

# THE AGRICULTURE, COMMUNITIES AND RURAL ENVIRONMENT ACT: PROTECTING PENNSYLVANIA'S AGRICULTURAL OPERATIONS FROM UNLAWFUL MUNICIPAL REGULATION

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## I. INTRODUCTION

The interface between agricultural production and nearby residential and commercial development poses a number of challenges for policy makers at the state and local level. Problems can arise when city dwellers move to rural areas and then object to the typical sights, sounds, and odors of modern agricultural production.<sup>1</sup> Likewise, problems can arise when new construction or expansion

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1. Problems also arise when an agricultural facility is located in an area that becomes transformed from a rural community to a primarily residential community. Cases involving this fact pattern include the notable cases of *Pendoley v. Ferreira*, 187 N.E.2d 142 (Mass. 1963) and

of agricultural facilities establishes operations that are of a size and scope unknown to longtime residents of the rural area.<sup>2</sup> When rural residents—regardless of the length of their rural residency—feel that their health, safety, or convenience is adversely impacted by agricultural operations, they often call upon their local municipalities to take action to remedy the real or perceived problems. It is not surprising that residents turn to their local municipalities for relief as these are the governmental entities that are closest to the situation, but many legal issues of this nature cannot be addressed at the local level.

Depending upon state law, local municipalities may have some ability to regulate agricultural operations. It is likely, however, that state laws or regulations governing agricultural operations prevent or severely limit the authority of local municipalities to address these issues. As a result of an unfamiliarity with the precise extent of state preemption or possibly due to pressure from their electorate, municipalities often cross the line of permissible regulation and address areas over which they do not have legal authority.

The enactment or enforcement of these unlawful local ordinances can present a serious impediment to the continued viability of agricultural operations. Uncertainty over whether a questionable ordinance would or would not survive a legal challenge to its validity can discourage investment in agricultural operations. Additionally, an agricultural producer may be required to expend significant resources in order to have an ordinance invalidated through the judicial process, even where the ordinance in question clearly exceeds the bounds of the municipality's legal authority. As policy makers at the state level consider what programs are appropriate to preserve farmland and protect agricultural operations, they should give appropriate consideration to the issue of unlawful municipal regulation. To what extent can a municipality regulate an agricultural operation? What exactly is an unlawful ordinance? What is the process to invalidate these unlawful ordinances? What are the appropriate remedies when a municipality has acted improperly? By addressing these and related questions, policy makers can ensure that agricultural operations are regulated by local government only to the extent contemplated and authorized by state law.

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*Spur Industries, Inc. v. Del E. Webb Development Co.*, 494 P.2d 700 (Ariz. 1972). In *Pendoley*, a well-established hog farm was enjoined from continued operation in a newly residential community. *Pendoley*, 187 N.E.2d at 143-44. Similarly, in *Spur Industries*, a long-standing feedlot was required to relocate because of its impact upon a newly established retirement community near the feedlot. *Spur Industries*, 494 P.2d at 701.

2. The landmark case interpreting Pennsylvania's Right to Farm Act, *Horne v. Haladay*, 728 A.2d 954 (Pa. Super. Ct. 1999), involved an unsuccessful nuisance lawsuit asserted by plaintiffs whose rural residency predated the operation of the allegedly offending poultry farm.

Due to the large number of municipalities within Pennsylvania,<sup>3</sup> and the important regulatory role that they play in land use and other local planning matters, municipal regulation of agricultural operations is an issue of particular importance in Pennsylvania. As such, the Pennsylvania General Assembly addressed this issue in 2005 through the enactment of legislation commonly referred to as the Agriculture, Communities and Rural Environment Act (ACRE).<sup>4</sup> This legislation defines an unauthorized local ordinance and prescribes a process through which an agricultural producer can challenge a questionable ordinance.<sup>5</sup> Although the legislation is less than five years old, it has had, and continues to have, a positive impact upon Pennsylvania's agricultural communities. As the body of interpretive case law is just beginning to be established,<sup>6</sup> the complete extent to which agricultural producers ultimately will benefit from the law is not yet fully defined. It is clear, however, that Pennsylvania's agricultural producers

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3. Pennsylvania has a total of 2562 municipalities at the subcounty level, including 56 cities, 958 boroughs, 1 town, 93 first class townships, and 1454 second class townships. Governor's Ctr. for Local Gov't Servs., Dep't of Cmty. & Econ. Dev., Pennsylvania Local Government Fact Sheet (Oct. 2009), <http://www.newpa.com/get-local-gov-support/municipal-statistics/download.aspx?id=218>. Pennsylvania ranks third nationally in the number of subcounty municipal governments, trailing only Illinois, which has 2731, and Minnesota, which has 2642. U.S. CENSUS BUREAU, LOCAL GOVERNMENTS AND PUBLIC SCHOOL SYSTEMS BY TYPE AND STATE: 2007 (2008), <http://www.census.gov/govs/cog/GovOrgTab03ss.html>.

4. See Act of July 6, 2005, No. 38, 2005 Pa. Laws 112 (codified at 3 PA. CONS. STAT. §§ 311-522 (2010)). This statute also is referred to as Act 38. It is distinct from, and has no relationship to, the Average Crop Revenue Election program authorized in the 2008 Farm Bill, also called ACRE, whereby agricultural producers can receive Counter Cyclical Program payments from the USDA on the basis of overall revenue, rather than the market price for the program commodities. See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 1105, 122 Stat. 1651 (codified at 7 U.S.C. § 8715 (2008)).

5. 2005 Pa. Laws 112.

6. A total of twelve opinions or reported per curiam orders have been issued by Pennsylvania courts—three by the Pennsylvania Supreme Court and nine by the Pennsylvania Commonwealth Court. Of these twelve decisions, four have been reversed or vacated. See *Commonwealth v. Heidelberg Twp.*, 984 A.2d 477 (Pa. 2009) (per curiam); *Commonwealth v. Locust Twp.*, 968 A.2d 1263 (Pa. 2009); *Commonwealth v. Heidelberg Twp.*, 934 A.2d 699 (Pa. 2007) (per curiam), *vacated*, 984 A.2d 477 (Pa. 2009) (per curiam); *Commonwealth v. Packer Twp.*, No. 432 M.D. 2009 (Pa. Commw. Ct. Mar. 17, 2010). *Commonwealth v. Packer Twp.*, No. 432 M.D. 2009 (Pa. Commw. Ct. Jan. 6, 2010); *Commonwealth v. E. Brunswick Twp.*, 980 A.2d 720 (Pa. Commw. Ct. 2009); *Commonwealth v. Richmond Twp.*, 975 A.2d 607 (Pa. Commw. Ct. 2009); *Commonwealth v. E. Brunswick Twp.*, 956 A.2d 1100 (Pa. Commw. Ct. 2008); *Commonwealth v. Richmond Twp.*, 917 A.2d 397 (Pa. Commw. Ct. 2007); *Commonwealth v. Locust Twp.*, 915 A.2d 738 (Pa. Commw. Ct. 2007), *rev'd*, 968 A.2d 1263 (Pa. 2009); *Commonwealth v. Lower Oxford Twp.*, 915 A.2d 685 (Pa. Commw. Ct. 2006), *rev'd*, 984 A.2d 477 (Pa. 2009) (per curiam); *Commonwealth v. Heidelberg Twp.*, No. 357 M.D. 2006 (Pa. Commw. Ct. Dec. 12, 2006), *rev'd*, 984 A.2d 477 (Pa. 2009).

have received some protections against unlawful municipal ordinances through the enactment and implementation of ACRE.

This Article will begin by reviewing the factual background and legislative history leading to the passage of ACRE in order to provide appropriate context of the environment within which this statute was enacted.<sup>7</sup> Next, the Article will address the specific provisions contained within the statute.<sup>8</sup> The Article then will discuss the administrative application and judicial interpretation of ACRE in its initial five years to ascertain the benefits that have been received by agricultural producers and municipalities thus far.<sup>9</sup> Finally, the Article will look to the future of ACRE by discussing areas within which the statute could be improved.<sup>10</sup>

## II. BACKGROUND LEADING TO THE ENACTMENT OF ACRE

### A. *Preexisting Statutory Protections*

The Pennsylvania General Assembly has enacted a number of statutes for the purpose of preserving farmland and protecting agricultural operations within the Commonwealth of Pennsylvania. These statutes include the Pennsylvania Farmland and Forest Land Assessment Act of 1974,<sup>11</sup> also known as Clean and Green, to authorize a preferential property tax assessment for eligible land;<sup>12</sup> the Agricultural Area Security Law,<sup>13</sup> to authorize the creation of agricultural districts where landowners receive certain protections and benefits including eligibility for participation in the purchase of agricultural conservation easement program;<sup>14</sup> the Right to Farm Act,<sup>15</sup> to provide protection from nuisance lawsuits and ordinances;<sup>16</sup> and the Conservation and Preservation Easements Act,<sup>17</sup> to estab-

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7. *See infra* Section II.

8. *See infra* Section III.

9. *See infra* Section IV.

10. *See infra* Section V.

11. Act of Dec. 19, 1974, No. 319, 1974 Pa. Laws 973 (codified at 72 Pa. Stat. Ann. §§ 5490.1 – 5490.13 (West 1990 & Supp. 2010)).

12. 72 Pa. Stat. Ann. § 5490.3.

