



Legislative Budget and Finance Committee

A JOINT COMMITTEE OF THE PENNSYLVANIA GENERAL ASSEMBLY

Offices: Room 400 • Finance Building • Harrisburg • Tel: (717) 783-1600

Mailing Address: P.O. Box 8737 • Harrisburg, PA 17105-8737

Facsimile (717) 787-5487

SENATORS

JOHN R. PIPPY

Chairman

GERALD J. LAVALLE

Vice Chairman

JAY COSTA, JR.

ROBERT M. TOMLINSON

ROBERT C. WONDERLING

JOHN N. WOZNIAK

REPRESENTATIVES

ROBERT W. GODSHALL

Secretary

DAVID K. LEVDANSKY

Treasurer

STEPHEN BARRAR

H. SCOTT CONKLIN

ANTHONY M. DELUCA

T. MARK MUSTIO

EXECUTIVE DIRECTOR

PHILIP R. DURGIN

CHIEF ANALYST

JOHN H. ROWE, JR.

Review of the Agricultural Conservation Easement Purchase Program

Pursuant to Senate Resolution 2007-195

September 2008

Table of Contents

	<u>Page</u>
Report Summary	S-1
I. Introduction	1
II. Findings and Conclusions	3
III. Background	51
IV. Appendices	61
A. Senate Resolution No. 195	62
B. Pending Legislation Relating to Agriculture Easements	64
C. Response to This Report	65

Report Summary

The Pennsylvania Agricultural Conservation Easement Purchase Program is widely recognized as one of the most successful programs in the nation, both in terms of the number of farms preserved (3,579 farms) and the eased acreage (395,636 acres). The ACE program is not intended simply to preserve open space, but rather to preserve enough farmland in sufficient concentration to support continued agricultural production. The specific criteria in Senate Resolution 2007-195, which called for this study, and our findings in these areas are listed below:

- 1. An analysis of the criteria used to prioritize which farms are selected for Agricultural Conservation Easement (ACE) purchase (p. 3).** ACE farms must be within an Agricultural Security Area (ASA) of at least 500 acres and meet other state-established minimum criteria, including being at least 50 acres in size (certain exceptions are allowed) and having at least 50 percent Land Capability Class I-IV soils and the greater of 50 percent or 10 acres of harvested cropland, pasture, or grazing land. County programs may contain additional criteria if approved by the State Agricultural Land Preservation Board. The counties rank the properties that meet the minimum program requirements. This is a complex process and involves scoring farms on factors such as soil quality, development pressure, and clustering of preserved farmland. Farms are ranked only against those farms in the same county, not statewide. Once farms are ranked, the farms are appraised in order of ranking. The county decides how much to offer for the priority easements. The amounts offered vary from county to county but cannot exceed the appraised value of the easement.

The criteria and process used in Pennsylvania to select ACE farms appears consistent with the criteria and process used in other states, and the counties responding to our questionnaire were generally satisfied with the criteria and processes used to select ACE farms. However, as discussed below, several counties thought the minimum 40 percent weighting for soil quality was too high and that more emphasis should be given to clustering preserved farms.

- 2. The land use relationship between farms selected for ACE purchase and adjoining and neighboring tracts of land (p. 12).** Although the Department of Agriculture does not maintain data on the land use relationship between ACE-preserved farms and the surrounding tracts of land, a farm must be in an ASA of at least 500 acres to be selected to participate in the ACE program. The ASA qualification process is rather involved and includes public hearings and consideration of local land use by several

different local and county planning agencies. The local planning commission is specifically charged with reporting on the potential effects the petition will have on the local government's planning policies and objectives. Thus, the decision to recommend and approve an ASA includes not only consideration of adjacent land uses, but also the possibility that the ASA may eventually include one or more ACE-preserved farms. The land use relationship between a potential ACE-preserved farm and adjoining tracts of land is also required to be considered as part of the ACE selection process.

- 3. The effect on the economic viability of preserved farms where the uses of surrounding lands have been converted from agricultural uses to nonagricultural uses (p. 14).** Because ACE farms must be in an ASA to be eligible to enroll in the program, farmers are protected from nuisance ordinances that could restrict normal farming operations. Additionally, ACE farms, even those that are in counties that do not qualify for the Clean and Green program, are eligible for significant real estate tax preferences. With such protections and preferences, preserved farms should be able to maintain their economic viability, at least as defined in the Agricultural Area Security Law, despite the development of the surrounding lands to nonagricultural uses.

Montgomery County officials noted that innovative farming products and techniques, such as organic fruits and vegetables, local cheeses, low-fat buffalo meat, and goat meat to serve growing ethnic communities in the region, can be highly successful on small farms that are located in areas near urban communities.

- 4. The number of farms and acreage currently preserved which are still in agricultural operation (p. 19).** As of mid-June 2008, 3,579 farms and 395,636 acres of farmland have been preserved under the ACE program. As part of the program, counties are required to inspect all restricted land at least annually to determine compliance with the deed of easement, including the requirement that the preserved land be kept in agricultural production. We found, however, that about one-third of the counties have failed to submit their inspection reports to the State Board in at least one of the past three years, and nine counties did not submit a report for any of the three years we reviewed. For those counties that do submit reports, we found only a few cited violations. These primarily concerned deficiencies with soil conservation plans or deed corrections.
- 5. The effect of current statutory language that provides for the extinguishment of an ACE under certain circumstances after 25 years (p. 21).** Once an easement is purchased, it cannot be extinguished for 25 years. After 25 years, if the eased land is no longer "viable agricultural land," the

Agricultural Area Security Law states that the land may be sold, conveyed, extinguished, leased, encumbered, or restricted to the current owner, subject to the approval of the county and state boards. The purchase price is to be equal to the assessed value of the development rights of the eased land at the time of resale. The ACE program is less than 25 years old, and no easement has been conveyed under this provision.

Although the “no-longer-viable” threshold appears high, many farmers and program advocates remain concerned over the existence of the 25-year provision. While the primary concern is to ensure the farmland is preserved in perpetuity, concern also exists that, should some eased land be found not viable and conveyed for development, landowners may find their federal charitable tax donation benefits in jeopardy. Under federal tax law, farmers can only claim charitable deductions for land donations that are perpetual easements. Many stakeholders, including the Pennsylvania Department of Agriculture (PDA), favor removing the 25-year extinguishment provision from the statute, as Maryland has done, to alleviate the confusion over its potential applicability. Senate Bill 2008-1513 would repeal this provision.

6. The effect of the absence of any current statutory per-acre cap on the amount of state dollars that can be spent to acquire an ACE (p. 27).

Prior to 2001, the Commonwealth had a statutory cap of \$10,000 per acre in Commonwealth funds for the purchase of an ACE. This cap was removed by Act 2001-14. Between January 1, 2002, and December 31, 2007, the Commonwealth has participated in 36 easement purchases (totaling 2,613 acres) where the Commonwealth’s cost has exceeded \$10,000 per acre. The total cost to the Commonwealth for these 36 easements was \$38.3 million. Had none of these easements been purchased, this money would have been available to purchase easements on lower ranking farms on approximately 23,759 acres of other farmland (based on an average Commonwealth cost of \$1,612 per acre, the statewide average since January 1, 2002, for easements that cost less than \$10,000 per acre in Commonwealth costs).

The PA Department of Agriculture expressed concern that if fixed legislative caps were instituted, they could quickly become out of step with the market. Under the current arrangement, the State Board and county programs can adjust caps to market conditions in a relatively short time because each county can establish caps lower than the fair market value based on the individual needs and desires of their program.

7. The effect of permitting the acquisition of an ACE on a farm of fewer than 50 contiguous acres in size (p. 27). Act 2006-46 amended the Agricultural Area Security Law to allow counties to purchase easements on as

few as 35 contiguous acres, and as few as 10 acres if the crop is unique to the area or is contiguous to another eased property. Prior to Act 46, farms and agricultural lands of between 35 and 50 acres could be preserved, but they had to be contiguous to land that had already been preserved in the ACE program. As the table below shows, the number of easements for properties of less than 50 acres increased in 2007, but not dramatically. The act provides that state funds cannot exceed 50 percent of the cost to purchase land 35 to 50 acres in size.

Easements for Properties of Fewer Than 50 Acres						
	# of Easements for Properties of Fewer Than 50 Acres	# of Acres	Average Price/Acre	State Cost	County Cost	Total Cost
2001	20	835	\$3,952	\$1,981,391	\$1,318,637	\$3,300,028
2002	17	721	3,187	1,017,959	1,279,518	2,297,477
2003	23	1,009	4,325	990,313	3,373,368	4,363,682
2004	13	538	2,482	734,123	601,305	1,335,428
2005	11	497	3,039	1,221,943	288,294	1,510,238
2006	19	791	5,932	2,060,486	2,631,928	4,692,414
2007	26	1,081	6,982	4,455,643	3,092,321	7,547,965

The large jumps in total costs in 2006 and 2007 are due to the purchase of three easements, all in Montgomery County, of \$1.8 million in 2006 (40 acres) and \$2.02 million (45 acres) and \$2.07 million (45 acres) in 2007.

