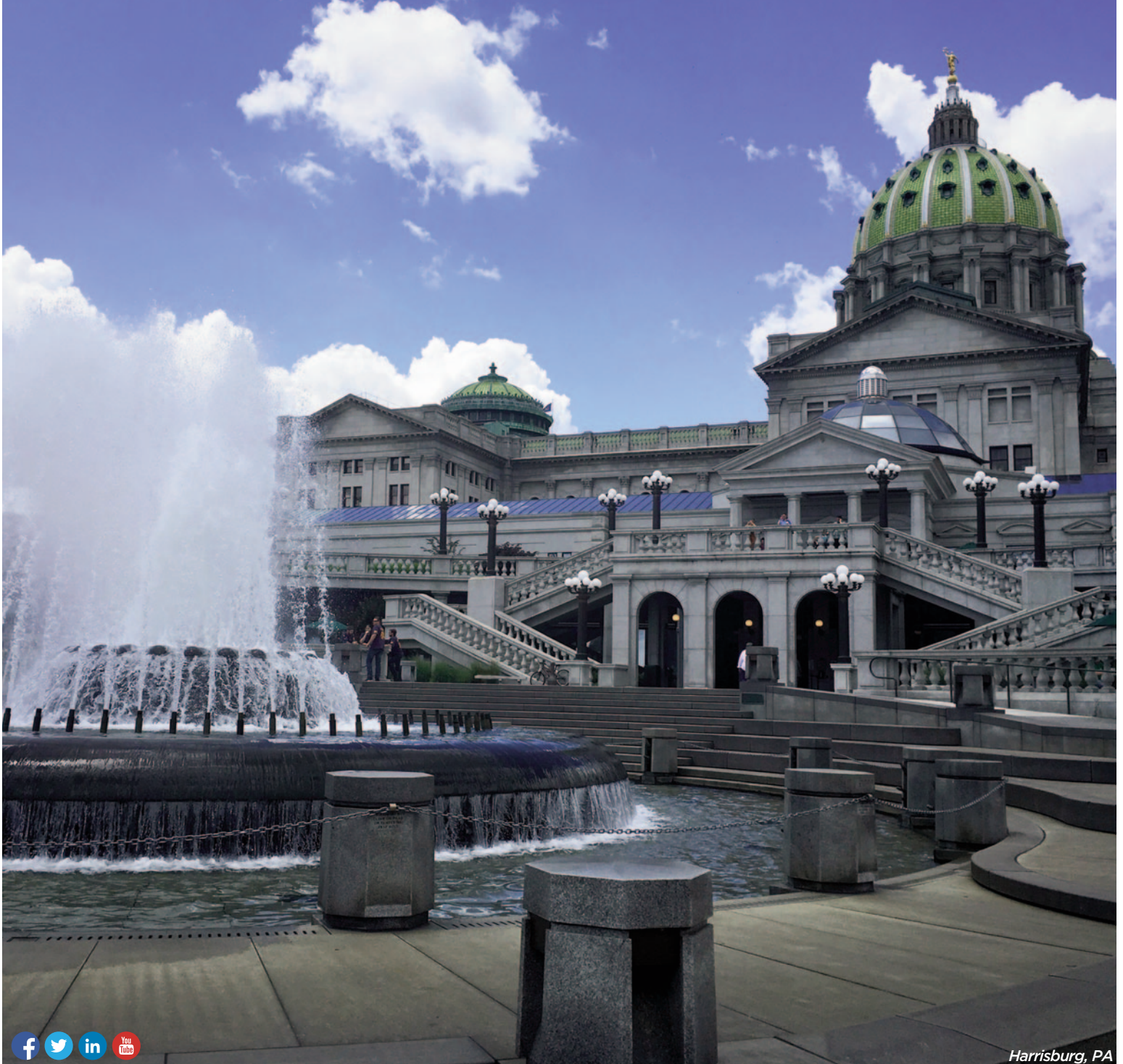


PLANNING FOR AGRICULTURE

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I. Introduction

Dating back to the founding of the commonwealth, the roots of Pennsylvania's economy has been embedded in the soil of agriculture. Agriculture was Pennsylvania's first dominant economic sector, and it remains the State's largest industry today. According to the United States Department of Agriculture, in 2012, Pennsylvania generated a total market value of \$7.4 billion in agricultural goods.

While agriculture's value to Pennsylvania has remained constant over the decades, the commonwealth's population has experienced a significant shift of growth from urban centers to suburban and rural areas. Often, this shift in population has resulted in direct conflicts with the business of agriculture.

Recent growth patterns have included an increase in suburban development into areas that were historically agricultural. This suburban expansion has been land-intensive, and normally requires large parcels to accommodate multi-home subdivisions, shopping centers and industrial parks. These large parcels are usually found at the rural fringe of communities and have often resulted in "leap-frog" development patterns where farmland is commingled with non-farmland uses.

Frictions tend to materialize when non-farming communities develop around agricultural operations because the general public typically perceives agriculture in a traditional and picturesque sense rather than through a practical business-oriented view. In reality, agriculture has always been an evolving industry; consistently employing science-based technology to produce higher yields and increased profits. As development expands into rural areas, those unfamiliar with the business of farming often object to the use of such modern agricultural practices. Consequently, various governmental bodies have endeavored to resolve the conflicts.

As of 2011, within Pennsylvania, there were 67 counties, 56 cities, 958 boroughs, 1 incorporated town, 1,547 townships (93 first class, 1,454 second class), 500 school districts, and 2,006 authorities (active and inactive). Local governments are considered creatures of the State, and thus their powers are derived from the State. Three hallmark powers delegated to local governments are land use, taxation, and eminent domain. Often, these three powers are strongly connected. To encourage particular types of land use, the State authorizes certain tax incentives and options. Eminent domain (the power to take private land for public use) can be used to implement plans and promote long-term public good.

The commonwealth has specifically given municipalities the general police powers, which include creating ordinances "necessary for the proper management, care, and control of the township and its finance and the maintenance of peace, good government, health and welfare of the township and its citizens, trade, commerce, and manufacturers." Local governments hold the valuable power of determining use of land through ordinances and zoning. Those powers are passed from the State to municipalities and are outlined in the Municipalities Planning Code. Along with this power comes the ability to use eminent domain to condemn properties and further the development and goals of a community. Those takings are tempered with the right of a citizen to receive just compensation for such a taking.

In the past, rural municipalities promoted and encouraged development based on the idea that more development increased tax revenues. However, the costs of developing and providing services (such as roads, schools, and utilities) to newly developed areas have often outweighed the benefits of a larger tax base.

In an effort to both manage land development and preserve the commonwealth's valuable agricultural base, the Pennsylvania General Assembly has passed several pieces of legislation. Understanding the effects of these statutes (as well as the interplay between state and local powers) can be difficult and time-consuming. The purpose of this document is to provide a summary of each piece of legislation that impacts agricultural operations within Pennsylvania.

This publication will describe and explain seven statutory areas that directly affect agriculture in Pennsylvania: 1) The Right to Farm Act; 2) Agricultural Security Areas; 3) State and Local Environmental Regulation of Agriculture; 4) Agriculture, Communities, and Rural Environments (ACRE); 5) Local Agricultural Planning Under the Municipalities Planning Code and Zoning; 6) Pennsylvania Clean and Green Program; and 7) Agricultural Conservation Easements.

II. Pennsylvania Right to Farm Act

[3 P.S. §§ 951-957] [See Appendix A for text of statute]

Background and Legislative Policy

Legislators in all fifty states have attempted to remedy conflicts between agricultural operations and non-farmers through the enactment of Right to Farm Laws. While the specific provisions vary in each state, as a general rule, all Right to Farm Laws endeavor to limit nuisance suits against farms.

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

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

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

- (1) Intentional and unreasonable, or
- (2) Unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct or for abnormally dangerous conditions or activities.

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

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

- (1) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort, or the public convenience;
- (2) Whether the conduct is prohibited by a statute, ordinance or administrative regulation; or
- (3) Whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect.

At times, normal farming practices gave rise to nuisance suits against agricultural producers from surrounding landowners who found these practices bothersome. As a result, farmers often faced expensive and time consuming litigation. In response to these circumstances, the General Assembly enacted the Pennsylvania Right to Farm Act (RTFA) in 1982. RTFA is actually entitled Protection of Agricultural Operations from Nuisance Suits and Ordinances, but is known by its more popular nickname.

Under RTFA, it is Pennsylvania's policy:

To conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products.

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.

According to the General Assembly, nuisance suits conflict with this express policy because they may cause agricultural operators to cease operations or to forego making investments in farm improvements.

Protections Granted

RTFA grants Pennsylvania's farmers three areas of protection: 1) the requirement that municipalities exclude normal agricultural operations from the definition of public nuisance; 2) limits on nuisance actions against agricultural operations; and 3) limits on the ability of municipalities to restrict direct commercial sales of agricultural commodities.

To provide guidance, RTFA defines **"normal agricultural operation"** as:

The activities, practices, equipment and procedures that farmers adopt, use or engage in the production and preparation for market of poultry, livestock and their products and in the production, harvesting and preparation for market or use of agriculture, agronomic, horticulture, silvicultural and aquacultural crops and commodities and is:

- (1) Not less than ten contiguous acres in area; or
- (2) Less than ten contiguous acres in area but has an anticipated yearly gross income of at least \$10,000

The term includes new activities, practices, equipment and procedures consistent with technological development within the agricultural industry. Use of equipment shall include machinery designed and used for agricultural operations, including, but not limited to, crop dryers, feed grinders, saw mills, hammer mills, refrigeration equipment, bins and related equipment used to store or prepare crops for marketing and those items of agricultural equipment and machinery defined by the act of December 12, 1994 (P.L. 944, No. 134), known as the Farm Safety and Occupational Health Act. Custom work shall be considered a normal farming practice.

Furthermore, an **"agricultural commodity"** is defined as:

Any of the following transported or intended to be transported in commerce:

- (1) Agricultural, aquacultural, horticultural, floricultural, viticultural or dairy products.
- (2) Livestock and the products of livestock.
- (3) Ranch-raised fur-bearing animals and the products of ranch-raised fur-bearing animals.
- (4) The products of poultry or bee raising.
- (5) Forestry and forestry products.
- (6) Any product raised or produced on farms intended for human consumption and the processed or manufactured products of such products intended for human consumption.

Limitation on Municipal Nuisance Ordinances

RTFA requires municipalities within Pennsylvania to encourage the "continuity, development and viability" of agricultural operations within its municipal boundaries. If the municipality has a nuisance ordinance, it must exclude normal agricultural operations from its definition of public nuisance. This would include any activity fitting the aforementioned definitions; however, the operator remains subject to the legitimate requirements of other municipal ordinances. For example, RTFA does not exempt agricultural operations from all restrictions that might be imposed by zoning ordinances.

Agricultural Zoning will be discussed in more detail in Section VI of this publication, but it should be noted that definitions within zoning ordinances are open for scrutiny, particularly by a claim alleging that an ordinance limits normal agricultural operations as defined by RTFA. Municipalities are therefore encouraged to define agricultural uses broadly when drafting ordinances, by using definitions in line with the Municipalities Planning Code or RTFA. For example, a municipality considers bee-keeping and honey production as agricultural activity if the operation meets RTFA's operational definition of being 10 acres in size or grossing \$10,000.

Limitation on Nuisance Actions

Under certain circumstances, RTFA prevents nuisance suits against agricultural operations from being successful.

First, the law prohibits a neighboring landowner or the municipality from prevailing in a nuisance suit against an agricultural operation engaged in normal agricultural operations if:

- (1) the operation has been operating lawfully for one year; and
- (2) the conditions or circumstances on the agricultural operation have not substantially changed during that one year time period.

Second, if the facility has been expanded or substantially altered, a nuisance suit will not be successful if:

- (1) one year has passed since the expansion/alteration; or
- (2) the expansion/alteration has been addressed in a nutrient management plan approved before the expansion/alteration pursuant to the requirements of the Pennsylvania Nutrient Management Act.

Limitation on Municipalities to Restrict Direct Commercial Sales

RTFA states that a municipality may not restrict direct commercial sales of agricultural commodities through its zoning ordinances. For an agricultural operator to realize this benefit, the following conditions must be met:

- (1) The product sold must meet the definition of an agricultural commodity;
- (2) The direct commercial sales must take place on property owned and operated by the landowner; and
- (3) That landowner must have produced at least 50% of the commodities sold.

Exceptions to Applicability of Right to Farm

While RTFA offers Pennsylvania farmers protections for their agricultural operations, those protections have limitations. RTFA does not protect farmers from nuisance suits in the following areas:

- (1) where an agricultural operation has a direct adverse effect on public health and safety;
- (2) where a zoning ordinance limits or prohibits an agricultural operation;
- (3) where an agricultural operation is in violation of federal, state, or local statute or regulation; or
- (4) where an agricultural operation pollutes water or causes flooding.

The General Assembly has addressed circumstances in which municipalities were enacting ordinances in violation of RTFA by passing the Agriculture, Communities, and Rural Environment Act (ACRE)/Act 38 of 2005. ACRE, which allows further legal action against unauthorized ordinances, is discussed in Section V of this publication.

Selected Case Law

Horne v. Haladay, 728 A.2d 954 (Pa. Super. Ct. 1999)

In November of 1993, an agricultural operator stocked a poultry house with 122,000 laying hens. In August of 1994, the agricultural operator constructed a decomposition building for chicken waste.

In November of 1995, a neighbor brought a private nuisance suit against the poultry farm alleging that the operation failed to take reasonable steps to control flies, strong odors, and excessive noise. The neighbor further alleged that these failures led to a \$60,000 devaluation of their property. The poultry farmer countered that the lawsuit was barred because it had not been filed within RTFA's limited one year time-period.

The Pennsylvania Superior Court found that RTFA applied to both private and public nuisances and that RTFA covered pre-existing neighbors. Ultimately, the court upheld dismissal of the suit because it had not been filed within the one year time-period.

Remaley v. Zook, Docket No. 580-2007 (Snyder Ct. Com. Pl. 2009)

In 1979, the Zooks began operating a dairy farm. In April 2007, the Zooks began construction of a poultry barn, and in August 2007, the poultry barn was stocked with chickens. In November 2007, a neighbor brought a nuisance suit against the Zooks due to the alleged odor created by the poultry operation. The neighbor requested a reconfiguration of the poultry barn and monetary damages for an alleged devaluation of their property.

The court ruled that odor from a poultry farm does not constitute a nuisance as a matter of law. The court further ruled that this particular poultry farm did not constitute a nuisance because of the Zooks' conduct was not unreasonable and the "gravity of harm suffered by Plaintiffs [did] not outweigh the utility of Defendants' conduct in operating a poultry farm in an agricultural community."

Gilbert v. Synagro Central, LLC, 90 A.3d 37 (Pa. Super. Ct. 2014)

From March 2006 to April 2009, 11,635 wet tons of biosolids were applied to the fields of a farm. In July 2008, surrounding residents brought a nuisance suit alleging that the application of biosolids resulted in offensive odors and created a health hazard for those living on the adjoining properties. The farming operation countered that this claim was barred by the one year limitation in RTFA.

The court held that the use of biosolids does not qualify as a "normal agricultural operation" as a matter of law. As a result, the nuisance suit involving biosolids was not automatically barred after one year because a factual issue existed regarding the applicability of RTFA.

III. Agricultural Area Security Law

[3 P.S. §§ 901-915]

Background and Legislative Policy

The Pennsylvania General Assembly passed the Agricultural Area Security Law (AASL) to assist farmers in handling the economic and social pressures that impact farming operations. This law enables municipalities and individuals to cooperatively create Agricultural Security Areas (ASA). These officially designated areas provide certain benefits to participating agricultural operators and to the surrounding community. In passing AASL, the General Assembly acknowledged that pressures are created when scattered development extends into good farm areas and specifically designed AASL to respond to those pressures.

According to the legislative findings in AASL:

It is the declared policy of the commonwealth to conserve and protect and to encourage the development and improvement of its agricultural lands for the production of food and other agricultural products.

It is the declared policy of the commonwealth to conserve and protect agricultural lands as valued natural and ecological resources which provide needed open spaces for clean air, as well, as for aesthetic purposes.

Description

An ASA is a tract or tracts of existing agricultural land that has been officially designated as an agricultural district. The legislation requires that a district be 250 acres or larger. The district may contain multiple tracts, and may contain tracts that are noncontiguous. ASAs can cross municipal and county boundaries, and the composition of the ASA will remain unchanged even after rezoning (unless the nonconforming use changes and the lands are removed from the ASA).

Creating an ASA is a collaborative effort between the landowners and the applicable township. As such, the decision to create a security area is both an individual decision to continue farming and a public expression of support for the land to remain in agricultural use. ASAs can be utilized as part of a multi-municipal planning venture or a tool for area-wide planning. There is no cost to the landowners for enrolling in the program and involvement in the program is at all times voluntary.

Protections Granted

As a landowner, there are a variety of benefits to enrolling land in an ASA. First, landowners are given limited protection against local regulations. Second, state agencies may not condemn a landowner's property without special permission. Third, landowners are eligible to participate in the state's agricultural conservation easement program. Finally, though not detailed in this publication, there are loan programs available through the commonwealth with reduced interest for farms enrolled in ASAs.

Limitation on the Power of Local Regulations

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

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

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

Importantly, local governing bodies are not completely barred from passing regulations and ordinances that affect farm operations or farm structures if such regulations or restrictions bear a direct relationship to the public health and safety.

Protection Against Condemnation of Land

A second advantage to placing land within an ASA is the heightened protection afforded security areas from eminent domain. Under the power of eminent domain, the government may transfer property from private ownership to public ownership. However, to exercise eminent domain, the government must fulfill two requirements:

- (1) the transfer must be for a public purpose; and
- (2) the government must compensate the private landowner with the fair market value of the property.

Under AASL, state and local agencies have limited power to exercise eminent domain over productive farmland within a security area. This limitation is not absolute; it simply adds another level of scrutiny to the takings process. In these cases, the entity doing the taking has the burden to prove that there is no other reasonable option available.

Limitation on Eminent Domain by State Agencies

AASL requires that the Commonwealth of Pennsylvania and its political subdivisions, agencies and authorities bring all condemnation requests that impact productive agricultural lands within an ASA before the Agricultural Land Condemnation Approval Board (ALCAB).

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

- (1) the proposed condemnation would not have an unreasonably adverse effect upon the preservation and enhancement of agriculture or municipal resources within the area; or
- (2) there is no reasonable and prudent alternative to using the lands within an ASA for the project.

If ALCAB determines there is no feasible alternative, or if it fails to act within 60 days, the condemnation may proceed. Nevertheless, there are some condemnations that lie outside ALCAB's jurisdiction and do not require ALCAB's approval. For example: widening existing roadways and constructing underground sewer and water lines where there is no surface disturbance.

The state agency seeking condemnation has the burden of proving that the ASA will not be substantially impacted by the proposed condemnation. ALCAB must interpret AASL in a manner that will preserve the economic viability of farming throughout the entire ASA.

Limitation on Eminent Domain by Local Governments and Others

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

Creating a New Agricultural Security Area

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

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

Any owner (or owners of viable agricultural land in the aggregate) who own at least 250 acres may apply for a creation of an ASA. The owner must also meet other ASA criteria. The area may be noncontiguous, but each parcel must be at least 10 acres or have an anticipated yearly gross income of at least \$2,000 from agricultural activity.

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

1. **Proposal:** The landowners must submit a proposal for the creation of a new ASA to a local government unit. The proposal must be submitted according to the regulations and requirements of the local governing body and must include a description of the proposed land and its boundaries.
2. **Notification:** The governing body must acknowledge the receipt of the landowner's proposal. The statute mandates several forms of acknowledgment, including an announcement at the next regular or special meeting of the governing body and a notice in a newspaper having general circulation within the proposed ASA.
3. **Proposal Review:** The governing body must submit the proposal and any proposed modifications to the county planning agency and the municipal planning agency. The county planning commission must report recommendations concerning the proposal to the governing body, but the municipal planning commission need only report the potential effects of the ASA on the local government.

AASL sets forth various evaluation factors and resource materials to be used by the planning commission or agency and the advisory committee. These factors help these groups come to an informed decision regarding the creation of an ASA. Evaluation factors to be used by the Planning Commission or Advisory Committee include:

- Land proposed for the inclusion shall have soils that are favorable to agriculture.
 - Use of land proposed for inclusion shall be compatible with municipal or multi-municipal comprehensive plans. Any zoning shall permit agricultural use, but need not exclude other uses.
 - Additional factors to be considered are the extent and nature of farm improvements, anticipated trends in agricultural economic and technological conditions, and any other relevant matter.
4. **Public Hearing:** Once the planning commission and advisory committee have submitted their reports to the local governing body, a hearing must be held. The statute requires that the hearing be held in a municipal building or other site that is easily accessible to the public within the municipality. Notice of the hearing must be published in a newspaper with a general circulation in the proposed area and by posting such notices in five prominent places throughout the area.
 5. **Decision:** After the hearing, the local governing body must come to a decision regarding the creation of an ASA. If the proposal is rejected or modified, the local governing body must provide written notification of the decision to the landowner. If the local governing body accepts the proposal, an ASA automatically is created and becomes immediately effective.

