

UPDATE ON ACRE
Penn State Agricultural Law Resource & Reference Center
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As of March 13, 2007 the Attorney General has received 28 requests for review. Five cases have been filed in Commonwealth Court, one of those cases had an agreed settlement but the municipality did not make timely changes – after filing changes were then made. Five of the cases were accepted by the Office of the Attorney General (OAG) and are in discussion with municipalities. Seven of the cases are under review. Eleven cases were declined. One case was withdrawn by the owner/operator.

The Attorney General’s Review process for Agriculture Community and Rural Environment (ACRE) requests is best understood by following the timeline from start to finish. After establishing an understanding of process and notice aspects, we can then analyze the statutory authority cited in accepted cases. ACRE also provides an option for a farmer to take a case directly to Commonwealth Court and as of the publication date of these materials one case has been filed under this section.

Timeline:

1. Owner or operator of a normal farming operation may request review a local ordinance believed to be unauthorized.
 - a. A letter explaining background facts, the reasons he/she believes the ordinance to be “unauthorized” and a copy of the ordinance are the most common items included in submission.
 - b. Maps, Zoning districts, photographs and other information may be provided as relevant.
2. Upon receipt of request the OAG has 120 days to make a decision.
 - a. OAG has been sending immediate acknowledgement of receipt to farmer
 - b. OAG also sends municipality letter of notice that a particular ordinance is being challenged (Started this in April following PSATS request) – This has created faster response time from Municipalities.
3. Review
 - a. OAG typically takes close to the full 120 days to complete review
 - b. OAG may ask Penn State (College of Agricultural Sciences) for opinions or information.
 - i. These contacts are part of a flexible and informal exchange.
 - ii. The University is not obligated to indicate definitively on whether a subject is part of a “normal agriculture operation”.
 - iii. They are not protected by attorney client privilege.
 - iv. The opinion/information is not part of the formal record.
 - v. While such sharing can potentially lead to identifying experts, Penn State follows a separate process (according to established Penn State

policy) when the University is approached with a request for expert testimony.

4. Completion of Review

- a. Notice of the decision is given to farmer.
 - i. If a case is rejected a general letter of notification is sent. No reasons are given for rejection.
 - ii. If OAG decides not to take the case, the farmer has the option under §315(b) to take the action on his/her own directly to Commonwealth Court.
- b. Notice is also sent to the municipality.
 - i. If the OAG plans to take the case and challenge the ordinance(s), OAG offers discussion and meeting.
 - ii. These meetings often result in “settlement” and a municipality will agree to change an ordinance based on the OAG’s review.
 - iii. After meeting (or offer of meeting if the municipality declines) another letter is sent asking the municipality to rescind the unauthorized ordinance or OAG will file by specified date. (30 days from the date of this letter is usually the deadline provided).

Request Summaries:

(*indicates Case has been filed in Commonwealth Court, ^ case still under review)

1. Cumberland Township, Greene County

Farmer's complaint was against an ordinance addressing stray animals. The owner complained that the ordinance could result in confiscation of his farm animals. The OAG did not accept the case after the 120 day review period.

2. Washington Township, Dauphin County

The zoning ordinance was challenged based on complaints that a re-zoning decreased property value of the operation. The OAG did not accept the case.

3. Bushkill Township, Northampton County

Farmer owns property on which he keeps "inoperable" vehicles, including a bus, house trailer, horse trailer, and vans which he uses as shelters for his animals. (Farmer claims that the [A]SPCA said there is nothing wrong with goats or other animals living in a bus, trailer, or van). Farmer also has two cattle trailers which he uses to store corn, hay, and straw, and uses vans and trucks to store feed, aid, grease, and supplies. Bushkill Township has enacted and enforced a zoning statute which prohibits the storage of "junked" vehicles on private or publicly-owned property. Farmer did not indicate in his letter to the AG whether his vehicles fall under the definition for "junked vehicles" in the Bushkill Zoning Statute. However, it is likely that they do fall under that definition because he uses them for storage and shelter, and did not mention or suggest that he uses the vehicles for transportation. The OAG did not accept the case.

4. Mount Joy Township, Adams County

The owner/operator complained that re-zoned property had decreased in value because of a zoning change from rural residential to agricultural preservation. The OAG notified the operator and the township that it would not accept the case.

5. Skippack Township, Montgomery County

The owner requested review of the "disturbing the peace" definition in the township code that bars the use of a Critter Blaster™ (cannon noises) to repel deer. The OAG notified the operator and the township that it would not accept the case. *The operator has filed a case in Commonwealth Court under Section 315(b).*

6. Paradise Township, York County

Farmer had less than five acres, which was the municipal requirement for agriculture. Farmer lived in agricultural district but was not allowed to keep livestock. Farmer claimed that he fit the definition of normal agriculture but did not specify the income amount from his farm. He relied on the Municipalities Planning Code 53 P.S. §10603(h) language "Zoning ordinances shall encourage the continuity, development and viability of agricultural operations. Zoning ordinances may not restrict operations in geographic areas

where agriculture has traditionally been present, unless the agricultural operation will have a direct adverse effect on the public health and safety.” The OAG notified the operator and the township that it would not accept the case.