13. Act of June 30, 1981, No. 43, 1981 Pa. Laws 128 (codified at 3 PA. STAT. ANN. §§ 901 – 915 (West 2008)).

14. 3 Pa. Stat. Ann. § 914.1.

15. Act of June 10, 1982, No. 133, 1982 Pa. Laws 454 (codified at 3 PA. STAT. ANN. §§ 951- 957).

16. 3 PA. STAT. ANN. § 951. Although this legislation is commonly referred to as the Pennsylvania Right to Farm Act, its legislative title is “An act protecting agricultural operations from nuisance suits and ordinances under certain circumstances.” 1982 Pa. Laws 454.

lish requirements for the creation and maintenance of certain easements.<sup>18</sup> In addition to statutory protections, there are a number of administrative programs available to agricultural producers in Pennsylvania.<sup>19</sup> The manner in which each of the various agricultural statutes and programs benefit agricultural operations is different, but a common thread among all is that each demonstrates a strong policy in favor of the protection of agricultural operations in Pennsylvania. For example, the Right to Farm Act expresses “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.”<sup>20</sup> The Agricultural Area Security Law contains a similar policy expression that also highlights the natural, ecological, and aesthetic value provided by agricultural land.<sup>21</sup>

Threats to the continued viability of agricultural operations can arise from a number of sources.<sup>22</sup> One of these sources is municipal regulation that unlawfully restricts agricultural operations. Pennsylvania’s Right to Farm Act and Agricultural Area Security Law each provide agricultural operations with some, albeit limited, protections from municipal ordinances.

Pennsylvania’s Right to Farm Act is a fairly typical nuisance-focused Right to Farm law<sup>23</sup> that provides three primary protections to agricultural opera-

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17. Act of June 22, 2001, No. 29, 2001 Pa. Laws 390 (codified at 32 PA. STAT. ANN. §§ 5051 – 5059 (West Supp. 2010)).

18. 32 PA. STAT. ANN. § 5054.

19. See generally PA. GEN. ASSEMBLY, LOCAL GOV’T COMM’N, *Pennsylvania Statutory and Regulatory Measures to Protect Agricultural Land and Open Space*, in PENNSYLVANIA LEGISLATOR’S MUNICIPAL DESKBOOK 109, 109 (3d ed. 2006) (listing the available programs), available at [http://www.lgc.state.pa.us/deskbook06/Issues\\_Land\\_Use\\_02\\_Pa\\_Measures\\_Protect\\_Ag\\_Land.pdf](http://www.lgc.state.pa.us/deskbook06/Issues_Land_Use_02_Pa_Measures_Protect_Ag_Land.pdf).

20. 3 PA. STAT. ANN. § 951.

21. *Id.* § 902.

22. These threats were described in the Statement of Legislative Findings for the Agricultural Area Security Law as follows: “Agriculture in many parts of the Commonwealth is under urban pressure from expanding metropolitan areas. This urban pressure takes the form of scattered development in wide belts around urban areas, and brings conflicting land uses into juxtaposition, creates high costs for public services, and stimulates land speculation. When this scattered development extends into good farm areas, ordinances inhibiting farming tend to follow, farm taxes rise, and hopes for speculative gains discourage investments in farm improvements. Many of the agricultural lands in the Commonwealth are in jeopardy of being lost for any agricultural purposes. Certain of these lands constitute unique and irreplaceable land resources of Statewide importance.” *Id.*

23. See generally Terence J. Centner, *Governments and Unconstitutional Takings: When Do Right-To-Farm Laws Go Too Far?*, 33 B.C. ENVTL. AFF. L. REV. 87 (2006) (discussing Right to Farm laws).

tions.<sup>24</sup> The Act protects against nuisance litigation and ordinances by establishing: (1) a limitation on the filing of nuisance lawsuits against agricultural operations by neighboring landowners,<sup>25</sup> and (2) a requirement that municipalities exclude normal agricultural operations from the definition of a public nuisance in any municipal ordinance so long as the operation does not adversely impact public health and safety.<sup>26</sup> In addition to these two nuisance-related protections, the third protection granted by the Act provides for a limitation on the ability of municipalities to restrict the direct commercial sales of agricultural products by the farmers who have produced these products.<sup>27</sup>

The primary focus of the Agricultural Area Security Law is not upon the limitation of municipal ordinances, but like the Right to Farm Act, it does contain some protections for agricultural operations in this area. The law establishes a procedure for landowners to create voluntary agricultural districts, referred to as Agricultural Security Areas,<sup>28</sup> within which farms receive certain protections and benefits including a limitation on the governmental exercise of eminent domain,<sup>29</sup> and eligibility for participation in Pennsylvania's purchase of agricultural conservation easement program.<sup>30</sup> With regard to municipal regulation, the law provides that municipalities "shall encourage the continuity, development and viability of agriculture . . . by not enacting local laws or ordinances which would unreasonably restrict farm structures or farm practices" within an Agricultural Security Area unless the laws directly benefit public health or safety.<sup>31</sup> Additionally, the law provides similar protection to that contained in the Right to Farm Act by requiring municipalities to exclude normal farming operations within an Agricultural Security Area from the definition of a public nuisance.<sup>32</sup>

Although the limitations on municipal regulations contained in these two laws are of some value to agricultural producers, they simply do not provide

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24. See 3 PA. STAT. ANN. §§ 953-954.

25. See *id.* § 954(a). To receive this protection, an agricultural facility must have been operating lawfully as a normal agricultural operation for at least one year with conditions substantially unchanged during that time. Where an agricultural operation has been expanded or substantially altered, the Act protects the operation if the expansion or alteration has been completed for at least one year or if the expansion or alteration has been addressed in the facility's nutrient management plan. *Id.*; see generally Jennifer L. Beidel, Comment, *Pennsylvania's Right-To-Farm Law: A Relief for Farmers or an Unconstitutional Taking?*, 110 PENN ST. L. REV. 163 (2005).

26. 3 PA. STAT. ANN. § 953(a) (also requiring that municipalities must "encourage the continuity, development, and viability of agricultural operations").

27. *Id.* § 953(b).

28. See *id.* §§ 905-910.

29. See *id.* § 913.

30. See *id.* § 914.1.

31. *Id.* § 911(a).

32. *Id.* § 911(b).

agricultural operations with sufficient practical protection from overreaching municipal ordinances without the additional protections provided by ACRE.<sup>33</sup> The reasons for the Right to Farm Act's failure to address this issue adequately stems from its focus on nuisance ordinances as well as its lack of a remedy for violative ordinances. Many of the municipal ordinances complained of by farmers as restricting their operations are not nuisance ordinances, but rather impose setbacks or other substantive requirements that are in conflict with state requirements. The Right to Farm Act, however, does not address these non-nuisance matters. Even for those nuisance ordinances addressed by the Act, the statute does not provide farmers with a remedy for violations. If a municipality enacts an ordinance in violation of the Right to Farm Act, a farmer must file suit against the municipality and pay for all court costs and attorney fees incurred in the challenge.<sup>34</sup> This potentially huge financial burden serves to discourage many farmers from challenging ordinances under the Right to Farm Act even where the ordinances are clearly unlawful.

The Agricultural Area Security Law similarly fails to address the issue adequately. While its protections are somewhat broader than the Right to Farm Act in that it prohibits unreasonable restrictions on farm structures and practices in addition to nuisance ordinances, it too lacks any remedy for violations. Furthermore, its application is limited only to those agricultural operations within specifically delineated Agricultural Security Areas.

One farmer's legal challenge of an unlawful ordinance enacted by his local municipality has been cited widely as providing a real-life example of the shortcomings in Pennsylvania law prior to the enactment of ACRE.<sup>35</sup> A dairy farmer in Granville Township, Bradford County, sought to diversify his operation by constructing a hog finishing facility.<sup>36</sup> In response, the township enacted an ordinance requiring that any manure storage for such facility be set back at least 1500 feet from any property line, public road, or water source.<sup>37</sup> It was not physically possible for the farmer's expansion to be in compliance with this requirement. In enacting the ordinance, the township ignored provisions of the Pennsylvania Nutrient Management Act that addressed the issue by imposing a 100 foot setback and by prohibiting any municipality from imposing a more restrictive

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33. Even with the protections provided by the Pennsylvania Right to Farm Act and the Agricultural Area Security Law, unlawful municipal ordinances were characterized during Senate consideration of the ACRE legislation as "what the agricultural community has held up as its number one issue for more than half a decade." COMMONWEALTH OF PA., LEGISLATIVE JOURNAL, S. 189-47, Reg. Sess., at 631 (2005).