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

Once the description of an ASA has been recorded, the local governing body must notify the Secretary of Agriculture. The notification must include (in writing) the number of land owners in the area, the total acreage of the area, the area approval date, and the date of recording for the area.

6. **Periodic Review:** The local governing body must review the newly created ASA every seven years. During this review, the governing body must request recommendations from the municipal planning agency, the county planning commission and the advisory committee. Prior to conducting the review, the local governing body must provide notification. It should be noted that if the agency does not review the ASA (in its seven year review period) the area is automatically renewed for an additional seven years.

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

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

Eligibility for Agricultural Conservation Easements

A significant advantage to having land enrolled within an Agricultural Security Area is that the landowner is eligible to participate in the Pennsylvania Agricultural Conservation Easement Purchase program. This program, which allows farmers to sell agricultural conservation easements, is an important farmland preservation tool. Agricultural Conservation Easements are discussed in Section VIII of this publication.

Selected Case Law

In re; Agric. Sec. Area in E. Lampeter Twp., 974 A.2d 1213 (Pa. Commw. Ct. May 2009)

East Lampeter Township Board of Supervisors denied a request to create an ASA. The Board determined the ASA was not needed because the Township already had suitable planning tools to prevent the inappropriate development of agricultural lands.

The court held that when deciding whether or not to create an ASA, planning commissions or advisory committees are not permitted to use "need for an ASA" as one of their evaluation factors.

41 Valley Assocs. v. Bd. of Supervisors of London Grove Township, 882 A.2d 5 (Pa. Commw. Ct. 2005)

Landowners applied to have a 152 acre parcel, lying in an Agricultural Preservation zoning district, included in the township's ASA. The landowners planned to use the property for the composting of mushroom substrate. The Township Board of Supervisors rejected this request because it had concerns regarding this use.

The court determined that the Board erred when it denied inclusion of the property because the purpose of AASL is to preserve land for a broad class of agricultural uses, not to enable a specific use.

In re: Forrester, 836 A.2d 102 (Pa. 2003)

The owner of a landlocked property requested the appointment of a board to create a private easement across a neighboring farm enrolled in an ASA. The owners of the farmland contended that the opening of the private road was an exercise of eminent domain and before the private easement could be granted, it must first receive approval by ALCAB.

The court held that because the opening of a private road does not accomplish a public purpose, it is not an exercise of eminent domain. As a result, obtaining approval by ALCAB is not necessary before granting a private easement.

IV. State and Local Environmental Regulation of Agriculture

Nutrient Management Act

Background and Legislative Policy

Pennsylvania has long been a leader in environmental legislation. In 1939, Pennsylvania passed the Clean Streams Law [35 P.S. §§ 691.1 et seq.], which authorized the Department of Environmental Protection (DEP) to adopt rules and regulations to prevent pollution of the waters of the commonwealth. The law controls the discharge of sewage and industrial waste and other pollutants into Pennsylvania's waterways. The law defines the discharge of any polluting substance as a public nuisance. Agricultural operators must carefully comply with the requirements of the Clean Streams Law.

Similarly, DEP enforces the Federal Clean Water Act of 1972 (CWA); which is administered by the Federal Environmental Protection Agency (EPA). CWA requires each state to establish water quality standards, and does not exempt agricultural operators from its pollution ban. Any unlawful pollution by an operator can result in civil penalties and a nuisance suit brought against the operator by the state.

In 1983, Pennsylvania signed the Chesapeake Bay agreement. Under this agreement, Maryland, Virginia, Pennsylvania, the District of Columbia, the Chesapeake Bay Commission, and EPA agreed to take steps to improve the quality of the Chesapeake Bay by reducing the nonpoint source pollutant content.

Subsequently, in 1993, Pennsylvania enacted the Nutrient Management Act and became the first state in the Chesapeake Bay watershed, and one of the first in the nation, to adopt mandatory nutrient management controls on farm pollution. The law requires operators to develop and follow nutrient management plans, and seeks to reduce the amount of nonpoint source pollution that flows into the Bay from Pennsylvania's watersheds by controlling the handling and application of manure and fertilizers in Pennsylvania.

The Nutrient Management Act is the first law in Pennsylvania that required regulatory oversight of the manure application practices of intensive agricultural operations. The Act controls nonpoint source pollutants by requiring that Concentrated Animal Operations (CAOs) develop and maintain a nutrient management plan. A CAO is an animal operation with eight or more Animal Equivalent Units (AEUs) where the animal density exceeds two AEUs per acre on an annualized basis. An AEU is defined as one thousand pounds live weight of livestock or poultry animals, regardless of the actual number of individual animals comprising the unit. Farms with fewer than two animal units per acre are not required to develop a nutrient management plan, but are encouraged to develop a plan voluntarily.

The Act regulates both nitrogen and phosphorus, in accordance with *Stephanie Adam v. Quail Ridge Farm*, a 2003 Pennsylvania Environmental Hearing Board case, where neighbors brought suit against Quail Ridge Farm over the pollution of Lake Ontelaunee. The farm was operating under a valid nutrient management plan, which did not account for phosphorus leaching into surface water, because the Act did not require plans to account for phosphorus. The board decided this was an error and as a result, nutrient management plans are required to account for both nitrogen and phosphorus.

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

- Identify the nutrients to be considered;
- Establish procedures to determine acceptable application rates for manure and other nutrient sources;
- Establish record-keeping requirements for land application and nutrient distribution;

- Identify best management practices for proper nutrient management;
- Establish minimum standards for manure storage;
- Establish the conditions under which the plan must be amended; and
- Establish criteria for manure handling under emergency situations.

Implementation

The State Conservation Commission (SCC) is responsible for developing, evaluating and administering the regulations of the Nutrient Management Act. SCC is dedicated to ensuring the wise use of Pennsylvania's natural resources, and protecting and restoring the natural environment through the conservation of its soil, water and related resources. One of SCC's major responsibilities is overseeing the preparation of nutrient management plans. SCC establishes criteria and planning requirements for nutrient management plans and enforces the plans. SCC implements the Act through agreements with local Conservation Districts which are responsible for reviewing and approving nutrient management plans within their districts pursuant to the requirements of the statute and the regulations.

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

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

The regulations require operators to include written plans for emergency manure leaks and spills. The operator must give the emergency plan to the local emergency management agency.

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

Rules require operators to test soils frequently, and plans must be evaluated every three years to determine whether the operations have undergone any significant changes.

Operators must create filtration mechanisms or vegetated buffers in the process of developing a plan. The buffers must be able to withstand a 25 year storm event with 24 hours of rain without allowing manure runoff to leak into surface waters.

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

Implications of the Nutrient Management Act for Local Planning

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

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

Nutrient Trading Program

[25 Pa. Code § 96.8]

DEP instituted its Nutrient Trading Program, effective October 2005, in an effort to control and minimize the nitrogen, phosphorus and sediment polluting the Susquehanna and Potomac watersheds and, consequently, the Chesapeake Bay. This is a voluntary program and according to DEP nutrient trading:

[E]nables point or nonpoint sources that exceed their environmental obligations to generate credits to meet their National Pollutant Discharge Elimination System permit obligations. Nutrient trading can act as an incentive for credit generators and credit purchasers to develop and maintain more cost effective or efficient waste treatment systems.

- A trade must involve comparable credits (for example, nitrogen may only be traded for nitrogen) that are expressed as mass per unit time (pounds per year)
- Credits generated by trading cannot be used to comply with existing technology based effluent limits except as expressly authorized by federal regulations
- Trading may only occur in a Department defined watershed
- Trading may take place between any combination of eligible point sources, nonpoint sources and third parties
- Each trading entity must meet applicable eligibility criteria established under the Department's nutrient trading regulations, 25 Pa. Code § 96.8, for this voluntary program

Water Resources Planning Act

[25 Pa. Code §§ 110.1 et seq.]

Pennsylvania's groundwater and surface water resources have experienced great strain as a result of increased encroachment of suburbs and urban development. To help remedy the situation, the Pennsylvania Legislature passed the Water Resources Planning Act, in December 2002 with the purpose of conserving and protecting the water resources in Pennsylvania by creating a new state water plan. Pennsylvania's previous water plan had not been updated in 25 years, and did not contain a mechanism to determine when water supplies were running low prior to wells running dry.

The Water Resources Planning Act helps local officials gauge their water supplies earlier, in time to remedy any problems that may arise. Importantly, the Act does not regulate the use of ground water, or grant DEP authority to regulate, control or require a permit for the withdrawal of water. What the Act does do is create a statewide committee to plan water use, and six regional committees (with members representing different interests, including agriculture) to create regional water plans for submission to the state committee.

The Act requires commercial, industrial, agricultural, or individual users who use upwards of 10,000 gallons of water per day (as averaged over a 30-day month) to register and report their water usage to DEP. Though not required, to help provide a more accurate portrayal of water use in the state, those using less water are encouraged to report their usage. Registration and reporting are free.

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

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

Agriculture Erosion and Sedimentation Control Plans

[25 Pa. Code § 102.4(a)]

The purpose of the Erosion and Sedimentation Control Plan is to maximize water quality throughout the state by minimizing the potential for accelerated erosion and sedimentation. Accelerated erosion and sedimentation occurs when human activities, in combination with natural processes, cause the ground to erode faster than it would without the human activities.

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

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

DEP, or the county conservation district, may approve alternative management practices to maintain existing water quality and uses. Additionally, if there is any water quality complaint, either organization may inspect or review a plan to determine regulatory compliance.

When an operator wants to plow or till near exceptionally valuable water (as defined by the water quality standards in Ch. 93) he must also have a written plan. Plans are to be prepared by a person trained and experienced in sedimentation control. Often this will be an employee of the county conservation district.

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

Anyone proposing twenty-five acres or more of timber harvesting, or road maintenance causing earth disturbance, is required to obtain an Erosion and Sedimentation Control Permit. With the exceptions of plowing or tilling, any earth disturbance of more than five acres requires an Erosion and Sedimentation Control permit.

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

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

Manure Management

[25 Pa. Code § 83.311]

All agricultural operations in Pennsylvania (regardless of size) that apply manure to the land are required to develop and follow a written Manure Management Plan (MMP). This requirement includes not only manure that is applied by mechanical equipment, but also manure applied by animals in pastures or Animal Concentration Areas (ACAs). MMPs must be prepared according to the format described in DEPs "Manure Management Plan Guidance" publication unless the farmer receives permission from DEP for an alternate plan format. MMPs can be prepared by the farmer and do not need approval (though MMPs must be kept on the farm and presented upon request from DEP or county conservation district staff) unless the farm is defined as a Concentrated Animal Operation (CAO) or a Concentrated Animal Feeding Operations (CAFO). In these cases, MMPs must be developed by a Certified Nutrient Management Specialist.

MMPs require the farmer to calculate the manure application rate by one of three methods:

- (1) The Manure Application Rate Charts which base values on the crop group and manure type;
- (2) Calculations derived from the applicable Nitrogen or Phosphorous Balance Worksheets; or
- (3) Developed and implemented by an individual trained in using the Pennsylvania Phosphorus Index.

To protect environmentally sensitive areas, when mechanically applying manure, there must be 100 foot setbacks from streams, lakes, ponds, open sinkholes or drinking water sources. It is possible for the farmer to reduce the setback from streams, lakes, and ponds to 50 feet if a recent soil test shows phosphorus levels of fewer than 200 parts per million; the farmer practices no-till methods; and there is either adequate residue or a cover crop. This setback from streams, lakes, and ponds may be further reduced to 35 feet if there is a permanent vegetated buffer along the body of water.

As a general rule, DEP discourages the winter time application of manure. As a result, during the winter season (defined as: (1) December 15 through February 28; (2) anytime the ground is frozen at least 4 inches; or (3) anytime the ground is snow covered) farmers may not apply more than 5,000 gallons per acre of liquid manure or 20 tons per acre of dry non-poultry manure or 3 tons per acre of dry poultry manure. Additionally, the winter time application of manure is restricted to those fields that have at least 25% crop cover at application time and slopes of no more than 15%.

All pastures must maintain dense vegetation that averages 3 inches in height, across the entire field, throughout the growing season. If a pasture becomes overgrazed and fails to meet the 3 inch vegetation requirement, the area will be considered an ACA.

ACAs (barnyards, feedlots, loafing areas, over grazed pasture, etc.) must be properly managed to prevent manure runoff into water bodies. This includes:

- (1) Diverting clean upslope water away from the ACA
- (2) Directing polluted runoff into storage or a vegetative filter
- (3) Limiting animal access to surface water to properly constructed livestock crossings
- (4) Keeping feed racks, shade, gates, etc., far away from water bodies

The storage of manure must also be closely managed. Every liquid or semi-solid manure storage facility must be evaluated by the farmer on at least a monthly basis. The farmer must document that there is no leakage, visible cracking, rodent holes, tree or shrub growth, tears in the liner, or any other problems which could lead to leakage. Additionally, the farmer must maintain a minimum 12 inch freeboard for all ponds and a 6 inch minimum freeboard for all other types of manure storage facilities.

To handle those times when weather or field conditions prevent the application of manure, many farmers employ stacking areas around the farmstead or in fields. When stacking around the farmstead, farmers must use an "improved stacking pad or covered area." To comply with this requirement, farmers may seek assistance from the United States Department of Agriculture's Natural Resources Conservation Service or the county conservation district. If a farmer chooses to stack manure in other areas, all stacks must be at least 100 feet from streams, lakes, open sinkholes, and drinking water wells. Additionally, stacks should be placed on areas with less than 8% slope and covered with a water repellant tarp if placed in an area for over 120 days.

Odor Management

[25 Pa. Code § 83.701-83.707]

As previously mentioned in this publication, conflicts often arise between farmers and those unfamiliar with farming practices. In an effort to resolve those clashes relating to normal agricultural operations, Pennsylvania's lawmakers enacted Act 38. Act 38, which is more commonly known as ACRE (Agriculture, Communities, and Rural Environment Act) addresses two issues: (1) the local regulation of normal agricultural operations; and (2) the odor management of concentrated animal feeding operations (CAFOs). This section offers a discussion regarding the issue of odor management, while the issue of local regulation is detailed in section V of this publication.

Beginning on February 26, 2009, Pennsylvania law requires that higher density animal operations and larger animal operations develop and implement odor management plans (OMPs) when building new facilities (such as new barns and new manure storages). The Pennsylvania State Conservation Commission (SCC) has been given reviewing authority regarding OMPs.

By way of clarification, a higher density animal operation is defined as a Concentrated Animal Operation (CAO). A CAO is defined as an animal operation with eight or more Animal Equivalent Units (AEUs) where the animal density exceeds two AEUs per acre on an annualized basis. An AEU is defined as one thousand pounds live weight of livestock or poultry animals, regardless of the actual number of individual animals comprising the unit. A larger animal operation is defined as a Concentrated Animal Feeding Operation (CAFO). Finally, a CAFO is defined as a CAO with greater than 300 AEUs, or any agricultural operation with greater than 1,000 AEUs, or any agricultural operation defined as a CAFO by EPA head numbers (700 cows, 2500 pigs, etc.).

OMPs must be in writing, must be written by a certified odor management specialist, must be site specific, and must be developed to minimize (not eliminate) the impacts of odor on the general public. Specifically, OMPs must contain an evaluation of potential odor impacts and list the Odor Best Management Practices (BMPs) necessary to address issues that may occur when a proposed facility has the potential to create "high odor conflict."

Each OMP is required to contain a signed statement (by the certified specialist that prepared the plan) attesting to the accuracy of the plan. Additionally, every OMP must contain a signed statement (by the agricultural operator) agreeing to:

- (1) Implement and maintain Odor BMPs according to the schedule listed in the plan;
- (2) maintain accurate records regarding the application of Odor BMPs; and
- (3) permit inspections by SCC

All OMPs must be submitted to SCC, which will use the Pennsylvania Odor Site Index (OSI) to evaluate and score the potential effects of any offsite migration of odors. OSI assesses the impact of odor in three areas: (1) odor sources; (2) site land uses; and (3) surrounding land uses.

First, the potential source of odor is analyzed based upon animal type and number; manure storage type; and animal history. Next, the proposed site land use is assessed to determine if any existing agricultural land designations (such as agricultural zoning, Agricultural Security Area, or farmland preservation) are present. Finally, surrounding land use factors (such as existence of other animal operations in the area, distance of property to nearest property line, and the number of neighbors within the evaluation area) are considered.

After conducting its evaluation, SCC will assign each OMP a score of low, medium, or high potential for odor conflict. If a proposed facility receives a score of either medium or high potential, Odor BMPs are required.

Ultimately, SCC will either approve or reject the proposed facility. Importantly, SCC's approval of an OMP is required prior to the start of construction of any new facility and a fully implemented plan is required prior to using the facility.

V. ACRE/Act 38 of 2005 (Local Regulation of Normal Agricultural Operations)

[3 Pa. Cons. Stat. §§ 311-318][See Appendix B for text of statute]

Background and Legislative Policy

As discussed previously in section II of this publication, through the Right to Farm Act (RTFA), the Pennsylvania Legislature attempted to balance the realities of modern agricultural operations with the nuisance concerns of the community. However, while RTFA offered farmers certain protections, those protections only pertained to nuisance ordinances, nuisance actions, and restrictions on direct commercial sales. Normal agricultural operations were not protected from any other type of unauthorized local regulation. Additionally, farmers were required to bear all costs associated with enforcing the rights they received under RTFA.

In an effort to further resolve conflicts relating to normal agricultural operations, Pennsylvania's lawmakers enacted Act 38. Act 38, which is more commonly known as ACRE (Agriculture, Communities, and Rural Environment Act) addresses two previously unresolved issues: (1) the local regulation of normal agricultural operations; and (2) the odor management of concentrated animal feeding operations (CAFOs). This section offers a discussion regarding the issue of local regulation, while the issue of odor management for CAFOs is detailed in section IV of this publication.

Upon passing ACRE, the Pennsylvania General Assembly expressly described the purpose of the statute through the following legislative declaration:

[T]he commonwealth has a vested and sincere interest in ensuring the long-term sustainability of agriculture and normal agricultural operations in a manner that is consistent with State Policies and statutes. In furtherance of this goal, the commonwealth has enacted statutes to protect and preserve agricultural operations for the production of food and other agricultural products.

The commonwealth has also empowered local government units to protect the health, safety and welfare of their citizens and to ensure that normal agricultural operations do not negatively impact upon the health, safety and welfare of citizens.

It is the purpose of this act to ensure that when local government units exercise their responsibilities to protect the health, safety and welfare of their citizens in regulating normal agricultural operations, ordinances are enacted consistent with the authority provided to local government units by the laws of this commonwealth.

The General Assembly further declares that the intent of this act is to provide for the resolution of conflicts that may arise from the regulation of normal operations. It is further the intent of this act that this process:

- (1) provides a dispassionate and unprejudiced legal review of local ordinances regulating normal agricultural operations to determine whether a local ordinance complies with the commonwealth's existing statutes;
- (2) reduces costs associated with determining whether a local ordinance complies with the commonwealth's existing statutes by utilizing current State resources and mechanisms; and
- (3) provides for a prompt and fair resolution to the conflict.

Descriptions and Definitions

At its very core, ACRE is designed to facilitate the protection of normal agricultural operations from all unauthorized local regulations. To accomplish that goal, ACRE grants the Attorney General the power and duty to: (1) review local ordinances to determine whether or not they comply with State law; and (2) bring a legal action against a local government unit to invalidate or prevent enforcement of an unauthorized local regulation.

To provide guidance, ACRE defines a local government unit as “a political subdivision of the commonwealth.” In practice, ACRE applies primarily to Pennsylvania’s townships although some borough ordinances also have been reviewed through ACRE.

Additionally, ACRE defines an unauthorized local ordinance as any ordinance enacted by a local government unit that prohibits or limits a normal agricultural unless:

- (1) the local government unit has authority under State law; and
- (2) the local government is not prohibited or preempted by State law from adopting the ordinance.

An unauthorized local ordinance also includes any ordinance that restricts or limits the ownership structure of a normal agricultural operation.

Finally, ACRE defines a normal agricultural operation as the activities, practices, equipment and procedures that farmers utilize in the production, harvesting, and preparation for market of agricultural, agronomic, horticultural, silvicultural, and aquacultural crops and commodities. To qualify under this definition, an agricultural operation must also be at least ten acres in size or produce an annual gross income of at least \$10,000.

Protections Granted

Under ACRE, the owner of a normal agricultural operation may ask the Pennsylvania Attorney General to review any ordinance believed to be an unauthorized local ordinance. The request for an ordinance review does not need to be in writing.

Upon receiving a request for an ordinance review, the Attorney General will examine the ordinance in question, and within 120 days, inform the requesting party as to whether or not the Attorney General believes the ordinance is unauthorized. If the requested review was in writing, the Attorney General’s response must also be in writing.

