-acre manure lagoon at Oceanview Farms in Onslow County burst through its dam. What followed was seen on news reports around the world, as 25 million gallons of excrement surged over a road, through a neighboring tobacco field and into the New River. The odoriferous tide was two feet deep and flowed for over two hours, ending up in the river, where it killed "virtually all aquatic life in the 17-mile stretch between Richlands and Jacksonville." When it was over, the New River had been the victim of a spill more than twice the size of the oil spill that followed the wreck of the Exxon Valdez.

John D. Burns, Comment, *The Eight Million Little Pigs - A Cautionary Tale: Statutory and Regulatory Responses to Concentrated Hog Farming*, 31 WAKE FOREST L. REV. 851 (1996) (quoting Michael Satchell, *Hog Heaven - and Hell*, U.S. NEWS & WORLD REP., Jan. 22, 1996, at 55).

141. *See* Michael Barrette, *Hog-tied by Feedlots*, ZONING NEWS, Oct. 1996, at 1.

planning for such intensive uses, these operations are making inroads in Pennsylvania.¹⁴²

The issue concerning industrial, large-scale concentrated feedlot operations or other vertically integrated operations defines what harms the operations create or threaten and then ensures that statutes, regulations and programs address those threats. If concerns center around nutrient or other pollution loads on streams or waterways, then legislatures should review the Nutrient Management Act or its federal counterparts, to ensure that such concerns are addressed.¹⁴³ If, for instance, the concern is the size of manure lagoons and the catastrophic effect of breaches of lagoon retaining banks as illustrated by the 1995 spills on North Carolina's Neuse River, then various safety measures, including frequent monitoring and primary and secondary containment systems, must also be considered.¹⁴⁴

Opposition to large scale operations may be based on less specific, but just as serious, concerns. When the new operation down the road is a tenant operation, where feed is not grown on the farm

142. See PA. STAT. ANN. tit. 3, §§ 1701-1718 (West 1995 & Supp. 1998). The purposes of this Act are as follows:

- (1) To establish criteria, nutrient management planning requirements and an implementation schedule for the application of nutrient management measures on certain agricultural operations which generate or utilize animal manure.
- (2) To provide for the development of an educational program by the State Conservation Commission in conjunction with the Cooperative Extension Service of The Pennsylvania State University, the Department of Agriculture and conservation districts to provide outreach to the agricultural community on the proper utilization and management of nutrients on farms to prevent the pollution of surface water and ground water.
- (3) To require the State Conservation Commission, in conjunction with the Cooperative Extension Service of The Pennsylvania State University, Department of Environmental Resources, Department of Agriculture and the Nutrient Management Advisory Board to develop and provide technical and financial assistance for nutrient management and alternative uses of animal manure, including a manure marketing and distribution program.
- (4) To require the Department of Environmental Resources to assess the extent of nonpoint source pollution from other nutrient sources, determine the adequacy of existing authority and programs to manage those sources and make recommendations to provide for the abatement of that pollution.

Id. § 1702.

143. See *id.*

144. See Burns, *supra* note 140, at 856-64 (stating "[o]ne other economic effect of the industry stems directly from its environmental impact. . . . [R]unoff and seepage from animal agricultural facilities play a large role in the over-nutrication of coastal rivers and sounds. Such pollution leads to fish kills and an overall decline in game fish population.").

or even locally, and where former crop land is seen only as a means of disposing of large amounts of manure, concern may exist for what is perceived as a lack of proper stewardship.

Many states restrict the entry of corporations into farming.¹⁴⁵ Some authorities see this as a misplaced, broad solution to problems that are more readily solved through specific regulations.¹⁴⁶ Zoning powers can play a role in the solution by defining what off-site uses or impacts are allowable. In addition, it is arguable that the language of the exclusions in both Pennsylvania's Right to Farm Act¹⁴⁷ and the Nutrient Management Act,¹⁴⁸ as well as other farm preferential statutes, would not be violated by zoning that restricts large scale agricultural feedlot operations. Zoning authority is based on a state's police powers and relates to the health,

145. See J.W. LOONEY ET AL., *AGRICULTURAL LAW: A LAWYER'S GUIDE TO REPRESENTING FARM CLIENT* (1990); Steven C. Bahls, *Preservation of Family Farms - The Way Ahead*, 45 *DRAKE L. REV.* 311, 312 (1997).