34. See 34 Pa. Bull. 372 (Jan. 17, 2004).

35. See *id.*

36. See *id.*

37. *Id.*

requirement.<sup>38</sup> The township also disregarded recommendations from the Bradford County Planning Commission and the State Conservation Commission as well as the farmer's efforts to inform the township supervisors and solicitor of the preemptive problems with the ordinance.<sup>39</sup> The farmer filed suit against the township and ultimately obtained a court order invalidating the ordinance.<sup>40</sup> Although the farmer's legal challenge was successful, he paid a reported \$80,000 in attorney fees to pursue the litigation.<sup>41</sup>

### B. *Legislative History of ACRE*

Against this backdrop, there was momentum among some agricultural organizations for additional legislation to provide farmers with adequate protection from the impact of municipal ordinances that unlawfully restricted agriculture. This legislative proposal, however, had opposition arising from concerns that it would limit the ability of municipalities to regulate matters of local concern such as concentrated animal feeding operations and the land application of biosolids.<sup>42</sup>

On April 30, 2002, The Pennsylvania Senate passed Senate Bill 1413, proposing to amend Pennsylvania's Right to Farm Act to include a fee shifting provision for legal challenges brought under the Act.<sup>43</sup> Pursuant to this bill, a municipality that "willfully or with wanton disregard" violated the Right to Farm Act could be required to pay for attorney fees and litigation costs incurred in a successful ordinance challenge.<sup>44</sup> Likewise, a challenger who filed a lawsuit that was "of a frivolous nature or was brought with no substantial justification" could be required to pay for the attorney fees and litigation costs incurred by the municipality in the successful defense of its ordinance.<sup>45</sup> Although this bill passed the

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38. *See id.*; 3 PA. CONS. STAT. §§ 501, 507 (2010).

39. 34 Pa. Bull. 372 (Jan. 17, 2004).

40. *Id.*

41. *Id.*

42. These concerns about the propriety of imposing limitations upon municipal authority continued to persist throughout the entire legislative process. Upon final consideration of the legislation that would become ACRE, numerous representatives stated opposition on the basis that the legislation would limit the ability of municipalities to control specific objectionable agricultural activities. COMMONWEALTH OF PA., LEG. J., H.R. 189-45, Reg. Sess., at 1660, 1666 (2005). *See generally* Nicole E. Carter, Comment, *Agriculture, Communities and Rural Environment Initiative: Can Small Family Farms and Large Agribusiness Live Peacefully in Pennsylvania?*, 16 WIDENER L. J. 1023, 1038-41 (2007) (discussing objections to ACRE).

43. S. 1413, 187th Gen. Assem., Reg. Sess. (Pa. 2002).

44. *Id.*

45. *Id.*



Senate by a vote of 48 to 2, it was never brought to a vote in the House of Representatives.<sup>46</sup>

Another attempt to address the issue occurred on November 27, 2002, when the Pennsylvania Senate voted 45 to 3 to add fee shifting language, generally similar to that previously proposed in Senate Bill 1413, as an amendment to a tangentially related bill that had been passed by the House of Representatives.<sup>47</sup> Once again, this bill, as amended by the Senate, was not brought to a vote in the House.<sup>48</sup>

Approximately one year later, on December 17, 2003, the General Assembly finally passed legislation to provide for fee shifting in the challenge of municipal ordinances that regulated agricultural operations.<sup>49</sup> The standards established in this legislation, House Bill 1222, were similar to those originally proposed in Senate Bill 1413. Under House Bill 1222, a municipality could be assessed fees and costs where it enacted an ordinance “willfully or with wanton disregard of the limitation of authority established under state law.”<sup>50</sup> Conversely, an agricultural producer could be assessed fees and costs for filing a suit that “was frivolous or was brought without substantial justification.”<sup>51</sup>

This legislative accomplishment was short-lived as Governor Edward G. Rendell vetoed House Bill 1222 on December 31, 2003.<sup>52</sup> In his veto statement,

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46. *Id.*

47. S. 406, 187th Gen. Assem., Reg. Sess. (Pa. 2002). Senate Bill 406 originally addressed frivolous civil actions by establishing a separate cause of action that could be asserted against attorneys and law firms who assert claims without an adequate legal basis. *Id.* As amended, the bill would have added the fee shifting language to the exceptions to governmental immunity provided in the Judicial Code, 42 PA. CONS. STAT. § 8542 (2010).

48. S. 406.

49. H.R. 1222, 187th Gen. Assem., Reg. Sess. (Pa. 2003). The subject matter of House Bill 1222 originally had been entirely unrelated to agriculture, as it addressed various judicial administrative matters including the release of sexually violent predators. *Id.* The fee-shifting provision for agricultural ordinances was added as a last-minute Senate amendment to the bill after it had been passed initially by the House of Representatives. *Id.* Although there was strong opposition to the inclusion of this provision, the House agreed to the bill as amended by the Senate. *See* COMMONWEALTH OF PA., LEG. J., H.R. 187-107, Reg. Sess., at 2499-2518 (2003).

50. H.R. 1222.

51. *Id.* Just as in Senate Bill 406, the fee shifting language would have been added to the exceptions to governmental immunity provided in the Judicial Code, title 42, section 8542 of the Pennsylvania Consolidated Statutes.

52. 34 Pa. Bull. 371 (Jan. 17, 2004). Although Governor Rendell signed his veto statement on December 31, 2003, this statement was not received by the House of Representatives until January 6, 2004. COMMONWEALTH OF PA., LEG. J., H.R. 188-1, Reg. Sess., at 3 (2004). The President pro tempore of the Pennsylvania Senate and the Speaker of the Pennsylvania House of Representatives challenged the timeliness of the veto, but it was upheld by rulings of the Pennsylvania Commonwealth Court and the Pennsylvania Supreme Court. *Jubelirer v. Pa. Dep’t of State*, 859 A.2d 874, 875, 877 (Pa. Commw. Ct. 2004), *aff’d*, 871 A.2d 789, 789 (Pa. 2005) (per curiam).

Governor Rendell indicated his general support for the fee shifting provision, but he believed that the legislation was deficient in failing to address “legitimate environmental concerns” associated with livestock production.<sup>53</sup> He directed his cabinet secretaries of the Departments of Agriculture and Environmental Protection to work with the Pennsylvania General Assembly to address the issue in a “comprehensive and progressive way.”<sup>54</sup> On August 10, 2004, the Rendell administration unveiled its Agriculture, Communities and Rural Environment (ACRE) Initiative proposing the establishment of a process to address unlawful municipal ordinances together with the imposition of “some of the most comprehensive environmental-quality protections in the nation.”<sup>55</sup> The fundamental tenet of the municipal ordinance aspect of the ACRE Initiative was the establishment of a five person Agriculture Review Board to review questionable ordinances.<sup>56</sup> The Review Board would facilitate negotiations between the interested parties and, if necessary, render a formal determination.<sup>57</sup> To achieve the desired balance necessary to address this topic in a “comprehensive and progressive” manner, the environmental aspects of the ACRE Initiative included strengthening Pennsylvania’s Nutrient Management Act and establishing odor mitigation requirements for livestock facilities.<sup>58</sup>

In 2005, legislation was introduced in the Pennsylvania House of Representatives that included many aspects of Governor Rendell’s ACRE Initiative.<sup>59</sup> After much legislative deliberation and amendment, including a removal of the Review Board provisions, House Bill 1646 passed both chambers of the General Assembly—in the House of Representatives by a vote of 131 to 65 and in the Senate by a vote of 49 to 1.<sup>60</sup> With Governor Rendell’s signature on July 6,

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53. 34 Pa. Bull. 371, 373 (Jan. 17, 2004).

54. *Id.*

55. Press Release, Pa. Dep’t of Env’tl. Prot., Rendell Administration Unveils ‘ACRE’ Initiative (Aug. 10, 2004), available at [http://www.education.state.pa.us/portal/server.pt/gateway/PTARGS\\_0\\_2\\_665697\\_0\\_0\\_18/RENDELL%20ADMINISTRATION%20UNVEILS%20ACRE%20INITIATIVE.pdf](http://www.education.state.pa.us/portal/server.pt/gateway/PTARGS_0_2_665697_0_0_18/RENDELL%20ADMINISTRATION%20UNVEILS%20ACRE%20INITIATIVE.pdf) [hereinafter Press Release].

56. *Id.* The Board was to be composed of the cabinet secretaries for the Pennsylvania Departments of Agriculture, Environmental Protection, and Community and Economic Development, the Dean of the College of Agricultural Sciences at Pennsylvania State University, and an at-large member appointed by the Governor. *Id.*

57. *Id.* An aggrieved party could appeal the Board’s formal determination to the Pennsylvania Commonwealth Court. *Id.*

58. *Id.*

59. See H.R. 1646, 189th Gen. Assem., Reg. Sess. (Pa. 2005).

60. See COMMONWEALTH OF PA., LEG. J., S. 189-47, Reg. Sess., at 634 (2005); COMMONWEALTH OF PA., LEG. J., H.R. 189-45, Reg. Sess., at 1665-66, 1673 (2005); COMMONWEALTH OF PA., LEG. J., H.R. 189-44, Reg. Sess., at 1578 (2005).