7. Marshall Township, Allegheny County

The owner of a beekeeping operation requested review of a Township Zoning Ordinance requiring a minimum lot size of 5 acres for agricultural operations. The owner complained that his particular operation fit the definition of agricultural operation even though it was less than 5 acres. The zoning was in place when the owner bought the property and installed his hives. The OAG did not accept the case.

8. East Bradford Township, Chester County

The township’s Riparian Buffer Ordinance was challenged. The owner argues that the ordinance impedes expansion of his agricultural operation. The OAG did not accept the case.

9. West Donegal Township, Lancaster County

Farmer purchased 66 acres with intent to farm and was permitted to build a barn but not to build farmstead home on the property. Land has no building on it and farmer (plain sect) would like to set up an operation. Farmland is preserved (by operator), but municipality denied permit to build home structure. The OAG did not accept the case.

10. Maxatawny Township, Berks County

Farm Market and small poultry operation existed as prior non-conforming use and attempted to construct coop in permitted action. Odor and dust complaint from neighbors and township is requiring both movement of chickens to permitted (but not yet built) location and reduction of poultry to 12 chickens. The OAG did not accept the case.

11. Centerville Borough, Washington County

Borough is differentiating between their ordinance definitions of “commercial agriculture” and “non-commercial agriculture” and requiring a permit for “private non-commercial use” in Agricultural zoning with a fine for non-compliance. This request was declined by the OAG.

12. *Belfast Township, Fulton County

Ordinance prohibits “corporate ownership of farms” (please see attached Agricultural Law Center summary of Court of Common Pleas case history). After the OAG notified the Township of legal issues with the ordinance. The township responded that it will repeal the ordinance. The township did not change the ordinance and the OAG notified that he would file a complaint. The complaint has been filed. *There has been some discussion indicating that Belfast Township may rescind the ordinance before the case goes before the Court, they have filed several extensions.*

13. *Locust Township, Columbia County

An ordinance that regulates “intensive animal agriculture” was challenged in the request. The OAG notified the Township of state preemption on the subject of concentrated animal feeding operations and concentrated animal operations and offered to meet to discuss problems with the ordinance. The township failed to rescind or amend the ordinance and the OAG has filed a complaint to invalidate and enjoin enforcement of the ordinance.

14. *Richmond Township, Berks, County

An ordinance that regulates “intensive animal agriculture” was challenged in the request. The OAG notified the Township of state preemption on the subject of concentrated animal feeding operations and concentrated animal operations and offered to meet to discuss problems with the ordinance. The township failed to rescind or amend the ordinance and the OAG has filed a complaint to invalidate and enjoin enforcement of the ordinance.

15. *Lower Oxford Township, Chester County

An ordinance that regulates composting activities was challenged by the owner/operator of a mushroom operation. The request indicated that the ordinance unlawfully restricts mushroom compost preparation. The OAG notified the Township of state preemption on the subject of nutrient management and offered to meet to discuss problems with the ordinance. The township failed to rescind or amend the ordinance and the OAG has filed a complaint to invalidate and enjoin enforcement of the ordinance.

16. *Heidelberg Township, North Heidelberg Township, Robesonia Borough, Womelsdorf Borough, Berks County

The owner/operator requested review of a multi-municipal ordinance which regulates “intensive raising of livestock or poultry”. The OAG notified the Township of state preemption on the subject of concentrated animal feeding operations and concentrated animal operations and offered to meet to discuss problems with the ordinance. The township failed to rescind or amend the ordinance and the OAG has filed a complaint to invalidate and enjoin enforcement of the ordinance.

17. Upper Providence Township, Montgomery County

This issue revolves around composting and nutrient management. The operators have a farm in an Ag Security District, and they rotate crops and raise horses, steers, hogs and poultry. The operator is an expert in agricultural composting, but the township defines his composting as a commercial activity and not agriculture. He lists differences between agricultural and commercial composting, including the equipment used and the materials, methods, etc in his request. The farmer is appealing a Cease and Desist order the township sent him to the AG. The farmer was given his cease and desist order in 2003, and he wrote to the AG on 8/10/2005. A letter was written to the township and the township agreed to rescind the ordinance.