8. **The effect of requiring local government participation for ACE purchases which exceed a set per-acre dollar amount (p. 29).** The impact of required county or municipal participation depends on the level of participation that would be required. Many counties and local governments already make substantial annual financial contributions to the program as county match funds, and in some cases (Berks and Lancaster) exceed the state match fund contribution. Also, many counties have established county caps that effectively utilize local (i.e., municipal) participation for high-cost easements. Statutorily requiring local government participation could be difficult.

9. **The options available to maximize the limited dollars available for ACE purchases, including consideration of installment purchases and the current Installment Purchase Agreement (IPA) Program (p. 29).** Farmers may choose to receive the proceeds from easement sales through deferred payments including like-kind exchange, installment purchase agreement

(IPA), and either short- or long-term installments, which can result in significant capital gains tax savings to farmers.

The IPA option, however, has only been used ten times, and seven of those were subsidized. There are two obstacles to the program: (1) to implement an IPA program, counties must adopt a “Debt Act,” agreeing to incur future debt, without knowing what the future revenues will be; and (2) the transactions costs for IPAs are high, typically between \$18,000 and \$20,000. IPA programs in other states have, however, been successful. The administrator of Pennsylvania’s IPA program attributes the lack of IPA participation in Pennsylvania to the conservative nature of Pennsylvania farmers and county officials, particularly the reluctance of landowners to incur transaction costs and the reluctance of county officials to incur debt. We also spoke to farmers and county program administrators who noted that in many areas of Pennsylvania land prices are still relatively low, so the tax savings available through an IPA are relatively modest.

Other ideas for maximizing ACE dollars include expanding transfer of development rights programs particularly at the township level, limiting ACE payments to less than 100 percent of the development rights, and urging counties to make greater use of the provision to award points for bargain sale agreements under the ranking system.

10. The feasibility of mandating transitional guidance to all eased farm owners at the time a farm is being conveyed to a new owner (p. 34). The Pennsylvania Department of Agriculture has a program to assist farmers in developing transition plans for their farms through the Center for Farm Transitions. The Center provides a one-stop source of information and services to Pennsylvania farmers who are in transition, including farmers who are conveying an eased farm to a new owner. Other states have similar programs, but we did not identify any state that mandates farmer participation. Also, virtually all of the farmers and stakeholders we spoke to did not support making such guidance mandatory, noting that any new mandate could jeopardize farmer participation and that farmers would need to willingly participate in such activities for the service to be meaningful.

11. The feasibility of additional dedicated sources of revenue to fund the program (p. 35). At the state level, Pennsylvania’s ACE program is currently funded through a \$20.5 million appropriation supported by cigarette tax revenues and 14.8 percent of the proceeds from the Environmental Stewardship Fund. These revenues, in addition to interest on securities and other miscellaneous revenues, amounted to \$33.4 million in FY

2007-08. This is the first year total county funds for ACE purchases, at \$41.3 million, exceeded state program funds.

Nearby states that provide dedicated funding for farmland preservation include: New Jersey (\$98 million each year for 10 years through bond proceeds to be paid back through state sales tax revenues) and Maryland, Delaware, and New York, all of which use a portion of their state real estate transfer tax monies to help fund their farmland preservation programs. Maryland and Delaware also permit their counties to use realty transfer taxes to fund farmland preservation programs. In Pennsylvania, local governments may impose, and several have imposed, a local earned income tax dedicated to, among other purposes, the purchase of agricultural easements.

12. The feasibility of providing property tax incentives for preserved farms, including an automatic use-value assessment and millage freeze (p. 38).

Both preserved and nonpreserved farms currently have real estate tax preferences available through the Clean and Green program. Under Clean and Green, farmland is assessed based upon its use value, rather than its market value. Because virtually all farms that are selected for the ACE program are already enrolled in the Clean and Green program, an automatic use-value assessment would probably have little substantive impact statewide.

State law currently provides for millage freezes for preserved farms, provided the county, local municipality, and school district all agree. Many county directors, however, cited the recent requirement (Act 2006-4) that all three jurisdictions (county, local municipality, and school district) agree to the freeze as overly burdensome. The directors much preferred the prior law whereby school districts could unilaterally freeze school district millage rates for the preserved farms in their district.

13. The feasibility of providing tax credits in lieu of cash payment for ACE purchases (p. 40). The Conservation Resource Center issued a report in 2007 entitled *State Conservation Tax Credits: Impact and Analysis*. That report found that the effectiveness of tax credit programs varied widely among the twelve states that have enacted such programs, with the two key variables being (1) the amount of the credit available and (2) whether landowners can transfer the credits to a third party and thereby realize an immediate financial benefit. To maintain the affordability of tax credits, states often place a cap on the total credits allowed. Such programs, however, are typically not limited to agricultural easements.

14. The effect of expanding the current provision authorizing coal mining on ACE-restricted land to the extraction of additional rock, minerals,

and gases (p. 41). The Agricultural Area Security Law currently authorizes underground mining for coal, oil, and natural gas on ACE-restricted land. Surface mining is prohibited. Expanding this provision to extract other rocks, minerals, or gases was generally viewed unfavorably by those we contacted. The impact of expanding the provision would likely be limited, however, because underground mining is expensive, and therefore not widely used for extracting low-cost materials such as limestone.

- 15. The effectiveness of the Agricultural Lands Condemnation Approval Board to adequately protect ACE-restricted land from condemnation (p. 42).** With certain exceptions, land within an Agricultural Security Area, including ACE-restricted land, is not subject to eminent domain without approval of the state Agricultural Lands Condemnation Approval Board (ALCAB). In the last three years, only two cases involving preserved farms have come before the Board. In one case, the Board was successful in diverting a new road, with no loss in acreage to the preserved farm. In the second case, condemnation of 4.06 acres was approved for a municipal authority to install a municipal water supply well on the property. ALCAB approval, however, is not required for work on an existing roadway. One such current project proposes condemning 80 feet for four miles along one side of the roadway, part of which is ACE-preserved land.
- 16. The effect of mandating a limitation on the amount of impervious surface, including paved roads, farm buildings, and other construction that can be established on ACE-restricted land (p. 45).** The ACE program does not have a specific, numeric limit on the amount of impervious surface allowed on an ACE-preserved farm. Because Pennsylvania has many small farms, there was near unanimous consent that mandating such a limit, such as the 2 percent impervious surface restriction in the federal Farm and Ranch Land Protection Program (FRPP), would be too restrictive in Pennsylvania. The impervious surface restriction was cited as one of the reasons why Pennsylvania has not in recent years participated heavily in the federal program, although PDA and Natural Resources and Conservation Services (NCRS) have negotiated a somewhat more liberal formula for determining impervious surfaces based on the total acres eased for FRPP agreements.
- 17. The effect of nonprofit organization participation in ACE purchases under the Agricultural Area Security Law (p. 46).** Under Act 1999-15, which established the Land Trust Reimbursement Grant Program, qualified land trusts can be reimbursed for up to \$5,000 for expenses incurred in the acquisition of agricultural conservation easements. Since the grant program began, 11 private trusts have received ACE application reimbursements totaling \$890,151 to preserve 13,663 acres.

The role of private land trust with regard to the ACE program has also been strengthened as a result of Act 2006-154. Act 154 clarified the authorization of government/land trust partnerships. Although widely viewed as a positive measure, an official with the Pennsylvania Land Trust Association reported it is still too early to assess what impact the act will have on the relationships between private land trusts and local governments.

18. The effect of permitting wind turbines used for generating electricity to be constructed on ACE-restricted land (p. 49). The Agricultural Area Security Law permits, with county and state board approval, ACE-preserved farms to engage in certain rural enterprises, including the production of energy from renewable sources for nonfarm uses. In most cases, wind turbines are used by ACE landowners to generate on-farm electrical usage. Any excess electricity generated is metered back to the landowner as credit for energy usage on the farm. Lancaster County, for example, allows ACE farms to construct wind turbines and excess energy is metered back to the owner, so long as it is incidental to the agricultural use and character of the farm, the equipment is located within the curtilage of existing farm buildings, and that the total site coverage of all Energy Rural Enterprises on the property is no more than 2 percent of the area of the property.

A bill currently before the New Jersey legislature goes further by defining solar and wind energy generation as an allowable agricultural use on a preserved farm, but the bill has not passed.

19. The effect of authorizing counties to utilize a portion of their annual state appropriations to fund legal costs incurred in ACE enforcement (p. 50). Under current law, ACE funds can be used to purchase easements and for certain administrative costs involved in such purchases, but not for legal costs incurred in ACE enforcement. However, counties may use Clean and Green funds for these costs. We spoke with several county program directors who reported that, at least to date, most compliance problems have been resolved without formal legal action, and so legal costs have been minimal. If this situation should change, and if the statute was changed to allow those costs to be funded from the ACE program funds, it could impact on the number of acres purchased for easements. If legal costs to enforce an easement became a problem, one suggestion we heard was for the Commonwealth to pay the legal costs for easements owned by the Commonwealth, counties pay the legal costs for the easements they own, and the costs to enforce jointly owned easements be prorated.