2005, the legislation came into law as Act 38 of 2005.<sup>61</sup> Although Act 38 does not have an official title, it is commonly referred to by the name of the Rendell administration initiative—the Agriculture, Communities and Rural Environment Act or ACRE. As enacted, ACRE addresses the local regulation of agriculture as well as the expansion of nutrient management requirements. The procedures and requirements related to the municipal regulation of normal agricultural operations became effective immediately upon the enactment of ACRE.<sup>62</sup>

### III. BASIC STATUTORY PROVISIONS OF ACRE

#### A. *Limitations on Local Regulation of Agriculture*

With regard to the municipal regulation of agricultural operations, the basic premise of ACRE is stated as, “[a] local government unit shall not adopt nor enforce an unauthorized local ordinance.”<sup>63</sup> To fully understand the practical application of this basic premise, it is necessary to consider three key definitions provided in the statute: (1) local government unit;<sup>64</sup> (2) unauthorized local ordinance;<sup>65</sup> and (3) normal agricultural operation.<sup>66</sup> Of these three critical terms, the definition of local government unit is the most straight-forward. The statute defines a local government unit as any political subdivision within the Commonwealth of Pennsylvania.<sup>67</sup> This broad definition encompasses the actions taken by all of the 2562 subcounty municipalities as well as the 67 counties within Pennsylvania.<sup>68</sup> Because most agricultural activity in Pennsylvania takes place outside of the more densely populated areas within boroughs and cities, ACRE has greatest applicability to the actions of townships.<sup>69</sup>

61. Act of July 6, 2005, No. 38, 2005 Pa. Laws 112 (codified at 3 Pa. Cons. Stat. §§ 311-522 (2010)).

62. The provisions of the odor management program established under ACRE became fully implemented on February 27, 2009. See 25 PA. CODE § 83.741 (2010).

63. 3 PA. CONS. STAT. § 313(a).

64. *Id.* § 312.

65. *Id.*

66. *Id.*; see also 3 PA. STAT. ANN. § 952 (West 2008) (defining “normal agriculture operation” in the Pennsylvania Right to Farm Act, which was incorporated by reference into ACRE).

67. § 312.

68. Governor’s Ctr. for Local Gov’t Servs., *supra* note 3.

69. Of the fifty-eight ordinances reviewed under the provisions of ACRE during the first four years of the statute’s application, fifty-six involved township ordinances, including three ordinances that had been jointly enacted by a township or townships together with a neighboring borough or boroughs. With regard to the two ordinances that did not originate from a township, one was enacted by a borough, and one was enacted by a county. All of the ordinances reviewed under the provisions of ACRE are listed in a series of annual reports prepared by the Attorney

The other key terms necessary for an understanding of ACRE—unauthorized local ordinance and normal agricultural operation—are intertwined because an unauthorized local ordinance cannot be established without the presence of a normal agricultural operation. An ordinance is considered to be an unauthorized local ordinance if it “prohibits or limits a normal agricultural operation,” unless state law, expressly or implicitly, authorizes the enactment of the ordinance and the subject matter of the ordinance has not been preempted or prohibited by state law.<sup>70</sup> Thus, consideration of whether an ordinance is unauthorized requires a determination that a normal agricultural operation has been restricted in addition to an analysis of the state authority for, and possible preemption of, the ordinance. Each of these factors is briefly discussed below.

A normal agricultural operation for the purposes of ACRE is defined by reference to the definition of a normal agricultural operation contained in the Pennsylvania Right to Farm Act.<sup>71</sup> According to this definition, a normal agricultural operation encompasses a broad range of activities within a broad range of agricultural industries.<sup>72</sup> Specifically, a normal agricultural operation is defined as “[t]he 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 . . . .”<sup>73</sup> The definition of a normal agricultural operation is not static, but rather encompasses any technological advances in the agricultural industry.<sup>74</sup> To be considered a normal agricultural operation, a farm must be of sufficient size as the definition includes only those operations that are at least ten acres in size or have an anticipated annual gross income of at least \$10,000.<sup>75</sup>

The second factor that must be reviewed in the analysis of whether an unauthorized local ordinance exists is the state authority for, and possible preemption of, the ordinance. The Pennsylvania Municipalities Planning Code,<sup>76</sup>

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General in accordance with title 3, section 318 of the Pennsylvania Consolidated Statutes. The annual reports are available at the web site of Penn State Law’s Agricultural Law Resource and Reference Center within the ACRE Resource Area. Penn State Law, Act 38 of 2005, Agriculture, Communities and Rural Environments (ACRE): Local Regulation of Normal Agricultural Operations, [http://law.psu.edu/academics/research\\_centers/agricultural\\_law\\_center/resource\\_areas/acre\\_pennsylvania\\_act\\_38#Attorney\\_General\\_Reports](http://law.psu.edu/academics/research_centers/agricultural_law_center/resource_areas/acre_pennsylvania_act_38#Attorney_General_Reports) (last visited April 26, 2010).

70. § 312.

71. *Id.* § 312; 3 PA. STAT. ANN. § 952.

72. § 952.

73. *Id.*

74. *Id.*

75. *Id.*

76. 53 PA. STAT. ANN. §§ 10101–11202 (West 1997 & Supp. 2010).

together with other state enabling legislation, provides significant authority to local governments to enact ordinances in a variety of legal areas including land use and planning.<sup>77</sup> As such, municipalities have general authority to enact many of the local ordinances that attempt to regulate agricultural operations. The determination of whether a particular ordinance is an unauthorized local ordinance, however, does not end with the general authorization provided by the Municipalities Planning Code or similar enabling statute. An analysis of whether the ordinance in question has been prohibited or preempted by state law also must be undertaken. The analysis of potential prohibition or preemption can be problematic for municipalities and is more frequently a focus of consideration under ACRE than the general authority for the ordinance. As an example, the Pennsylvania Nutrient Management Act establishes specific environmental requirements for defined situations involving livestock facilities and prohibits a municipality from enacting more stringent requirements.<sup>78</sup> Accordingly, a local ordinance that attempts to impose a setback or other requirement more stringent than that stated in the Nutrient Management Act will be considered to be an unauthorized local ordinance.<sup>79</sup>

In addition to ordinances that are not authorized or that are preempted by state law, a local ordinance also is considered to be an unauthorized ordinance if it restricts or limits the ownership structure of a normal agricultural operation.<sup>80</sup> Some municipalities have attempted to limit corporate ownership of agricultural operations or otherwise have attempted to limit corporate activities.<sup>81</sup> Any such ordinance is considered to be an unauthorized local ordinance and is thus subject to the procedural provisions contained within ACRE.<sup>82</sup> This protection of corporate agricultural activities within Pennsylvania is an interesting component of ACRE as it runs counter to laws in some states that specifically restrict corporate involvement in agricultural operations.<sup>83</sup>

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77. There are a number of state statutes that provide municipalities with authority to act in different areas. *See, e.g.*, Pa. Local Gov't Comm'n, *Frequently Cited Municipal Laws of PA*, <http://www.lgc.state.pa.us/laws.html> (last visited April 26, 2010) (listing some of Pennsylvania's enabling statutes and other laws that impact municipal actions).

78. 3 PA. CONS. STAT. § 519 (2010).

79. *Id.* §§ 312, 519.

80. § 312.

81. *See, e.g.*, *Commonwealth v. E. Brunswick Twp.*, 956 A.2d 1100, 1103 (Pa. Commw. Ct. 2008).

82. *See* 3 PA. CONS. STAT. § 312.

83. *See generally* Anthony B. Schutz, *Corporate-Farming Measures in a Post-Jones World*, 14 DRAKE J. AGRIC. L. 97 (2009) (providing general information about corporate farming laws).

### B. *Procedures to Address Questionable Municipal Ordinances*

The most important features of ACRE are the inclusion of two procedural measures relating to the manner in which a questionable local ordinance can be challenged. The first of these authorizes the involvement of the Pennsylvania Attorney General in the process of reviewing ordinances and initiating legal challenges of potentially violative municipal ordinances.<sup>84</sup> The second of the procedural measures is the authorization for filing a legal challenge directly with the Pennsylvania Commonwealth Court rather than with the county-level trial court.<sup>85</sup>

Prior to the enactment of ACRE, the burden to challenge an unlawful ordinance fell upon the agricultural producer or other private party adversely impacted by the ordinance. To challenge the enforcement of an ordinance or to invalidate the ordinance, the agricultural producer was required to file suit with the appropriate county Court of Common Pleas. The producer bore all of the court costs and attorney fees incurred in the prosecution of the action, and the amount of time that would be necessary for the case to proceed through the trial court and onto any appeals within the Pennsylvania appellate court system likely would be lengthy. Even where the ordinance clearly was unlawful, no state governmental support was available to invalidate the ordinance or otherwise to assist the agricultural producer.

Through the enactment of ACRE, a process has been established through which agricultural producers can obtain support from the Pennsylvania Attorney General to challenge an ordinance. Although the ACRE Initiative as originally proposed by the Rendell Administration called for the involvement of an Agriculture Review Board in this process,<sup>86</sup> the General Assembly elected not to establish this new entity. By authorizing the Attorney General to file a legal action, ACRE has relieved the agricultural producer, in most situations, from incurring the financial burdens associated with the extensive litigation that may be necessary to challenge an ordinance. Where an agricultural producer believes that an ordinance is an unauthorized local ordinance, as that term is defined under ACRE, the producer may request that the Attorney General review the ordinance and, if necessary, file suit to invalidate the ordinance.<sup>87</sup>

Upon receipt of such a request, the Attorney General has 120 days to review the request and advise the requestor whether he will be filing a suit seeking

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84. 3 PA. CONS. STAT. §§ 314, 315(a).

85. *Id.* § 315.