If the Attorney General determines that the ordinance is an unauthorized local ordinance, the Attorney General may bring legal action against the local government unit to either have the ordinance invalidated or enjoined.

Procedure for Attorney General’s Ordinance Review

To comply with the requirements of ACRE, the Office of Attorney General (OAG) has established a procedure to effectively process all requested ordinance reviews.

Upon receiving a request to review an ordinance, OAG will send an acknowledgement to the requesting party informing them that their requested review has been received. At that time, OAG will also send notice to the relevant local government unit informing them that a review request has been received and that their ordinance will be the subject of a review.

Within 120 days, OAG will review the ordinance to determine if the ordinance is unauthorized. Upon completing its review, and within 120 days, OAG will notify both the requesting party and the local government unit in writing; stating whether or not OAG has accepted the case and intends to bring legal action to invalidate or enjoin the ordinance.

Since the enactment of ACRE, OAG has maintained a policy of avoiding litigation whenever possible. Instead, when OAG determines that a local government unit has enacted an unauthorized ordinance, OAG will first attempt to correct any legal problems through negotiation. Accordingly, if OAG accepts the case, the local government unit is given the opportunity to discuss the ordinance with OAG and to correct any problems before a suit is filed.

If OAG and the local government unit, however, cannot arrive at a resolution regarding the ordinance in question, OAG will file suit in Commonwealth Court. Significantly, the entire costs of this legal action are borne by OAG; not the landowner affected by the ordinance.

Private Right of Action

Even if OAG does not determine that a local ordinance is unauthorized (and does not accept the case), the owner of a normal agricultural operation still has the ability to bring a private legal action before Commonwealth Court to have the ordinance invalidated or enjoined. In such a case, the landowner will be responsible for legal expenses. Relatedly, ACRE allows for fee shifting (payment of other party's attorney fees and litigation costs) under a private right of action when the local government unit acts with negligent disregard or when the private right of action was brought without substantial justification.

Attorney General's Annual ACRE Reports

Under ACRE, the Attorney General is required to issue an annual report detailing: (1) how many reviews were requested, the nature of the complaints and the location of the ordinances cited; (2) how many reviews were conducted; (3) how many legal actions were brought by the Attorney General; and (4) information on the outcome of legal actions brought by the Attorney General. The Attorney General's annual ACRE reports can be found on the Penn State Agricultural Law Resource and Reference Center's website.

According to the Attorney General's Annual ACRE Report, as of January 16, 2014, OAG has reported the following statistics regarding the ACRE program:

- OAG has received a total of 102 ordinance review requests
- OAG has reviewed a total of 88 ordinance requests
- 10 ordinance review requests are currently pending review by OAG
- 4 ordinance review requests were withdrawn while a review was pending
- OAG has denied 47 ordinance review requests
- OAG has accepted 41 ordinance review requests
- 28 of the accepted ordinance review requests have been resolved either through negotiation or litigation
- OAG is currently negotiating 10 accepted ordinance review cases with local government units
- 3 accepted ordinance review cases are currently in litigation

Selected Case Law

Commonwealth v. East Brunswick Township, 956 A.2d 507 (Pa. Commw. Ct. 2008)

East Brunswick Township enacted an ordinance that made it illegal for corporations to apply biosolids to land. As a result, a corporately owned farm was prevented from applying biosolids to its land despite possessing a permit issued by the Pennsylvania Department of Environmental Protection (DEP).

Under ACRE, the Attorney General brought suit, claiming that the ordinance was unauthorized because it conflicted with the State's environmental statutes. East Brunswick Township claimed that the township possessed the inalienable right to local self-government which is superior to State government and that ACRE was an unconstitutional infringement upon that right.

The court held that "local governments are creatures of the legislature from which they get their existence." Accordingly, the court determined ACRE to be constitutional.

Commonwealth v. Locust Township, 968 A.2d 1263 (Pa. 2009)

The Attorney General brought an action in the Commonwealth Court against Locust Township challenging the validity of the Township's ordinance on the grounds that it conflicted with and was preempted by a number of state statutes. Locust Township countered that a municipality must first enforce an ordinance before the Attorney General can challenge it under ACRE.

The court held that the Attorney General does not need to wait for an ordinance to be enforced before that ordinance may be challenged under ACRE.

Boswell v. Skippack Twp., No. 389 M.D. 2006 (Pa. Commw. Ct. 2012)

A husband and wife brought a private right of action suit against Skippack Township challenging an ordinance that prevented the use of a “deer cannon;” a device designed to repel deer from their tree farm. The couple alleged the ordinance was unauthorized because the deer cannon was a normal agricultural operation protected under ACRE.

The court upheld the lower court decision that the landowners did not meet their burden of proving that the use of a deer cannon constituted a normal agricultural operation.

VI. The Municipalities Planning Code (MPC) and Agricultural Zoning

[53 P.S. § 10101 et seq.]

Municipalities Planning Code (MPC)

Background and Legislative Policy

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

Accordingly, through MPC, the Pennsylvania General Assembly requires municipalities to consider certain policies of statewide importance when creating land use plans and ordinances. Relevant to farming, MPC requires that all municipal zoning ordinances endeavor to preserve prime agricultural land. Additionally, to provide clarity and direction regarding this prime agricultural land, the Governor issued a 2003 Executive Order (see Appendix C for a copy of Order 2003-2).

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

Multi-municipal Comprehensive Planning

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

- Provide for sharing of tax revenues
- Enter into agreements for transfer of development rights
- Develop small-area plans for non-residential areas
- Respond to curative amendment challenges by providing for the challenged use on a regional basis
- Designate valued resource areas and designate growth areas

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

Conservation by Design

Municipalities may use Conservation by Design (sometimes referred to as Growing Greener) to protect agriculture and mature forests. Conservation by Design is a Pennsylvania-wide program that encourages municipalities and developers to design residential subdivisions that incorporate open spaces into the community. Some municipalities choose Conservation by Design as a way to appeal to the buyer. Other municipalities choose Conservation by Design as a way to protect valuable resources and maintain the character of their community. For example, Lancaster County, in an effort to preserve its strong agricultural history, allows dwellings to be placed on smaller lots, but requires either access to or views of the surrounding open lands.

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

Application procedures for a conservation subdivision take into consideration resources and environmental features of historic, scenic or environmental value. Important features are noted in the plan and categorized for consideration.

According to the Natural Lands Trust:

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

Transfer of Development Rights (TDR) and Regional Development

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

Under TDR, development rights can be transferred from one site to another; from an area to be preserved or protected to an area where growth can be accommodated and is desirable. Purchasers are usually other landowners who want to increase the density of their developments. The property owner whose land is being restricted receives fair compensation and the takings issue is avoided. Local governments may also buy development rights in order to control price, design details or restrict growth. This is done by creating a development rights "bank" where a farmer can sell a unit of development rights and a contractor or builder can purchase it at a later time.

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

Under 53 P.S. §10619.1, local governments are authorized to enact ordinances allowing the implementation of the transfer of development rights. In the absence of such an ordinance, the transfer of development rights is prohibited. Development rights cannot be transferred across municipal lines, except when there is a multi-municipal zoning ordinance between the municipalities where the sending and receiving parcels are located. Multi-municipal planning often goes hand-in-hand with TDRs (See 53 P.S. § 10904).

Agricultural Issues

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

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

MPC regulates the creation and implementation of comprehensive plans. County bodies must consider agricultural land in their comprehensive plans and must develop plans that preserve and enhance prime agricultural lands. Counties must also ensure that land use regulations be compatible with existing agricultural operations.

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

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

Forestry Issues

MPC requires that forestry activities, including but not limited to timber harvesting, be a permitted use by right in all zoning districts. The language provides no exceptions. For example, a municipality would not be able to decide that it would restrict the harvesting of trees over six feet tall or more than eight inches in diameter arbitrarily. Nevertheless, municipalities may be able to use their police powers to create reasonable permit requirements.

Selected Case Law

***Developers, Inc. v. Bedminster Township Zoning Hearing Board*, 820 A.2d 143 (Pa. 2002)**

The court affirmed a lower court’s denial of a substantive challenge to the ordinance’s constitutional validity. The Bedminster Township (Bucks County) Board of Supervisors adopted an ordinance that protected 50 percent of “farmland of statewide importance” and 50 percent of “farmland of local importance” on any 10-acre site located within an Agricultural-Preservation (AP) zone. These categories included non-prime Class II, Class III and Class IV soils.

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

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

Agricultural Zoning

Background and Legislative Policy

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

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

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

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

The purpose of agricultural zoning is to protect farmland from incompatible uses that would adversely affect the long-term economic viability of the area within the region. Zoning accomplishes this purpose in three ways: (1) by protecting prime agricultural soil; (2) by maintaining large areas of agricultural land; and (3) by minimizing land use conflicts.

First, effective agricultural zoning ordinances protect prime agricultural soils. A dynamic agricultural sector requires productive soils capable of supplying food for human and animal consumption. Not all communities contain such valuable soils, however, and many communities contain them in a limited supply. By preserving for agricultural use those soils that are most suitable for agriculture, and directing development to areas that contain non-suitable soils, zoning protects fertile and productive land.

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

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

Types of Zoning that Protect Agriculture

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

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

Exclusive Agricultural Zoning

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

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

Non-exclusive Agricultural Zoning

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

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

Large Minimum Lot Size Zoning

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

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

Area-Based Allocation

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

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

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

When using Area-Based Allocation zoning, municipalities generally select one of two types of area-based formulas: a fixed-system formula or a sliding scale formula.

A fixed-system formula allows one dwelling for a specified number of acres. For example, a municipality may allow one non-farm dwelling unit for every 25 acres of an agricultural parcel. A 25-acre parcel would yield one non-farm dwelling; a 100-acre parcel would yield four non-farm dwellings.

A sliding scale formula varies the number of allowed dwelling units based on the acreage of the parcel from which the units will be subdivided. As the size of the agricultural parcel changes, the number of severable parcels changes accordingly. Sliding scale formulas are rarely linear. Frequently, under these formulas, larger agricultural parcels may subdivide proportionally fewer non-farm dwelling units than smaller agricultural parcels. Such a non-linear sliding scale

formula is based on the theory that smaller agricultural parcels are less viable than larger parcels. Allowing increased non-farm development on smaller parcels satisfies the demand for residential dwellings and shifts the demand away from large, valuable agricultural parcels towards the smaller parcels which are less valuable to the preservation of agriculture.

Advantages and Disadvantages of Agricultural Zoning

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

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

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

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

Definitions within zoning ordinances are open for scrutiny. Municipalities are therefore often encouraged to broadly define agricultural uses when drafting ordinances by using definitions in line with MPC or the Right to Farm Act definitions. In other words, listing very specific types of agriculture can often be construed as restrictive or exclusive of a legal agricultural use that drafters may not have included. It is important to draft all ordinances carefully, particularly when trying to word an ordinance that has lasting power into the future.

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

Legal Challenges to Agricultural Zoning

While the types of legal challenges to zoning ordinance are limitless, the three most commonly employed are: (1) lack of authority; (2) takings; and (3) substantive due process.

Lack of Authority Challenges

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

For example, in the case of *Naylor v. Township of Hellam*, 773 A.2d 770 (Pa.2001), the township had imposed a one-year moratorium on certain new types of subdivision and land development while it revised its zoning and subdivision land development ordinances. Naylor and other landowners brought suit, contesting the townships power to impose such a moratorium. The Township argued that MPC and the Second Class Township Code authorized the reenactment of the moratorium.

The court recognized that zoning enabling legislation, as opposed to zoning ordinances, must be liberally construed and the legislature is presumed to favor the public interest over any private interest. Nevertheless, the court held that while MPC and the Second Class Township Code granted townships the power to regulate land development, neither explicitly nor impliedly granted municipalities the power to suspend land development.

Takings Challenges

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

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

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

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

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

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

Substantive Due Process Challenges

Pursuant to the substantive due process legal theory, the U.S. Constitution demands that all governmental intrusions into fundamental rights and liberties are both fair and reasonable. Additionally, the theory of substantive due process requires that any governmental intrusion be in the furtherance of a legitimate governmental interest.

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

- (1) addresses a public purpose;
- (2) is reasonably related to that public purpose, and
- (3) does not unfairly impact the property owner.

In 1985, the Pennsylvania Supreme Court used a substantive due process analysis to uphold the validity of agricultural zoning. In *Boundary Drive Associates v. Shrewsbury Township Board of Supervisors*, 491 A.2d 86 (Pa. 1985), a landowner challenged a sliding-scale zoning ordinance that limited the number of parcels he could subdivide from his agricultural land. The court found that the township's sliding scale formula did not violate the landowner's substantive due process rights, because the formula was: (1) reasonably related to the public purpose of preserving farmland; and (2) not unfairly restrictive. Nevertheless, the court suggested that there may be instances when a zoning ordinance would be invalid (such as when the zoning ordinance is arbitrary, unreasonable, or unrelated to the public, health, safety, morals and welfare).

VII. Pennsylvania Clean and Green Program (Act 319)

[72 P.S. §§ 5490.1-5490.13] [See Appendix D for text of statute]

Background and Legislative Policy

In 1973, amongst growing concern that Pennsylvania was in danger of losing much of its valuable open spaces to sprawl, the voters of the commonwealth amended the State's constitution to empower the Legislature to "[e]stablish standards and qualifications for private forest reserves, agricultural reserves, and land devoted to agricultural use, and make special provision for the taxation thereof..." [Pa. Const. Art. 8, § 2(b)(i)].

Following the adoption of this constitutional provision, the Pennsylvania General Assembly enacted Act 319: the Pennsylvania Farmland and Forest Land Assessment Act of 1974. Today, Act 319 is most commonly known as Clean and Green.

What is the Clean and Green Program?

The Clean and Green program provides tax incentives to qualifying property owners in exchange for restrictions on land use. Accordingly, the valuation of property enrolled in Clean and Green is based upon the use of the land rather than the land's actual fair market value. Because use values generally result in a lower tax assessment rate than fair market values, land enrolled in Clean and Green typically provides the landowner with lower property taxes. Once land is enrolled in Clean and Green, the landowner must use the land consistent with statutory provisions or face the potential of seven years of roll-back taxes (the difference between the taxes paid under Clean and Green versus what would have been paid without enrollment in the program) plus six percent (6%) interest.

The Clean and Green program has proven to be quite popular among Pennsylvania's landowners. According to the Pennsylvania Department of Agriculture (PDA), as of 2012, 9.4 million acres of land were enrolled in the Clean and Green program.

Currently, only eleven counties in Pennsylvania do not have Clean and Green programs. Generally, these are counties which have not had recent reassessments. As a result, taxes are currently lower than they would be under a reassessment and participation in the Clean and Green program.

What Land is Eligible for Clean and Green?

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

Agricultural Use

Definition

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

- any farmstead land on the tract;
- a woodlot;
- any land which is rented to another person and used for the purpose of producing an agricultural commodity; and
- any land devoted to the development and operation of an alternative energy system, if a majority of the energy annually generated is utilized on the tract.

Related Definitions

Farmstead land is defined as: Any curtilage and land situated under a residence, farm building or other building which supports a residence, including a residential garage or workshop.

Curtilage is defined as: The land surrounding a residential structure and farm building used for a yard, driveway, on-lot sewage system or access to any building on the tract.

Farm building is defined as: A structure utilized to store, maintain or house farm implements, agricultural commodities or crops, livestock and livestock products, as defined in the act of June 30, 1981 (P.L. 128, No. 43), known as the "Agricultural Area Security Law."

Agricultural commodity is defined as: Any of the following:

- (1) Agricultural, apicultural, aquacultural, horticultural, floricultural, silvicultural, viticultural and dairy products.
- (2) Pasture.
- (3) Livestock and the products thereof.
- (4) Ranch-raised furbearing animals and the products thereof.
- (5) Poultry and the products of poultry.
- (6) Products commonly raised or produced on farms which are:
 - (i) intended for human consumption; or
 - (ii) transported or intended to be transported in commerce.
- (7) Processed or manufactured products of products commonly raised or produced on farms which are:
 - (i) intended for human consumption; or
 - (ii) transported or intended to be transported in commerce.
- (8) Compost.

Woodlot is defined as: An area of less than ten acres, stocked by trees of any size and contiguous to or part of land in agricultural use or agricultural reserve.

Eligibility Requirements

To be eligible for Clean and Green under agricultural use, the land must have been devoted to agricultural use the preceding three years and is:

- not less than ten contiguous acres in area, including the farmstead land, or
- has an anticipated yearly gross income of at least two thousand dollars (\$2,000)

Contiguous tract is defined as: All portions of one operational unit as described in the deed or deeds, whether or not the portions are described as multiple tax parcels, tracts, purparts or other property identifiers. The term includes supportive lands, such as unpaved field access roads, drainage areas, border strips, hedgerows, submerged lands, marshes, ponds and streams.

[Note: The portion of a property underneath a public road cannot be counted towards the ten contiguous acres for Clean and Green; *Way v. Berks County Bd. of Assessment Appeals*, 990 A.2d 1191, Pa. Cmwlth. 2010.]

Agricultural Reserve

Definition

Noncommercial open space lands used for outdoor recreation or the outdoor enjoyment of scenic or natural beauty and open to the public for such use, without charge or fee, on a nondiscriminatory basis. The term includes any land devoted to the development and operation of an alternative energy system, if a majority of the energy annually generated is utilized on the tract.

Public Access

Agricultural reserve land is the only category of land under the Clean and Green program that must be open to the public for recreational use. Nevertheless, a landowner may place reasonable restrictions on public access to the agricultural reserve land. According to 7 Pa. Code § 137b.64, some examples of reasonable restrictions include limiting access to the land to pedestrians only and prohibiting hunting.

Eligibility Requirements

To be eligible for Clean and Green under agricultural reserve, the land must not be less than ten contiguous acres in area, including the farmstead land. [See agricultural use section for definitions of contiguous acres and farmstead land.]

Forest Reserve

Definition

Land, ten acres or more, stocked by forest trees of any size and capable of producing timber or other wood products. The term includes any land devoted to the development and operation of an alternative energy system, if a majority of the energy annually generated is utilized on the tract.

Eligibility Requirements

To be eligible for Clean and Green under forest reserve, the land must not be less than ten contiguous acres in area, including the farmstead land. [See agricultural use section for definitions of contiguous acres and farmstead land.]

How is Land Enrolled in Clean and Green?

Landowners wishing to enroll in the Clean and Green program must make their application on a current “Clean and Green Valuation Application” form. This is a uniform preferential assessment application form developed by the Pennsylvania Department of Agriculture. County assessors are required to keep a supply of these forms on hand. Applications for the Clean and Green program are filed with the county board of assessment in which the land is located. If an application is filed with a county on or before June 1, the county must review and process the application for the next calendar year. For example, if a county receives an application on or before June 1, 2014, and the application is approved, the landowner must receive the Clean and Green tax rate for taxing years beginning in calendar year 2015. However, if an application is received on or after June 2, 2014, the landowner is not entitled to receive the Clean and Green tax rate until taxable year 2016. An exception exists if the county undergoes a countywide reassessment. When a countywide reassessment occurs, the application deadline is October 15, or 30 days after the final order of the county board for assessment appeals, whichever comes first.

The county board of assessment is limited to charging an application fee of no more than \$50 for processing an application. This fee can be charged whether or not the application is approved. In addition to the application fee, the recorder of deeds may charge a fee for filing an approved application in a Clean and Green docket. The recording fee may only be charged if the Clean and Green application has been approved by the county board.

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

Once a property is successfully enrolled in Clean and Green, there is no need to reapply. The land will continue to receive the preferential assessment so long as all qualifications are met. Nevertheless, a landowner receiving preferential assessment under Clean and Green must provide the county assessor 30 days’ notice of any proposed change in use of the land, a change in ownership of any portion of the land, or any type of division or conveyance of the land. The change must be recorded in the Clean and Green docket at the landowner’s expense. However, the county may not impose any additional fee, other than the recording fee, for amending the application for a property division or a change of ownership.

Enrollment of Multiple Tracts of Land

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

A landowner is permitted to enroll in Clean and Green adjoining land which would not by itself qualify because of lack of acreage and/or gross income requirements of the program. To be included in Clean and Green, the adjoining land must be used consistently with agricultural use, agricultural reserve or forest reserve purposes, and the landowner must submit an amended Clean and Green application.

Multiple Uses of One Tract of Land

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

Determining Land Use Values

The Pennsylvania Department of Agriculture (PDA) is required to establish and provide all county assessors with county specific use values for land in agricultural use and agricultural reserve. These use values are based on the present value of the income stream the land can generate when put to its best agricultural use. PDA must provide these use values to the county assessors by May 1 of each year.

PDA is also required to provide all county assessors with use values for land in forest reserve. These values are based on the average value of timber in a particular county or the average six timber types by county. PDA must provide these values to the county assessors by May 1 of each year.

A county assessor may establish use values for land use subcategories that are less than the use values established by PDA, however, a county assessor may not establish or apply use values that are higher than those use values established by PDA. Additionally, county assessors must apply all use values uniformly throughout the county.