Conclusion

Pennsylvania has one of the most successful, if not the most successful, farmland preservation programs in the country. The ACE program, with its emphasis on quantitative rankings and local land use decision-making, is widely viewed as a model for selecting and preserving agriculturally important farms. Support for the program is also strong among farmers, with approximately 2,000 farms on county waiting lists to enroll in the program. However, the rising cost of agricultural easements, combined with reductions in state funding, present significant challenges for the future. This is particularly true given the program's emphasis on saving farmland in areas under high development pressure, where easement costs can easily exceed \$10,000 per acre.

This year (2008) marks the first year that counties have dedicated more funds to the ACE program than the Commonwealth: \$41.3 million in county funds versus \$33.0 million in Commonwealth funds. While such strong support at the county and local level is obviously positive, additional state funding sources, such as through state real estate transfer taxes or conservation tax credits, appear necessary if the Commonwealth is to continue as a meaningful partner in this joint effort. Modifying Act 43 to allow counties to use state funds in acquiring transfer of development rights (TDRs), similar to what is now being done in Lancaster County with county funds, could also be explored as a low-cost way of preserving additional farmland while still meeting local economic growth goals. We also found widespread support for the State Board to reduce the program's emphasis on preserving high-cost farms in the direct path of development, which would allow more acreage to be preserved on better-value farms that, in the long run, are likely to prove more beneficial to a county's agricultural industry.

Finally, with the ACE program having preserved over 400,000 acres on over 3,600 farms, the counties' role in monitoring and enforcing the easement restrictions on existing preserved farms takes on increased importance. While we found the county farmland preservation directors to be dedicated and enthusiastic advocates for their programs, we also found that a significant number of counties (9) have failed to submit their required annual inspection reports for at least the past three years. The counties have repeatedly requested that they be allowed to use state funds for such administrative purposes—a position the Pennsylvania Department of Agriculture supports—but a legislative change is necessary to make this possible.

I. Introduction

Senate Resolution 2007-195 directed the Legislative Budget and Finance Committee (LB&FC) to review the Agricultural Conservation Easement Purchase Program. The resolution directed that the review include an analysis of nineteen specific areas related to the program. Please see Appendix A for a copy of Senate Resolution 2007-195 (SR 195).

Study Objectives

As stated in SR 195, the objectives of this study are to determine:

- the criteria used to prioritize which farms are selected for Agricultural Conservation Easement (ACE) purchase;
- the land use relationship between farms selected for ACE purchase and adjoining and neighboring tracts of land;
- the number of farms and acreage currently preserved which are still in agricultural operation;
- the effect on the economic viability of preserved farms where the uses of surrounding lands have been converted from agricultural uses to nonagricultural uses;
- the effect of current statutory language that provides for the extinguishment of an ACE under certain circumstances after 25 years;
- the effect of the absence of any current statutory per-acre cap on the amount of state dollars that can be spent to acquire an ACE;
- the effect of permitting the acquisition of an ACE on a farm of fewer than 50 contiguous acres in size;
- the effect of requiring local government participation for ACE purchases which exceed a set per-acre dollar amount;
- the options available to maximize the limited dollars available for ACE purchase, including consideration of installment purchases and the current Installment Purchase Agreement Program;
- the feasibility of mandating transitional guidance to all eased farm owners at the time a farm is being conveyed to a new owner;
- the feasibility of additional dedicated sources of revenue to fund the program,
- the feasibility of providing property tax incentives for preserved farms, including an automatic use-value assessment and millage freeze;
- the feasibility of providing tax credits in lieu of cash payment for ACE purchases;
- the effect of expanding the current provision authorizing coal mining on ACE-restricted land to the extraction of additional rock, minerals or gases;
- the effectiveness of the Agricultural Lands Condemnation Approval Board (ALCAB) to adequately protect ACE-restricted land from condemnation;

- the effect of mandating a limitation on the amount of impervious surface, including paved roads, farm buildings and other construction which can be established on ACE-restricted land;
- the effect of nonprofit organization participation in ACE purchases under the Agricultural Area Security Law;
- the effect of permitting wind turbines used for generating electricity to be constructed on ACE-restricted land; and
- the effect of authorizing counties to utilize a portion of their annual state appropriations to fund legal costs incurred in ACE enforcement.

Scope and Methodology

We met with the Pennsylvania Department of Agriculture Bureau of Farmland Preservation staff to discuss their program activities. We reviewed the state statutes and regulations related to the program. As part of our discussions with the state staff, we reviewed county program files, individual preserved farm files, inspection reports, and ALCA Board opinions. We attended a training session provided by the state staff for county personnel. Additionally, we attended several State Agricultural Land Preservation Board meetings and the spring meeting of the Pennsylvania Farmland Preservation Association.

We sent questionnaires to the 57 participating county program directors and met with several county farmland preservation boards and county farmland preservation directors. We spoke with farmers and viewed preserved farms. We met or spoke with interested stakeholders including other pertinent state agencies' personnel, private land preservation trusts, and representatives of the Pennsylvania Builders' Association. We reviewed materials regarding other states' programs and spoke with their directors. We also spoke with the American Farmland Trust.

Acknowledgements

We thank Douglas Wolfgang, the Director of the PA Department of Agriculture's Bureau of Farmland Preservation, and his staff for their assistance with this project. We also thank the many county directors who assisted us in our work as well as the various interested parties who responded to our requests for information.

Important Note

This report was developed by Legislative Budget and Finance Committee staff. The release of this report should not be construed as an indication that the Committee or its individual members necessarily concur with the report's findings and recommendations.

Any questions or comments regarding the contents of this report should be directed to Philip R. Durgin, Executive Director, Legislative Budget and Finance Committee, P.O. Box 8737, Harrisburg, Pennsylvania 17105-8737.

II. Findings and Conclusions

1. An Analysis of the Criteria Used to Prioritize Which Farms Are Selected for Agricultural Conservation Easement (ACE) Purchase

The Agricultural Conservation Easement Purchase (ACE) program is established by Act 1981-43, as amended, known as the Agricultural Area Security Law, 3 P.S. §901 *et seq.* An agricultural easement is an interest in the land that prevents the development of the land for a purpose other than agricultural production. Fifty-seven counties participate in the Pennsylvania ACE program, and, as of mid-June 2008, almost 396,000 acres of farmland have been preserved at a total cost of \$940 million. Table 1 lists the participating counties and the number of acres that have been preserved under the program in each county.¹

Exhibit 1 lists the state-established minimum criteria for ACE applications required by Department regulations. One of the required criteria is that farms selected for ACE purchase must be located within an established Agricultural Security Area (ASA) of at least 500 acres. To establish an ASA, landowners must submit a proposal to the governing body within the local government unit. The land must have soils conducive to agriculture and be used for the production of crops, livestock, livestock products, horticultural specialties, or timber. The property, if zoned, must be zoned to permit agricultural uses. Once an ASA is established, the county is authorized to create a program for the purchase of agricultural conservation easements within the county, subject to the approval of the State Agricultural Land Preservation Board. The requirements for a county program are described in Exhibit 2.

County Prioritization Criteria

Property owners approach their county board to participate in the ACE program. Once a property meets the statutory standards for participation in the program, it is ranked within the county before the easement value is determined. The ranking process is established in Pennsylvania Department of Agriculture (PDA) regulations. Farms are ranked using a Land Evaluation and Site Assessment (LESA) System, which includes a soil assessment to evaluate the land, a site assessment that evaluates the development potential (farms that are likely to be developed for nonagricultural uses receive higher scores), farmland potential (potential agricultural productivity, size, and farmland stewardship practiced on the tract) and clustering potential (proximity to other ACE-preserved land) of the farmland. Each of these categories includes several scoring factors. Exhibit 3 outlines this process.

¹The acres reflected are only those that are preserved as part of this program. Other county or private programs may account for additional acreage being preserved in a county. Additionally, although Pike and Warren Counties have programs they have not purchased any easements as of June 2008.

