



**PennState Law**

Center for Agricultural  
and Shale Law



# ACRE LAW 101:

## Agriculture, Local Regulations, and Nutrient Management

**MARCH 6, 2024 | 9:00 AM–1:00 PM**

**LIBERTY ROOM - US HOTEL TAVERN  
401 S JUNIATA ST, HOLLIDAYSBURG, PA 16648**



**PennState  
Extension**



**PennState Law**

Center for Agricultural  
and Shale Law



**Michelle A. Henry**

*Pennsylvania Attorney General*

### Speakers

- **Robert Willig:** Senior Deputy Attorney General  
Pennsylvania Office of the Attorney General
- **Brook Duer:** Staff Attorney  
Penn State Law Center for Agricultural & Shale Law
- **Robb Meinen:** Assistant Research Professor  
Penn State Extension - University Park

### Topics

- A General Overview of Pennsylvania's ACRE Law
- The Ordinance Review Process by PA Office of the Attorney General
- Policy for Ag-Related Nutrient Application & Manure Storage



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- 18 years in private practice in Lancaster County
- 12 years at the Pennsylvania Department of Agriculture (8 years as Chief Counsel)
- Penn State Ag Law Center since 2019.





## **PENN STATE CENTER FOR AGRICULTURAL AND SHALE LAW**

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### **CENTER MISSION AND BACKGROUND**

The Center for Agricultural and Shale Law conducts research and educational programs to serve a wide variety of stakeholders including agricultural producers, landowners, mineral interest and royalty owners, business professionals, judges, attorneys, legislators, government officials, community groups, and the general public. Center programs are funded in part by the Commonwealth of Pennsylvania through the Pennsylvania Department of Agriculture. The Center for Agricultural and Shale Law is a partner of the National Agricultural Law Center (NALC) at the University of Arkansas System Division of Agriculture, which serves as the nation's leading source of agricultural and food law research and information.

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## Agricultural Law Virtual Resource Rooms



ACRE/Pennsylvania Act 38



Pennsylvania Agricultural Area Security  
Law



Pennsylvania Right to Farm Act



Pennsylvania Clean and Green Act



Pesticide & Herbicide Non-Target Injury



Solar Electricity Generation on Rural  
Lands





HOME › ISSUE TRACKERS › AGRICULTURAL LAW ISSUE TRACKERS

## Agricultural Law Issue Trackers



Ag Gag Statutes



Agricultural Antitrust Litigation



Animal Confinement



Dicamba



Genetically Modified Salmon



Glyphosate



# Pennsylvania Agricultural Mediation Program

## Who can request mediation?

### USDA-related issues:

- Agricultural Loans
- Wetlands determinations
- Compliance with farm programs, including conservation programs
- National organic program established under the Organic Foods Production Act of 1990
- Agricultural Credit
- Rural water loan programs
- Grazing on National Forest System land
- Pesticides

### Non-USDA issues:

- Land and Equipment Lease issues.
- Family farm transition.
- Farmer-neighbor disputes.
- As approved by PA Secretary of Agriculture



## Contact us:

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# **PA Protections of Existing Agricultural Uses**