86. Press Release, *supra* note 55.

87. 3 PA. CONS. STAT. § 314(a).

to invalidate the ordinance.<sup>88</sup> During the 120-day review period, the Attorney General may require outside assistance to make the technical determination of whether the ordinance in question impacts a “normal agricultural operation.”<sup>89</sup> The determination of whether a particular activity is considered to be a normal agricultural operation may be dispositive in the Attorney General’s decision to file suit.<sup>90</sup> The statute requires that the Secretary of the Pennsylvania Department of Agriculture and the Dean of the College of Agricultural Sciences at the Pennsylvania State University provide this expert consultation, at the request of the Attorney General, on “the nature of normal agricultural operations in this Commonwealth.”<sup>91</sup>

After the Attorney General completes the ordinance review and makes a determination as to whether a suit will be filed to invalidate the ordinance, the Attorney General provides written notification to the requestor and the affected municipality.<sup>92</sup> The statute vests the Attorney General with discretion as to whether he will file suit to invalidate the ordinance and does not require that the Attorney General provide any reasons for his decision.<sup>93</sup>

Where the Attorney General believes that an ordinance is unlawful, ACRE authorizes him to file suit in Pennsylvania’s Commonwealth Court against the local municipality to invalidate the ordinance.<sup>94</sup> The Commonwealth Court generally functions as an appellate court that addresses litigation involving state agencies, although the Commonwealth Court is vested with original jurisdiction when any statute grants that authority.<sup>95</sup> With the authorization to file suits under ACRE in the Commonwealth Court rather than the Court of Common Pleas, each court opinion establishes state-wide precedent. Thus, a dispute involving an or-

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88. *Id.* § 314(c). If the request was made to the Attorney General in writing, then the Attorney General is required to provide a written response. *Id.* The Attorney General is not required to notify the municipality when a request for review is submitted, yet as a practical matter, the Attorney General provides written notification to both the requestor and affected municipality when a request for review is received. TOM CORBETT, FOURTH ANNUAL REPORT OF THE ATTORNEY GENERAL TO THE GENERAL ASSEMBLY PURSUANT TO SECTION 318 OF ACT 38 OF 2005 “ACRE” AGRICULTURE, COMMUNITIES AND RURAL ENVIRONMENT 2 (2009), [http://law.psu.edu/\\_file/aglaw/Act\\_38/2009\\_ACRE\\_Report\\_from\\_Attorney\\_General.pdf](http://law.psu.edu/_file/aglaw/Act_38/2009_ACRE_Report_from_Attorney_General.pdf) [hereinafter CORBETT, FOURTH ANNUAL REPORT].

89. *See* 3 PA. CONS. STAT. § 314(d).

90. The Attorney General also may require expert assistance following this 120-day review period as the case proceeds through the judicial system. *See id.*

91. *Id.*

92. *See* CORBETT, FOURTH ANNUAL REPORT, *supra* note 88. Although this is not a statutory requirement, the Attorney General has been following this practice of notifying both parties following the completion of an ordinance review. *See id.*

93. 3 PA. CONS. STAT. § 314(b).

94. *Id.* § 315(a).

95. 42 PA. CONS. STAT. § 761(a)(4).

dinance restricting a dairy operation in one part of the state will have precedential value throughout the state.

In addition to authorizing suits by the Attorney General, ACRE authorizes any aggrieved party to file suit directly with the Commonwealth Court to invalidate an ordinance.<sup>96</sup> In most cases, this private right of action will be exercised after the Attorney General has declined to accept the case, but there is no requirement that a private party request Attorney General review prior to filing suit. Certainly, in most cases, an agricultural producer would prefer to have the Attorney General bear the costs of litigation. There may be some producers, however, who prefer to handle the ordinance challenge without the involvement of the Attorney General's office for a variety of reasons.<sup>97</sup>

ACRE provides for the shifting of attorney fees and litigation costs, but only in cases that have been filed pursuant to the private right of action authorization contained in title 3, section 315(b) of the Pennsylvania Consolidated Statutes.<sup>98</sup> Fee shifting is not authorized under ACRE if the Attorney General has filed a lawsuit. In a private right of action, a court may order the municipality to pay the attorney fees and costs incurred by the agricultural producer where the municipality has acted "with negligent disregard of the limitation of authority established under State law."<sup>99</sup> Similarly, the court may order the agricultural producer to pay the attorney fees and costs incurred by the municipality where the producer's challenge of the ordinance was "frivolous or was brought without substantial justification . . . ."<sup>100</sup>

The statute also contains a provision for the appointment of masters by the Commonwealth Court to hear ACRE cases.<sup>101</sup> At the direction of the Com-

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96. 3 PA. CONS. STAT. § 315(b).

97. An agricultural producer may choose to file a private right of action rather than utilizing the services of the Attorney General in order to retain control over the litigation. The producer may not wish for the case to be resolved through negotiation, or the producer may believe that his or her personally-selected attorney will represent his or her interests more capably than will the office of the Attorney General. Also, the agricultural producer may seek to impose his or her attorney fees upon the municipality through the provisions of title 3, section 317(1) of the Pennsylvania Consolidated Statutes. 3 PA. CONS. STAT. § 317(1) (2010).

98. *Id.* § 317.

99. *Id.* § 317(1).

100. *Id.* § 317(2).

101. *Id.* § 316(b). Under the statute, the Commonwealth Court is granted the authority to promulgate rules for the selection of masters to handle ACRE cases on a full-time or part-time basis. *Id.* § 316(a). The number of masters to be appointed and their compensation is to be determined by the Commonwealth Court. *Id.* This provision authorizing the appointment of a master has not yet been utilized. In at least one case, however, the township has requested that a master be appointed. On November 17, 2009, Packer Township filed a motion seeking appointment of a master. Motion for Appointment, Commonwealth v. Packer Twp., No. 432 M.D. 2009 (Pa. Commw. Ct. Nov. 17, 2009). The court denied this request on November 25, 2009, without preju-



monwealth Court, appointed masters may conduct initial hearings in actions brought by the Attorney General or by a private party.<sup>102</sup> Following a hearing conducted by a master, the master shall prepare and forward written findings and a recommendation to the president judge of the Commonwealth Court.<sup>103</sup> By confirmation of the president judge, the findings and recommendations of the master shall become the ruling of the Commonwealth Court.<sup>104</sup>

#### IV. EARLY IMPLEMENTATION AND INTERPRETATION OF ACRE

##### A. *The Attorney General's Review of Municipal Ordinances*

The enactment and early implementation of ACRE has been well received by the agricultural community. In the first year following its passage, agricultural producers requested that the Attorney General review sixteen different municipal ordinances that were alleged to unlawfully regulate agricultural operations.<sup>105</sup> Requests for review have continued to be submitted to the Attorney General at approximately this same rate in the subsequent years as a total of fifty-eight requests for review have been submitted in the first four years of the statute's application.<sup>106</sup> In performing each of these reviews to determine wheth-

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dice to the ability of the township to refile the motion after pending preliminary objections were resolved. Order Denying Application for Relief, *Commonwealth v. Packer Twp.*, No. 432 M.D. 2009 (Pa. Commw. Ct. Nov. 25, 2009).

102. 3 PA. CONS. STAT. § 316(b).

103. *Id.* § 316(c).

104. *Id.* § 316(d). The president judge can order a rehearing at any time following the master's hearing upon a showing of cause. *Id.*

105. TOM CORBETT, FIRST ANNUAL REPORT OF THE ATTORNEY GENERAL TO THE GENERAL ASSEMBLY PURSUANT TO SECTION 318 OF ACT 38 OF 2005 "ACRE" AGRICULTURE, COMMUNITIES AND RURAL ENVIRONMENT 3-7 (2006), [http://law.psu.edu/\\_file/aglaw/Act\\_38/2006ACREReportFromAttorneyGeneral.pdf](http://law.psu.edu/_file/aglaw/Act_38/2006ACREReportFromAttorneyGeneral.pdf) [hereinafter CORBETT, FIRST ANNUAL REPORT]. The statute requires that the Attorney General submit an annual report to the chairman and minority chairman of the Agriculture and Rural Affairs Committees in both chambers of the Pennsylvania General Assembly describing activity under the statute. 3 PA. CONS. STAT. § 318. The Attorney General is required to include the following information in these annual reports: "(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[; and] (4) Information on the outcome of legal actions brought by the Attorney General." *Id.* The time periods covered within each of these annual reports prepared by the Attorney General has been from July 6th of one year to July 6th of the subsequent year, and the reports generally have been prepared in September of each year. See, e.g., CORBETT, FOURTH ANNUAL REPORT, *supra* note 88.