146. See Bahls, *supra* note 145, at 327-29. One commentator stated: States should avoid the temptation to use the drastic measure of prohibiting corporate farms, especially when more focused legislation will protect the public from the perceived evils of corporate farmers. Focused statutes that directly address specific rural problems would better protect the public from unacceptable behavior by both corporate and family farms.

Id.

147. See PA. STAT. ANN. tit. 3, § 953. The pertinent provisions of this statute provide:

- (a) Every municipality shall encourage the continuity, development and viability of agricultural operations within its jurisdiction. Every municipality that defines or prohibits a public nuisance shall exclude from the definition of such nuisance any agricultural operation conducted in accordance with normal agricultural operations so long as the agricultural operation does not have a direct adverse effect on the public health and safety.
- (b) Direct commercial sales of agricultural commodities upon property owned and operated by a landowner who produces not less than 50% of the commodities sold shall be authorized, notwithstanding municipal ordinance, public nuisance or zoning prohibitions. Such direct sales shall be authorized without regard to the 50% limitation under circumstances of crop failure due to reasons beyond the control of the landowner.

Id.

148. See *id.* § 1701. Section 1701 states: [T]his act and its provisions are of Statewide concern and occupy the whole field of regulation regarding nutrient management to the exclusion of all local regulations. Upon adoption of the regulations authorized by section 4, no ordinance or regulation of any political subdivision or home rule municipality may prohibit or in any way regulate practices related to the storage, handling or land application of animal manure or nutrients or to the construction, location or operation of facilities used for storage of animal manure or nutrients or practices otherwise regulated by this act if the municipal ordinance or regulation is in conflict with this act and the regulations promulgated thereunder.

Id.

safety, welfare and morals of the community. Such an operation can arguably have a “direct adverse effect on the public health and safety.”¹⁴⁹

At the same time, however, municipalities would need to ensure that such regulations are carefully tailored to address the health or safety hazard that they are trying to avoid. Pennsylvania appellate courts have found zoning ordinances unconstitutional when these ordinances entirely exclude uses from municipalities where no specific reason exists for that exclusion.¹⁵⁰

The greatest hurdle to local zoning in its application to large scale animal feedlot operations is avoiding the preemption language in the Nutrient Management Act.¹⁵¹ Through regulating for health and safety issues, and not manure-related problems, a municipality may avoid having its ordinance preempted. Additional regulations, such as setback requirements, buffer zones and even nuisance disclaimers, may also provide further protections within the legitimate scope of zoning authority.¹⁵²

V. CONCLUSION — ZONING FOR THE FUTURE

The use of zoning to combat different land use problems has grown exponentially over the past twenty years. Of the programs discussed in this article, only zoning is mandatory. While farmers as a group may generally dislike restrictions that limit the use of their land,¹⁵³ agricultural zoning may be the best method for protecting the viability of the industry in their particular municipality and region.

149. *Id.*

150. *See* National Land and Inv. Co. v. Kohn, 215 A.2d 597 (Pa. 1966) (holding that four acre minimum residential lot size was exclusionary); *see also* Surrick v. Zoning Hearing Bd. of Township of Upper Providence, 382 A.2d 105 (Pa. 1978) (holding that ordinance preventing multifamily dwellings was exclusionary); West v. Township Supervisors of Adams Township, 513 A.2d 1114 (Pa. Commw. Ct. 1986) (holding that ordinance prohibiting mobile home parks was exclusionary).

151. *See* PA. STAT. ANN. tit. 3, § 1717.

152. *See* Thompson, *supra* note 19, at 1-3.