- Right to Farm Law
- ACRE Law



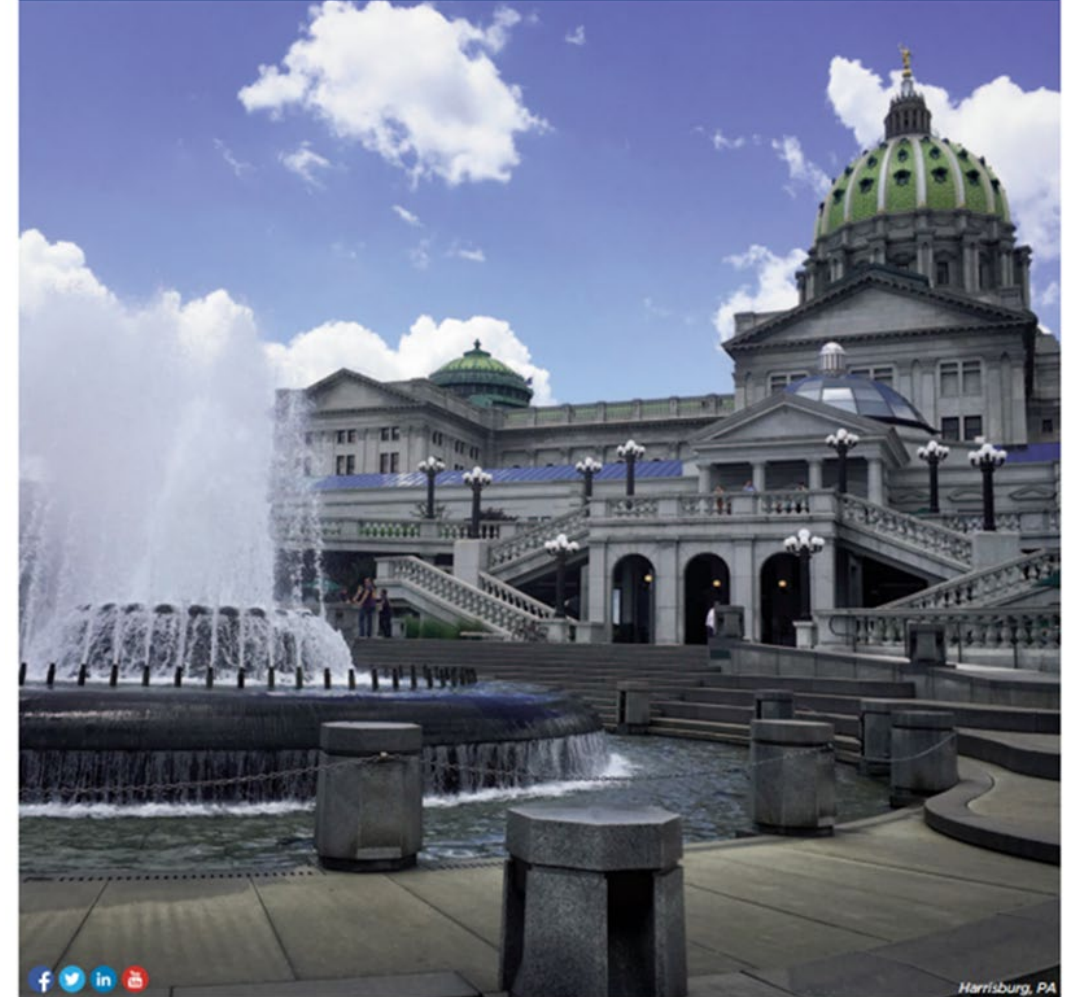
# “Ag Use” protection technically starts with municipal planning / zoning

Resource: PA Dept of Community and  
Economic Development’s publication:

## Planning for Agriculture

### PLANNING FOR AGRICULTURE

Third Edition | November 2014



Harrisburg, PA



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# MPC - *Municipalities Planning Code* on agriculture

- Enabling legislation for municipal regulation of land uses.

**Section 105. Purpose of Act:** “. . . to promote the preservation of this Commonwealth’s natural resources and prime agricultural land . . . to encourage the preservation of prime agricultural land . . . ***to ensure that municipalities enact zoning ordinances that facilitate the present and future economic viability of existing agricultural operations in this Commonwealth and do not prevent or impede the owner or operator’s need to change or expand their operations in the future in order to remain viable . . .***”

- Quote from DCED’s “Planning for Agriculture” publication: “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.”





## MPC Section 603. Ordinance Provisions.

(b) *Zoning ordinances, . . . may permit, prohibit, regulate, restrict and determine:*

- (1) *Uses of land*, watercourses and other bodies of water.
- (2) Size, height, bulk, location, erection, construction, repair, maintenance, alteration, razing, removal and use of structures.
- (3) *Areas and dimensions* of land and bodies of water *to be occupied by uses and structures*, as well as areas, courts, yards, and other open spaces and distances to be left unoccupied by uses and structures.
- (4) Density of population and *intensity of use*.
- (5) *Protection and preservation* of natural and historic resources and *prime agricultural land and activities*.

*“ . . . **except to the extent that . . . regulation of activities related to commercial agricultural production would exceed the requirements imposed under***



- **Nutrient Management Act** (“*regardless of whether any agricultural operation within the area to be affected by the ordinance would be a concentrated animal operation*”)
- **Agricultural Area Security Law**
- **Right to Farm Law**



## **Right to Farm Laws – *Background***

- Right to Farm Laws have been enacted in all 50 states.
- All Right to Farm Laws attempt to remedy farm vs. non-farm conflicts.
- The specific provisions in Right to Farm Laws vary from state to state.
- Right to Farm Laws generally limit nuisance lawsuits against farms.





