

Pennsylvania Commonwealth Court decision on the Agriculture, Communities and Rural Environment Act (ACRE), Act 38 of 2005.

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Since its passage on July 6, 2005, many agricultural producers and community officials looked to the Courts for its interpretation of the authority that the ACRE law gives the Attorney General to take action against local governments that adopt ordinances that conflict with the authority given them under state law. The case reported in this article is the latest decision handed down and one that adds significant breadth to a growing body of law in this area. In many ways, this decision supports the structure that the ACRE law put in place to address questions about local regulation of agricultural activities.

The Case:

On February 20, 2007, Pennsylvania's Commonwealth Court handed down its decision in *Commonwealth v. Richmond Township and its Board of Supervisors* (No. 360, M.D. 2006). The Attorney General exercised his authority under ACRE to address enforcement of Richmond Township's 2000 ordinance that imposed a variety of restrictions on intensive agricultural operations in the Township that are inconsistent with other state policies and statutes. Unlike some of the other recent cases, this case plainly involved a local community seeking to enforce an ordinance that existed prior to ACRE's being in effect.

The Facts:

Kevin and Mary Jane Weaver own a farming operation in Richmond Township that was classified as an intensive agricultural operation. The Weavers filed a request for a variance and a special exception in regard to their operation. The facts in the opinion do not tell us why these actions were taken. On March 28, 2005 the Weavers filed a land use appeal with the Township's Zoning Hearing Board. The Board held several hearings on the Weavers' claim that the Township's denial of their requests was unlawful. The Weavers argued that the Township based its decision to deny the variance and special exception on the fact that the Weavers failed to comply with a Township setback requirement, a requirement that the Weaver's claim to be unauthorized and preempted by state laws, such as the Nutrient Management Act for instance.

Following the passage of ACRE in July, 2005, the Weavers requested a stay of the Zoning Hearing Board proceedings in order to petition the Attorney General to use his ACRE authority to address their claim of the Township's unauthorized ordinance. The Attorney General reviewed the ordinance and filed a petition with Commonwealth Court to invalidate the setback requirement of the ordinance and prevent the Township from enforcing it. The Township filed preliminary objections on a variety of issues which the Court addressed. Preliminary objections are a common procedure where a defendant, such as the Township, challenges the legal adequacy of what the other party, in this case

the Attorney General, stated in its petition to the Court. These preliminary objections help to clarify issues and raise questions about the law being applied. Decisions on preliminary objections do not address the main issue between the parties, however. Those matters are decided after the preliminary objections are decided. In this case the main issue is whether the township's 2000 ordinance regulating intensive livestock facilities is an unauthorized ordinance. Preliminary objections occur early in a any lawsuit and set the stage for some key issues to be decided later.

The Decision:

The first preliminary objection the Court addressed was whether the Attorney General's ACRE authority allowed him to petition Commonwealth Court to decide a matter involving a land use regulation dispute. Prior to ACRE, disputes involving land use regulations were generally considered to be in the exclusive jurisdiction of the state zoning enabling law and the procedures it put in place to decide them. Under zoning law disputes are first heard by the Township Zoning Hearing Board followed by an appeal to the Court of Common Pleas and then the Commonwealth Court and beyond, if necessary. ACRE, on the other hand, directed the Attorney General's petition to go directly to Commonwealth Court whose decisions would be precedent in all counties of the state, not just the county in which the Court of Common Pleas is located. Under ACRE's procedure, decisions would be made quicker and at less cost to the producer who challenges local government. Time and money would be saved if the ACRE procedure is used.

Commonwealth Court decided that the authority granted the Attorney General was not in conflict with the zoning enabling law and the Court then decided the issues raised in the Attorney General's petition rather than have the zoning hearing board decide the issues.

A second objection involved whether the Weavers were required to complete the Zoning Hearing Board process before they could invoke the ACRE protections, an argument that is similar to the exhaustion of administrative remedies that is common in administrative law. The Court held that since the Attorney General is a party to the action before the Court, and not the Weavers, whatever the Weavers did or failed to do would not prevent the Attorney General from acting under ACRE.