Farmstead Assessment

Under Agricultural Use, the farmstead land always receives a preferential assessment. However, under Agricultural Reserve and Forest Reserve, the farmstead land only receives the preferential assessment if that county's commissioners have specifically created an ordinance granting the farmstead preferential status.

Removing Land from Clean and Green

The general rule of the Clean and Green program is that after land is enrolled, the landowner is obligated to continue using the land in a qualified use indefinitely or face the penalty of roll-back taxes for the most recent seven years, plus interest. The roll-back tax is the difference between the taxes paid based on the Clean and Green rate and the taxes that would have been paid if the land were not enrolled in Clean and Green. Roll-back taxes are due for the year of the change of use and the six previous tax years for a total of seven years. Land that has been in Clean and Green for more than seven years is only subject to roll-back taxes for the seven most recent tax years, and land that has been in Clean and Green for less than seven years is subject to roll-back taxes only for the years it has been in the program. In addition to the tax, interest is imposed on each year's roll-back tax at the rate of six percent (6%) per year.

Dividing Property Enrolled in Clean and Green

When a property enrolled in Clean and Green is divided into multiple tracts, the division will fall into one of two categories: separations or split-offs.

Separations

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

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

Split-Offs

A split-off is a division of a tract of Clean and Green land into two or more tracts, where one or more of those tracts do not meet the program's requirements. For example, if a landowner sells four acres of land that will not gross \$2,000 yearly of agricultural income for the buyer, this is a split-off because this four-acre tract could not be enrolled in Clean and Green. Generally, a split-off subjects both the split-off tract and the remaining tract to roll-back taxes. The landowner who conducts the split-off is the one liable for the payment of the roll-back taxes.

Exceptions/limitations on roll-back taxes

Each year, a landowner may split-off a tract of up to two acres for agricultural use, agricultural reserve use, forest reserve use, or for the construction of a residential dwelling to be occupied by the owner of the split-off tract. (In very limited circumstances, the owner may be able to split-off up to three acres for a residential lot.) A maximum of 10 percent of the original tract enrolled under Clean and Green, or 10 acres, whichever is less, can be split-off under this provision. For these transfers, roll-back taxes apply only to the split-off tract. The remaining portion of the land can remain enrolled in Clean and Green as long as it continues to meet the requirements of the program. If the remainder of the land no longer qualifies for the Clean and Green program, roll-back taxes are due on the entire parcel that was originally enrolled. Whenever a landowner is required to pay roll-back taxes, he has the option to terminate preferential assessment of the land with respect to which roll-back taxes are due.

A landowner may devote two acres or less of Clean and Green land for selling agricultural products or for a rural enterprise incidental to the operational unit. If two acres or fewer are used for the direct commercial sales of agriculturally related products or for a rural enterprise incidental to the operational unit, roll-back taxes are imposed only on the portion of the tract devoted to the commercial activity. The rural enterprise must not permanently render the surrounding land incapable of producing an agricultural commodity. Additionally, if the direct commercial sale of agriculturally related products occurs on no more than one-half acre, at least 50% of the products sold are produced on the tract, and no new utilities or buildings are constructed for the sale of the products or the rural enterprise, then no roll-back taxes will be due.

Clean and Green also allows special exceptions/limits on roll-back taxes for certain other non-agricultural uses:

- The owner of a tract enrolled in Clean and Green may lease a portion of the tract to be used for a wireless or cellular communication tower. However, certain conditions must be met: (1) the landowner may lease a maximum of one-half acre for this purpose; (2) the tract of land leased may not have more than one communication tower; (3) the tract of land must be accessible; and (4) the tract of land cannot be sold or subdivided. In this situation, the owner must pay roll-back taxes on the tract of land that is leased for the communication tower; however the remaining land continues to be eligible for the Clean and Green tax rate as long as it continues to meet the program's requirements.
- Land enrolled in Clean and Green may be leased for the exploration or removal of oil, gas, and coal bed methane, as well as for pipe storage yards. However, the portion of the tract's land that is actually devoted to oil, gas, or coal bed methane exploration and removal (such as well sites) will be subject to roll-back taxes. The remainder of the tract will continue to be eligible for the Clean and Green tax rate as long as it continues to meet the program's requirements.
- Similarly, land enrolled in Clean and Green may be leased for commercial wind operations. As with oil and gas, the portion of the tract's land actually devoted to wind power generation will be subject to roll-back taxes. The remainder of the tract will continue to be eligible for the Clean and Green tax rate as long as it continues to meet the program's requirements.
- Finally, land enrolled in Clean and Green may be conveyed to a non-profit corporation for use as a cemetery without triggering the payment of roll-back taxes. The remainder of the tract that is not transferred will continue to be eligible for Clean and Green as long as it continues to meet the program's requirements. Roll-back taxes may be forgiven if land is granted or donated to certain entities such as school districts or religious organizations.

It is important to note that land enrolled in Agricultural Use or Forest Reserve may be utilized for recreational activity such as hunting, fishing, hiking, and camping without subjecting the tract to roll-back taxes. However, these recreational activities must not render the land incapable of being immediately converted to agricultural use or timber production.

Civil Penalty for Clean and Green Violations

In addition to roll-back taxes and interest, counties may impose a civil penalty of not more than \$100 for each violation of the Clean and Green law. The County Board of Assessment Appeals must notify the landowner by certified mail of the nature of the violation, the amount of the civil penalty and the right to contest the civil penalty. If the landowner does not notify the county (in writing) of intent to contest the penalty within 10 days, the penalty becomes final.

Recent Legislative Amendments to Clean and Green

In recent years, the Pennsylvania General Assembly has enacted numerous amendments to the Clean and Green program. Since 2003, the amendments to Clean and Green are as follows:

- **Regular Session 2003-2004: Act No. 235** – providing for the definitions of "agritainment," "county commissioners" and "recreational activity"; and further providing for the definition of "forest reserve", for land devoted to agricultural use, agricultural reserve and/or forest reserve, for responsibilities of county assessor and for roll-back taxes and special circumstances.
- **Regular Session 2009-2010: Act No. 88** – further providing for definitions, for general responsibilities of county assessors, for split-off, separation or transfer and for roll-back taxes and special circumstances (addressing alternative energy systems; leasing for wireless service; exploration or extraction of gas, oil or coal bed methane).
- **Regular Session 2009-2010: Act No. 109** – further providing for definitions, for split-off, separation or transfer of land and for penalty for ineligible use; and providing for removal of land from preferential assessment (addressing alternative energy/wind).
- **Regular Session 2011-2012: Act No. 190** – further providing for definitions, for roll-back taxes and special circumstances and for appeals (addressing composting and direct commercial sales).

- **Regular Session 2011-2012: Act No. 34** – small noncoal surface mining (bluestone) on land enrolled in the state’s Clean and Green program treated the same as land used for wind energy or for oil, gas and coal bed methane exploration.
- **Regular Session 2011-2012: Act No. 35** – further providing tax calculation for utilization of land or conveyance of rights for exploration or extraction of gas, oil or coal bed methane.

Selected Case Law

Hydrusko v. County of Monroe, 699 A.2d 828 (Pa. Commw. Ct. 1997).

Landowner constructed a bed and breakfast on land enrolled in Clean and Green. The bed and breakfast was the landowner’s primary residence. The court held that a bed and breakfast was not an allowed use under Clean and Green and as a result, roll-back taxes were due on the entire property.

Godshall v. Montgomery County Board of Assessment Appeals, 42 D&C. 3d 191 (Montgomery Ct. Com. Pl. 1985).

The court held that the use land for a five day folk festival violated the requirements of the Clean and Green program. As a result, roll-back taxes were due on the entire property.

In re Appeal of Martin, 830 A.2d 616 (Pa. Commw. Ct. 2003).

Fourteen acres were separated from a sixty-three acre tract that was enrolled in Clean and Green. Within seven years of the separation, two acres were sold-off of the fourteen acre tract.

The court held that because the sale of the two acres resulted in an impermissible use under Clean and Green, the owner of the separated fourteen acres was required to pay seven years of roll-back taxes on the entire sixty-three acre tract originally enrolled in Clean and Green.

Wending Creek3656, LLC v. Potter County Board of Assessment Appeals, 732 A.2d 690 ((Pa. Commw. Ct. 2005).

Land was enrolled in the Clean and Green Program under forest reserve. The property consisted of forest land and an open field. In the open field, the landowner installed a pop-up sprinkler, a raised area for a golf green, and a manhole in preparation for construction of a proposed golf course. No further alterations were made.

The court stated that the alterations did not change the established character of the open field.

Therefore, the court held that a change in use had not occurred and that the landowner was not liable to pay roll-back taxes.

VIII. Agricultural Conservation Easements

[3 P.S. § 914.1][See Appendix E for text of statutory provision]

Background and Legislative Policy

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

In 1988, in an effort to reduce the loss of prime farmland to development, the Pennsylvania General Assembly created the Agricultural Conservation Easement Purchase program by amending the Agricultural Area Security Law (AASL). AASL defines an agricultural conservation easement as an “interest in land... which... represents the right to prevent the development or improvement of the land for any purpose other than agricultural production.” The first easements were purchased in 1989, and as of 2014, 491,423 acres have been enrolled in the program.

When a farmer sells an agricultural conservation easement, he sells the right to develop his land for nonagricultural purposes. The land continues to be his private property, and the farmer retains all privileges of land ownership except the privilege to sell the land for nonagricultural development or to develop the land himself for a nonagricultural purpose. Importantly, the farmer may expand his agricultural operation under the state program. In contrast, some private easement programs restrict all or most development of the agricultural enterprise.

Description of the Pennsylvania Agricultural Conservation Easement Purchase Program

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

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

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

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

- be located in an ASA of 500 acres or more;
- consist of at least 35 contiguous acres;
- contain at least 50 percent of soils that are within USDA classifications I, II, III or IV;
- contain at least 50 percent or 10 acres (whichever is greater) of harvested cropland, pasture or grazing land.

If the local government board does purchase a conservation easement, or a portion of an easement, cooperation with the county is still necessary in order to meet the requirements of AASL.

An agricultural conservation easement is permanent. An easement or a portion of an easement may be extinguished through condemnation after approval by the Agricultural Land Condemnation Approval Board. If an easement or a portion of an easement is extinguished, the commonwealth is to be compensated as measured by the current fair market value of that easement to Farmland Preservation.

AASL empowers both the commonwealth and individual counties to organize and administer conservation easement programs. A county is given considerable flexibility in administering its own program. It may provide recommendations to the state board concerning which easements to purchase or it may purchase those easements itself. A county may use state funds to purchase an easement, or it may raise county funds consistent with the Local Government Debt Act.

How Farms are Selected for Easement Purchase

Because government funds are limited, not every qualified farm is enrolled in the conservation easement program. Counties determine which eligible farms will be selected for easement purchase according to:

- (1) the quality of the farmlands subject to the proposed easements, including soil classification and soil productivity ratings;
- (2) the likelihood that the farmland may be converted to nonagricultural use, given the current market for development;
- (3) proximity to other conservation easements;
- (4) stewardship of the land and use of conservation practices (including consistency with nutrient management requirements); and
- (5) other local equitable and nondiscriminatory procedures.

Based on these criteria, each farm receives a ranking and is placed on a waiting list in order of that ranking. While more than 4,300 farms have been enrolled in the program, it is estimated that 2,000 eligible farms still remain on county waiting lists.

What Happens When a Farm is Selected for Easement Purchase?

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

The price for an agricultural conservation easement cannot exceed the difference between the nonagricultural value and the agricultural value. Payments for the easement may be made in either a lump sum, installments, or in any other lawful manner. If payment is to be made in installments, the landowner is entitled to interest. Pennsylvania's Installment Purchase Program allows the county to pay for the conservation easements with a municipal bond.

Once the government buys the easement, the property owner loses the right to develop the property for nonagricultural uses. In effect, the farmer has sold this right to the government. To identify whether any violations of the deed of easement have occurred, and if the required conservation plan is being followed, each preserved farm is to be physically inspected at least every two years by the county program administrator.

Pennsylvania's agricultural conservation easement program does allow limited exceptions to the statute's ban on development. The owner may grant leases to companies for the extraction of underground oil, gas, coal and noncoal minerals. Additionally, the landowner may grant rights-of-ways for utilities and the activities related to oil, gas, coal and noncoal mineral development. The owner may also construct structures for personal or employee residential use; though only one residential structure may be built, and the structure must be on fewer than two acres.

Selected Case Law

Lenzi v. Agric. Land Preservation Bd., 602 A.2d 396 (Pa. Commw. Ct. 1992).

The court held that an adversely affected neighboring property owner has standing to object a proposed agricultural easement.

Cook v. Pa. Dep't of Agric., 646 A.2d 598 (Pa. Commw. Ct. 1993).

Landowners sold to the state board and the county board jointly an agricultural conservation easement. Subsequently, the landowners sought permission to subdivide the property. The court held that when a landowner conveys an easement jointly to the state and county, both the State Agricultural Land Preservation Board and the county land preservation board must consent to a subdivision.

Appendix A – Pennsylvania Right to Farm Act

Protection of Agricultural Operations from Nuisance Suits and Ordinances

[3 P.S. §§ 951-957] [Current as of June 30, 2014]

§ 951. Legislative policy

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.

§ 952. Definitions

The following words and phrases when used in this act shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

“Agricultural commodity.” Any of the following transported or intended to be transported in commerce:

- (1) Agricultural, aquacultural, horticultural, floricultural, viticultural or dairy products.
- (2) Livestock and the products of livestock.
- (3) Ranch-raised fur-bearing animals and the products of ranch-raised fur-bearing animals.
- (4) The products of poultry or bee raising.
- (5) Forestry and forestry products.
- (6) Any products raised or produced on farms intended for human consumption and the processed or manufactured products of such products intended for human consumption.

“Municipality.” A county, city, borough, incorporated town, township or a general purpose unit of government as established by the act of April 13, 1972 (P.L. 184, No. 62),¹ known as the “Home Rule Charter and Optional Plans Law.”

“Normal agricultural operation.” The activities, practices, equipment and procedures that farmers adopt, use or engage in the production and preparation for market of poultry, livestock and their products and in the production, harvesting and preparation for market or use of agricultural, agronomic, horticultural, silvicultural and aquacultural crops and commodities and is:

- (1) not less than ten contiguous acres in area; or
- (2) less than ten contiguous acres in area but has an anticipated yearly gross income of at least \$10,000.

The term includes new activities, practices, equipment and procedures consistent with technological development within the agricultural industry. Use of equipment shall include machinery designed and used for agricultural operations, including, but not limited to, crop dryers, feed grinders, saw mills, hammer mills, refrigeration equipment, bins and related equipment used to store or prepare crops for marketing and those items of agricultural equipment and machinery defined by the act of December 12, 1994 (P.L. 944, No. 134), known as the Farm Safety and Occupational Health Act. Custom work shall be considered a normal farming practice.

§ 953. Limitation on local ordinances

(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.

§ 954. Limitation on public nuisances

(a) No nuisance action shall be brought against an agricultural operation which has lawfully been in operation for one year or more prior to the date of bringing such action, where the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation and are normal agricultural operations, or if the physical facilities of such agricultural operations are substantially expanded or substantially altered and the expanded or substantially altered facility has either: (1) been in operation for one year or more prior to the date of bringing such action, or (2) been addressed in a nutrient management plan approved prior to the commencement of such expanded or altered operation pursuant to section 6 of the act of May 20, 1993 (P.L. 12, No. 6), known as the Nutrient Management Act, and is otherwise in compliance therewith: Provided, however, That nothing herein shall in any way restrict or impede the authority of this State from protecting the public health, safety and welfare or the authority of a municipality to enforce State law.

(b) The provisions of this section shall not affect or defeat the right of any person, firm or corporation to recover damages for any injuries or damages sustained by them on account of any agricultural operation or any portion of an agricultural operation which is conducted in violation of any Federal, State or local statute or governmental regulation which applies to that agricultural operation or portion thereof.

§ 955. Water damages

The provisions of section 4 (3 P.S. § 954) shall not affect or defeat the right of any person, firm or corporation to recover damages for any injuries or damages sustained by him or it on account of any pollution of, or change in condition of, the waters of any stream or on account of any flooding of lands to any such person, firm or corporation.

§ 956. Saving clause

(a) This act shall not be construed to invalidate any contract made prior to its effective date nor shall it be construed to apply to any suit brought prior to its effective date.

(b) The provisions of this act shall not affect or defeat the intent of any federal, state or local statute or governmental regulation except nuisance ordinances as they apply to any normal agricultural operation.

§ 957. Severability

If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

Appendix B – Act 38 of 2005

Local Regulation

[3 Pa. Cons. Stat. §§ 311-318] [Current as of June 30, 2014]

§ 311. Scope

This chapter deals with local regulation of normal agricultural operations.

§ 312. Definitions

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Local government unit.” A political subdivision of the commonwealth.

“Normal agricultural operation.” As defined under section 2 of the act of June 10, 1982 (P.L. 454, No. 133), entitled “An act protecting agricultural operations from nuisance suits and ordinances under certain circumstances.”

“Unauthorized local ordinance.” An ordinance enacted or enforced by a local government unit which does any of the following:

- (1) Prohibits or limits a normal agricultural operation unless the local government unit:
 - (i) has expressed or implied authority under State law to adopt the ordinance; and
 - (ii) is not prohibited or preempted under State law from adopting the ordinance.
- (2) Restricts or limits the ownership structure of a normal agricultural operation.

§ 313. Certain local government unit actions prohibited

(a) Adoption and enforcement of unauthorized local ordinances.--A local government unit shall not adopt nor enforce an unauthorized local ordinance.

(b) Existing local ordinances.--This chapter shall apply to the enforcement of local ordinances existing on the effective date of this section and to the enactment or enforcement of local ordinances enacted on or after the effective date of this section.

(c) Construction.--Notwithstanding the provisions of this section, nothing in this chapter shall be construed to diminish, expand or otherwise affect the legislative or regulatory authority of local government units under State law, including the following:

- (1) Chapter 5 (relating to nutrient management and odor management).
- (2) The regulation, control or permitting procedures for the land application of class A or B biosolids.

§ 314. Duties of Attorney General

(a) Request for review.--An owner or operator of a normal agricultural operation may request the Attorney General to review a local ordinance believed to be an unauthorized local ordinance and to consider whether to bring legal action under section 315(a) (relating to right of action).

(b) Discretion.--The Attorney General has the discretion whether to bring an action under section 315(a).

(c) Response.--Within 120 days after receiving a request under subsection (a), the Attorney General shall advise the person that made the request whether or not the Attorney General will bring legal action under section 315(a). If the request under subsection (a) is in writing, the response shall be in writing.

(d) Consultation.--The secretary and the dean of the College of Agricultural Sciences at The Pennsylvania State University shall, upon request of the Attorney General, provide expert consultation regarding the nature of normal agricultural operations in this commonwealth.

§ 315. Right of action

(a) Attorney General action.--The Attorney General may bring an action against the local government unit in Commonwealth Court to invalidate the unauthorized local ordinance or enjoin the enforcement of the unauthorized local ordinance.

(b) Other party action.--Notwithstanding any provision of 42 Pa.C.S. Ch. 85 Subch. C (relating to actions against local parties), any person who is aggrieved by the enactment or enforcement of an unauthorized local ordinance may bring an action against the local government unit in Commonwealth Court to invalidate the unauthorized local ordinance or enjoin the enforcement of the unauthorized local ordinance.

§ 316. Commonwealth Court masters

(a) General rule.--The Commonwealth Court may promulgate rules for the selection and appointment of masters on a full-time or part-time basis for actions brought under section 315 (relating to right of action). A master shall be a member of the bar of this commonwealth. The number and compensation of masters shall be fixed by the Commonwealth Court and their compensation shall be paid by the commonwealth.

(b) Hearings before masters.--The Commonwealth Court may direct that hearings in actions brought under section 315 be conducted in the first instance by the master in the manner provided for in this subchapter.

(c) Recommendations of masters.--Upon the conclusion of a hearing before a master, the master shall transmit written findings and a recommendation for disposition to the president judge. Prompt written notice and copies of the findings and recommendations shall be given to the parties to the proceeding.

(d) Rehearing before president judge.--The findings and recommendations of the master shall become the findings and order of the Commonwealth Court upon written confirmation by the president judge. A rehearing may be ordered by the president judge at any time upon cause shown.

§ 317. Attorney fees and costs

In an action brought under section 315(b) (relating to right of action), the court may do any of the following:

- (1) If the court determines that the local government unit enacted or enforced an unauthorized local ordinance with negligent disregard of the limitation of authority established under State law, it may order the local government unit to pay the plaintiff reasonable attorney fees and other litigation costs incurred by the plaintiff in connection with the action.
- (2) If the court determines that the action brought by the plaintiff was frivolous or was brought without substantial justification in claiming that the local ordinance in question was unauthorized, it may order the plaintiff to pay the local government unit reasonable attorney fees and other litigation costs incurred by the local government unit in defending the action.