# Pennsylvania Right to Farm Act (RTF)

- 3 P.S. §§ 951-957
- Enacted on June 10, 1982
- Amended in 1998 to also specifically include protections for expansion or alteration of existing agricultural operations.



# Pennsylvania Right to Farm Act

## *Legislative Policy*

- “to conserve and 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.”



# Pennsylvania Right to Farm Act – Protections Granted

- Requires that municipalities exclude ***normal agricultural operations*** (NAO) from definition of nuisance in any nuisance ordinance\*;
- Limits privately-filed nuisance lawsuits against normal agricultural operations (NAO); and
- Limits ability of municipalities to restrict direct commercial sales of agricultural products\* (d/n require NAO).

***\* a version of these provisions are also in the Ag Area Security Law***





# Parallel language in Ag. Area Security Law

*Within an Ag Security Area:*

- “not enacting local laws or ordinances which would unreasonably restrict farm structures or farm practices . . . unless direct relationship to the public health and safety. “
- **“a public nuisance shall exclude from the definition of such nuisance any agricultural activity or operation conducted using normal farming operations within an agricultural security area . . . if such agricultural activity or operation does not bear a direct relationship to the public health and safety.”**



# **“Normal Agricultural Operations” (NAO)**

- The activities, practices, equipment, and procedures utilized in production, harvesting, and preparation for market
- Of agricultural, agronomic, horticultural, silvicultural, and aquacultural crops and commodities
- For operations that are at least ten acres in size or produce annual gross income of at least \$10,000.



# RTF: Limitation on Nuisance Actions

- Right to Farm Act is a **defense** to nuisance action\* against agricultural operations where:
  - Operation has been lawfully operating for at least one year;
  - Conditions complained of have existed since established date of operation; and
  - Conditions complained of are normal agricultural operations.

*\*whether brought by a private citizen or by a municipality.*





# RTF: Limitation on Nuisance Actions

- Where agricultural operations are expanded or altered, Right to Farm Act is a defense to a nuisance action if:
  - Operation has expanded or altered for at least one year; **OR**
  - Expansion or alteration has been addressed in Nutrient Management Plan.



# RTF: Exceptions to Nuisance Limitation

Right to Farm Act does not protect farmers where:

- Agricultural operation has direct adverse effect on public health and safety;
- Zoning ordinance limits or prohibits the operation;
- Agricultural operation is in violation of federal, state, or local statute or regulation;
- Agricultural operation pollutes water or causes flooding.



# RTF: Direct Commercial Sales Protection

Direct commercial sales must be a permitted use:

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

**(Does not require showing of “NAO”)**





# Two Significant Cases on NAO

**Gilbert v. Synagro**, 131 A.3d 1 (Pa. 2015).

- Land application of biosolids is a normal agricultural operation.

**Branton v. Nicholas Meats**, 159 A.3d 540 (Pa. Super. 2017)

- Land application of food processing residual waste is a normal agricultural operation.



# ACRE

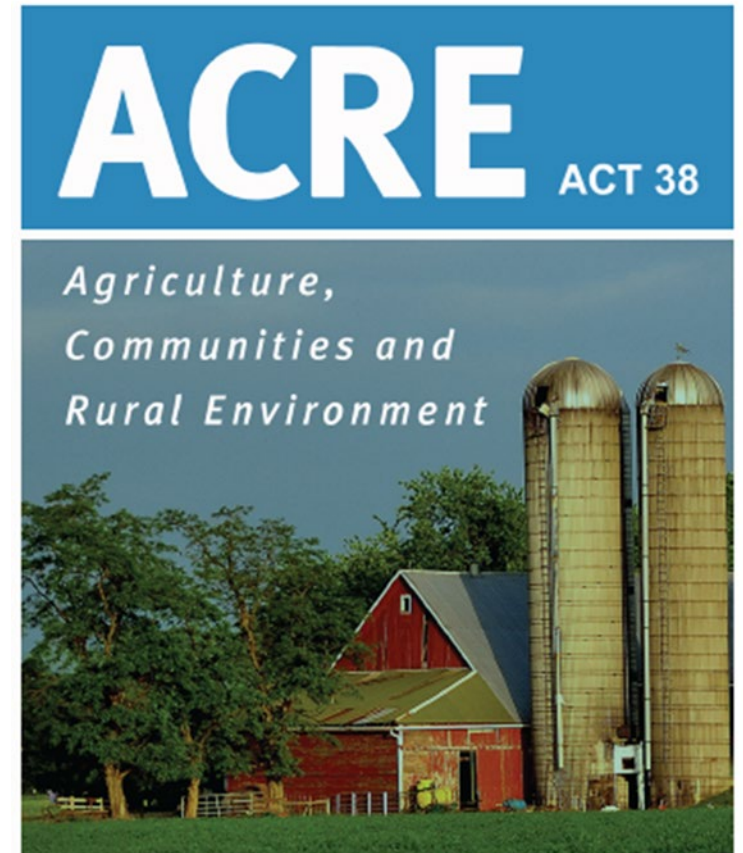
## *Office of Attorney General (OAG) Ordinance Review*