106. In the first year of the statute's application, from July 6, 2005, to July 6, 2006, a total of sixteen requests for review were submitted. CORBETT, FIRST ANNUAL REPORT, *supra* note 105. In the second year, from July 6, 2006, to July 6, 2007, a total of nineteen requests for review were

er or not the ordinance in question was an unauthorized local ordinance under the statute, the Attorney General has demonstrated remarkable balance. Of the fifty-four ordinance reviews that had been completed as of October 1, 2009, the Attorney General notified twenty-six municipalities that the municipality had enacted or enforced an ordinance that unlawfully regulated agricultural operations.<sup>107</sup> In the remaining twenty-eight ordinance reviews, the Attorney General advised the agricultural producer that his office would not be taking any further legal action with regard to the ordinance.<sup>108</sup>

The twenty-six cases that have been accepted by the Attorney General have included ordinances that have regulated intensive animal agriculture,<sup>109</sup> re-

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submitted. TOM CORBETT, SECOND ANNUAL REPORT OF THE ATTORNEY GENERAL TO THE GENERAL ASSEMBLY PURSUANT TO SECTION 318 OF ACT 38 OF 2005 "ACRE" AGRICULTURE, COMMUNITIES AND RURAL ENVIRONMENT 3 (2007), [http://law.psu.edu/\\_file/aglaw/Act\\_38/2007ACREReportFromAttorneyGeneral.pdf](http://law.psu.edu/_file/aglaw/Act_38/2007ACREReportFromAttorneyGeneral.pdf) [hereinafter CORBETT, SECOND ANNUAL REPORT]. In the third year, from July 6, 2007, to July 6, 2008, a total of eight requests for review were submitted. TOM CORBETT, THIRD ANNUAL REPORT OF THE ATTORNEY GENERAL TO THE GENERAL ASSEMBLY PURSUANT TO SECTION 318 OF ACT 38 OF 2005: "ACRE" AGRICULTURE, COMMUNITIES AND RURAL ENVIRONMENT 3 (2008), [http://law.psu.edu/\\_file/aglaw/Act\\_38/2008ACREReportFromAttorneyGeneral.pdf](http://law.psu.edu/_file/aglaw/Act_38/2008ACREReportFromAttorneyGeneral.pdf) [hereinafter CORBETT, THIRD ANNUAL REPORT]. In the fourth year, from July 6, 2008, to July 6, 2009, a total of fifteen requests for review were submitted. CORBETT, FOURTH ANNUAL REPORT, *supra* note 88, at 3.

107. CORBETT, FOURTH ANNUAL REPORT, *supra* note 88, at 1, 3.

108. *Id.* at 3.

109. Locust Township, Columbia County, enacted an ordinance regulating "intensive animal agriculture." CORBETT, FIRST ANNUAL REPORT, *supra* note 105, at 4. Richmond Township, Berks County, enacted an ordinance regulating "intensive agricultural activity." *Id.* at 5. Heidelberg Township, North Heidelberg Township, Robesonia Borough, and Womelsdorf Borough in Berks County enacted a joint ordinance regulating the "intensive raising of livestock or poultry." *Id.* Lower Towamensing Township, Carbon County, enacted an ordinance prohibiting "intensive agriculture." *Id.* at 6. Clay Township, Lancaster County, enacted an ordinance regulating "intensive agricultural production facilit[ies]." *Id.* at 7. Hartley Township, Union County, enacted an ordinance regulating "commercial livestock and concentrated animal operations." CORBETT, SECOND ANNUAL REPORT, *supra* note 106, at 6. Lewis Township and Turbotville Borough in Northumberland County enacted a joint ordinance regulating concentrated animal operations. *Id.* at 8. Peach Bottom Township, York County, enacted an ordinance regulating "concentrated animal operations and concentrated animal feeding operations." CORBETT, THIRD ANNUAL REPORT, *supra* note 106, at 7-8. Salem Township, Luzerne County, enacted an ordinance imposing setback requirements for livestock. *See id.* at 8. Lehigh Township, Northampton County, enacted an ordinance imposing setback requirements for commercial livestock operations. *Id.* at 9-10. Lewis Township, Union County, enacted an ordinance regulating non-concentrated animal operations. *Id.* at 10. Heidelberg Township, Lebanon County, enacted an ordinance regulating concentrated animal operations. CORBETT, FOURTH ANNUAL REPORT, *supra* note 88, at 9. Elizabeth Township, Lancaster County, enacted an ordinance regulating concentrated animal operations. *Id.* at 13.

stricted agricultural or commercial composting operations,<sup>110</sup> regulated biosolid application,<sup>111</sup> restricted timber harvesting,<sup>112</sup> restricted agricultural roadside markets,<sup>113</sup> prohibited corporate ownership of farms,<sup>114</sup> and required greenhouses to comply with the Uniform Construction Code.<sup>115</sup> In each of these cases, the Attorney General has provided the municipality with the opportunity to rescind or amend the ordinance to bring it into legal compliance.<sup>116</sup> In some cases, the municipality has complied with this request immediately. More often, the Attorney General and the municipality have engaged in negotiations in order to settle on an alternate or amended ordinance that is in compliance with the requirements of ACRE. In the first four years of ACRE, this process of notification together with subsequent negotiation has resulted in eleven ordinances being rescinded or amended without resort to litigation.<sup>117</sup> For seven ordinances, negotiations to find an acceptable compromise between the Attorney General and the municipality continue.<sup>118</sup> In the remaining eight cases, the Attorney General has filed suit in

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110. Upper Providence Township, Montgomery County, enacted an ordinance prohibiting commercial composting. CORBETT, FIRST ANNUAL REPORT, *supra* note 105, at 3. Lower Oxford Township, Chester County, enacted an ordinance restricting mushroom compost preparation. *Id.* at 5.

111. East Brunswick Township, Schuylkill County, enacted an ordinance regulating the land application of biosolids. CORBETT, SECOND ANNUAL REPORT, *supra* note 106, at 7. Packer Township, Carbon County, enacted an ordinance regulating the land application of biosolids. CORBETT, FOURTH ANNUAL REPORT, *supra* note 88, at 9. Shrewsbury Township, York County, enacted an ordinance regulating the land application of biosolids. *Id.* at 11. Barry Township, Schuylkill County, enacted an ordinance regulating the land application of biosolids. *Id.* at 13.

112. Salisbury Township, Lehigh County, enacted an ordinance requiring a special exception to harvest timber. *See* CORBETT, SECOND ANNUAL REPORT, *supra* note 106, at 7. Upper Salford Township, Montgomery County, enacted an ordinance regulating timber harvesting. CORBETT, FOURTH ANNUAL REPORT, *supra* note 88, at 10.

113. Douglass Township, Berks County, enacted an ordinance restricting roadside stands. CORBETT, THIRD ANNUAL REPORT, *supra* note 106, at 9.

114. Belfast Township, Fulton County, enacted an ordinance prohibiting corporate ownership of farms. CORBETT, FIRST ANNUAL REPORT, *supra* note 105, at 6.

115. Shrewsbury Township, York County, applied the requirements of the Uniform Construction Code to the construction of greenhouses. CORBETT, FOURTH ANNUAL REPORT, *supra* note 88 at 12.

116. *See, e.g., id.* at 2.

117. *See id.* at 7, 8, 10, 12; CORBETT, THIRD ANNUAL REPORT, *supra* note 106, at 7, 9; CORBETT, SECOND ANNUAL REPORT, *supra* note 106, at 6; CORBETT, FIRST ANNUAL REPORT, *supra* note 105, at 3, 6.

118. The Attorney General is in ongoing negotiations with the following municipalities: Lower Towamensing Township, Carbon County; Hartley Township, Union County; Lewis Township, Union County; Heidelberg Township, Lebanon County; Shrewsbury Township, York County; Barry Township, Schuylkill County; and Elizabeth Township, Lancaster County. *See* CORBETT, FOURTH ANNUAL REPORT, *supra* note 88, at 6, 7, 9, 10, 11, 13.

the Commonwealth Court seeking to have the ordinance struck down.<sup>119</sup> Six of these cases remain pending, while two ordinances have been rescinded or amended following the commencement of litigation.<sup>120</sup>

The twenty-eight cases where the Attorney General has not taken any further legal action have included ordinances that have regulated stray animals,<sup>121</sup> prohibited farm animals within borough limits,<sup>122</sup> regulated small poultry operations,<sup>123</sup> imposed a setback for livestock housing,<sup>124</sup> restricted timber harvesting,<sup>125</sup> diminished property values or property marketability through re-zoning,<sup>126</sup> re-zoned to approve high density residential dwelling near agricultural operations,<sup>127</sup> excluded aquaculture from the definition of agriculture,<sup>128</sup> regulated the storage of materials and prohibited littering,<sup>129</sup> required a minimum lot size of five acres for agricultural operations,<sup>130</sup> impeded animal expansion into a riparian buffer zone,<sup>131</sup> required a special use permit to sell products at a farm market,<sup>132</sup> required

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119. See *Commonwealth v. Locust Twp.*, 968 A.2d 1263, 1265 (Pa. 2009); *Commonwealth v. Heidelberg Twp.*, 934 A.2d 699 (Pa. 2007); *Commonwealth v. E. Brunswick Twp.*, 980 A.2d 720, 722 (Pa. Commw. Ct. 2009); *Commonwealth v. Richmond Twp.*, 975 A.2d 607, 610 (Pa. Commw. Ct. 2009); *Commonwealth v. Lower Oxford Twp.*, 915 A.2d 685, 685 (Pa. Commw. Ct. 2006); *Commonwealth v. Packer Twp.*, No. 432 M.D. 2009 (Pa. Commw. Ct. filed Aug. 18, 2009); *Commonwealth v. Peach Bottom Twp.*, No. 423 M.D. 2009 (Pa. Commw. Ct. filed Aug. 12, 2009); *Commonwealth v. Belfast Twp.*, No. 564 M.D. 2006 (Pa. Commw. Ct. filed Oct. 26, 2006).

120. *Belfast Township*, No. 389 M.D. 2006, settled on February 20, 2007, and *East Brunswick Township*, No. 476 M.D. 2007, settled on November 19, 2009.

121. Cumberland Township, Greene County and Barrett Township, Monroe County, included such ordinances. CORBETT, FIRST ANNUAL REPORT, *supra* note 105, at 4; see CORBETT, THIRD ANNUAL REPORT, *supra* note 106, at 9.