Table 1

**Summary of Agricultural Conservation
Easement Purchases by County – June 19, 2008**

<u>County</u>	<u>Number of Farms</u>	<u>Number of Acres</u>	<u>Purchase Price</u>	<u>Average Price Per Acre</u>
Adams	119	17,156	\$ 28,282,607	\$ 1,649
Allegheny	15	1,689	10,586,811	6,267
Armstrong.....	2	128	256,098	2,000
Beaver	16	1,757	4,034,034	2,296
Bedford.....	12	2,450	1,621,066	662
Berks	534	56,472	115,199,801	2,040
Blair	36	5,250	4,689,127	893
Bradford	8	1,761	1,337,238	759
Bucks	98	9,183	79,350,694	8,641
Butler	34	4,006	11,298,402	2,820
Cambria.....	8	1,441	1,540,283	1,069
Carbon	15	1,200	2,485,832	2,071
Centre	34	5,747	11,136,105	1,938
Chester.....	216	19,832	105,158,515	5,302
Clinton	18	1,794	1,714,408	956
Columbia.....	25	2,690	2,574,436	957
Crawford.....	2	310	310,453	1,000
Cumberland.....	108	13,358	32,712,255	2,449
Dauphin.....	115	11,567	15,880,491	1,373
Delaware	2	198	2,678,360	13,527
Erie	48	5,826	10,421,559	1,789
Fayette	10	1,225	1,343,560	1,097
Franklin	101	13,850	24,923,296	1,799
Fulton	2	145	272,126	1,877
Huntingdon.....	4	418	628,257	1,504
Indiana	5	578	957,490	1,656
Juniata.....	9	1,188	1,099,282	925
Lackawanna	38	3,544	5,766,431	1,627
Lancaster	581	50,903	124,361,175	2,443
Lawrence.....	17	1,597	1,618,970	1,014
Lebanon	113	13,517	20,554,075	1,521
Lehigh	223	18,308	53,361,030	2,915
Luzerne	19	1,934	4,927,284	2,547
Lycoming.....	55	7,098	6,517,750	918
Mercer	37	6,354	5,032,030	792
Mifflin.....	15	1,764	1,839,848	1,043
Monroe	80	5,825	14,617,953	2,510
Montgomery	109	7,254	73,514,700	10,134
Montour	10	798	658,679	825
Northampton	91	10,037	38,066,900	3,793
Northumberland	14	1,732	1,919,156	1,108
Perry.....	32	5,313	3,457,776	651

Table 1 (Continued)

<u>County</u>	<u>Number of Farms</u>	<u>Number of Acres</u>	<u>Purchase Price</u>	<u>Average Price Per Acre</u>
Potter.....	4	614	\$ 415,418	\$ 677
Schuylkill	86	9,663	10,051,235	1,040
Snyder.....	20	2,199	2,501,709	1,138
Somerset.....	6	726	1,575,706	2,170
Sullivan.....	5	482	486,680	1,010
Susquehanna.....	25	5,493	4,168,884	759
Tioga	11	1,574	1,370,884	871
Union.....	55	5,801	6,768,220	1,167
Washington	22	3,303	5,852,379	1,772
Wayne	32	4,487	4,854,193	1,082
Westmoreland.....	66	9,268	19,747,501	2,131
Wyoming	8	1,038	985,682	950
York.....	<u>209</u>	<u>33,786</u>	<u>52,762,013</u>	<u>1,562</u>
Total	3,579	395,636	\$940,246,844	\$ 2,377

Source: Developed by LB&FC staff from information obtained from the Department of Agriculture's Bureau of Farmland Preservation.

State Established Minimum Criteria for Applications

The county program shall consider the quality of the farmland tract, including the USDA soil classification and productivity.

The farmland tract shall be one or more of the following:

1. Located in an agricultural security area consisting of 500 acres or more.
2. Bisected by the dividing line between two local government units, having the majority of its viable agricultural land within an agricultural security area of 500 acres or more and the remainder in another local government unit outside of an agricultural security area.
3. Bisected by the dividing line between the purchasing county and an adjoining county, having the land located in the purchasing county within an agricultural security area of 500 acres or more and the remainder in another county outside of an agricultural security area, and with respect to which one of the following applies:
 - A mansion house is on the tract and located within the purchasing county.
 - When the mansion house on the tract is bisected by the dividing line between the two counties, the landowner has chosen the purchasing county as the situs of assessment for tax purposes;
 - When there is no mansion house of the farmland tract, the majority of the tract's viable agricultural land is located within the purchasing county.

The farmland tract shall be one or more of the following:

1. Contiguous acreage of at least 50 acres in size (a county may allow a farmland tract to be at least 35 acres in size).
2. Contiguous acreage of at least 10 acres in size and utilized for a crop unique to the area.
3. Contiguous acreage of at least 10 acres in size and contiguous to property which has a perpetual conservation easement.

The farmland tract shall contain at least 50 percent of soils which are both available for agricultural production and of land capability classes I-IV, as defined by the USDA-NRCS.

The farmland tract shall contain the greater of 50 percent or 10 acres of harvested cropland, pasture or grazing land.

The county program may contain additional criteria to evaluate farmland tracts if the criteria are fair, objective, equitable, nondiscriminatory and emphasize the preservation of viable agricultural land which will make a significant contribution to the agricultural economy, and are approved by the State Board. For example, a county program might require crop yields from a farmland tract to meet or exceed county crop yield averages, or might require the farmland tract to generate annual gross receipts of a particular sum, or might require that structures and their curtilages not occupy more than a certain percentage of the total acreage of the farmland tract.

Statutory Criteria for Purchasing Agriculture Easements

The standards, criteria and requirements established by the State Board for its approval of county programs for purchasing agricultural conservation easements include, but are not limited to, the extent to which the county programs consider and address the following:

1. The quality of the farmlands subject to the proposed easements, including soil classification and soil productivity ratings. Farmland considered should include soils which do not have the highest soil classifications and soil productivity ratings but which are conducive to producing crops unique to the area.
2. The likelihood that the farmlands would be converted to nonagricultural use unless subject to an agricultural conservation easement. Areas in the county devoted primarily to agricultural use where development is occurring or is likely to occur in the next 20 years should be identified. For purposes of considering the likelihood of conversion, the existence of a zoning classification of the land shall not be relevant, but the market for nonfarm use or development of farmlands shall be relevant.
3. Proximity of the farmlands subject to proposed easements to other agricultural parcels in the county which are subject to agricultural conservation easements.
4. The stewardship of the land and use of conservation practices and best land management practices, including, but not limited to, soil erosion and sedimentation control and nutrient and odor management.
5. Fair, equitable, objective and nondiscriminatory procedures for determining purchase priorities.
6. Provisions requiring a farmland tract to be contiguous acreage of at least 50 acres in size unless the tract is at least 10 acres in size and is either utilized for a crop unique to the area or is contiguous to property which has a perpetual conservation easement in place held by a "qualified organization."
7. A county may require a farmland tract to be contiguous acreage of at least 35 acres in size unless the tract is at least ten acres in size and is either utilized for a crop unique to the area or is contiguous to a property which has a perpetual conservation easement in place held by a "qualified conservation organization."^a

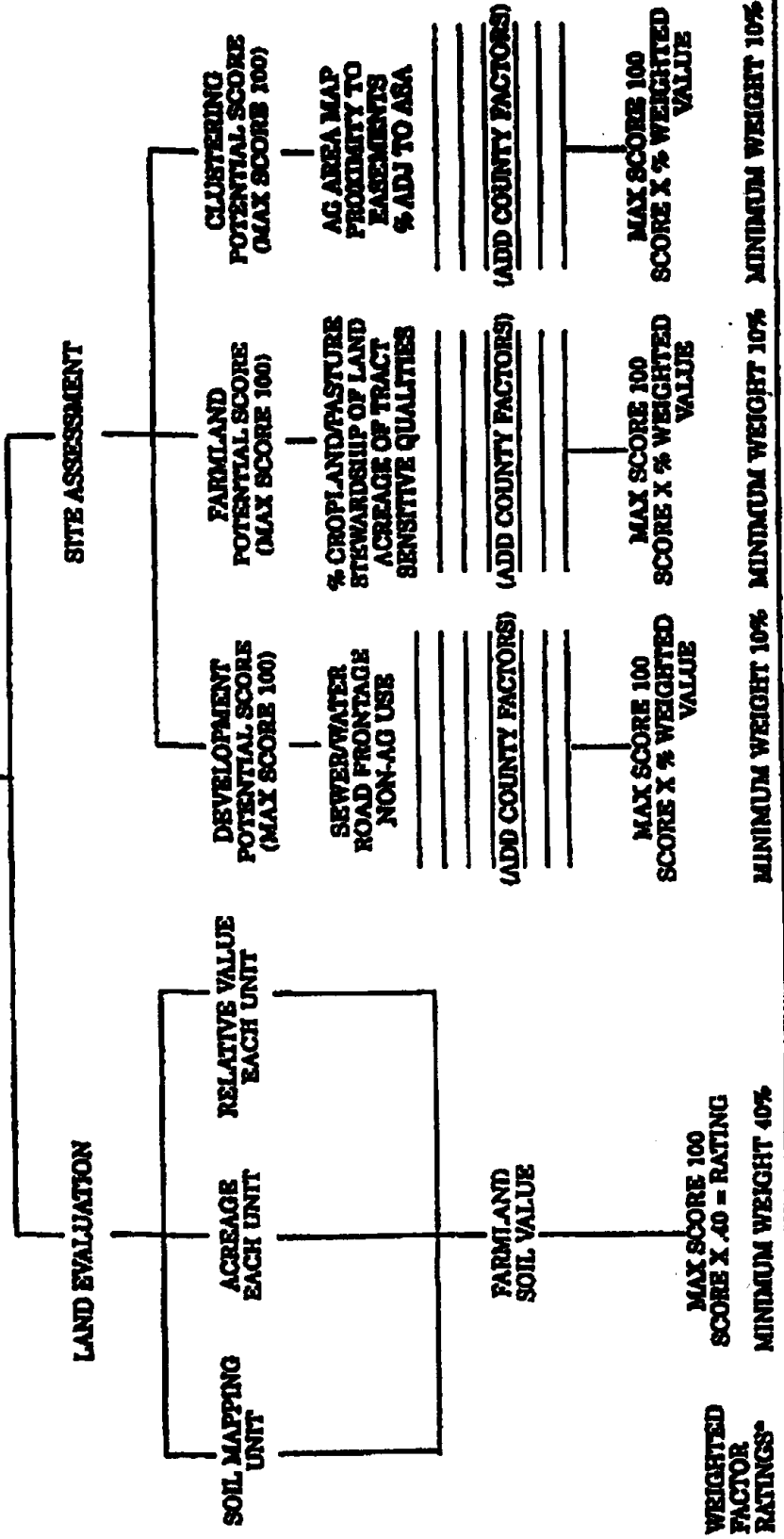
^aAs defined in §170(h)(3) of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. §170(h)(3)).