153. *See* James B. Wadley & Pamela Falk, *Lucas and Environmental Land Use Controls in Rural Areas: Whose Land is it Anyway?*, 19 WM. MITCHELL L. REV. 331, 344-45 (1993). These commentators explain:

From the perspective of the farm and ranch landowner, the real problem of land use regulation has three distinct facets: 1) the values used in the decision making tend to be urban; 2) the effect of the decision making is to transfer control away from the farm and ranch landowner; and 3) the dominant impact of land use regulations falls disproportionately upon rural landowners.

Id. at 344.

For agricultural zoning to successfully combat the land use problems concerning farmers, municipalities and the rural way of life, Pennsylvania must consider the adoption of regional zoning. As Robert Freeman, a former Northampton County state legislator, noted, "I am convinced that the vast majority of social ills that we see are directly related to the pattern of sprawled development we have created in this country."¹⁵⁴

Often, rural zoning in its current form is the basis for the problem. When many of the current zoning laws were adopted, development of any sort was considered beneficial. The report of the Pennsylvania 21st Century Environment Commission echoed this, determining that "[t]he Municipalities Planning Code authorizes planning and zoning for development; it does not envision the conservation of rural communities where agriculture, mining, quarrying, timbering, recreation and tourism may be preferred."¹⁵⁵ Under some forms of zoning, the old fashioned small town, with its mixed uses, small lots and existing sense of community, would be illegal.¹⁵⁶

What is needed is a reexamination of comprehensive plans, their goals and their joint relationship to land uses. Through development of new zoning concepts that preserve the countryside and develop villages, the erosion of rural viewsapes and communities may be halted. With this, the pressure placed upon farms and agricultural lands may also be lessened. Rural zoning plans must be creative, with specific goals and enabling objectives. Unique solutions, such as sliding scale zoning, must evolve from such reexaminations.

Regionalized planning will also assist in these goals by preventing disparities between adjoining municipalities. The report of the Pennsylvania 21st Century Commission defined "sprawl" as "a spreading, low-density, automobile dependent development pattern of housing, shopping centers and business parks that wastes lands needlessly."¹⁵⁷ The Commission, recognizing the pervasive nature of sprawl, recommended something akin to regionalized zoning, stating "the Commission urges strengthening the ability

154. Garry Lenton, *Suburbs are Far From Superb*, HARRISBURG PATRIOT-NEWS, Dec. 3, 1995, at G1.

155. PENNSYLVANIA 21ST CENTURY ENVIRONMENT COMMISSION, REPORT 9 (1998).

156. See Joel Russell, *The Need for New Models of Rural Zoning*, ZONING NEWS, Jun. 1996, at 1.

157. PENNSYLVANIA 21ST CENTURY ENVIRONMENT COMMISSION, REPORT 91 (1998).

and authority of community officials and agencies to plan their growth in cooperation with their county and neighboring municipalities.”¹⁵⁸

Unfortunately, this change will not occur without a fight. Various components of the pro-development camp are voicing opposition to the recommendations of the Pennsylvania 21st Century Commission’s report. The community economic improvement realized through construction, and the threats regionalized land use regulation will pose to individual property rights and local government independence, are used as arguments by pro-development forces that oppose the recommendations of the Governor Ridge-appointed 21st Century Commission.¹⁵⁹

Undoubtedly, the debate concerning agricultural, rural and regional zoning will be intense. The difficulty of the challenge, however, should not be the reason the challenge is not undertaken. Without such reexamination and the insight it produces, the march of “progress” may go on unheeded. With such development, a person may still be able to “get there from here,” but no one may want to take the trip.

158. *Id.* at 20.

159. See Matthew Vadum, *Activists Gear Up For Brawl Over Sprawl*, CENTRAL PENN BUS. JOURNAL, October 16, 1998, at 1. One commentator explained that even though both sides have been complaining about “sprawl” for decades, these ideological conflicts will expand, and the conflict will be difficult to resolve. See *id.*