§ 318. Reports to General Assembly

The Attorney General shall provide to the chairman and the minority chairman of the Senate Committee on Agricultural and Rural Affairs and the chairman and minority chairman of the Agricultural and Rural Affairs Committee of the House of Representatives an annual report to include the following:

- (1) Information on how many reviews were requested, the nature of the complaints and the location of the ordinances cited.
- (2) Information on how many reviews were conducted.
- (3) Information on how many legal actions were brought by the Attorney General.
- (4) Information on the outcome of legal actions brought by the Attorney General.

Appendix C

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
EXECUTIVE ORDER

Subject: Agricultural Land Preservation Policy

Number: 2003-2

Date: March 20, 2003

By Direction of: Edward G. Rendell, Governor

WHEREAS, Pennsylvania is the most productive agricultural state in the Northeast with more than 50,000 farms and 7.7 million acres of crop and pasture land; and

WHEREAS, the commonwealth's abundant supply of agricultural land has sustained farm families, farm operations, and rural communities in Pennsylvania for generations; and

WHEREAS, Pennsylvania farmers are a vital component of the commonwealth's economy, a leading economic enterprise in the commonwealth, generating over \$4.5 billion annually in cash receipts, supporting a \$45 billion a year economic activity and employing nearly one-fifth of Pennsylvania's workforce; and

WHEREAS, increased land development and farm costs have caused Pennsylvania to lose more than 46 percent of its farmland since 1950; and

WHEREAS, Pennsylvania's future generations need to be assured a reliable source of food and fiber; and

WHEREAS, federal, state, and local governments, along with individual landowners, are valuable partners in the effort to identify and preserve critical farmlands; and

WHEREAS, from 1988 through 2003, the Commonwealth of Pennsylvania and participating counties have invested over \$510 million, and preserved almost 250,000 acres of agricultural land under the Agricultural Conservation Easement Purchase Program; and

WHEREAS, part of the commonwealth's continuing efforts is to conserve its farmland, assist farm operations, and preserve the quality of life in rural communities, it is in the best interest of all Pennsylvanians that the commonwealth continue its Agricultural Land Preservation Policy; and

WHEREAS, all state agencies under the Governor's jurisdiction should work together to preserve agricultural lands with a common definition of prime agricultural land and a common vision.

NOW, THEREFORE, be it resolved that I, Edward G. Rendell, Governor of the Commonwealth of Pennsylvania, by virtue of the authority vested in me by the Constitution of the Commonwealth of Pennsylvania and other laws, do hereby order and direct all agencies under my jurisdiction seek to mitigate and protect against the conversion of prime agricultural land and adopt policies herewith.

1. It shall be the policy of the commonwealth to protect through the administration of all agency programs and regulations, the commonwealth's "prime agricultural land" from irreversible conversion to uses that result in its loss as an environmental and essential food and fiber resource.
2. Commonwealth funds and commonwealth-administered federal funds shall not be used to encourage the conversion of "prime agricultural land" to other uses when feasible alternatives are available.
3. The "prime agricultural land" to be protected under this Executive Order shall include lands:
 - a. in active agricultural use (not including the growing timber);
 - b. lands devoted to active agricultural use the preceding three years; and
 - c. fall into at least one of the categories of agricultural land described below. State agencies shall provide protection to "prime agricultural land" under this Executive Order based upon the following levels of priority:
 - (1) Preserved Farmland (Highest Priority). Preserved farmland includes lands that fit into either of the following categories:
 - a) Farmland that is restricted to agricultural use by an agricultural conservation easement that has been recorded in the appropriate county land records office. Such easements include:
 - 1) easements owned by the commonwealth and/or county and township under the authority of Act 43 of 1981, as amended, the Agricultural Area Security Law, and
 - 2) easements owned by any other "qualified conservation organization," as that term is defined at Section 170 (h) (3) of the Internal Revenue Code. Qualified conservation organizations can include private nonprofit land conservation organizations, in addition to local governments and state governments.
 - b) Farmland that is restricted to agricultural use by deed restrictions that have been imposed under the authority of Act 442 of 1968 and that have been recorded in the appropriate county land records office.
 - (2) Farmland in Agricultural Security Areas (Second Highest Priority). Farmland approved by local government units after public review and comment according to the procedures in Act 43 of 1981, as amended.
 - (3) Farmland Enrolled in Act 319 of 1974, As Amended (Clean and Green) or Act 515 of 1996, As Amended (Third Highest Priority). Farmland enrolled for preferential tax assessments as land in "agriculture use" (Act 319) or "farmland" (Act 515).
 - (4) Farmland Planned for Agriculture Use and Subject to Effective Agricultural Zoning (Fourth Highest Priority). Farmland designated for agricultural use in a comprehensive plan and zoning ordinance adopted pursuant to Act 247 of 1968, as amended, the Municipalities Planning Code that delineates an area of agriculturally valuable soils and existing farms.
 - (5) Land Capability Classes I, II, III, and IV Farmland and Unique Farmland (Fifth Highest Priority). Land Capability Classes I, II, III, and IV Farmland is mapped by the U. S. Department of Agriculture (USDA) Natural Resources Conservation Service (formerly Soil Conservation Service) and published in county soil surveys. "Unique Farmland" is defined by the USDA Natural Resources Conservation Service as land other than prime farmland that is used for the production of specific high value food and fiber crops. The USDA Natural Resources Conservation Service has established a mechanism under which Unique Farmland is identified and mapped by interested county committees.
4. The Agricultural Land Condemnation Approval Board (ALCAB) shall consider this policy in its review of agricultural lands proposed for condemnation authorized under Act 100 of 1979, and Act 43 of 1981, as amended. Act 100 requires ALCAB's approval for the condemnation of agricultural lands for highways and solid and liquid waste disposal facilities. Act 43 of 1981, as amended, requires ALCAB's approval for condemnation of land in Agricultural Security Areas and land protected by Agricultural Conservation Easements.

5. All agencies under the Governor's jurisdiction shall amend their individual documents titled Guidance for Implementation of the Agricultural Land Preservation Policy within six months of the date of this order. The amended guidance document shall be submitted to the Governor's Policy Office and the Department of Agriculture. This guidance document shall include:
 - a. A listing of agency actions including land acquisitions, planning, construction, permit review, and financial assistance that may directly or indirectly impact prime agricultural lands.
 - b. A statement of agency guidelines and procedures, which have been or will be instituted to eliminate or minimize impacts detrimental to the continued use of prime agricultural lands.
 - c. A description of any changes in statutes or regulations needed to implement the intent of this order.
6. The following commonwealth agencies shall participate in an interagency committee, chaired by the Department of Agriculture, to solve mutual problems in meeting the objectives of this order:
 - a. Governor's Policy Office.
 - b. Governor's Budget Office.
 - c. Department of Agriculture.
 - d. Department of Community and Economic Development.
 - e. Department of Conservation and Natural Resources.
 - f. Department of Corrections.
 - g. Department of Education.
 - h. Department of Environmental Protection.
 - i. Department of General Services.
 - j. Department of Transportation.
 - k. Pennsylvania Infrastructure Investment Authority.
7. Cooperation by State Agencies. The Department of Agriculture shall be the lead agency for implementing this policy. All agencies under the Governor's jurisdiction shall fully support this agricultural land preservation policy and shall cooperate with the Secretary of Agriculture by providing assistance and information, as necessary, to carry out the function and responsibilities hereunder.
8. Effective Date. This order shall take effect immediately.
9. Rescission. Executive Order 1997-6.

Appendix D – Clean and Green

Assessment of Farmland and Forest Land

[72 P.S. §§ 5490.1-5490.13] [Current as of June 30, 2014]

§ 5490.1. Short title

This act shall be known and may be cited as the “Pennsylvania Farmland and Forest Land Assessment Act of 1974.”

§ 5490.2. Definitions

As used in this act, the following words and phrases shall have the meanings ascribed to them in this section unless the context obviously otherwise requires:

“Agricultural commodity.” Any of the following:

- (1) Agricultural, apicultural, aquacultural, horticultural, floricultural, silvicultural, viticultural and dairy products.
- (2) Pasture.
- (3) Livestock and the products thereof.
- (4) Ranch-raised furbearing animals and the products thereof.
- (5) Poultry and the products of poultry.
- (6) Products commonly raised or produced on farms which are:
 - (i) intended for human consumption; or
 - (ii) transported or intended to be transported in commerce.
- (7) Processed or manufactured products of products commonly raised or produced on farms which are:
 - (i) intended for human consumption; or
 - (ii) transported or intended to be transported in commerce.
- (8) Compost.

“Agricultural reserve.” Noncommercial open space lands used for outdoor recreation or the enjoyment of scenic or natural beauty and open to the public for such use, without charge or fee, on a nondiscriminatory basis. The term includes any land devoted to the development and operation of an alternative energy system, if a majority of the energy annually generated is utilized on the tract.

“Agricultural use.” Land which is used for the purpose of producing an agricultural commodity or is devoted to and meets 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. The term includes:

- (1) any farmstead land on the tract;
- (2) a woodlot;
- (3) any land which is rented to another person and used for the purpose of producing an agricultural commodity; and
- (4) any land devoted to the development and operation of an alternative energy system, if a majority of the energy annually generated is utilized on the tract.

“Agritainment.” Farm-related tourism or farm-related entertainment activities, which are permitted or authorized by a landowner in return for a fee on agricultural land for recreational or educational purposes. The term includes, but is not limited to, corn mazes, hay mazes, farm tours and hay rides. The term does not include activities authorized under section 8(d).

“Alternative energy.” Electricity, heat or other usable form of energy generated from a Tier I energy source.

“Alternative energy system.” A facility or energy system that utilizes a Tier I energy source to generate alternative energy. The term includes a facility or system that generates alternative energy for utilization onsite or for delivery of the energy generated to an energy distribution company or to an energy transmission system operated by a regional transmission organization.

“Capitalization rate.” The percentage rate used to convert income to value, as determined by the most recent five-year rolling average of fifteen-year fixed loan interest rates offered to landowners by the Federal Agricultural Mortgage Corporation or other similar Federal agricultural lending institution, adjusted to include the landowner's risk of investment and the effective tax rate.

“Compost.” Material resulting from the biological digestion of dead animals, animal waste or other biodegradable materials, at least fifty percent (50%) by volume of which is comprised of products commonly produced on farms.

“Contiguous tract.” All portions of one operational unit as described in the deed or deeds, whether or not the portions are divided by streams, public roads or bridges and whether or not the portions are described as multiple tax parcels, tracts, purparts or other property identifiers. The term includes supportive lands, such as unpaved field access roads, drainage areas, border strips, hedgerows, submerged lands, marshes, ponds and streams.

“Contributory value of farm building.” The value of the farm building as an allocated portion of the total fair market value assigned to the tract, irrespective of replacement cost of the building.

“County commissioners.” The board of county commissioners or other similar body in home rule charter counties.

“Curtilage.” The land surrounding a residential structure and farm building used for a yard, driveway, on-lot sewage system or access to any building on the tract.

“Department.” The Department of Agriculture of the commonwealth.

“Farm building.” A structure utilized to store, maintain or house farm implements, agricultural commodities or crops, livestock and livestock products, as defined in the act of June 30, 1981 (P.L. 128, No. 43), known as the “Agricultural Area Security Law.”

“Farmstead land.” Any curtilage and land situated under a residence, farm building or other building which supports a residence, including a residential garage or workshop.

“Forest reserve.” Land, ten acres or more, stocked by forest trees of any size and capable of producing timber or other wood products. The term includes any land devoted to the development and operation of an alternative energy system, if a majority of the energy annually generated is utilized on the tract.

“Income approach.” The method of valuation which uses a capitalization rate to convert annual net income to an estimate of present value. Present value is equal to the net annual return to land divided by the capitalization rate.

“Land use category.” Agricultural use, agricultural reserve or forest reserve.

“Net return to land.” Annual net income per acre after operating expenses are subtracted from gross income. Calculation of operating expenses shall not include interest or principal payments.

“Recreational activity.” Includes, but is not limited to:

- (1) Hunting.
- (2) Fishing.
- (3) Swimming.
- (4) Access for boating.
- (5) Animal riding.
- (6) Camping.
- (7) Picnicking.
- (8) Hiking.
- (9) Agritainment activities.
- (10) Operation of nonmotorized vehicles.
- (11) Viewing or exploring a site for aesthetic or historical benefit or for entertainment.
- (12) Operation of motorized vehicles if the operation is:
 - (i) over an existing lane and incidental to an activity described in paragraphs (1) through (10); or
 - (ii) necessary to remove an animal which has been hunted under paragraph (1).

“Roll-back tax.” The amount equal to the difference between the taxes paid or payable on the basis of the valuation and the assessment authorized hereunder and the taxes that would have been paid or payable had that land been valued, assessed and taxed as other land in the taxing district in the current tax year, the year of change, and in six of the previous tax years or the number of years of preferential assessment up to seven.

“Separation.” A division, by conveyance or other action of the owner, of lands devoted to agricultural use, agricultural reserve or forest reserve and preferentially assessed under the provisions of this act, into two or more tracts of land, the use of which continues to be agricultural use, agricultural reserve or forest reserve and all tracts so formed meet the requirements of section 3.

“Split-off.” A division, by conveyance or other action of the owner, of lands devoted to agricultural use, agricultural reserve or forest reserve and preferentially assessed under the provisions of this act into two or more tracts of land, the use of which on one or more of such tracts does not meet the requirements of section 3.

“Tier I energy source.” A Tier I alternative energy source, as defined in section 2 of the act of November 30, 2004 (P.L. 1672, No. 213), known as the “Alternative Energy Portfolio Standards Act.”

“Tract.” A lot, piece or parcel or land. The term does not refer to any precise dimension of land.

“USDA-ERS.” The United States Department of Agriculture-Economic Research Service.

“USDA-NRCS.” The United States Department of Agriculture-Natural Resources Conservation Service.

“Woodlot.” An area of less than ten acres, stocked by trees of any size and contiguous to or part of land in agricultural use or agricultural reserve.

§ 5490.3. Land devoted to agricultural use, agricultural reserve, and/or forest reserve

(a) For general property tax purposes, the value of land which is presently devoted to agricultural use, agricultural reserve, and/or forest reserve shall, on application of the owner and approval thereof as hereinafter provided, be that value which such land has for its particular land use category if it also meets the following conditions:

- (1) Land presently devoted to agricultural use: Such land was devoted to agricultural use the preceding three years and is not less than ten contiguous acres in area, including the farmstead land, or has an anticipated yearly gross income of at least two thousand dollars (\$2,000).
- (2) Land presently devoted to agricultural reserve: Such land is not less than ten contiguous acres in area, including the farmstead land.
- (3) Land presently devoted to forest reserve: Such land is not less than ten contiguous acres in area, including the farmstead land.

(a.1) The following apply to enrollment:

- (1) A landowner may enroll one tract or more than one contiguous tract for preferential assessment if the total area to be enrolled meets the minimum requirements for eligibility otherwise prescribed in this section. A landowner may not enroll less than the entire contiguous portion of land described in the deed applicable to a tract for which enrollment for preferential assessment is sought.
- (2) A tract of land which is used for agricultural use, agricultural reserve or forest reserve purposes may be enrolled for preferential assessment notwithstanding that the tract itself does not meet the minimum requirements for eligibility otherwise prescribed in this section if the tract is contiguous to a tract or tracts which have been previously enrolled by the landowner for preferential assessment.

(b), (c) Deleted.

(d) The county board of assessment appeals may not terminate preferential assessment of land previously determined by the board to qualify for preferential assessment without:

- (1) written notice under section 4(c.1) from the landowner expressing that preferential assessment is to be terminated; or
- (2) written notice under section 5(a)(2) from the county assessor to the landowner that preferential assessment is to be terminated, stating the reason for such termination and the opportunity for a hearing under section 9.

(e) A county assessor may not impose any requirements or conditions of eligibility for preferential assessment other than those otherwise prescribed in this section.

(f) A tract of land enrolled in either the agricultural use or forest reserve land use category and otherwise eligible for preferential assessment under this section shall not be deemed ineligible because the owner of the tract of land permits or authorizes or has permitted or authorized a recreational activity on the tract pursuant to section 8(f).

(g) (1) The county commissioners may adopt an ordinance to include farmstead land in the total use value for land in agricultural reserve. Any ordinance adopted pursuant to this subsection shall be applied uniformly to all land in agricultural reserve in the county.

- (2) The county commissioners may adopt an ordinance to include farmstead land in the total use value for land in forest reserve. Any ordinance adopted pursuant to this subsection shall be applied uniformly to all land in forest reserve in the county.

§ 5490.4. Applications for preferential assessments

(a) The county board for assessment appeals shall have the responsibility to accept and process applications for preferential assessments as prescribed by this act.

(a.1) A complete and accurate application for preferential assessment shall be accepted by a county board for assessment appeals or a county assessor if the provisions of section 3 are met. All applications for preferential assessment shall be processed in every county in a timely manner to become effective for the tax year of each taxing body which commences in the calendar year immediately following the application deadline.

(b) Each owner of land qualifying under this act as agricultural use, agricultural reserve and/or forest reserve, desiring preferential use assessment shall make application to the county board of assessment appeals of the county in which the land is located. Except as provided in subsection (b.1), such application must be submitted on or before June 1 of the year immediately preceding the tax year. Preferential assessment shall continue under the initial application or an application amended under subsection (f) until land use change takes place.

(b.1) In a year when a reassessment is implemented, the application must be submitted within thirty days of the final order of the county board for assessment appeals or by October 15 of the same year, whichever is sooner, regardless of whether or not judicial review of the order is sought.

(b.2) A landowner may apply for preferential assessment for any eligible land in any county, regardless of the landowner's county of residence and whether or not the residence of the landowner is situated on the land submitted for application.

(b.3) One application may include more than one land use category.

(c) There shall be uniform application forms for preferential assessment in all counties. Such application forms shall be developed by the department. In addition to the information which the department shall deem appropriate, the following statement shall be included:

“The applicant for preferential assessment hereby agrees, if his application is approved for preferential assessment, to submit thirty days'-notice to the county assessor of a proposed change in use of the land, a change in ownership of a portion of the land or of any type of division or conveyance of the land. The applicant for preferential assessment hereby acknowledges that, if his application is approved for preferential assessment, roll-back taxes under section 5.1 of the act may be due for a change in use of the land, a change in ownership of any portion of the land, or any type of division or conveyance of the land.”

(c.1) A landowner receiving preferential assessment under this act shall submit 30 days' notice to the county assessor of a proposed change in use of the land, a change in ownership of any portion of the land, or any type of division or conveyance of the land.

(d) The approved application for preferential assessment shall be recorded by the county board for assessment appeals in the office of the recorder of deeds for the county in a preferential assessment docket. A breach of the preferential assessment shall also be recorded by the county board for assessment appeals in the office of the recorder of deeds. The recorder shall charge a fee for the recordings in accordance with the acts relating to the imposition of fees by recorders of deeds. The recorder of deeds may not impose a fee unless an application for preferential assessment is approved by the county board for assessment appeals. The fee for recording the breach of the preferential assessment shall be added onto the total of the roll-back taxes due and shall be paid by the owner of the property.

(e) The county board for assessment appeals may impose a fee for processing applications for preferential assessment of no more than fifty dollars (\$50).

(f) Amendments to initial application shall be as follows:

- (1) When a landowner receiving preferential assessment changes a deed as a result of a split-off, separation, transfer or change of ownership, the county board for assessment appeals shall adjust the initial application to reflect the deed change. Such change shall be recorded in accordance with subsection (d). Recording fees shall be paid by the landowner and the county assessor may not impose any additional fees for amending an application.
- (2) Preferential assessment on land which continues to meet the provisions of section 3 shall not lapse and shall continue at the same rate previously established under section 4.

§ 5490.4a. Responsibilities of department

(a) By June 30, 1999, and by May 1 of each year thereafter, the department shall establish and provide to all county assessors county-specific use values for land in agricultural use and agricultural reserve in accordance with this section.

(b) When establishing county-specific use values for land in agricultural use and agricultural reserve, the department shall consult with the Department of Agricultural Economics and Rural Sociology of the College of Agricultural Sciences at The Pennsylvania State University, the Pennsylvania Agricultural Statistics Service, USDA-ERS, USDA-NRCS and other sources as the department deems appropriate and shall use the income approach for asset valuation.

(c) By June 30, 1999, and by May 1 of each year thereafter and in consultation with the Bureau of Forestry of the Department of Conservation and Natural Resources, the department shall establish and provide to all county assessors use values for land in forest reserve.

§ 5490.4b. Responsibilities of county assessor in establishing use values

(a) For each application for preferential assessment, the county assessor shall establish a total use value for land in agricultural use, including farmstead land, and for land in agricultural reserve by considering available evidence of the capability of the land for its particular use utilizing the USDA-NRCS Agricultural Land Capability Classification system and other information available from USDA- ERS, The Pennsylvania State University and the Pennsylvania Agricultural Statistics Service. Contributory value of farm buildings shall be used.