18. Lower Towamensing Township, Carbon County

An ordinance in this township prohibits “intensive agriculture”. The OAG notified the Township of state preemption on the subject of concentrated animal feeding operations and concentrated animal operations and offered to meet to discuss problems with the ordinance. The OAG and the township worked out a settlement; the township has given commitment that the ordinance will be repealed.

19. Clay Township, Lancaster County

Poultry operation that is expanding and has nutrient management plans in place for current operation and for expansions has challenged the municipalities set back requirements that are more extensive than the NMA requirements. These set backs would make the operation impossible. The OAG has accepted this case and is currently in discussion with the township about settlement.

20. Hartley Township, Union County

Farmer applied for permit to build poultry houses and was denied a variance. Ordinance related to set back and permitting requirements is challenged. Owners claim that they are unable to expand operation to generate a profit. Owner asked neighbors for signatures indicating their approval for set backs proposed. Owner claims unable to get other permits because of delay on decision from municipality over location and storm water management plan.
Discussions ongoing with the municipality.

21. East Brunswick Township, Schuylkill County

Tree farmer applies biosolids on agricultural operation. New ordinance bans biosolid application in the township and has language banning corporate agriculture. New ordinance would require extensive testing of materials that reach beyond testing required by DEP.

22. WITHDRAWN Upper Allen Township, Cumberland County

Operator is challenging township assertion that activity on his operation is commercial and not agricultural and therefore the pole barn where equipment is stored must not be used as commercial and defined agricultural activity with a number of detailed compliance factors. Operator argues that renters and equipment are used for agriculture operation on farm site.

23. ^Richland Township, Bucks County

Municipality is requiring agriculture construction to comply with several permitting requirement, studies and erosion controls, handicap parking areas, sprinkler system and several other costly pre-approval for construction of a farm building. Farmer complains that township has unreasonably restricted,

burdened and delayed construction of agriculture building on Clean and Green agriculture property. *The request is under review.*

24. ^West Hanover Township, Dauphin County

Winery applied for a permit for expansion and was told the zoning had changed. The municipality is requiring removal of 100 grape vines and a buffer of trees along the property line, which would damage grape growing conditions. *Request is under review.*

25. ^Upper Mount Bethel Township, North Hampton County

Farmer has had to challenge farm market and structure permits through special use. While the township reimbursed farmer in first instance, farmer must go through special use consideration in order to sell products at the market. In order to get permission from the township, farmer must pay costs for hearing board. *Request is under review.*

26. ^ Orange Township, Columbia County Operator would like to construct an indoor arena for an equine operation and has been denied consideration of the building as an agricultural facility. Other circumstances involved such as residing old barn and the County requiring operator to obtain “Land Development” plan. *Request is under review.*

27. ^ Salisbury Township, Lehigh County. Owner of 23 acres, mostly wooded sought to operate small alpaca farm on the property which also houses lumber and tree operations. The Zoning Hearing board and the other supervisory bodies do not allow “livestock” on the property. Parties have unsuccessfully sought a variance. *Request is under review.*

28. Bethel Township, Berks County. Owner of trout hatchery seeks relief from ordinance that he claims will disallow other operators from starting up operations because of inconsistent definitions of agriculture. *Request is under review.*

Agriculture Laws Commonly Applied:

All of the complaints filed in Commonwealth Court thus far have cited the same set of laws.

Agricultural laws the Attorney General cites:

- a. ACRE 3 Pa C.S. 313
- b. Nutrient Management Act 3 Pa C.S. 501
- c. Water Resources Planning Act 27 Pa C.S. 3131
- d. Municipalities Planning Code 53 P.S. 10603(h)
- e. Agricultural Area Security Law 3 P.S. 911
- f. Right to Farm Law 3 P.S. 953¹ (see definitions below)
- g. Domestic Animal Law 3 Pa C.S. § 2301 (cited for single case, not in all complaints)

¹ The Right to Farm Act (RTF) is entitled “Protection of Agricultural Operations from Nuisance Suits and Ordinances”, but is known by its more popular nickname.

While the OAG cites all of these statutes in a way that fits the individual complaint, it is important to note that the cases pursued thus far have largely been Nutrient Management Cases because ordinances restrict “intensive” operations (which create large volumes of manure/odor). The Nutrient Management Act provides that “no ordinance or regulation of political subdivision may prohibit or in any way regulate practices related to the storage, handling, land application of animal manure or nutrients or to the construction, location or operation of facilities used for storage of animal manure or nutrients or practices otherwise regulated by this chapter if the municipal ordinance or regulation is in conflict with this chapter and the regulations or guidelines promulgated under it.” Nutrient Management related cases have the most forceful language backing a preemption argument and it makes sense that the OAG would take such cases early in the process.