Source: Agricultural Area Security Law, 3 P.S. §914.1(d).

The counties weight these criteria within a minimum and maximum value prescribed in the regulations, with the weighted values totaling 100 percent. The regulations require the soil evaluation to have a minimum weighted value of 40 percent, with a maximum weighted value of 70 percent. The site assessment criteria of development potential, farmland potential, and clustering potential each have a minimum weighted value of 10 percent, with a maximum weighted value of 40 percent each. In the Montgomery and Lancaster County programs, for example, farmland potential and clustering potential are each weighted at 25 percent, and development potential is weighted at 10 percent. Erie County weights

Farmland Ranking System

LESA RANKING SYSTEM



FARM	SOIL NO.	DEVELOPMENT NO.	LAND NO.	CLUSTERING NO.	TOTAL**	PRIORITY RANKING
1						
2						
3						

*COUNTIES MAY DISTRIBUTE AN ADDITIONAL 30% WEIGHT AMONG THE FOUR CATEGORIES.

**MAX RATING SCORE 100

developmental potential at 30 percent, farmland potential at 20 percent, and clustering potential at 10 percent. All three programs weight soil value at 40 percent

Each county uses the resulting rankings to select those farms to be preserved that year based on the funding available to the county. Farms are ranked only against those farms in the same county, not statewide. The county then seeks an appraisal of the farms based on the ranking. When making an offer to purchase an easement after receiving the appraisals, the County Board is required to consider the farmland ranking score, the cost relative to the county's total funding, and any additional factors the county program has set forth that would result in offers to purchase being made in other than the descending order of farmland ranking score. For example, Centre County is able to go out of descending order if the farmer has agreed to the federal addendum language.

The value of the conservation easement is the difference between the appraisal of the land's agricultural fair market value and the non-agricultural fair market value. The statute does not include a maximum amount that may be paid for an easement, but it does state that the purchase price cannot exceed the appraised value of the easement. About two-thirds of the counties participating in the program have adopted a maximum amount to be paid per acre (from state, county, or all sources), and several others have adopted a maximum based on a percentage of the easement value (see Exhibit 4). In some cases, e.g., Lancaster County, the willingness of the landowner to accept less than the full value of the easement, i.e., a bargain sale, is used as a factor in the ranking process.

File Review

We reviewed 22 farm conservation easement files from eight counties to determine whether the minimum state standards and the county standards were appropriately applied to the farms. In all cases, the farms met both the state and the county requirements. In 15 of the cases we reviewed, the easements were a bargain sale (i.e., purchased for less than the appraised easement value). Since 2000, approximately half of all easements were bargain sales at an average of 82 percent of the easement appraisal. (See Table 2.)

The appraisals we reviewed also discuss the characteristics of the location of the farm (including its proximity to other preserved farms), road frontage, proximity to populated areas, use of properties in the surrounding area, and access to sewer and water lines. For example, we reviewed the appraisals for three farms in Mercer County and found that the appraiser noted that the farms were within four miles of a larger population center and that residential development was occurring in the immediate area of the farms. In these three cases, the pressure of development was determined to be "moderate." The appraisal of a farm in Montgomery County stated that the population of the area had doubled between the 1990 and 2000 census. The appraiser noted that the pressure of development was "high."²

²A farm we visited joined the program in 1999 when it was surrounded by other farmland. Today, a development of single and multi-family houses is being constructed on land that abuts this farm.

Exhibit 4

County Maximum Purchase Price Summary

<u>County</u>	<u>Cap</u>	<u>County</u>	<u>Cap</u>
Adams	None	Lawrence	\$1,000 ^a
Allegheny	None	Lebanon	\$2,500 ^a
Armstrong	\$2,000/Acre ^a	Lehigh	\$6,000 ^a
Beaver	None	Luzerne	\$3,500 ^a
Bedford	\$1,500 ^a	Lycoming.....	\$2,000 ^a
Berks	\$2,500 (set every year) ^a	Mercer.....	\$1,000 ^a
Blair	None	Mifflin.....	\$10,000 State ^c
Bradford.....	\$1,500 ^a	Monroe.....	\$10,000 State ^c
Bucks.....	\$12,000 State and County ^b	Montgomery....	None
Butler	\$10,000 State ^c	Montour.....	\$10,000 State ^c
Cambria.....	\$10,000 State ^c	Northampton....	\$10,000 State ^c
Carbon.....	\$10,000 State ^c	Northumberland	\$2,000 ^a
Centre.....	\$5,000 ^a	Perry	70% of Easement Value ^e
Chester	\$12,000 State, County, & Twp. ^d	Pike	\$10,000 Using Single Funding Source - \$20,000 if 2 or More
Clinton	\$2,500 State, County, & Twp. ^d	Potter	\$4,000 ^a
Columbia	\$10,000 ^a	Schuylkill	\$2,500 ^a
Crawford.....	\$1,000 ^a	Snyder.....	None
Cumberland...	\$4,000 County & State ^b	Somerset.....	\$2,000 ^a
Dauphin	\$1,500 ^a	Sullivan	None
Erie	None	Susquehanna...	None
Fayette.....	None	Tioga	\$10,000 State ^c
Franklin.....	\$2,500 State, County, & Twp. ^d	Union.....	None
Fulton.....	None	Warren	None
Greene.....	\$2,000 ^a	Washington.....	\$2,000 ^a
Huntingdon	85% of Easement Value ^e	Wayne.....	None
Indiana.....	\$4,000 State ^c	Westmoreland..	None
Juniata	\$10,000 State ^c	Wyoming.....	None
Lackawanna ..	\$2,500 ^a	York.....	90% of Easement Value ^e
Lancaster.....	Established Yearly		

^aThis represents the maximum to be paid per acre using all sources of funds.

^bThis represents the maximum to be paid per acre from state and county funds.

^cThis represents the maximum to be paid per acre using state funds. Additional payment may be made from other resources.

^dThis represents the maximum to be paid per acre from state, county, and township funds.

^eThis represents the maximum to be paid from all sources as a percentage of the appraised easement value.

Source: Pennsylvania Department of Agriculture.

Table 2

Historical Agricultural Conservation Easement Bargain Sales

	<u>2006-07</u>	<u>2005-06</u>	<u>2004-05</u>	<u>2003-04</u>	<u>2002-03</u>	<u>2001-02</u>	<u>2000-01</u>
Total Easements.....	262	216	248	232	246	316	298
Bargain Sales	139	127	141	113	148	157	143
Bargain Sales as Percent of Total.....	53.1%	58.8%	56.9%	48.7%	60.2%	49.7%	48.0%
Average Percent of Purchase Price	79.0%	75.0%	77.0%	85.0%	88.0%	85.2%	84.6%

NOTE: Reporting period for data is the end of February through the end of February of the following year.

Source: Developed by LB&FC staff from data in Farmland Preservation Annual Reports.

Pennsylvania's Criteria Compared to Other States

A report released in 2006 discusses the criteria used by easement programs around the country to select farms for participation in their programs.³ This report analyzed 46 programs (seven in Pennsylvania counties) in 15 states and found that most programs use minimum standards (including farm size, location in a designated agricultural district, and soil quality) as part of their evaluation process. The 34 quantitative programs that use numerical rankings, as does Pennsylvania, prioritized their selections based primarily on agricultural quality (soil quality) and proximity to other preserved farms. Twenty-two of the programs, including the Pennsylvania programs, allow the minimum parcel size to be reduced if the parcel is near land that is already protected. Most programs tend to favor (i.e., award more points to) larger rather than smaller parcels of land.

This study reported that the Agricultural Quality category they reviewed, which includes the quality of the soils, was the most frequently used and most influential by weight factor in the programs. The weight factor percentage spanned from 5 to 10 percent to the 50 to 60 percent range. Pennsylvania's 40 percent minimum weight for soil quality is near the upper end of this range. Although development proximity is one of the most frequently used criteria for easement programs, programs vary on whether they assign positive or negative points to this factor, depending on whether close location to development is considered a preservation asset or liability for acquiring easements. In Pennsylvania, a farm's proximity to development results in a higher score.

We concluded that the minimum criteria in the Pennsylvania program are consistent with that used in many programs nationwide. Additionally, most programs are similar to Pennsylvania's program in that they allow for significant flexibility at the local level in how the criteria are applied.