The Township also objected that the Attorney General's failure to join the Weavers in his petition was a failure to join an indispensable party to the lawsuit whose interest would be affected by the decision as described in civil procedural rules. Joining indispensable parties is a legal procedure requirement designed to have all necessary parties involved in one lawsuit to settle the issues between them. Commonwealth Court dismissed the objection as the Attorney General has authority under ACRE as a public official. Joining every party with an interest to any lawsuit is subject to reasonable limitations. If taken literally, practically every citizen in the township would have an interest that would be affected by the Court's decision and joining everyone in the Township would be unreasonable. In a similar manner the Court dismissed the Township's objections that service upon it by certified mail instead of personal service by the Sheriff was improper

and that the Notice to Plead required by Court Rules was not properly attached to the petition. Each of these three objections involved narrow questions of legal procedure.

The Township's final preliminary objection had a different outcome. In this case the Township objected to the Attorney General's petition allegation that the Township's 2000 Ordinance improperly prohibits or limits "normal agricultural operations." The Township argued this allegation was factually inadequate as it did not specify how the Ordinance affects these types of operations. In its decision the Court concluded that the Attorney General's allegation was not a conclusion of fact which are proper allegations to make in a petition, but rather a conclusion of law. Since conclusions of law are decisions that Courts have authority to make, the Court is free to ignore the statement and make its own decision whether the regulation affected normal agricultural operations. In affirming the objection that this allegation was not specific enough to meet legal standards, the Court gave the Attorney General leave to amend the petition to raise more details about how the local ordinance would affect producers.

Under the ACRE law, here is how a "normal agricultural operation" is defined. A normal agricultural operation includes:

The activities, practices, equipment and procedures that farmers adopt, use or engage in the production and preparation for market of poultry, livestock and their products and in the production, harvesting and preparation for market or use of agricultural, agronomic, horticultural, silviculture and aquaculture crops and commodities and is:

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

The term includes new activities, practices, equipment and procedures consistent with technological development within the agricultural industry. Use of equipment includes machinery designed and used for agricultural operations, including, crop dryers, feed grinders, saw mills, hammer mills, refrigeration equipment, bins and related equipment used to store or prepare crops for marketing and those items of agricultural equipment and machinery defined by the Farm Safety and Occupational Health Act. Custom work is considered a normal farming practice.

The term and definition of "normal agricultural operation" is taken from the Pennsylvania Protection of Agricultural Operations from Nuisance Suits Act, (3 Pa.C.S.A. section 951-et seq.) the "Right to Farm" Law. This term is one that has a rich history associated with it. When the Right to Farm law was passed in 1982, the term included the requirement that a normal agricultural operation be one that farmers usually and customarily adopt or use (3 Pa.C.S.A. sections 952). Although the "usual or customary" standard is one that makes sense in defining what a normal agricultural operation would be, it has obvious

limitations. Within a short time, the term was amended to remove the usual and customary standard and replaced with the current language including the final paragraph which opens the door to new developments, practices and procedures that are consistent with the growth and development of technology in the agricultural sector.

The change in the definition that removes the “usual and customary” standard is significant for it allows the agricultural sector to evolve but still retain its treatment as normal. Within the agricultural sector considerable change occurred in the past 20 years and the flexibility inherent in the definition of a “normal agricultural operation” that qualifies for Right to Farm protection has been a crucial part in promoting that development. The amendment allows for extension of Right to Farm protection to new activities, practices, equipment and procedures, provided they are consistent with technological development within the agricultural industry.

Where do we go from here?

As mentioned above, decisions on preliminary objections do not address the principal issue between the parties, which in this case is whether the 2000 Ordinance was “unauthorized” under ACRE. Whether the Township decides to appeal the dismissal of its preliminary objections is a legal question that hinges on a determination of whether that appeal opportunity exists. Absent an appeal, the next step would be for Commonwealth Court to move forward with hearing the testimony regarding the Attorney General’s allegations about the Township’s ordinance.