(b) For each application for preferential assessment, the county assessor shall establish a total use value for land in forest reserve by considering available evidence of capability of the land for its particular use. Contributory value of farm buildings shall be used.

(c) A county assessor may establish use values which are less than the values provided by the department under section 4.11, but lesser values shall be applied uniformly to all land in the county eligible for preferential assessment.

(d) For purposes of this section:

- (1) Farmstead land located within an area enrolled as agricultural use shall be assessed at agricultural use value.
- (2) Farmstead land located within an area enrolled as agricultural reserve or forest reserve shall be assessed at agricultural use value if either:
 - (i) a majority of land in the application for preferential assessment is enrolled as agricultural use land; or
 - (ii) in the circumstance that noncontiguous tracts of land are enrolled under one application, a majority of land on the tract where the farmstead land is located is enrolled as agricultural use land.

§ 5490.5. Responsibilities of the county assessor in general

(a) In addition to keeping such records as are now or hereafter required by law, it shall be the duty of the county assessor:

- (1) To indicate on property record cards, assessment rolls, and any other appropriate records, the fair market value, the normal assessed value, the land use category and the number of acres enrolled in each land use category, the use value under section 4.21 and the preferentially assessed value of each parcel granted preferential use assessments under this act; and annually, to record on such records all changes, if any, in the fair market value, the normal assessed value, the land use category and the number of acres enrolled in each land use category, the use value under section 4.2 and the preferentially assessed value of such properties.
- (2) To notify in writing the appropriate taxing bodies and landowner of any preferential assessments granted or terminated for each parcel, including the land use category and the number of acres enrolled in each land use category, within their taxing jurisdiction and of the reason for termination within five days of such change. There shall be a right of appeal as provided by section 9.2

- (3) To notify in writing the owner of a property that is preferentially assessed under this act, and the taxing bodies of the district in which such property is situated, of any changes in the fair market value, the normal assessed value, the land use category and the number of acres enrolled in each land use category, the use value under section 4.2 or the preferentially assessed value within five days of such change. There shall be a right of appeal as provided for in section 9.
- (4) To maintain a permanent record of the tax rates, in mills, levied by each of the taxing authorities in the county for each tax year.
- (5) By January 31 of each year, to report to the department for the previous year the number of acres enrolled in each land use category, the number of acres terminated in each land use category, the dollar amount received as roll-back taxes and the dollar amount received as interest on roll-back taxes.

(b) It shall be the duty of the county assessor, as set forth under section 8(c), to calculate roll-back taxes, give notice of the amounts due to landowners and interested parties and to file liens for unpaid roll-back taxes.

(b.1) With respect to the development of an alternative energy system which continues to meet the definition of agricultural use, agricultural reserve or forest reserve, the land devoted to that development and operation shall retain the same land use category for preferential assessment as was approved for the land before the devotion took place.

(c) The preferential use assessments granted under this act shall be considered by the State Tax Equalization Board in determining the market value of taxable real property for school subsidy purposes. The State Tax Equalization Board shall not reflect the individual school district market value decrease, as it relates to agricultural land, when certifying the Statewide market value to the Department of Education.

§ 5490.5a. Penalty for ineligible use

If a landowner removes land from a preferential assessment under section 8.1, if a landowner changes the use of any tract of land subject to preferential assessment under this act to one which is inconsistent with the provisions of section 3 or if for any other reason the land is removed from a land use category under section 3, except for a condemnation of the land, the land so removed and the entire tract of which it was a part shall be subject to roll-back taxes plus interest on each year's roll-back tax at the rate of six percent (6%) per annum. After the first seven years of preferential assessment, the roll-back tax shall apply to the seven most recent tax years.

§ 5490.5b. Civil penalties

(a) The county board for assessment appeals may assess a civil penalty of not more than one hundred dollars (\$100) upon a person for each violation of this act or any regulation promulgated under this act.

(b) If a civil penalty is assessed against a person under subsection (a), the county board for assessment appeals must notify the person by certified mail of the nature of the violation and the amount of the civil penalty and that the person may notify the county board for assessment appeals in writing within ten calendar days that the person wishes to contest the civil penalty. If, within ten calendar days from the receipt of that notification, the person does not notify the county board for assessment appeals of intent to contest the assessed penalty, the civil penalty shall become final.

(c) If timely notification of the intent to contest the civil penalty is given, the person contesting the civil penalty shall be provided with a hearing in accordance with 2 Pa.C.S. Ch. 5 Subch. B (relating to practice and procedure of local agencies) and Ch. 7 Subch. B (relating to judicial review of local agency action).

§ 5490.6. Split-off, separation or transfer; leasing for wireless service; utilization of land or conveyance of rights for exploration or extraction of gas, oil or coal bed methane; utilization of land for commercial alternative energy generation; death of landowner; temporary leases

(a) Repealed by 1998, Dec. 21, P.L. 1225, No. 156, § 7, imd. effective.

(a.1) (1) The split-off of a part of land which is subject to preferential assessment under this act shall subject the land so split off and the entire tract from which the land was split off to roll-back taxes as set forth in section 5.1, except as provided in this subsection. The landowner who conducts the split-off shall be liable for payment of roll-back taxes. If one of the following provisions apply, roll-back taxes under section 5.1 shall only be due as provided in this subsection:

- (i) The tract or tracts split off do not exceed two acres annually, except that a maximum of the minimum residential lot size requirement annually may be split off if the property is situated in a local government unit which requires a minimum residential lot size of two to three acres; the tract or tracts split off are used only for agricultural use, agricultural reserve or forest reserve or for the construction of a residential dwelling to be occupied by the person to whom the land is conveyed; and the total tract or tracts so split off do not exceed the lesser of ten acres or ten percent (10%) of the entire tract subject to preferential assessment.
 - (ii) The split-off occurs through a condemnation.
- (2) Each tract which has been split off under and meets the provisions of paragraph (1)(i) shall be subject to roll-back taxes for such a period of time as provided in section 5.1. The landowner who conducts the split-off shall be liable for payment of roll-back taxes, which shall only be due with respect to the split-off portion of land. If the owner of the tract which has been split off under paragraph (1)(i) subsequently changes the use of that land to an ineligible use, the owner of the original tract which continues to be eligible for preferential assessment shall not be liable for any roll-back taxes triggered as a result.
- (2.1) No roll-back taxes shall be due for a split-off described in paragraph (1)(ii).
- (3) The split-off of a tract of land which meets the provisions of paragraph (1) shall not invalidate the preferential assessment on any land retained by the landowner which continues to meet the provisions of section 3.
 - (4) Payment of roll-back taxes by the liable landowner shall not invalidate the preferential assessment on any land which continues to meet the provisions of section 3.
 - (5) Any person may bring an action in equity to enjoin use of the land inconsistent with the use provided in this subsection.
 - (6) Land which has been split off shall be deemed to be used for residential use, agricultural use, agricultural reserve or forest reserve unless it is demonstrated that the owner of the split-off parcel is actively using the tract in a manner which is inconsistent with residential use, agricultural use, agricultural reserve or forest reserve.

(a.2) The owner of land subject to preferential assessment may separate land. If a separation occurs, all tracts formed by the separation shall continue to receive preferential assessment unless, within seven years of the separation, there is a subsequent change of use to one inconsistent with the provisions of section 3. Such subsequent change in use shall subject the entire tract so separated to roll-back taxes as set forth in section 5.1. The landowner changing the use of the land to one inconsistent with the provisions of section 3 shall be liable for payment of roll-back taxes. After seven years from the date of the separation, only that portion of land which has had its use changed to one which is inconsistent with the provisions of section 3 shall be subject to roll-back taxes as set forth in section 5.1. Payment of roll-back taxes shall not invalidate the preferential assessment on any land which continues to meet the provisions of section 3.

(a.3) If ownership of land subject to a single application for preferential assessment is transferred to another landowner, the land shall continue to receive preferential assessment, and no roll-back taxes shall be due unless there is a subsequent change of use to one inconsistent with the provisions of section 3. The landowner changing the use of the land to one inconsistent with the provisions of section 3 shall be liable for payment of roll-back taxes. Payment of roll-back taxes shall not invalidate the preferential assessment on any land which continues to meet the provisions of section 3.

(b) Repealed by 1998, Dec. 21, P.L. 1225, No. 156, § 7, imd. effective.

(b.1) The owner of property subject to preferential assessment may lease land covered by the preferential assessment to be used for wireless or cellular telecommunication when the following conditions are satisfied:

- (1) The tract of land so leased does not exceed one-half of an acre.
- (2) The tract of land does not have more than one communication tower.
- (3) The tract of land is accessible.
- (4) The tract of land is not sold or subdivided. A lease of land shall not be considered a subdivision under this paragraph.

(b.2) Use of land under this section for wireless services other than wireless telecommunications may only qualify if such wireless services share a tower with a wireless telecommunications provider as provided for in subsection (b.1). Roll-back taxes shall be imposed upon the tract of land leased by the landowner for wireless or cellular telecommunications purposes and the fair market value of that tract of land shall be adjusted accordingly. The lease of such a tract of land shall not invalidate the preferential assessment of the land which is not so leased, and such land shall continue to be eligible for preferential assessment if it continues to meet the requirements of section 3.

(b.3) The wireless or cellular communications provider shall be solely responsible for obtaining required permits in connection with any construction on a tract of land which it leases pursuant to the provisions of this section for telecommunications purposes. No permit requested pursuant to this section shall be denied by a municipality for any reason other than failure to strictly comply with permit application procedures.

(c) Repealed by 1998, Dec. 21, P.L. 1225, No. 156, § 7, imd. effective.

(c.1) The following apply:

- (1) Land subject to preferential assessment may be leased or otherwise devoted to the exploration for and removal of gas and oil, including the extraction of coal bed methane, and the development of appurtenant facilities, including new roads and bridges, pipelines and other buildings or structures, related to exploration for and removal of gas and oil and the extraction of coal bed methane.
- (2) Portions of land subject to preferential assessment may be used for exploration for and removal of gas and oil, including the extraction of coal bed methane, and the development of appurtenant facilities, including new roads and bridges, pipelines and other buildings or structures, related to those activities.
- (3) Roll-back taxes shall be imposed upon those portions of land actually devoted to activities set forth in paragraph (2), excluding land devoted to subsurface transmission or gathering lines, which shall not be subject to roll-back tax. The portion of land subject to roll-back tax shall be the well site and land which is incapable of being immediately used for the agricultural use, agricultural reserve or forest reserve activities required under section 3, as determined when a well production report is first due to the Department of Environmental Protection as required by section 212 of the act of December 19, 1984 (P.L. 1140, No. 223), known as the "Oil and Gas Act," and 25 Pa. Code § 78.121 (relating to production reporting) or its subsequent version. A copy of this report shall be provided by the Department of Environmental Protection to the county assessor within ten days of its submission. The fair market value of the well site and land which is incapable of being immediately used for the agricultural use, agricultural reserve or forest reserve activities required under section 3 shall be adjusted retroactively to the date a permit was approved under section 201 of the "Oil and Gas Act." The tax calculated based on the adjusted fair market value shall be due and payable in the tax year immediately following the year in which a well production report is provided to the county assessor. Roll-back taxes shall become due upon the receipt of a well production report by the county assessor. The utilization of a portion of land for activities set forth in paragraph (2) shall not invalidate the preferential assessment of the land which is not so utilized and the land shall continue to receive preferential assessment if it continues to meet the requirements of section 3.
- (4) Notwithstanding paragraph (3), no roll-back tax shall be imposed upon a landowner for activities related to the exploration for or removal of oil or gas, including the extraction of coal bed methane, conducted by parties other than the landowner that hold the rights to conduct such activities pursuant to an instrument, conveyance or other vesting of the rights if the transfer of the rights occurred:
 - (i) before the land was enrolled for preferential assessment under this act; and
 - (ii) before the effective date of this section.

(c.2) (Reserved).

(c.3) The owner of property subject to preferential assessment may temporarily lease a portion of the land for pipe storage yards, provided, however, that roll-back taxes shall be imposed upon those portions of land subject to preferential assessment that are temporarily leased or otherwise devoted for pipe storage yards and the fair market value of those portions of land shall be adjusted accordingly. The imposition of roll-back taxes on portions of land temporarily leased or devoted for pipe storage yards shall not invalidate the preferential assessment of land which is not so leased or devoted, and that land shall continue to be eligible for preferential assessment if it continues to meet the requirements of section 3. Only one lease under this subsection is permitted to a landowner, and a copy of the lease shall be provided to the county assessor within ten days of its signing by the landowner. The lease shall not exceed two years and shall not be extended or renewed. Following the expiration of the lease, the land shall be restored to the original use which qualified it for preferential assessment.

(c.4) The following apply:

- (1) The owner of property subject to preferential assessment may lease or otherwise devote land subject to preferential assessment to small noncoal surface mining, as provided for under the act of December 19, 1984 (P.L. 1093, No. 219), known as the "Noncoal Surface Mining Conservation and Reclamation Act."
- (2) Roll-back taxes shall be imposed upon those portions of land leased or otherwise devoted to small noncoal surface mining and the fair market value of those portions of the land shall be adjusted accordingly. Roll-back taxes on those portions of the land shall not invalidate the preferential assessment of the land which is not leased or devoted to small noncoal surface mining and the land shall continue to be eligible for preferential assessment if it continues to meet the requirements of section 3.
- (3) Only one small noncoal surface mining permit may be active at any one time on land subject to a single application for preferential assessment.

(c.5) The following shall apply:

- (1) Portions of land subject to preferential assessment may be leased or otherwise devoted to a wind power generation system.
- (2) Roll-back taxes shall be imposed upon those portions of the land actually devoted by the landowner for wind power generation system purposes, and the fair market value of those portions of the land shall be adjusted accordingly. The wind power generation system shall include the foundation of the wind turbine and the area of the surface covered by appurtenant structures, including, but not limited to, new roads and bridges, transmission lines, substations and other buildings or structures related to the wind power generation system. The utilization of a portion of the land for a wind power generation system shall not invalidate the preferential assessment of land which is not so utilized, and such land shall continue to receive preferential assessment if it continues to meet the requirements of section 3. An owner who is subject to roll-back taxes under this subsection shall submit a notice of installation of a wind power generation system to the county assessor no later than thirty days following the commencement of electricity generation at the wind power generation system.

(d) Upon the death of a landowner receiving preferential assessment under this act, if land subject to preferential assessment is divided among the beneficiaries designated as class A for inheritance tax purposes and, as a result of such division, one or more tracts no longer meet the provisions of section 3, no roll-back tax shall be due on any of the land which previously qualified for preferential assessment. A subsequent change in the use of one such beneficiary's portion of the divided land shall not subject any other beneficiary's portion of the divided land to roll-back taxes. Roll-back taxes shall be due only in accordance with the provisions of section 5.1 on the tract held by the beneficiary who changes the use of any portion of his or her inheritance.

(e) Any change in use of land subject to preferential assessment shall be in compliance with the zoning ordinances of the local municipality, if in effect.

§ 5490.7. Contiguous land in more than one taxing district

Where contiguous land in agricultural use, agricultural reserve, and/or forest reserve in one ownership is located in more than one taxing district, compliance with the minimum area requirement under section 3 shall be determined on the basis of the total area of such land and not the area which is located in the particular taxing district

§ 5490.8. Roll-back taxes; special circumstances

(a) Deleted.

(b) Unpaid roll-back taxes shall be a lien upon the property collectible in the manner provided by law for the collection of delinquent taxes. Roll-back taxes shall become due on the date of change of use or on the date a well site restoration report is filed with the county assessor under section 6(c.1)(3), or with regard to a wind power generation system under section 6(c.2), on the date the notice of the installation of the system is received by the county assessor, or any other termination of preferential assessment and shall be paid by the owner of the land at the time of change in use, or any other termination of preferential assessment, to the county treasurer or to the tax claim bureau, as the case may be, whose responsibility it shall be to make proper distribution of the taxes to the taxing bodies wherein the property is located. Nothing in this section shall be construed to require the taxing body of a taxing district in which land enrolled in preferential use is situated to accept the roll-back taxes due and payable to that taxing district if the use of the land is changed for the purpose of granting or donating such land to:

- (1) a school district;
- (2) a municipality;
- (3) a county;
- (4) a volunteer fire company;
- (5) a volunteer ambulance service;
- (6) a not-for-profit corporation, tax exempt under section 501(c)(3) of the Internal Revenue Code of 1954 (68A Stat. 3, 26 U.S.C. § 501(c)(3)), provided that, prior to accepting ownership of the land, such corporation enters into an agreement with the municipality wherein the subject land is located guaranteeing that it will be used exclusively for recreational purposes, all of which shall be available to the general public free of charge. In the event the corporation changes the use of all or a portion of the land or charges admission or any other fee for the use or enjoyment of the facilities, the corporation shall immediately become liable for all roll-back taxes and accrued interest previously forgiven pursuant hereto; or
- (7) a religious organization for construction or regular use as a church, synagogue or other place of worship, including meeting facilities, parking facilities, housing facilities and other facilities which further the religious purposes of the organization.

(b.1) Any accrued interest on roll-back taxes shall become due on the date of change of use or any other termination of preferential assessment and shall be paid by the landowner liable for roll-back taxes, at the time of change in use or any other termination of preferential assessment, to the county treasurer. The county treasurer shall make proper distribution of the interest to the county commissioners and the county comptroller, as the case may be, who shall properly designate all of the interest for use by the county board of the eligible county under the act of June 30, 1981 (P.L. 128, No. 43), known as the "Agricultural Area Security Law." The interest shall be in addition to other local money appropriated by an eligible county for the purchase of agricultural conservation easements under section 14.1(h) of the "Agricultural Area Security Law." If the county where the interest is collected is not an eligible county under the "Agricultural Area Security Law," the county treasurer shall forward all of the interest to the Agricultural Conservation Easement Purchase Fund.

(b.2) Interest on roll-back taxes distributed in accordance with subsection (b.1) to the county commissioners and the county comptroller, as the case may be, for use by the county board of the eligible county under the "Agricultural Area

Security Law” shall be segregated into a special roll-back account, and, notwithstanding any other provisions of the “Agricultural Area Security Law,” the eligible county board in distributing moneys from the special roll-back account shall, in its discretion, give priority to the purchase of agricultural conservation easements from agricultural security areas located within the municipal corporation in which the land subject to the roll-back taxes is situate.

(c) Within five working days after receipt of a notice from the owner of a property, which is preferentially assessed, of a proposed change in the use of the land, to one not meeting the requirements of section 3, or a split-off of a portion of the land, the county assessor shall:

- (1) Calculate by years the total of all roll-back taxes due at the time of change and shall notify the property owner of such amounts. In the case of a conveyance of all or part of said land, he shall notify the prospective buyer, if known, of such amounts.
- (2) With respect to the roll-back taxes for the current year, he shall notify the taxing bodies of the district in which the property is located of the additional amount of assessment upon which taxes shall be levied and collected. In the case of county property taxes, he shall notify the tax collector of the appropriate district of additional county tax to be collected.
- (3) With respect to roll-back taxes for years prior to the current year which the assessor has determined to be due, he shall file a claim for such amounts with the tax claim bureau or the county treasurer, as the case may be, which upon said filing shall constitute a lien having the same force and effect as if filed by the taxing bodies.

(d) (1) A landowner may apply a maximum of two acres of a tract of land subject to preferential assessment toward direct commercial sales of agriculturally related products and activities or for a rural enterprise incidental to the operational unit without subjecting the entire tract to roll-back taxes, provided that:

- (i) The commercial activity is owned and operated by the landowner or his beneficiaries who are designated as class A for inheritance tax purposes.
 - (ii) An assessment of the inventory of the goods involved verifies that it is owned by the landowner or his beneficiaries.
 - (iii) The rural enterprise does not permanently render the land incapable of producing an agricultural commodity.
- (2) Roll-back taxes shall be imposed upon that portion of the tract where the commercial activity takes place and the fair market value of that tract shall be adjusted accordingly.
- (3) Notwithstanding the provisions of paragraph (2), no roll-back taxes shall be due and no breach of a preferential assessment shall be deemed to have occurred if the direct commercial sales of agriculturally related products:
- (i) Take place on no more than one half of an acre;
 - (ii) Are of at least fifty percent (50%) of products produced on the tract; and
 - (iii) Require no new utilities or buildings.

(e) (1) Notwithstanding the provisions of subsection (a), no roll-back taxes shall be due and no breach of a preferential assessment shall be deemed to have occurred if:

- (i) the land transferred from a preferential assessment is conveyed to a nonprofit corporation for use as a cemetery and at least ten acres of land remain in the preferential use after removal; or
- (iii) the land transferred from a preferential assessment, or an easement or a right-of-way in that land, is conveyed to a nonprofit corporation and:
 - (A) the subject land does not exceed twenty feet in width;
 - (B) the subject land is used as a trail for nonmotorized passive recreational use;

- (C) the subject land is available to the public for use without charge; and
- (D) at least ten acres of land remain in preferential assessment after conveyance.