2. The Land Use Relationship Between Farms Selected for ACE Purchase and Adjoining and Neighboring Tracts of Land

Although the Department of Agriculture does not maintain data on current land uses on the tracts of land adjoining preserved farms, this information is considered at length at the time a property petitions for enrollment in the Agricultural Security Area (ASA) and as part of the ACE application process.

ASA Land Use Review

A prerequisite for participation in the ACE purchase program is that the property must be enrolled in an ASA of not less than 500 acres. For a property to be enrolled in an ASA, the property owner must voluntarily submit a petition to the municipality in which the property is located requesting inclusion in an ASA. The

³A *National View of Agricultural Easement Programs: How Programs Select Farmland to Fund – Report 2*, A Joint Project of American Farmland Trust and Agricultural Issues Center, June 2006.

municipality must submit the petition to local and county planning commissions for review and comment. The local planning commission is specifically charged with reporting on the potential effects the petition will have on the local government's planning policies and objectives.

Additionally, the petition must be submitted to the Agricultural Security Area Advisory Committee (ASAAC) for review and comment. The ASAAC is appointed by the local governing body and must consist of three active farmers, each representing a different farm, one citizen of the municipality, and one member of the governing body. The purpose of the ASAAC is to render expert advice relating to the desirability of establishing an ASA. Specifically, the ASAAC is to consider the nature of farming and farm resources within the proposed area and the relation of farming in the proposed ASA.

In reviewing the reports of the planning commissions, the ASAAC, and testimony from the public hearing, the local governing body must consider the following factors:

1. The land proposed for inclusion in the ASA must have soils which are conducive to agriculture. This factor is deemed to have been satisfied if at least 50 percent of the land contains class I through IV soils or if the land is currently in active farm use and is being maintained in accordance with a soil conservation plan.
2. The land proposed must be in accordance with the local comprehensive plans and agricultural use must be permitted by any zoning ordinance.
3. The land proposed must be deemed to be viable agricultural land.
4. The extent and nature of farm improvements.
5. Anticipated trends in agricultural, economic, and technological conditions.
6. Any other matters that may be relevant to the specific proposal.

When reviewing these petitions, the reviewing bodies are aware of the implications, including the potential for the property to be subject to an ACE. Thus, the decision to recommend and approve an ASA has included consideration of not only adjacent land uses, but also the possibility that the ASA may eventually include one or more ACE preserved farms.

ACE Land Use Review

The land use relationship between farms selected for ACE purchase and adjoining and neighboring tracts of land is also assessed at the time a farm owner applies to the ACE program. This process, and the ramifications of changing land use after an ACE property is enrolled in the program, is discussed in Item 3 below.

3. The Effect on the Economic Viability of Preserved Farms Where the Uses of Surrounding Lands Have Been Converted From Agricultural Uses to Nonagricultural Uses

Although not specifically stated in statute, the ACE program is not intended simply to preserve open space, but rather to preserve enough farmland in sufficient concentration to support continued agricultural production. As discussed in an article by Penn State professors Timothy Kelsey and Stanford Lembeck, enough farms need to remain in a community to keep farm input suppliers, shippers, processors, and other farm-related business services available in that community.⁴

Another reason to preserve larger areas is that agricultural operations can produce noise, spray drift, and manure odor that is not compatible with residential or commercial development. Clustering also makes it easier to use other complementing techniques, such as agricultural protection zoning and agricultural districts that help address other issues pressuring farms, such as rising property values and nuisance complaints.

We should note that some counties disagree that clustering is necessary to support viable farms. Montgomery County, for example, noted that innovative farming products and techniques, such as organic fruits and vegetables, local cheeses, low-fat buffalo meat, and goat meat to serve growing ethnic communities in the region, can be highly successful on small farms that are located in areas near urban communities.

Requirements Regarding Clustering

“Clustering potential,” meaning a farm’s proximity to other preserved farms, is one of several factors counties are required to include in their farm preservation ranking system. Certain Pennsylvania Department of Agriculture legislation requirements, however, can make such clustering difficult. These include:

The State Funding Formula for Allocation of State Funds to Counties. The Bureau of Farmland Preservation currently utilizes a two-part formula, as detailed in the Agricultural Area Security Law, to distribute state farmland preservation funds.⁵ First, a county’s grant is based upon the county’s real estate transfer taxes relative to all other counties. Second, the county’s state match is based on that county’s agricultural production values and the amount of funding the county provides relative to all other counties, known as the county match amount.

⁴*Purchase of Conservation Easements for Farmland Preservation: Pennsylvania’s Experience*, by Timothy W. Kelsey and Stanford M. Lembeck, 1998.

⁵This discussion of the funding formula has been greatly simplified. The actual formula is quite complex.

As a result, a considerable amount of state grant money has gone to suburban counties with relatively little farmland and high conservation easement prices simply because these counties have high real estate transfer taxes and can afford to contribute toward the program (see Table 3).

For example, in 2008, Montgomery County received a state allocation of \$2.83 million, or 8.6 percent of total state funds, even though it produces less than 1 percent of the Commonwealth's total agricultural production. Similarly, Bucks County received a state allocation of \$2.30 million, 7.0 percent of the statewide total, even though it accounts for only 1.4 percent of the state's agricultural production. Because the formula directs significant state funds to such suburban counties, more rural counties that have much lower per acre easement costs, and therefore would be more conducive to clustering, receive relatively little funding.

The Weighting of Soils and Development Pressure Relative to Other Factors in Determining a County's Ranking of Farms for Preservation. In the mid-1990s, the state Farmland Preservation Board adopted a rule requiring county ranking systems to give a minimum of 40 percent of the overall weight to soil quality.⁶ The purpose of this rule is to ensure that preserved farms are quality farms.

Another required factor ranking farms is the development potential of the land, with land having a high potential to be developed receiving a higher score. The availability of sewer and public water, road frontage, and the extent of non-agricultural use in the area are three of the required sub-factors that must be considered in the score for development potential.

These two factors, soil quality and development potential, often work together to result in high scores for the highest-cost farms in the county: farms with good soils, on relatively flat land, and in the direct path of development. Because of the high development potential, these farms are not only costly, but may be among the most difficult to cluster with other agricultural land.

Several counties reported frustration having to work with a farmland ranking system that gives relatively low scores to some of their county's "best value" farms, either because they had somewhat lower quality soils or because they are not in the direct path of development. Many county directors expressed a desire to return to a lower minimum soil quality requirement, such as the 30 percent minimum that had been used prior to 1994.

The Pennsylvania Builders' Association also questions the priority placed on preserving properties with existing sewer and water lines. They note that when farms in close proximity to developed land are preserved, it results in developers having to reach further into the countryside to find developable land, thus promoting sprawl.

⁶Soil quality includes factors such as the slope of the land, drainage, and depth.

Table 3

State Funding for Agricultural Easements, by County*

	<u>2008</u>	<u>2007</u>	<u>2006</u>	<u>2005</u>	<u>2004</u>
Adams	\$ 484,540	\$ 635,291	\$ 2,105,617	\$ 639,869	\$ 1,539,469
Allegheny.....	1,157,643	1,419,765	3,667,752	887,178	1,541,252
Armstrong.....	56,510	73,395	169,233	42,670	64,122
Beaver.....	313,882	366,086	701,011	189,547	271,652
Bedford.....	67,602	71,748	184,698	36,826	64,439
Berks	2,501,187	3,694,347	8,169,469	1,901,296	3,708,414
Blair	211,984	190,161	512,697	175,111	262,492
Bradford.....	103,262	111,570	257,118	59,007	161,520
Bucks.....	2,298,168	2,991,994	6,543,292	1,864,568	3,284,069
Butler	481,443	564,263	1,445,195	465,438	728,717
Cambria.....	114,796	152,707	383,339	104,420	144,502
Carbon.....	158,686	187,911	467,391	114,435	180,634
Centre.....	346,286	435,656	1,078,713	279,154	560,695
Chester.....	2,658,379	3,326,201	8,767,844	1,964,346	3,619,265
Clinton	64,490	73,103	167,649	66,176	52,491
Columbia	102,048	117,263	272,377	69,932	133,336
Crawford.....	81,039	113,343	262,072	57,247	
Cumberland.....	1,016,818	977,529	6,275,305	812,064	1,019,432
Dauphin.....	783,531	919,690	2,102,045	473,856	1,061,376
Delaware				884,052	1,535,808
Erie	441,200	518,305	1,101,742	384,702	651,932
Fayette	109,439	105,480	288,800	63,470	120,681
Franklin.....	1,313,303	1,918,949	4,214,732	846,157	806,677
Fulton	28,248	34,509	90,565	14,986	40,445
Greene	42,779	36,441	80,410		
Huntingdon.....	58,876	93,375	198,389	46,852	67,888
Indiana.....	75,239	92,445	238,583	63,397	98,248
Juniata.....	63,986	51,225	142,183	25,195	37,415
Lackawanna	350,944	400,505	1,070,659	234,478	344,572
Lancaster.....	3,090,699	3,938,159	9,321,198	2,362,879	3,589,177
Lawrence.....	98,675	102,543	282,254	70,957	136,390
Lebanon	1,257,052	779,638	2,615,785	574,800	1,806,043
Lehigh.....	2,038,555	2,783,125	6,294,647	1,261,464	2,292,270
Luzerne	482,204	615,883	1,338,310	317,758	535,627
Lycoming.....	188,114	211,934	539,175	147,060	271,387
Mercer	187,581	181,794	454,665	138,019	241,427
Mifflin	65,054	89,460	226,170	53,993	82,739
Monroe	505,689	751,018	2,439,156	759,182	1,399,689
Montgomery	2,825,342	3,288,361	8,063,318	1,846,391	3,205,994
Montour	41,258	40,770	99,201	22,049	42,721
Northampton.....	1,799,131	1,889,315	6,944,010	1,330,099	1,799,055
Northumberland ..	83,176	99,469	292,006	63,749	123,949
Perry.....	92,501	114,564	287,091	76,536	159,578
Pike	226,902				
Potter.....	30,543	38,397	101,319	27,674	36,534