The Belfast Township complaint focuses on a ban of “corporate farms”, that would otherwise be considered “normal agriculture operations”. This complaint focuses on ACRE language and the Right to Farm definitions which are the definitions that ACRE adopts for “normal agriculture operation”. The possibility for recovery of attorney fees here is complex. The farmers fought this case in the Court of Common Pleas for several years prior to ACRE passage and because their case was accepted and not filed under 315(b), the recovery of fees is not an option.

It is also interesting to note that cases which rely heavily on the Municipalities Planning Code §10603 were not taken unless the ordinance also violated another more obvious statute with preempting language. “Zoning ordinances shall encourage the continuity, development and viability of agricultural operations. Zoning ordinances may not restrict agricultural operations or changes to or expansions of agricultural operations in geographic areas where agriculture has traditionally been present, unless the agricultural operation will have a direct adverse effect on the public health and safety. Nothing in this subsection shall require a municipality to adopt a zoning ordinance that violates or exceeds the provisions of the act of May 20, 1993 (P.L.12, No.6), known as the "Nutrient Management Act," the act of June 30, 1981 (P.L.128, No.43), known as the "Agricultural Area Security Law," or 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." The Paradise Township request relied heavily on the MPC for its argument but was ultimately rejected. Other laws that may be referenced in the future include the

agriculture building exemption to the Uniform Construction Code, and the future Odor Regulations

In preliminary objections Locust, Heidelberg, and Lower Oxford Townships argued that the Attorney General had no authority to bring actions when there has not been enforcement of an ordinance after ACRE was enacted. The Attorney General argued that language in the Act, “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.” 3 Pa. C.S. §313(b) should not be interpreted to only be applied after enforcement on the owner/operator involved in the challenge. The OAG relies on language in 3 Pa. C.S. §315(a) explicitly authorizing the AG to sue to invalidate or enjoin the enforcement of an unauthorized ordinance.

UPDATE: Commonwealth court sustained the objection and dismissed Lower Oxford Township, Heidelberg, and Locust Township cases by agreeing with the townships’ arguments about enforcement post ACRE. **In those cases the Court said that if an ordinance was on the books before ACRE was enacted, it had to be enforced after ACRE in order to have a case in controversy, ripe for the OAG to bring on behalf of the farmer.** The cases were dismissed without prejudice which means that the farmer can renew his request if the township enforces the ordinance against the operation in the future. As of the date of this paper, Locust Township was argued with similar objections by the township and will likely have the same result. Richmond Township and Belfast Township ordinances have been enforced and therefore the Commonwealth will likely overcome the preliminary objection. **None of the cases have been decided on the substantive nature of the complaint – this means that the Court has not looked at an ordinance to see if it was pre-empted by state agriculture laws and unauthorized. The OAG has appealed the first three cases (Lower Oxford, Heidelberg and Locust) to the Supreme Court.. The Court overruled all of Richmond Township’s preliminary objections. It did ask the OAG to amend some language in the complaint but did not dismiss the case. Belfast Township filed for several extensions and their ordinance is expected to be repealed before the case is heard.**

Highlights - Important Definitions/Language:

This section will discuss the law in detail below, but it is important to become familiar with the definitions in the RTF law. The broad nature of the RTF definitions applies to smaller production facilities, larger operations, and hobby operations. The law protects specialty businesses that may be unique and uncommon but still involve agricultural practices. These definitions are part of other laws (such as ACRE) and include agricultural uses that may be broader than the average citizen's views on agriculture. These definitions are copied from §952ⁱ.

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.

Normal agricultural operation. The customary and generally accepted activities, practices and procedures that farmers adopt, use or engage in year after year in the production AND preparation for market or poultry, livestock and their products and in the production and harvesting of agricultural, agronomic, horticultural, silvicultural and aquicultural crops and commodities and is:

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

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

Skippack Township (follow-up):

This farmer has filed in Commonwealth Court after receiving notification that the OAG would not pursue his complaint. His use of the Critter Blaster™ has been sited under the "disturbing the peace" ordinance. The larger impact of the Skippack Township case is the

process by which the Court will review an activity in light of the “Right to Farm” definition of “normal agriculture operation”. The Attorney General has complete discretion whether or not to take a case under ACRE. The research and record leading to that decision are not “official record” and the letters of notification are purposely brief without rationale. This can be both beneficial and frustrating for the owner/operator that decides to move forward under 315(b). The notification letter’s lack of reasoning prevents the municipality from adopting the OAG’s reason for rejection as a defense for their ordinance. However, the record of opinions shared by Penn State or any other entity that might have been sought are unrecorded. The plaintiff in a 315(b) case must build his/her own case without relying on the OAG’s analysis and perhaps even without being able to obtain expert witnesses that the OAG may have been able to compel had they taken the case. **The criminal charges have been settled but the civil suit between the farmer and his neighbors has yet to be heard.**