- (2) Any acquisition or subsequent resale or change in use of any of the removed land for use other than as a cemetery under paragraph (1)(i) or as a trail under paragraph (1)(iii) shall subject the nonprofit corporation to payment of roll-back taxes and interest due on the entire tract of land removed.

(f) No roll-back taxes shall be due and no breach of preferential assessment shall be deemed to have occurred if the owner of a tract of land that is subject to preferential assessment permits or authorizes or has permitted or authorized to be performed on the tract or any portion of the tract any recreational activity regardless of whether or not the landowner imposes a fee or charge to perform the recreational activity provided that:

- (1) the tract of land in question is enrolled in either the agricultural use or forest reserve land use categories; and
- (2) the recreational activity performed does not render the land incapable of being immediately converted to agricultural use on agricultural use land and does not permanently render the land incapable of producing timber or other wood products on forest reserve land.

§ 5490.8a. Removal of land from preferential assessment

(a) A landowner receiving preferential assessment under this act may remove land from preferential assessment if:

- (1) the landowner notifies in writing the county assessor by June 1 of the year immediately preceding the tax year for which the removal is requested;
- (2) the entire tract or tracts enrolled on a single application for preferential assessment is removed from preferential assessment; and
- (3) the landowner pays rollback taxes on the entire tract or tracts as provided for in section 5.1.

(b) Land removed from preferential assessment under this section shall not be eligible to be subsequently reenrolled in preferential assessment by the same landowner.

(c) Nothing in this section shall be construed to prohibit a landowner whose land was terminated from preferential assessment under other sections of this act from reenrolling the land in preferential assessment.

§ 5490.9. Appeals

(a) The owner of a property which is subject to preferential assessment or for which preferential assessment is sought, and the political subdivision in which said property is situated, shall have the right of appeal in accordance with existing law.

(a.1) In the event a change relating to composting in this act becomes effective during an active appeal and is applicable to the active appeal, no roll-back tax shall be due or collected and the roll-back tax shall be reimbursed if already paid for such activities to which roll-back taxes were applied.

(b) When roll-back taxes for prior years are to be collected as provided above, no person and no political subdivision shall be permitted to question any assessment of any prior year before the Board of Assessment Appeals unless a timely appeal was filed pursuant to the requirements of the acts of Assembly relating to assessment appeals during the time period for which appeals for that year would normally be taken.

§ 5490.10. Renegotiation of open space agreements

Any county which has covenanted with landowners of farm or forest land as to assessments and open space use of such land under the act of January 13, 1966 (1965 P.L. 1292, No. 515), entitled "An act enabling certain counties of the commonwealth to covenant with land owners for preservation of land in farm, forest, water supply, or open space uses," may, at the landowner's option renegotiate such agreements so as to make them conform to the provisions of this act as to preferential assessments.

§ 5490.11. Rules and regulations

The department shall promulgate rules and regulations necessary to promote the efficient, uniform, Statewide administration of the act.

§ 5490.12. Applicability

This act shall apply to all counties of the Commonwealth of Pennsylvania.

§ 5490.13. Severability; inconsistent laws

If any section, provision, or clause of this act shall be declared invalid or inapplicable to any persons or circumstances, such action shall not be construed to affect the rest of the act or circumstances not so affected. All laws or portions of laws inconsistent with the policy and provisions of this act are hereby repealed to that extent.

Appendix E

§ 914.1. Purchase of agricultural conservation easements

(a) State Agricultural Land Preservation Board.--The Department of Agriculture and the State Agricultural Land Preservation Board shall administer pursuant to this section a program for the purchase of agricultural conservation easements by the commonwealth.

- (1) There is established within the Department of Agriculture as a departmental board the State Agricultural Land Preservation Board. The State board shall consist of 17 members.
 - (i) There shall be eight voting ex officio members of the State board: the Secretary of Agriculture, who shall serve as the board chairman; the Secretary of Community and Economic Development, or his designee; the Secretary of Environmental Protection, or his designee; the Chairman and the Minority Chairman of the House Agriculture and Rural Affairs Committee, or their designees; the Chairman and the Minority Chairman of the Senate Agriculture and Rural Affairs Committee, or their designees; and the Dean of the College of Agricultural Sciences of The Pennsylvania State University, or his designee.
 - (ii) Five members shall be appointed by the Governor. One member shall be a current member of the governing body of a county, one member shall be a person who is recognized as having significant knowledge in agricultural fiscal and financial matters, one member shall be an active resident farmer of this commonwealth, one member shall be a residential, commercial or industrial building contractor, and one member shall be a current member of a governing body. Initially, two members shall be appointed for a term of four years, two members shall be appointed for a term of three years and one member shall be appointed for a term of two years. Thereafter, the terms of all members appointed herein shall be four years. The term of a person appointed to replace another member whose term has not expired shall be only the unexpired portion of that term. Members may be reappointed to successive terms.
 - (iii) One member each shall be appointed by the Speaker of the House of Representatives, the Minority Leader of the House of Representatives, the President pro tempore of the Senate and the Minority Leader of the Senate, who shall, at the time of appointment, be resident farm owners and operators of at least one commercial farm in this commonwealth. The initial term of the appointee of the President pro tempore of the Senate shall be four years, the initial term of the appointee of the Speaker of the House of Representatives shall be three years, the initial term of the appointee of the Minority Leader of the Senate shall be two years and the initial term of the appointee of the Minority Leader of the House of Representatives shall be one year. Thereafter, the terms of all appointees shall be four years. An appointment made to fill an unexpired term shall be only for the duration of the unexpired term. Members may be reappointed to successive terms.
- (2) Nine members shall constitute a quorum for purposes of conducting meetings and official actions pursuant to authority given to the State board under this act.
- (3) 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: Provided, That the board shall have the power and authority to promulgate, adopt, publish and use guidelines for the implementation of this act until September 30, 1990, or the effective date of final rules and regulations, whichever first occurs, pending adoption of final rules and regulations. Guidelines proposed under the authority of this section shall be subject to review by the General Counsel and the Attorney General in the manner provided for the review of proposed rules and regulations pursuant to the act of October 15, 1980 (P.L. 950, No. 164), known as the "Commonwealth Attorneys Act," but shall not be subject to review pursuant to the act of June 25, 1982 (P.L. 633, No. 181), known as the "Regulatory Review Act."
 - (ii) To adopt rules of procedure and bylaws 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 as provided in subparagraph (iii).
 - (v) To purchase in the name of the commonwealth agricultural conservation easements if recommended by a county and approved by the State board as provided in subparagraph (iii).
 - (vi) To purchase agricultural conservation easements jointly with a county, or jointly with a county and a local government unit, or jointly with a county and an eligible nonprofit entity, or jointly with a county, a local government unit and an eligible nonprofit entity, if recommended by a county and approved by the State board as provided in subparagraph (iii).
 - (vii) To allocate State moneys among counties for the purchase of agricultural conservation easements, in accordance with provisions of subsection (g).
 - (viii) To establish and maintain a central repository of records which shall contain records of county programs for purchasing agricultural conservation easements, records of agricultural conservation easements purchased by local government units, by local government units and counties, by local government units and the commonwealth and by eligible nonprofit entities in accordance with subsection (b.2) and records of agricultural conservation easements purchased by the commonwealth. All records indicating the purchase of agricultural conservation easements shall refer to and describe the farm land subject to the agricultural conservation easement.
 - (ix) To record agricultural conservation easements purchased by the commonwealth or jointly owned, in the office of the recorder of deeds of the county wherein the agricultural conservation easements are located.
 - (x) To establish and publish the standards, criteria and requirements necessary for State board approval of county programs for purchasing agricultural conservation easements.
 - (xi) To review and certify and approve, or disapprove, county programs for purchasing agricultural conservation easements.
 - (xii) To exercise other discretionary powers as may be necessary and appropriate for the exercise and performance of its duties, powers and responsibilities under this act.
 - (xiii) To determine an annual easement purchase threshold.
 - (xiv) To review and approve or disapprove for recertification each county program for the purchase of agricultural conservation easements.
 - (xv) To authorize the development of a guidebook defining all technical elements necessary for a complete application for purchase of an agricultural conservation easement. Such guidebook shall include model formats of the specific components of applications. Guidebooks shall be distributed to every county with an approved program for purchasing agricultural conservation easements.
- (4) The State board is authorized to:
- (i) Take the actions necessary to qualify for Federal guarantees and interest rate assistance for agricultural easement purchase loans under Chapter 2 of the Food, Agriculture, Conservation, and Trade Act of 1990 (Public Law 101-624, 104 Stat. 3616).
 - (ii) Segregate from the Agricultural Conservation Easement Purchase Fund, into a Farms for the Future Trust Fund, funds necessary to qualify for the maximum amount of funding made available under the Federal act. There shall be deposited in this trust fund, and are appropriated for the purposes of this act, any interest rate assistance subsidies provided by participation in the Federal program. The State board is authorized to deposit interest accruing on moneys in the trust fund, in excess of the amounts needed to satisfy interest payments, in the Agricultural Conservation Easement Purchase Fund.

(b) County programs.--After the establishment of an agricultural security area by the governing body, the county governing body may authorize a program to be administered by the county board for purchasing agricultural conservation easements from landowners whose land is either within an agricultural security area or in compliance with the criteria set forth in paragraph (2)(i).

- (1) The county board shall be composed of five, seven or nine members appointed by the county governing body. The chairman of the county governing body shall designate annually one member of the county board to serve as chairman of the county board. County board members shall be appointed from among the following groups: the number of farmers shall constitute one less than a majority of the board; one member shall be a current member of the governing body of a township or borough located within the county; one member shall be a commercial, industrial or residential building contractor; and the other members shall be selected at the pleasure of the county governing body. The county board membership of the member of the governing body of a township or borough located within the county shall be deemed vacant upon vacancy in, or the expiration of the term of, the township or borough office to which the member was elected. The term of the initial farmer appointees shall be three years, the initial term of the current member of the governing body of a township or borough shall be two years and the initial term of all other members shall be one year. Thereafter, the term of all members shall be three years.
- (2) It shall be the duty and responsibility of the county board to exercise the following powers:
 - (i) (A) To adopt rules and regulations for the administration of a county program for the purchase of agricultural conservation easements in accordance with the provisions of this act, including, but not limited to, rules and regulations governing the submission of applications by landowners, establishing standards and procedures for the appraisal of property eligible for purchase as an agricultural conservation easement, establishing minimum criteria for eligibility of viable agricultural land a portion of which is used for commercial equine activity and establishing standards and procedures for the selection or purchase of agricultural conservation easements.
 - (A.1) Prior to exercising authority under subsection (b.2), to include in such rules and regulations, standards and procedures for the participation with eligible nonprofit entities in the purchase of agricultural conservation easements as described in subsection (b.2).
 - (B) To include in such rules and regulations, standards and procedures for the selection or purchase of agricultural conservation easements, in accordance with subsection (b.2), by the county solely or jointly with the commonwealth, a local government unit, an eligible nonprofit entity or any combination of these, on that portion of a parcel which is not within an agricultural security area if all of the following criteria are complied with:
 - (I) The land is part of a parcel of farm land which is bisected by the dividing line between two local government units.
 - (II) The majority of the farm's viable agricultural land is located within an existing agricultural security area. Upon purchase of an easement covering the portion of the parcel which is not located within an agricultural security area, that portion of the parcel shall immediately become part of the previously established agricultural security area which contains a majority of the farm's viable agricultural land. The governing body which created the agricultural security area which contains a majority of the farm's viable agricultural land shall be responsible for the recording, filing and notification outlined in section 8(d) and (g) concerning land added to the agricultural security area pursuant to this clause.
 - (C) To include in such rules and regulations, standards and procedures for the selection or purchase of agricultural conservation easements, in accordance with subsection (b.2), by the county solely or jointly with the commonwealth, a local government unit, an eligible nonprofit entity or any combination of these, on that portion of a parcel located in an adjoining county if all of the following criteria are complied with:
 - (I) The land is part of a parcel of farm land which is bisected by the dividing line between the purchasing county and the adjoining county.

- (II) Either a mansion house is located on that portion of the parcel which is within the purchasing county or the dividing line between the counties bisects the mansion house and the owner of the parcel has chosen the purchasing county as the situs of assessment for tax purposes or, if there is no mansion house on the parcel, the majority of the farm's viable agricultural land is located in the purchasing county.
 - (III) The portion of the parcel located in the purchasing county is within an agricultural security area. Upon purchase of an easement by the purchasing county covering that portion of the parcel located in the adjoining county, the portion of the parcel located in the adjoining county shall immediately become part of the agricultural security area previously established in the purchasing county. The governing body which created the agricultural security area in the purchasing county shall be responsible for the recording, filing and notification outlined in section 8(d) and (g) concerning land added to the agricultural security area pursuant to this clause.
- (ii) To adopt rules of procedure and bylaws governing the operation of the county board and the conduct of its meetings.
 - (iii) To execute agreements to purchase agricultural conservation easements in the name of the county.
 - (iv) To purchase in the name of the county agricultural conservation easements either within agricultural security areas or pursuant to the criteria set forth in subparagraph (i).
 - (v) To use moneys appropriated by the county governing body from the county general fund to hire staff and administer the county program.
 - (vi) To use moneys appropriated by the county governing body from the county general fund or the proceeds of indebtedness incurred by the county and approved by the county governing body for the purchase of agricultural conservation easements either within agricultural security areas or pursuant to the criteria set forth in subparagraph (i).
 - (vii) To establish and maintain a repository of records of farm lands which are subject to agricultural conservation easements purchased by the county.
 - (viii) To record agricultural conservation easements purchased by the county in the office of the recorder of deeds of the county wherein the agricultural conservation easements are located and to submit to the State board a certified copy of agricultural conservation easements within 30 days after recording. The county board shall attach to all certified copies of the agricultural conservation easements submitted to the State board a description of the farm land subject to the agricultural conservation easements.
 - (ix) To submit to the State board for review the initial county program and any proposed revisions to approved county programs for purchasing agricultural conservation easements.
 - (x) To recommend to the State board for purchase by the commonwealth agricultural conservation easements within agricultural security areas located within the county.
 - (xi) To recommend to the State board the purchase of agricultural conservation easements by the commonwealth and the county jointly, or jointly by the commonwealth, the county and a local government unit, or jointly by the commonwealth, the county and an eligible nonprofit entity, or jointly by the commonwealth, the county, a local government unit and an eligible nonprofit entity.
 - (xii) To purchase agricultural conservation easements jointly with the commonwealth, or jointly with the commonwealth, the county and a local government unit, or jointly with the commonwealth, the county and an eligible nonprofit entity, or jointly with the commonwealth, the county, a local government unit and an eligible nonprofit entity.
 - (xiii) To exercise other powers which are necessary and appropriate for the exercise and performance of its duties, powers and responsibilities under this act.
 - (xiv) To submit to the State board applications for agricultural conservation easements in accordance with the guidebook authorized under subsection (a)(3)(xv).

- (xv) To exercise primary enforcement authority with respect to the following:
 - (A) Agricultural conservation easements within the county.
 - (B) Agricultural conservation easements acquired pursuant to the criteria set forth in subparagraph (i), including any portion of such an agricultural conservation easement extending into an adjoining county.
- (xvi) Notwithstanding any other permitted or required use of accrued interest distributed in accordance with section 8(b.1) and (b.2) of the act of December 19, 1974 (P.L. 973, No. 319), known as the "Pennsylvania Farmland and Forest Land Assessment Act of 1974," to use any portion of that accrued interest in the following manner:
 - (A) To develop conservation plans.
 - (B) To monitor and enforce agricultural conservation easements, including the payment of legal costs associated with defending an agricultural conservation easement.
- (xvii) To inspect all agricultural conservation easements within the county on at least a biennial basis to determine compliance with the applicable deed of easement. The following shall apply to inspections:
 - (A) The first inspection shall be completed within one year of the date of easement sale.
 - (B) A landowner shall be notified of an inspection, and the inspection shall be conducted on a date and time agreeable to the county and the landowner.
 - (C) Within ten days of conducting an inspection, the county board shall prepare a written inspection report, which shall be provided to the landowner. If a violation is discovered, the report shall be provided to the landowner by certified mail.
 - (D) The county board and the State board may inspect the restricted land, jointly or severally, without prior notice if there is reasonable cause to believe that any provision of the deed of easement has been or is being violated.
- (3) The county may incur debt pursuant to the act of July 12, 1972 (P.L. 781, No. 185), known as the "Local Government Unit Debt Act," for the purchase of agricultural conservation easements.
- (4) County programs for the purchase of agricultural conservation easements originally approved by the State board on or before December 31, 1994, shall be reviewed by the State board and approved or disapproved for recertification by December 31, 1996, and every seventh year thereafter. County programs for the purchase of agricultural conservation easements originally approved by the State board after December 31, 1994, shall be reviewed by the State board and approved or disapproved for recertification by December 31 of the seventh year after the date of original approval and every seventh year thereafter. On or before December 31, 1995, and the end of such other seven-year periods thereafter, the county board shall submit to the State board any proposed revisions to the county program for the purchase of agricultural conservation easements. County programs subject to State board review and recertification under this paragraph shall be approved or disapproved in accordance with the requirements of subsection (d), provided that the State board shall give priority to determining that county programs are in compliance with applicable provisions of law, regulations and guidelines. After December 31, 1996, and the end of such other seven-year periods, the State board shall not approve a county board's recommendation to purchase until the county program has been approved for recertification, provided that the State board may postpone the deadline for recertification of any county's program by up to 12 months and, during such period of postponement, may approve a county board's recommendation to purchase.
- (5) The governing body of the county may authorize the establishment of a program for the purchase of agricultural conservation easements on an installment or other deferred basis. The obligation of the county to make payment on an installment or other deferred basis shall not be subject to the requirements of section 602(b) or (c) of the "Local Government Unit Debt Act."

(b.1) Local government unit participation.--Any local government unit that has created an agricultural security area may participate along with an eligible county and the commonwealth, and an eligible nonprofit entity, in the preservation of farmland through the purchase of agricultural conservation easements.

- (1) The local government unit, in conjunction with a county board, may participate with the State board in the purchase of agricultural conservation easements.
- (2) The local government unit shall recommend to the county board the purchase of agricultural conservation easements by the eligible county and the local government unit as joint ownership.
- (3) The local government unit shall recommend to the county board the purchase of agricultural conservation easements by the local government unit and the commonwealth as joint ownership.
- (4) The local government unit may purchase an agricultural conservation easement, provided that all of the following apply:
 - (i) The agricultural conservation easement is located within an agricultural security area of at least 500 acres or the easement purchase is a joint purchase with either a county or both a county and the commonwealth pursuant to the criteria set forth in subsection (b)(2)(i).
 - (ii) The deed of agricultural conservation easement is at least as restrictive as the deed of agricultural conservation easement prescribed by the State board for agricultural conservation easements purchased by the commonwealth.
 - (iii) The local government unit shall participate with the county board in complying with paragraph (5) for recording any agricultural conservation easement purchased by the local government unit.
- (5) The county board shall be responsible to record agricultural conservation easements where a local government unit is a party to the purchase of the easement. The easement shall be recorded by the county board in the office of the recorder of deeds of the county wherein the agricultural conservation easements are located. The county board shall submit to the State board a certified copy of agricultural conservation easements within 30 days after recording. The county board shall attach to all certified copies of the agricultural conservation easements submitted to the State board a description of the farmland subject to the agricultural conservation easements.
- (6) The local government unit may incur debt pursuant to 53 Pa.C.S. Pt. VII Subpt. B (relating to indebtedness and borrowing) for the purchase of agricultural conservation easements.

(b.2) Eligible nonprofit entity participation.--An eligible nonprofit entity may participate, along with an eligible county, the commonwealth and a local government unit eligible to participate under subsection (b.1), in the preservation of farmland through the purchase of agricultural conservation easements.

- (1) The eligible nonprofit entity may purchase an agricultural conservation easement if all of the following apply:
 - (i) The agricultural conservation easement is a joint purchase with the county and may include the commonwealth or a local government unit, or both.
 - (ii) The deed of agricultural conservation easement is as prescribed by the State board for agricultural conservation easements purchased by the commonwealth.
- (2) The county board shall be responsible to record agricultural conservation easements where an eligible nonprofit entity is a party to the purchase of the easement. The easement shall be recorded by the county board in the office of the recorder of deeds of the county wherein the agricultural conservation easements are located. The county board shall submit to the State board a certified copy of agricultural conservation easements within 30 days after recording. The county board shall attach to all certified copies of the agricultural conservation easements submitted to the State board a description of the farmland subject to the agricultural conservation easements.