### ACRE – Agriculture, Communities and Rural Environment

On July 6, 2005, Act 38 also known as “ACRE” (Agriculture, Communities and Rural Environment) went into effect to ensure that ordinances adopted by local governments to regulate normal agricultural operations are not in violation of state law. A local ordinance cannot exceed, duplicate or conflict with state law.

An “unauthorized local ordinance” is an ordinance enacted or enforced by a local government unit which does either of the following:

- Prohibits or limits a normal agricultural operation unless the local government unit has authority under state law to adopt the ordinance and it is not prohibited or preempted under state law.
- Restricts or limits the ownership structure of a normal agricultural operation.





# ACRE: The law's fundamental text:

## § 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.

**"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.





## **ACRE - Why enacted? Right to Farm Act has limits.**

- RTF only says a “normal ag operation” cannot be the subject of a “nuisance” lawsuit or ordinance.
- Only creates a defense to “nuisance” claim once filed in court.
- Requires farmers to bear all costs to assert the protection to farming and only useful once the farmer is sued for nuisance.
- RTF has limited usefulness; no way to assert it “offensively.”



## ACRE - Issues Addressed

- Applies to all actions and forms of local regulation of “normal agricultural operations.” (not limited to nuisance or even zoning)
- ACRE addresses municipal regulation of normal agricultural operations “*as written*” or “*as applied*.”
- Creates an “offensive” enforcement mechanism. It’s a sword, not just a shield.
- “Unauthorized ordinance” also includes any ordinance that *restricts or limits the ownership structure* of a normal agricultural operation.
  - Preventing discrimination against so-called “corporate farms” was the primary purpose of the law when enacted.
  - Foreign ownership? This is an unanswered question, so far.
- Same bill also enacted Odor Management for CAFOs. Odor Management regulations enacted with plan preparation requirements.



# ACRE – “Normal Agricultural Operation” incorporated from the RTF Law

- Activities, practices, equipment, and procedures utilized in production, harvesting, and preparation for market
  - agricultural, agronomic, horticultural, silvicultural, and aquacultural crops and commodities;

AND

- At least ten acres in size or produce annual gross income of at least \$10,000.
- Coda: *“Includes new activities, practices, equipment . . .”*
- **Absent: any reference to marketing and retail sales.**



## **ACRE - Procedure**

- Producer submits written request to Attorney General's Office for review of ordinance.
- Attorney General has 120 days to determine whether to accept case.





## **ACRE - Procedure**

- If Attorney General accepts case, municipality is given opportunity to discuss ordinance revision before suit is filed.
- Attorney General may file suit in PA Commonwealth Court if unable to resolve the issues with the municipality.



## ACRE – Procedure

- Costs of action are borne by Attorney General's Office, not landowner.
  - There is also a “private right of action” which allows an individual to use ACRE as the basis for a lawsuit.
  - Permissive award to plaintiff of attorneys' fees/costs if “negligent disregard” or to defendant if “frivolous” or w/o “substantial justification.”
- Litigation in Commonwealth Court establishes statewide precedent.
- Annual report to PA General Assembly required. [2021 Annual Report](#).

# ACRE

ACT 38

*Agriculture,  
Communities and  
Rural Environment*



<https://www.attorneygeneral.gov/resources/acre/>

Requests for review of an ordinance should be sent, in writing, to the following address:

**PA Office of Attorney General  
Attn: ACRE  
15th Floor, Strawberry Square  
Harrisburg, PA 17120**

[ACRE@attorneygeneral.gov](mailto:ACRE@attorneygeneral.gov)

Requests for review should include a copy of the ordinance, a short explanation of the objection the farm owner or operator has to the ordinance, and any other materials that will aid the Attorney General's review.