Table 3 (Continued)

	<u>2008</u>	<u>2007</u>	<u>2006</u>	<u>2005</u>	<u>2004</u>
Schuylkill	\$ 260,491	\$ 333,422	\$ 820,574	\$ 248,574	\$ 440,054
Snyder.....	66,481	108,838	226,467	63,499	119,311
Somerset.....	118,603	132,882	327,582	75,341	131,469
Sullivan	19,185	27,429	67,191	16,640	30,237
Susquehanna.....	93,597	121,240	322,389	86,613	140,075
Tioga	78,034	100,295	261,550	67,397	123,762
Union.....	175,752	171,058	547,144	287,145	84,104
Warren	32,227	59,820	146,279		
Washington	352,085	437,747	1,166,022	265,275	504,535
Wayne.....	179,097	236,175	544,218	129,540	224,539
Westmoreland.....	556,611	722,087	1,838,170	524,249	1,036,274
Wyoming.....	48,515	69,657	156,736	38,949	68,402
York.....	<u>2,520,538</u>	<u>2,881,663</u>	<u>5,318,493</u>	<u>1,377,739</u>	<u>2,273,115</u>
Total	\$33,000,000	\$40,000,000	\$102,000,000	\$25,000,000	\$43,000,000

*Total includes grant, match, and redistributed funds.

Source: Developed by LB&FC staff using data provided by the Pennsylvania Department of Agriculture.

The Legal Definition of Agricultural Viability

In addition to the economic efficiencies that can be achieved by clustering, the viability of preserved farms depends, at least in a legal sense, on several factors having little to do with farming or the local agricultural infrastructure. Under the Agricultural Area Security Law, “viable agricultural land” is defined as land suitable for agricultural production and where “. . . real estate taxes, farm use restrictions, and speculative activities are limited to levels approximating those in commercial agricultural areas not influenced by the proximity of urban and related nonagricultural development.”

This definition has never been specifically challenged in court under the provisions of the ACE program, so a detailed explanation of how this is to be applied in a specific instance is not available. However, as a result of the Preserved Farmland Tax Stabilization Act and the Clean and Green program, real estate taxes on the land on preserved farms in areas under development pressure should not be substantially higher than the real estate taxes on land in areas not under development pressure. This is because the Clean and Green program provides a real estate tax benefit to owners of agricultural or forest land by taxing that land on the basis of its “use value” rather than its market value. The use value is based on the net return to the agricultural landowner that is produced by use of the land asset.

Although eight counties do not currently participate in the Clean and Green program (i.e., Bedford, Blair, Crawford, Franklin, Indiana, Lebanon, Mercer, and Northumberland Counties), the preserved farms in these counties would still be eligible for the tax preferences available through the Preserved Farmland Tax Stabilization Act, which also requires that agricultural conservation easements be assessed at the land’s restricted farmland value.

Similarly, by law, preserved farms must be located within an Agricultural Security Area of at least 500 acres. ASAs, by law, are protected from many of the nuisance ordinances that can restrict normal farming operations. Assuming the local government would continue the ASA designation (the designation must be reviewed every seven years), preserved farms would thus also meet this test for viability.⁷

The third criterion pertains to “speculative activities,” which presumably refers to the purchase of land with the intent to resell it within a few years at a substantially higher price. We were unable to quantify the extent to which areas adjacent to preserved farms are subject to speculative activities. However, given that

⁷In addition to ASAs, agricultural zoning has also been used to help ensure that the land surrounding a preserved farm is able to be used for agricultural purposes. For example, Lancaster County requires that preserved farms be located in an agricultural zoning district to qualify for preservation with either state or county funding. Lancaster County has taken the further step of requiring that this zoning be “effective agricultural zoning,” a higher standard that allows not more than one lot subdivision for every ten acres of farm parcel.

the ACE program has been structured to give priority to farmland that is under development pressure, it is reasonable to assume that preserved farms are often in areas with relatively high speculative activities.

4. The Number of Farms and Acreage Currently Preserved Which Are Still in Agricultural Operation

As shown on Table 1, as of mid-June 2008, 3,579 farms and 395,636 acres of farmland have been preserved under the ACE program. As part of the program, the county board is required by regulation to inspect all restricted land within a county at least annually to determine compliance with the applicable deed of easement, including the requirement that the land be kept in agricultural production.

The inspection determines, for example, whether the land continues to be used for permitted agricultural purposes, has not violated requirements related to the construction of buildings and other structures, and has a soil conservation plan as needed. Within ten days of the inspection, a report including the following is to be prepared:

- the identification of the land inspected;
- the name of the owner of the farmland at the time the easement was originally acquired and the name of the current owner;
- a description of modifications in the number, type, location, or use of any structures on the land since the date of filing of the deed of easement;
- a description of the deviations from the conservation plan observed on the restricted land; and
- a statement indicating whether the structure permitted under the act has been constructed on the restricted land and, if so, the month and year construction was completed and a description of the structure and its location on the land.

A copy of the report is mailed to the owner and annually the inspection reports are filed with the State Board.

Based on our review of the inspection report summaries maintained at the Department of Agriculture, not all counties have submitted reports in every year. About one-third of the counties that have preserved farms have failed to submit annual inspection reports to the State Board in at least one of the last three years. Nine of the 54 counties with preserved farms (during this review period) did not submit reports for any of those years. Additionally, the reports filed by the counties do not state the number of preserved farms in the county as of a specific date, nor does the Department of Agriculture program staff make this determination. Therefore, it was not possible for us (nor the Department of Agriculture staff) to determine whether all the ACE farms in the county had been inspected.

We discussed these concerns with the staff of several county ACE programs. According to county program staff, even though an official inspection report may not be filed in a timely manner with the state, program personnel may have visited the property numerous times during the year. As reported by one county program director, she receives telephone calls from USDA staff whenever they are on site at a property and have any concerns about activities on a preserved farm so she can visit the property to ensure that the activities are in compliance with the easement. Another program director stated that his county had completed the inspection reports, but had not yet sent them to the state program office. The directors also noted that, as the program matures, the burden of annual inspections increases.

The inspection reports we reviewed address the information required by the regulations and, generally, cite few if any violations. Most of the violations that do occur involve problems with the soil conservation plan or the need for deed corrections. The county staff works with the farmer to implement the necessary soil conservation plan and to correct the deed errors. Problems with deeds often happen when a property is conveyed to a new party, and the deed fails to include the easement restrictions as required by the act. Again, the county staff works with the appropriate parties to correct the deed. Once corrected, a copy of the new deed is forwarded to the State Board.

The county board has enforcement authority if violations are found; however, the State Board may also enforce the terms of state or jointly purchased easements. According to ACE program staff, few formal enforcement actions have been taken, with most violations corrected by the county staff working with the farmer as discussed above. In one instance, the ACE program staff was involved in enforcing the provisions of the easement. In that case, three trailers were placed on the preserved farm for the use of farm employees. The easement allows one additional structure to be placed on the eased farm. After written communication from the ACE staff and county staff, the trailers were removed.

In another case, the county is pursuing the correction of a violation in court. During an annual inspection of the property, the county program staff found that the landowner was operating a paint ball business on approximately 10 acres of the approximately 100-acre preserved farm. The remaining area of the farm, however, continues in agricultural production. According to the county program staff, the landowner is continuing to operate the paint ball business, and they have proceeded to court to enforce the easement provisions. This county also had a situation where a landowner was operating a milk hauling business on a preserved farm that expanded into a significant business hauling other non-farm related products. The landowner agreed to remove these business activities from the preserved farm when directed by the county staff.

During the course of our review, several problems with the current inspection and enforcement requirements were noted by county staff:

- Department of Agriculture regulations require counties to inform the farmer of the results of the inspection by certified mail. Not only is this costly for the county, but several of the county staff noted that the farmers complain about having to go to the post office to pick up the mail, since they are rarely available when the mail is delivered at the farm.
- The county directors are concerned about the short time frames established in the regulations for the inspection, correction of and, if necessary, enforcement related to violations of the easement restrictions. The counties have not issued violations of soil conservation plans or deeds due in part to the near impossibility of being able to comply with the time frames established in regulation.
- The directors recommended that the frequency of inspections be reduced to once every two years rather than annually. Most have limited staff and find it difficult to conduct annual inspections, and, as noted above, few significant violations are found. Inspections could be conducted more frequently at the county's discretion if circumstances warranted. PDA, however, favors continuing the annual inspections and authorizing the use of ACE funds for this enforcement effort. The PDA is concerned that as more properties with easements change ownership, it is more likely that new purchasers will be unfamiliar with the easement provisions, and the county will need to enforce the easement provisions.