(c) Restrictions and limitations.--An agricultural conservation easement shall be subject to the following terms, conditions, restrictions and limitations:

- (1) The term of an agricultural conservation easement shall be perpetual.
- (2), (3) Deleted by 2011, July 7, P.L. 247, No. 44, § 2, effective in 60 days [Sept. 6, 2011].
- (4) Instruments and documents for the purchase, sale and conveyance of agricultural conservation easements shall be approved by the State board or the county board, as the case may be, prior to execution and delivery. Proper releases from mortgage holders and lienholders must be obtained and executed to insure that all agricultural conservation easements are purchased free and clear of all encumbrances.
- (5) Whenever any public entity, authority or political subdivision exercises the power of eminent domain and condemns land subject to an agricultural conservation easement, the condemnor shall provide just compensation to the owner of the land in fee and to the owner of the easement as follows:
 - (i) The owner of the land in fee shall be paid the full value which would have been payable to the owner but for the existence of an agricultural conservation easement less the value of the agricultural conservation easement at the time of condemnation.
 - (ii) The owner of the easement shall be paid the value of the easement at the time of condemnation.
 - (iii) For easements owned jointly by the commonwealth and an eligible county, if the eligible county commits its share of funds received under this paragraph toward the purchase of agricultural conservation easements, the condemnor shall provide the commonwealth's share of funds to the eligible county for use in purchasing agricultural conservation easements in accordance with this act.
 - (iv) For easements owned by the commonwealth, the condemnor shall provide the commonwealth's share of funds received under this paragraph to the eligible county for use in purchasing agricultural conservation easements in accordance with this act.
 - (v) Funds received by an eligible county under this paragraph shall not be considered matching funds under subsection (h).
 - (vi) If an eligible county which receives funds under this paragraph fails to spend the commonwealth's share of funds within two years of receipt of the funds, the eligible county shall pay the commonwealth the commonwealth's share of funds received under this paragraph plus 6% simple interest. These funds shall be deposited into the Agricultural Conservation Easement Purchase Fund.
- (6) An agricultural conservation easement shall not prevent:
 - (i) The granting of leases, assignments or other conveyances or the issuing of permits, licenses or other authorization for the exploration, development, storage or removal of coal or noncoal minerals by underground mining methods, oil and gas by the owner of the subject land or the owner of the underlying coal or noncoal minerals by underground mining methods, oil and gas or the owner of the rights to develop the underlying coal or noncoal minerals by underground mining methods, oil and gas, or the development of appurtenant facilities related to the removal of coal or noncoal minerals by underground mining methods, oil or gas development or activities incident to the removal or development of such minerals.
 - (ii) The granting of rights-of-way by the owner of the subject land in and through the land for the installation of, transportation of, or use of water, sewage, electric, telephone, coal or noncoal minerals by underground mining methods, gas, oil or oil products lines.
 - (iii) Construction and use of structures on the subject land necessary for agricultural production or a commercial equine activity.
 - (iv) Construction and use of structures on the subject land for the landowner's principal residence or for the purpose of providing necessary housing for seasonal or full-time employees: Provided, That only one such structure may be constructed on no more than two acres of the subject land during the term of the agricultural conservation easement.
 - (v) Customary part-time or off-season minor or rural enterprises and activities which are provided for in the county Agricultural Conservation Easement Purchase Program approved by the State board under subsection (d).
 - (vi) Commercial equine activity on the subject land.

- (7) Land subject to an agricultural conservation easement shall not be subdivided for any purpose which may harm the economic viability of the farmland for agricultural production. Land may be subdivided prior to the granting of an agricultural conservation easement, provided that subdividing will not harm the economic viability for agricultural production of the land subject to the easement.
- (8) Nothing in this act shall prohibit a member of the State board or county board or his or her family from selling a conservation easement under this program, provided that all decisions made regarding easement purchases be subject to the provisions of section 3(j) of the act of October 4, 1978 (P.L. 883, No. 170), referred to as the Public Official and Employee Ethics Law.

(d) Program approval.--

- (1) The standards, criteria and requirements established by the State board for State board approval of county programs for purchasing agricultural conservation easements shall include, but not be limited to, the extent to which the county programs consider and address the following:
 - (i) The quality of the farmlands subject to the proposed easements, including soil classification and soil productivity ratings. Farmland considered should include soils which do not have the highest soil classifications and soil productivity ratings but which are conducive to producing crops unique to the area.
 - (ii) The likelihood that the farmlands would be converted to nonagricultural use unless subject to an agricultural conservation easement. Areas in the county devoted primarily to agricultural use where development is occurring or is likely to occur in the next 20 years should be identified. For purposes of considering the likelihood of conversion, the existence of a zoning classification of the land shall not be relevant, but the market for nonfarm use or development of farmlands shall be relevant.
 - (ii.1) Proximity of the farmlands subject to proposed easements to other agricultural parcels in the county which are subject to agricultural conservation easements.
 - (iii) The stewardship of the land and use of conservation practices and best land management practices, including, but not limited to, soil erosion and sedimentation control as required by the act of June 22, 1937 (P.L. 1987, No. 394), known as "The Clean Streams Law," and nutrient and odor management as may be required by 3 Pa.C.S. Ch. 5 (relating to nutrient and odor management). A conservation plan shall only be required to be updated when a change in land management practice takes place or when a violation of "The Clean Streams Law" occurs.
 - (iv) Fair, equitable, objective and nondiscriminatory procedures for determining purchase priorities.
 - (v)(I) Provisions requiring a farmland tract to be contiguous acreage of at least 50 acres in size unless the tract is at least ten acres in size and is either utilized for a crop unique to the area or is contiguous to property which has a perpetual conservation easement in place held by a "qualified organization" as defined in section 170(h)(3) of the Internal Revenue Code of 1986 (Public Law 99- 514, 26 U.S.C. § 170(h)(3)).
 - (II) A county may require a farmland tract to be contiguous acreage of at least 35 acres in size unless the tract is at least ten acres in size and is either utilized for a crop unique to the area or is contiguous to a property which has a perpetual conservation easement in place held by a "qualified conservation organization" as defined in section 170(h)(3) of the Internal Revenue Code of 1986. If a county implements the provisions of this subclause, State funds used for the purchase of an agricultural conservation easement less than 50 acres in size may include costs incidental to the purchase and shall not exceed 50% of the purchase price per acre, unless it is at least ten acres in size and is either utilized for a crop unique to the area or is contiguous to a property which has a perpetual conservation easement in place held by a "qualified conservation organization" as defined in section 170(h)(3) of the Internal Revenue Code of 1986. A county program shall require a minimum weighted value of 20% for prioritizing applications for agricultural conservation easement purchase when implementing the provisions of paragraph (ii.1).

- (2) The State board shall act on a county's program for purchasing agricultural conservation easements within 60 days of its receipt, and shall notify immediately the county in writing of approval or disapproval of its program in accordance with the criteria set forth in this subsection. Failure of the State board to act on the submission of a county program under this provision within 60 days of its receipt shall be deemed to constitute approval of the county program by the State board.

(e) Easement purchase.--

- (1) The State board may reject the recommendation made by a county for purchase of an agricultural conservation easement whenever:
 - (i) The recommendation does not comply with a county program certified and approved by the State board for purchasing agricultural conservation easements.
 - (ii) Clear title cannot be conveyed.
 - (iii) The farmland which would be subject to the agricultural conservation easement is either not located within a duly established agricultural security area of 500 or more acres established or recognized under this act or not in compliance with the criteria set forth in subsection (b)(2)(i).
 - (iv) The allocation of a county established pursuant to subsection (h) is exhausted or is insufficient to pay the purchase price.
 - (v) Compensation is not provided to owners of surface-mineable coal disturbed or affected by the creation of such easement.
- (2) The State board shall act to approve, disapprove or table the recommendation by a county for purchase of an agricultural conservation easement within 60 days of its receipt, unless the following conditions delay such action:
 - (i) The occurrence of a catastrophic event which precludes the convening of the State board. Any natural disaster, including, but not limited to, fire, flood, excessive wind, snow or earthquake shall constitute a catastrophic event.
 - (ii) The issue of a subdivision causes further questions by the State board.
 - (iii) Legal actions or court decisions are pending which would affect the recommendation in question.
 - (iv) The State board passes a resolution directing that an independent hearing examiner conduct an administrative hearing on any issue relating to the recommendation submitted by the county. In such an occurrence, the 60-day period shall be extended to 120 days. The 60-day period shall be extended until all issues set forth in this paragraph are resolved to the satisfaction of the State board, whereby the State board shall act at the next scheduled meeting on the recommendation of the county board. Decisions delayed due to catastrophic events shall be determined in as reasonable an amount of time as possible.
- (3) If the State board disapproves the recommendation by a county for purchase of an agricultural conservation easement, the county shall be given written notice of the disapproval within ten days of the decision of the State board. The written notice shall state the reason for the State board's disapproval of the recommendation.
- (4) A decision of the State board issued under the authority of this subsection shall be an adjudication subject to the provisions of 2 Pa.C.S. (relating to administrative law and procedure).
- (5) Failure of the State board to act on a recommendation by a county for purchase of an agricultural conservation easement within 60 days of its receipt shall be deemed to constitute approval by the State board, unless one or more of the conditions under paragraph (2) exist.

(f) Valuation.--The State board or the county board, as the case may be, shall select and retain an independent State-certified general real estate appraiser to determine market value and farmland value. If the seller disagrees with the appraisal made by the State or county board's appraiser, the seller shall have the right to select and retain a separate

independent State-certified general real estate appraiser within 30 days of receipt of the appraisal of the State or county board's appraiser to determine market value and farmland value. The State board or the county board shall establish the agricultural value and the nonagricultural value of the property subject to the agricultural conservation easement. The State board may provide for a periodic review by a State-certified general real estate appraiser of appraisals submitted by counties in order to assure that the appraisals were performed in accordance with the standards of appraisal practice.

- (1) The agricultural value shall equal the sum of:
 - (i) the farmland value determined by the seller's appraiser; and
 - (ii) one-half of the difference between the farmland value determined by the State or county board's appraiser and the farmland value determined by the seller's appraiser if the farmland value determined by the State or county board's appraiser exceeds the farmland value determined by the seller's appraiser.
- (2) The nonagricultural value shall equal the sum of:
 - (i) the market value determined by the State or county board's appraiser; and
 - (ii) one-half of the difference between the market value determined by the seller's appraiser and the market value determined by the State or county board's appraiser, if the market value determined by the seller's appraiser exceeds the market value determined by the State or county board's appraiser.
- (3) 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.

(g) Purchase price.--The price paid for purchase of an agricultural conservation easement in perpetuity shall not exceed the difference between the nonagricultural value and the agricultural value determined pursuant to subsection (f) at the time of purchase, unless the difference is less than the State or county boards' original appraised value in which case the State or county boards' original easement value may be offered. The purchase price may be paid in a lump sum, in installments over a period of years, or in any other lawful manner of payment. If payment is to be made in installments or another deferred method, the person selling the easement may receive, in addition to the selling price, interest in an amount or at a rate set forth in the agreement of purchase, and final payment of all State money shall be made within, and no later than, five years from the date the agricultural conservation easement purchase agreement was fully executed. The county may provide for payments on an installment or other deferred basis and for interest payments by investing its allocation of State money for purchases approved by the State board under subsection (h)(11) in securities deposited into an irrevocable escrow account or in another manner provided by law.

(h) Allocation of State moneys.--By March 1 of each year, the State board shall make an annual allocation among counties, except counties of the first class, for the purchase of agricultural conservation easements.

- (1) As used in this subsection, the following words and phrases shall have the meanings given to them in this paragraph unless the context clearly indicates otherwise:
 - (i) "Adjusted weighted transfer tax revenues." An amount equal to the weighted transfer tax revenues of a county divided by the sum of the weighted transfer tax revenues of all counties except counties of the first class.
 - (ii) "Annual agricultural production." The total dollar volume of sales of livestock, crops and agricultural products according to the most recent Annual Crop and Livestock Summary published by the Pennsylvania Agricultural Statistics Service.
 - (iii) "Annual easement purchase threshold." An amount annually determined by the State board which equals at least \$10,000,000.
 - (iv) "Average realty transfer tax revenues." The total annual realty transfer tax revenues collected in all counties, except counties of the first class, divided by 66.

- (v) "Realty transfer tax revenues." The tax imposed and collected under section 1102-C of the act of March 4, 1971 (P.L. 6, No. 2), known as the "Tax Reform Code of 1971."
 - (vi) "Weighted transfer tax revenues." An amount equal to the total annual realty transfer tax revenues collected in a county divided by the sum of the total annual realty transfer tax revenues collected in all counties except counties of the first class which does not exceed three times the average realty transfer tax revenues.
- (2) An annual allocation shall be made to each county, except counties of the first class, for the purchase of agricultural conservation easements by the commonwealth at the beginning of the county fiscal year which equals 50% of the annual easement purchase threshold multiplied by the adjusted weighted transfer tax revenues of the county for the preceding calendar year.
 - (3) If the aggregate annual allocation under this paragraph to all counties, except counties of the first class, does not exceed 50% of the annual easement purchase threshold, an additional annual allocation from 50% of the annual easement purchase threshold shall be made to a county, except a county of the first class, at the beginning of the county fiscal year for the joint purchase of agricultural conservation easements by the commonwealth and a county. The additional annual allocation under this paragraph shall equal the sum of:
 - (i) The annual appropriation of local moneys by a county for the purchase of agricultural conservation easements which does not exceed the average annual allocation under paragraph (2) multiplied by four.
 - (ii) The annual appropriation of local moneys by a county for the purchase of agricultural conservation easements which does not exceed the average annual allocation under paragraph (2) multiplied by four, if the county has an annual agricultural production which equals at least 2% of the total annual agricultural production of the commonwealth for the same year.
 - (4) If the aggregate annual allocation under paragraph (3) to all counties, except counties of the first class, would exceed 50% of the annual easement purchase threshold, paragraph (3) shall not apply, and an additional annual allocation shall be made under this paragraph at the beginning of the county fiscal year for the joint purchase of agricultural conservation easements by the commonwealth and a county, except a county of the first class. The additional annual allocation to a county under this paragraph shall equal 50% of the annual easement purchase threshold multiplied by a percentage equal to the annual appropriation of local moneys appropriated by the county for the purchase of agricultural conservation easements divided by the aggregate of local moneys appropriated by all counties, except counties of the first class, for the purchase of agricultural conservation easements and in all cases shall not exceed the average annual allocation under paragraph (2) multiplied by four.
 - (5) An additional annual allocation shall be made to a county, except a county of the first class, from the amount by which 50% of the annual easement purchase threshold exceeds the total allocations made under paragraph (3) or (4), as the case may be, as follows:
 - (i) An additional annual allocation shall be made for the joint purchase of agricultural conservation easements by the commonwealth and a county which equals six-tenths of the amount by which 50% of the annual easement purchase threshold exceeds the total allocations made under paragraph (3) or (4), as the case may be, multiplied by a percentage equal to the annual appropriation of local moneys appropriated by the county for the purchase of agricultural conservation easements divided by the aggregate of local moneys appropriated by all counties, except counties of the first class, for the purchase of agricultural conservation easements.
 - (ii) An additional annual allocation shall be made for the purchase of agricultural conservation easements by the commonwealth which equals four-tenths of the amount by which 50% of the annual easement purchase threshold exceeds the total allocations made under paragraph (3) or (4), as the case may be, multiplied by the adjusted weighted transfer tax revenues of the county for the preceding calendar year.

- (6) The allocation of a county shall be adjusted for purchases of agricultural conservation easements made with moneys from the county's allocation, for all costs, except administrative costs, incurred by the commonwealth or a county incident to the purchase of agricultural conservation easements and for the costs of reimbursing nonprofit land conservation organizations for expenses incurred in acquiring and transferring agricultural conservation easements to the commonwealth or county. No purchase of an agricultural conservation easement shall be made with State moneys allocated to a county unless the amount of the purchase price is equal to or less than the adjusted allocation or the county pays the portion of the purchase price which represents the difference between the purchase price and the adjusted allocation.
- (7), (8) Deleted.
- (8.1) Beginning with the annual allocation under paragraphs (2), (3), (4) and (5) made by March 1, 1995, and for each annual allocation thereafter, money allocated to counties which are not eligible counties shall be immediately reallocated to eligible counties. Fifty percent of the money available for reallocation under this paragraph shall be reallocated to eligible counties on the basis of the annual agricultural production in each eligible county as a percentage of the total annual agricultural production in all those eligible counties. Twenty-five percent of the money available for reallocation under this paragraph shall be reallocated to eligible counties on the basis of the realty transfer tax revenues for the last fiscal year in each of the eligible counties as a percentage of the total realty transfer tax revenues for the last fiscal year in all those eligible counties. Twenty-five percent of the money available for reallocation under this paragraph shall be reallocated to eligible counties on the basis of the local moneys appropriated by eligible counties for the purchase of agricultural conservation easements for the current county fiscal year in each of the eligible counties as a percentage of the total of local moneys appropriated for the purchase of agricultural conservation easements for the current county fiscal year in all those eligible counties.
- (8.2) The total annual allocation made to an eligible county by March 1 of the county's fiscal year for the purchase of agricultural conservation easements and the total annual reallocation made to an eligible county under paragraph (8.1) may be spent over a period of two consecutive county fiscal years. Money allocated or reallocated to a county under this subsection which has not been expended or encumbered by such county at the conclusion of the second county fiscal year shall be restored to the fund. Such money shall not be restored to the fund if by December 31 of the second fiscal year the department has received an agreement executed by the landowner and the county to purchase a specific agricultural conservation easement as part of the county board's recommendation for purchase.
- (9) The allocation made to a county under this subsection shall be used for the purchase of agricultural conservation easements in perpetuity.
- (10)(i) Notwithstanding any other provision of this subsection or any provision of regulations promulgated pursuant to this act, the department shall not reallocate funds which were allocated prior to January 1, 1994, if, by December 31, 1993, the department has received an agreement signed by the landowner and the county board to purchase a specific agricultural conservation easement as part of the county board's recommendation for purchase.
 - (i) Nothing in this paragraph shall affect any reallocation made prior to the effective date of this paragraph.
- (11) Whenever the State board approves the recommendation made by a county for purchase of an agricultural conservation easement on an installment or other deferred basis and final payment is to be made more than five years from the date the agricultural conservation easement purchase agreement is fully executed, the moneys allocated to the county for the purchase of such easement, exclusive of interest, shall be transferred to the county and may be invested by the county in the manner provided by law. Transfer of the moneys to the county shall relieve the commonwealth of any obligation to pay or assure the payment of the purchase price and interest.
 - (i) Subdivision of land after easement purchase.--
 - (1) Each county program shall specify the conditions under which the subdivision of land subject to an agricultural conservation easement may be permitted. In no case, however, shall a county program permit a subdivision which will:
 - (i) harm the economic viability of the farmland for agricultural production; or

- (ii) convert land which has been devoted primarily to agricultural use to another primary use, except that a county program may permit one subdivision for the purpose of the construction of a principal residence for the landowner or an immediate family member.
- (2) The county board may agree to permit a parcel of land subject to an agricultural conservation easement to be subdivided after the granting of such easement as follows:
- (i) The landowner of record may submit an application, in such form and manner as the county board may prescribe, to the county board requesting that a parcel of the land subject to an easement be subdivided. Upon receipt of the application, the county board shall cause to be forwarded written notification thereof to the county zoning office, county planning office and county farmland preservation office, herein referred to as the reviewing agencies. Each reviewing agency shall have 60 days from receipt of such notification to review, comment and make recommendations on the proposed application to the county board.
 - (ii) After reviewing the application and the comments and recommendations submitted by the reviewing agencies, the county board shall approve or reject the application to subdivide within 120 days after the date of its filing unless the time is extended by mutual agreement of the landowner and reviewing agencies.
 - (iii) If the application to subdivide land is approved by the county board, a copy of the application, along with the comments and recommendations of the reviewing agencies, shall be forwarded to the State board for review and approval or disapproval. When reviewing an application to subdivide land subject to an agricultural conservation easement, the State board shall consider only whether the application complies with the conditions under which subdivisions are permitted by the approved county program. The State board shall notify the county board of its decision regarding the application.
 - (iv) If the application to subdivide is rejected by the county board, the application shall be returned to the landowner with a written statement of the reasons for such rejection. Within 30 days after the receipt of the statement of rejection, the landowner may appeal the rejection in accordance with 2 Pa.C.S. Ch. 5 Subch. B (relating to practice and procedure of local agencies) and Ch. 7 Subch. B (relating to judicial review of local agency action).

(j) Change of ownership.--

- (1) Whenever interest in land subject to an agricultural conservation easement is conveyed or transferred to another person, the deed conveying or transferring such land shall recite in verbatim the language of the easement as set forth in the deed executed in connection with the purchase of the agricultural conservation easement.
- (2) The person conveying or transferring land subject to an agricultural conservation easement shall within 30 days of change in ownership notify the county board and the department of the name and address of the person to whom the subject land was conveyed or transferred and the price per acre or portion thereof received by the landowner from such person.
- (3) Notwithstanding any other provisions of law to the contrary, the restrictions set forth in a deed executed in connection with the purchase of an agricultural conservation easement shall be binding on any person to whom subsequent ownership of the land subject to the easement is conveyed or transferred.

(k) Provisions for agricultural conservation easements.--Any land subject to an agricultural conservation easement under this act shall continue to be subject to the provisions of sections 11, 12 and 13 regardless of any future modification or termination of the agricultural security area under section 9.

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Governor's Center for Local Government Services**

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