## Excerpt of OAG's ACRE webpage.

The below grid is an easy reference guide to the ACRE cases that have come in to the Office of the Attorney General for review since the beginning of 2017. You will find the following in the grid: 1) the month and date the complaint was received; 2) the Township involved; 3) a brief bullet point of the issue(s) involved in the case; 4) a link to the ordinance(s) challenged; 5) a link to the ACRE complaint the Office of Attorney General received; 6) a link to the Township response if one was received; 7) the status of the Office of Attorney General's ACRE review; and 8) the disposition. Please check this site frequently for updates on existing and newly received cases.

Received	Township ▾	Issue	Ordinance	Complaint	Township Response	Status	Disposition
October 2023	Lewis Township	Siting of Poultry Barn	<a href="#">Ordinance</a>	<a href="#">Complaint</a>		Completed	Settled
September 2023	Valley Township	Silviculture	<a href="#">Ordinance</a>	<a href="#">Complaint</a>	<a href="#">Township Response</a>	Pending Review	
September 2023	Frankstown Township	Junkyard; Building in Floodplain		<a href="#">Complaint</a>	<a href="#">Township Response</a>	Completed	Denied
September 2023	Little Britain Township	Mushroom Composting	<a href="#">Ordinance</a>	<a href="#">Complaint</a>	<a href="#">Township Response</a>	Pending Review	
August 2023	Independence Township	Setbacks	<a href="#">Ordinance</a>	<a href="#">Complaint</a>		Completed	Accepted <a href="#">View Letter</a>
August 2023	Earl Township	Ducks; Setbacks; Normal Agricultural Operation; Nuisance	<a href="#">Ordinance</a>	<a href="#">Complaint</a>	<a href="#">Township Response</a>	Pending Review	Letter <a href="#">View Letter</a>
August 2023	Frailey Township	Biosolids	<a href="#">Ordinance</a>	<a href="#">Complaint</a>	<a href="#">Township Response</a>	Pending Review	
August 2023	Greene Township	Stormwater Management; Timber; CAO/CAFO Definitions; Permitting	<a href="#">Ordinance</a>	<a href="#">Complaint</a>		Pending Review	
August 2023	East Donegal Township	High Tunnels; Stormwater Management		<a href="#">Complaint</a>	<a href="#">Township Response</a>	Completed	Denied <a href="#">View Letter</a>





## ACRE & MPC Section 603 text

- Most challenged ordinances are enacted by a local government unit using authority in the Municipalities Planning Code.
- Issues of Express and Implied **Preemption** begin to enter the analysis.



# MPC Section 603(b) – Preemption Language

**(b) Zoning ordinances, . . . may permit, prohibit, regulate, restrict and determine:**

- (1) Uses of land, watercourses and other bodies of water.**
- (2) Size, height, bulk, location, erection, construction, repair, maintenance, alteration, razing, removal and use of structures.**
- (3) Areas and dimensions of land and bodies of water to be occupied by uses and structures, as well as areas, courts, yards, and other open spaces and distances to be left unoccupied by uses and structures.**
- (4) Density of population and intensity of use.**
- (5) Protection and preservation of natural and historic resources and prime agricultural land and activities.**

***“ . . . except to the extent that . . . regulation of activities related to commercial agricultural production would exceed the requirements imposed under***



- Nutrient Management Act (“*regardless of whether any agricultural operation within the area to be affected by the ordinance would be a concentrated animal operation*”)
- Agricultural Area Security Law
- Right to Farm Law

<sup>2</sup> The definition of what constitutes a CAO is rather technical, but it suffices to say that they are larger, higher intensity agricultural operations. See 3 Pa.C.S. § 503 (defining CAO as “[a]gricultural operations meeting the criteria established under this chapter”); *id.* § 506(a) (providing a definition for CAOs while further requiring review of the criteria used to identify CAOs and the making of appropriate changes to the definition by regulation); 25 Pa. Code § 83.201 (defining CAOs as “[a]gricultural operations with eight or more animal equivalent units [(AEUs), defined as 1,000 pounds live weight of livestock or poultry animals, regardless of the actual number of animals, 3 Pa.C.S. § 503; see also 25



# QUESTIONS / DISCUSSION?

Email questions and inquiries to Brook Duer at  
[dhd5103@psu.edu](mailto:dhd5103@psu.edu)

## Thank You!