122. New Milford Borough, Susquehanna County, enacted such an ordinance. CORBETT, THIRD ANNUAL REPORT, *supra* note 106, at 8.

123. Maxatawny Township, Berks County, enacted such an ordinance. CORBETT, SECOND ANNUAL REPORT, *supra* note 106, at 8.

124. Neshannock Township, Lawrence County, and Jackson Township, Columbia County, enacted such ordinances. CORBETT, FOURTH ANNUAL REPORT, *supra* note 88, at 11, 14.

125. CORBETT, THIRD ANNUAL REPORT, *supra* note 106, at 10.

126. See CORBETT, FIRST ANNUAL REPORT, *supra* note 105, at 4, 6.

127. Newtown Township, Upper Makefield Township, and Wrightstown Township, Bucks County, approved such rezoning. CORBETT, SECOND ANNUAL REPORT, *supra* note 106, at 10.

128. Bethel Township, Berks County, enacted such an exclusion. CORBETT, THIRD ANNUAL REPORT, *supra* note 106, at 7.

129. Bushkill Township, Northampton County, enacted such an ordinance. CORBETT, FIRST ANNUAL REPORT, *supra* note 105, at 4.

130. Paradise Township, York County, and Marshall Township, Allegheny County, required such minimums. *Id.* at 7.

131. East Bradford Township, Chester County, enacted a Riparian Buffer Ordinance. CORBETT, SECOND ANNUAL REPORT, *supra* note 106, at 6.

submission of a land development plan for an equestrian arena,<sup>133</sup> imposed a fencing setback requirement for horses,<sup>134</sup> required a horse barn and riding arena to comply with the Uniform Construction Code,<sup>135</sup> required removal of grape vines along a property boundary,<sup>136</sup> denied a permit for a residential dwelling,<sup>137</sup> and enforced a disturbing the peace ordinance for using a propane cannon to repel deer from a Christmas tree farm.<sup>138</sup>

The Attorney General is not required to provide any reasoning for its failure to take any further action,<sup>139</sup> so it cannot be determined exactly why the Attorney General discounted the problems alleged by the agricultural producers with each of these ordinances.<sup>140</sup> Since the statute does provide for a private right of action, the producer has the ability to file an action against the municipality in the Commonwealth Court even if the Attorney General has not acted upon the request.<sup>141</sup> Only one producer has availed himself of this opportunity by filing a private right of action.<sup>142</sup>

#### B. *Benefits from the Implementation of the Ordinance Review Process*

Although none of the nine lawsuits<sup>143</sup> filed under ACRE have yet reached a final court decision opining on the merits of the ordinance in question, the ap-

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132. Upper Mount Bethel Township, North Hampton County, required such a permit. *Id.* at 9.

133. Orange Township, Columbia County, required such a plan. *Id.* at 9-10.

134. Robinson Township, Washington County, had such an ordinance. CORBETT, FOURTH ANNUAL REPORT, *supra* note 88, at 10.

135. West Earl Township, Lancaster County, and Jefferson Township, Berks County have such a requirement. *Id.* at 11, 13.

136. West Hanorver Township, Dauphin County, had such a requirement. CORBETT, SECOND ANNUAL REPORT, *supra* note 106, at 10.

137. *Id.* at 8.

138. Skippack Township, Montgomery County, had such an ordinance. *See* CORBETT, FIRST ANNUAL REPORT, *supra* note 105, at 6-7.

139. *See* 3 PA. CONS. STAT. § 314 (2010).

140. The Attorney General has both accepted and rejected ordinances involving regulation of farm markets, timber harvesting, livestock housing setbacks, and Uniform Construction Code compliance. *See, e.g.,* CORBETT, FOURTH ANNUAL REPORT, *supra* note 88, at 8-12; CORBETT, SECOND ANNUAL REPORT, *supra* note 106, at 9. Because the Attorney General provides only minimal information in the annual reports and is not required to provide reasons for his decisions, it is difficult to ascertain why some of the ordinances were deemed to be lawful while ordinances of a similar nature were deemed to be unauthorized.

141. 3 PA. CONS. STAT. § 315(b).

142. *See* *Boswell v. Skippack Twp.*, No. 389 M.D. 2006 (Pa. Commw. Ct. filed July 14, 2006).

143. Eight lawsuits have been filed by the Attorney General, and one suit has been filed as a private action. *See* cases cited *supra* notes 116, 139.

plication of ACRE has benefited agricultural producers in several ways. First and foremost, thirteen municipal ordinances that unlawfully regulated agricultural operations have been rescinded or amended. Legal problems in eleven of these ordinances have been corrected without the filing of litigation. Certainly, the process of resolving problems with unlawful ordinances through negotiation rather than litigation benefits all parties. Unlike the dairy farmer in Granville Township who was required to incur a financial burden of \$80,000,<sup>144</sup> the agricultural producers impacted by these thirteen unlawful ordinances have not been required to pay any legal fees to obtain relief.

Even those agricultural producers who submitted requests for review that were not accepted by the Attorney General have benefitted from the application of ACRE. The Attorney General's balanced treatment of requests demonstrates that he is not predisposed to finding legal problems in ordinances nor is he predisposed to ignoring legal problems in ordinances. As such, a requestor should feel as though he or she is getting a neutral review of the ordinance in question. Prior to the enactment of ACRE, an agricultural producer had no such opportunity to obtain an unbiased opinion on the legality of the ordinance. Believing the ordinance to be unlawful, some of these producers may have filed suit at significant expense to receive an adverse determination from a court. Under ACRE, the producer remains able to file a private action following the Attorney General's determination, so the producer has not lost anything through the enactment of ACRE should he or she be determined to challenge the ordinance.

Municipalities also have benefitted from the early application of ACRE. The focus on negotiation rather than litigation has obvious financial advantages for the municipalities. Just as do agricultural producers, municipalities benefit from receiving an unbiased review of the ordinance's legality. Prior to the initiation of litigation, the Attorney General is not in an adversarial position to the municipality. His treatment of requests demonstrates that he is not advocating for the agricultural producer in every case, or even in most cases. Through the ordinance review process, the Attorney General is providing the municipality with a free unbiased legal opinion on its ordinance. The municipality may choose to defend the ordinance in litigation, but certainly this review should have value to the municipality.

### *C. Judicial Interpretation of ACRE*

Agricultural producers have received benefits from ACRE in its early years, but these benefits have arisen primarily through the Attorney General's

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144. 34 Pa. Bull. 372 (Jan. 17, 2004).

active role in the ordinance review process rather than through judicial victories. This is not to say that agricultural producers have fared poorly in early court opinions. In fact, the reverse is true. Much of the early case law has been generated from the filing of preliminary objections by municipalities, and in each case, the Attorney General's complaint ultimately withstood the township's objection or objections.<sup>145</sup>

None of the filed cases have yet been resolved on the merits. As a result, the ACRE case law does not provide any court opinions ruling whether or not a particular practice, such as the land application of biosolids, is a normal agricultural operation.<sup>146</sup> Likewise, there is not yet established precedent under ACRE as to whether, or to what extent, a municipality may regulate livestock facilities.<sup>147</sup> Despite this, courts have decided some important foundational issues in the emerging body of ACRE case law.

The Commonwealth Court has ruled that ACRE is constitutional and that the statute properly conveys standing upon the Attorney General to challenge a municipal ordinance.<sup>148</sup> The Pennsylvania Supreme Court has also ruled that the Attorney General's standing to challenge an ordinance is not dependent upon receiving a request for ordinance review.<sup>149</sup> Rather, the Attorney General can file a legal challenge of an ordinance on his own initiative.<sup>150</sup> Additionally, the Supreme Court has ruled that the procedural framework established by ACRE applies to land use ordinances and that the Commonwealth Court has original jurisdiction to hear such cases.<sup>151</sup> In so ruling, the Supreme Court rejected the argument that the Attorney General's challenge of a land use ordinance under ACRE must be presented initially to the local zoning heard board.<sup>152</sup>

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145. See, e.g., *Commonwealth v. Heidelberg Twp.*, 984 A.2d 477, 477 (Pa. 2009) (per curiam) (overruling preliminary objections); *Commonwealth v. Locust Twp.*, 968 A.2d 1263, 1265 (Pa. 2009) (concluding the lower court properly overruled preliminary objections); *Commonwealth v. Packer Twp.*, No. 432 M.D. 2009 (Pa. Commw. Ct. filed Jan. 6, 2010) (overruling preliminary objections); *Commonwealth v. E. Brunswick Twp.*, 980 A.2d 720, 726 (Pa. Commw. Ct. 2009) (overruling preliminary objection); *Commonwealth v. E. Brunswick Twp.*, 956 A.2d 1100, 1112 (Pa. Commw. Ct. 2008) (overruling preliminary objection); *Commonwealth v. Richmond Twp.*, 917 A.2d 397, 406 (Pa. Commw. Ct. 2007) (overruling preliminary objections); see also *Commonwealth v. Richmond Twp.*, 975 A.2d 607, 617 (Pa. Commw. Ct. 2009) (denying a motion for judgment on the pleadings).

146. See, e.g., *E. Brunswick Twp.*, 980 A.2d at 729.

147. See *Richmond Twp.*, 975 A.2d at 614.

148. *E. Brunswick Twp.*, 956 A.2d at 1112.

149. *Locust Twp.*, 968 A.2d at 1270-71.

150. *Id.* at 1271.

151. *Id.*

152. *Id.* at 1270.

Another of the foundational questions that has been resolved in the interpretation of ACRE is its applicability to ordinances that were enacted prior to the effective date of ACRE. This issue was presented in three of the ordinance challenges filed by the Attorney General.<sup>153</sup> Although the ordinance in each of these cases was not being enforced by the municipality against the agricultural producer, the Attorney General argued that the ordinances were nonetheless unauthorized local ordinances.<sup>154</sup> The Supreme Court agreed with this argument in ruling that the Attorney General has the authority to challenge a local ordinance that was promulgated prior to the enactment of ACRE regardless of whether the municipality has acted to enforce the ordinance.<sup>155</sup>

The Commonwealth Court also has ruled that summary relief is available in an ACRE challenge even though those provisions are not included specifically within the statute.<sup>156</sup> Under Rule 1532(b) of the Pennsylvania Rules of Appellate Procedure, summary relief is appropriate “where the moving party establishes that the case is clear and free from doubt; that there exist no genuine issues of material fact to be tried; and that the moving party is entitled to judgment as a matter of law.”<sup>157</sup> While summary relief is available as a theoretical remedy in an

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153. See *id.* at 1271; *Commonwealth v. Heidelberg Twp.*, 934 A.2d 699 (Pa. 2007); *Commonwealth v. Lower Oxford Twp.*, 915 A.2d 685, 686 (Pa. Commw. Ct. 2006).

154. Although an ordinance is not being enforced against a farmer, it nonetheless may have an adverse impact on the farmer’s operations. The farmer may wish to expand or otherwise change operations, but to do so would violate this questionable ordinance. The farmer then has two choices. One of his choices is to proceed with the expansion. This option carries risk to the farmer, as he cannot predict with certainty whether the municipality will act to enforce its ordinance. If the municipality does enforce the ordinance, he must decide whether to challenge the enforcement action. This action carries further risk as he cannot determine with certainty whether the ordinance will be invalidated or upheld. As a result of this uncertainty, any expense incurred in an expansion is done so at great risk. Another undesirable option for the farmer is to forego expansion in order to remain in compliance with the questionable ordinance.

155. *Locust Twp.*, 968 A.2d at 1274. At the time of the passage of ACRE, an ordinance regulating “intensive animal operations” was in force in Locust Township, Columbia County. *Id.* at 1267. The Attorney General filed suit challenging this ordinance as being preempted by Pennsylvania law. *Id.* The township filed a preliminary objection to the use of the statute because section 313(b) of the statute required either the “enactment or enforcement” of an ordinance, neither of which had been alleged. *Id.* at 1265, 1266. Based upon the application of the Statutory Construction Act, title 1, section 1921 of the Pennsylvania Consolidated Statutes, and the precedent of *Arsenal Coal Co. v. Department of Environmental Research*, 477 A.2d 1333 (Pa.1984), the court rejected this argument, finding that the Attorney General was not required “to wait for the Township to attempt to enforce the Ordinance” before he could file suit. *Locust Twp.*, 968 A.2d at 1273, 1275.

156. *Commonwealth v. E. Brunswick Twp.*, 956 A.2d 1100, 1113 (Pa. Commw. Ct. 2008).

157. *Id.*



ACRE case, the court has not yet found the applicable standard to have been established.<sup>158</sup> Thus, summary relief has not been granted in an ACRE case to date.

#### V. THE FUTURE OF ACRE—AREAS FOR IMPROVEMENT

The enactment and administration of ACRE have yielded many positive results for Pennsylvania's agricultural communities, but there are three changes that would improve its operation. The statute should be amended to: (1) require that the Attorney General provide more information about successful negotiations that have led to the amendment of an unlawful municipal ordinance, (2) establish a procedure for a municipality to request review of a proposed ordinance, and (3) expand the fee shifting provision to include actions filed by the Attorney General. Enacting these amendments would more fully effectuate the goals of the statute by providing added transparency and information about the ordinance review process as well as by imposing financial responsibility upon municipalities who act in disregard of their legal authority.

Requiring the Attorney General to provide additional information about municipal ordinances that were amended through the negotiation process would assist agricultural producers and municipalities alike in future decision making. The Attorney General's implementation of the ordinance review and resolution process places an emphasis, as it should, on correcting problematic ordinances through negotiation rather than litigation. One by-product of this approach, however, is that the details of any such resolution are not widely known. While the Attorney General is required to provide the Pennsylvania General Assembly with an annual report,<sup>159</sup> this report contains very cursory details about the outcome of the negotiation process.<sup>160</sup> For each request for review, the annual report typically will provide a very brief description of the ordinance's content.<sup>161</sup> If the Attorney General believes that the ordinance is unauthorized, the report will contain an additional sentence to the effect of, "The OAG notified the Township of legal problems with the ordinance and offered the Township an opportunity to discuss and correct them."<sup>162</sup> Where negotiations with the municipality have been successful, the report will contain a final sentence to the effect of, "[a]fter negotiation, the Township/Borough agreed to amend the ordinance to bring it into compliance with Act 38."<sup>163</sup> Details about the terms of the amended ordinance are not

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158. *Id.* at 1116.

159. 3 PA. CONS. STAT. § 318 (2010).

160. *See, e.g.*, CORBETT, FOURTH ANNUAL REPORT, *supra* note 88, at *passim*.

161. *See, e.g., id.*

162. *E.g., id.* at 3.

163. *E.g., id.* at 7.

provided in the report. This cursory explanation does not provide outside parties, such as other agricultural producers or municipalities, with information about the specific problems in the ordinance or with the amended provisions that were deemed to be acceptable. By failing to provide this information, the facts and resolution of each case have application only to that case. Certainly, the product of negotiations between the Attorney General and a municipality does not establish legal precedent for an ordinance enacted by another municipality. And certainly, the Attorney General is not rendering a legal ruling in the ordinance review process. The Attorney General is, however, exercising impartial judgment as to whether particular language in an ordinance is violative of state law. This information, if made readily available, would provide guidance to producers and municipalities throughout the state as to what language in an ordinance will be acceptable or unacceptable in the view of the Attorney General.

Similarly, the statute should enable municipalities to submit proposed or enacted ordinances to the Attorney General for review. Many municipalities do not intend to enact unlawful ordinances, but they may not be entirely certain of the bounds of their legal authority. Establishing a formal process for municipalities to seek review of an ordinance from the Attorney General would assist those municipalities that wish to clarify the extent of their authority before acting. A request for review submitted by a municipality should be subjected to the same review process and reporting requirements that are applicable to requests for review submitted by agricultural producers. By conducting ordinance reviews of this nature, the Attorney General would lessen the possibility that an unlawful ordinance would be enacted, which would lessen the possibility that an agricultural producer would be subjected to the terms of an unlawful ordinance. By including this information in its annual report, the Attorney General likewise would lessen the possibility that another municipality would enact a similar unlawful ordinance.

Early efforts of the Pennsylvania General Assembly to address the issue of unlawful municipal ordinances focused exclusively on the shifting of attorney fees and costs of litigation as a deterrent to unlawful or abusive conduct.<sup>164</sup> ACRE includes a fee shifting provision, but it applies only to litigation filed by private parties and not to litigation filed by the Attorney General.<sup>165</sup> The reason for inclusion of the fee shifting only within the private right of action section is not clear. On its face, this provision applies evenly to both municipalities and agricultural producers. Its effect, however, will impact agricultural producers much more harshly than it will affect municipalities.

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164. *See supra* Section IIB.

165. 3 PA. CONS. STAT. § 317 (2010).

In most cases, the filing of a private right of action will not occur until after the Attorney General has made a determination that the standard for an unauthorized ordinance has not been met. In such a case, it will be difficult for a producer to prove that the local government has acted with negligent disregard because the Attorney General has acted as though the ordinance is lawful. Conversely, it will be much easier for the municipality to prove that the producer does not have substantial justification for the action because the Attorney General already has made a determination to decline involvement in a challenge of the ordinance. As it is presently stands, the possibility of fee shifting will have the impact of chilling an agricultural producer from filing a private right of action while having virtually no impact on municipalities. Since one of the purposes of ACRE is to discourage abusive or frivolous conduct by all parties, fee shifting should be applicable to all actions in which the party acts with the requisite intent.

## VI. CONCLUSION

When policy makers at the state level act to preserve farmland and protect agricultural operations in a comprehensive manner, the unlawful municipal regulation of agriculture is one of the issues that should be addressed. Pennsylvania's Agriculture, Communities and Rural Environment Act confronts the municipal regulation of agriculture in a progressive and effective way. The framework established through ACRE to address this issue contains three features that have been instrumental to the statute's early success, and these features should be key components in any similar legislation enacted elsewhere. First, agricultural producers should not bear the financial burden to challenge unlawful local ordinances. Second, the ordinance review process should be administered by an unbiased entity that will administer the process in a balanced manner to ensure that all parties respect the process. Third, the ordinance review process should allow for negotiation as well as litigation, but an emphasis should be placed upon negotiation. These three elements of ACRE afford Pennsylvania agricultural producers with appropriate protections from municipal regulation to the benefit of all members of Pennsylvania's agricultural communities.