5. The Effect of Current Statutory Language That Provides for the Extinguishment of an ACE Under Certain Circumstances After 25 Years

Pennsylvania's ACE statute originally provided for two types of easements: perpetual easements and easements for a term of 25 years. The valuation process was the same for both types of easements, but the 25-year easement purchase price could not exceed one-tenth of the appraised easement value. Act 1994-96 eliminated the 25-year easement, essentially deeming all easements perpetual, while retaining the extinguishment language applicable after 25 years. As a result, the current act is confusing in that all easements are perpetual, yet they are also subject to the act's original 25-year extinguishment provision.

Specifically, once an easement is purchased, it cannot be sold, conveyed, extinguished, leased, encumbered, or restricted in whole or in part for a period of 25 years.⁸ At the end of 25 years, if the land subject to the agricultural easement is no longer viable agricultural land, the Commonwealth (subject to the approval of the State Board) and the county (subject to the approval of the county board) may sell, convey, extinguish, lease, encumber, or restrict an agricultural easement to the

⁸The first easement in the Pennsylvania program was purchased in 1989; therefore, the 25-year provision becomes effective in 2014.

easement's current owner of record. The purchase price is to be equal to the value of the easement at the time of resale determined pursuant to the process required by the act at the time of the original conveyance.

None of the easements purchased under the state program prior to 1994 were 25-year easements. Most of the easements purchased as 25-year easements in the Lancaster County program, which preceded the state program, have been converted to perpetual easements at the request of the landowners.

The “Viable Agricultural Land” Definition

In addition to being in the program for 25 years, to extinguish an easement requires that the farm no longer be viable agricultural land. The act defines “viable agricultural land” as:

Land suitable for agricultural production and which will continue to be economically feasible for such use if real estate taxes, farm use restrictions, and speculative activities are limited to levels approximating those in commercial agricultural areas not influenced by the proximity of urban and related nonagricultural development.

Under this definition, the viability of agricultural land is to be determined by real estate taxes, farm use restrictions, and the level of speculative activities. As noted previously (p. 18), all but eight of the counties with preserved farms participate in the Clean and Green program, which allows participating land devoted to agricultural use to be taxed at a preferential rate. The Preserved Farm Tax Stabilization Act, 72 P.S. §5491.1 et seq., also specifically allows preserved farmland to be taxed at a preferential rate. If a preserved farm qualifies for preferential assessment under another act, such as Clean and Green, it can be assessed at the lowest preferential assessment for which it qualifies. Programs like these offset, at least to a degree, the affect of increasing real estate taxes. However, while these programs help protect the land from increased property taxes, the farmhouse does not receive the preferential assessment.

Similarly, by law, preserved farms must be located within an Agricultural Security Area. ASAs, by law, are protected from many of the nuisance ordinances that can restrict normal farming operations, and would meet this test for viability.

The third economic feasibility criterion pertains to “speculative activities.” Although we were unable to quantify the extent to which areas adjacent to preserved farms are subject to speculative activities, given that the ACE program is designed to give priority to farmland that is under development pressure, it is reasonable to assume that preserved farms are often in areas with relatively high speculative activities.

The definition of “viable agricultural land” requires all three of the economic feasibility criteria to be addressed if seeking to extinguish an easement pursuant to the 25-year provision. At least two of the three criteria would appear difficult to establish due to the preferential tax programs and the protections afforded to farms in an Agricultural Security Area.

Other Factors That Would Make a 25-year Extinguishment Unlikely

In addition to the three economic feasibility tests, another important aspect to the 25-year provision is that the act provides that the Commonwealth and county (i.e., the easement owner, not the landowner) have the option to pursue the easement extinguishment. Additionally, the act does not require that the easement be extinguished if the land is no longer agriculturally viable land; it only provides for that option. We should note, however, that even though the landowner is not specifically authorized to initiate the change to the easement, Department of Agriculture counsel indicated that it is nevertheless possible that the courts would grant standing to the landowner to do so.

Additionally, if an ACE was extinguished, the easement value that the landowner would need to pay to the easement holder could be prohibitively high. Under the act, if any portion of an easement is extinguished, the entity acquiring that portion is required to reimburse the Commonwealth and applicable county the current fair market value of the easement, not the original easement purchase price. If it was determined that due to the development of adjacent and nearby property the ACE was no longer economically feasible, the petitioner could be required to reimburse the Commonwealth and county almost the full current fair market value of the property. This is possible because at the time of the easement purchase, the Commonwealth and county purchased the difference between the agricultural value and the development value of the property. If significant agricultural value no longer exists, then the Commonwealth and county, by virtue of the purchase of all non-agricultural value, must hold close to the full property value. As a result, there could be little financial incentive to extinguish an ACE.

Department of Agriculture staff further indicated it will be difficult to show that farmland subject to an easement is no longer suitable for agricultural production since there are numerous types of agricultural production for which land may be used, such as for growing herbs, nursery stock, and locally sold produce.⁹ In addition, the agricultural production ability of the land focuses on the land, not on the specific circumstances of the landowner. Thus, just because a particular farmer raising a particular crop cannot sustain agricultural production, it does not mean that another farmer, perhaps raising a different product, could not be successful.

⁹The State Board, however, has not issued a policy statement or guideline regarding its interpretation of this provision or the procedures it would use in implementing it.

Applicability of Federal Charitable Contribution Tax Deduction

Another concern raised regarding the 25-year extinguishment provision is that it may affect the applicability of the federal tax charitable contribution deduction that is available under certain circumstances. In easement purchases where the purchase price is less than the appraised value of the easement, the farmer may be able to take the difference between the two as a charitable contribution. Under federal tax provisions, however, farmers can only get the charitable contribution if it is a perpetual easement. Some farmers are therefore concerned about the potential ramifications of the 25-year provision if farms do leave the program.

The Pennsylvania Land Trust Association (PALTA) has expressed concern about several aspects of the ACE program and the applicability of the federal charitable contribution deduction to a bargain sale easement. Specifically, the PALTA cites the existence of a “25-year-and-out” clause in the legislation and the lack of restrictions on agricultural buildings’ size, quantity or location as possibly running afoul of the “conservation purposes” test of Internal Revenue Code §170(h).¹⁰ According to a PALTA official, the IRS is planning to audit 1,000 to 2,000 eased farms nationwide, so these issues may need to be addressed in a future Pennsylvania statute.

County and State Staff Concerns

Another concern related to the 25-year provision is the confusion and doubt it creates when discussing the program with farmers. According to the county program staff we spoke to, virtually all the farmers who are seriously interested in the ACE program want their farms to be permanently preserved. When asked if the ACE program provides for permanent protection, oftentimes the staff feel compelled to inform the farmer of the 25-year extinguishment provision. This can lead to an extended conversation because the language is confusing, and it has yet to be tested in court, so how the provision might be interpreted in the future is unknown. Virtually all, if not all, of the county program directors we spoke to favor the removal of the 25-year provision to clarify that the intent of the law is to create perpetual easements.¹¹ State program staff also favors removing this provision and including a statement that the removal was to clarify the intent to create perpetual easements, such as was done in Maryland (discussed below). Senate Bill 2008-1513 would repeal this provision.¹²

¹⁰PALTA recommends that to be consistent with IRS requirements for deductibility, the ACE provisions regarding mineral rights should require notice prior to the exercise of those reserved rights that could have an adverse impact on the properties’ conservation values. PALTA also recommends that the ACE be amended to prohibit “removal of mineral substances in any manner that adversely affects the land’s agricultural potential.”

¹¹In contrast, the PA Builders Association recommends that farmland not be preserved in perpetuity since conditions change and the program should be able to respond to that change.

¹²See Appendix B for other pending bills related to the ACE program.

Other States

We reviewed statutes for the contiguous states as well as several others that were recommended to us to determine whether those states also have extinguishment provisions. Exhibit 5 shows the results of this review. Most of the states' statutes we reviewed that provide for the extinguishment of an easement have similarly stringent requirements. As shown on Exhibit 5, even those states without a specified term of years in their statutes for extinguishment of an easement have high standards to meet in order to extinguish the easement. In addition to Delaware's "feasibility of profitable farming on the land," Connecticut requires proof that public interest results in an overriding necessity to relinquish the easement.¹³ Ohio allows for extinguishment of the easement if an unexpected change in conditions of or surrounding the land makes it impossible or impractical to use the land as required by the easement.¹⁴ Clearly, the easements in those states are not intended to be easily extinguished.

Maryland removed its 25-year provision for farms preserved after 2004 to remove confusion over the application of the provision. According to a program official, the intent of the legislature had always been that the easements were in perpetuity, and the amendment removing the 25-year provision only clarified that intent. The change, however, is only applicable to easements established after October 1, 2004. Maryland reported it has had no reduction in the number of applications for the program since this change and has had requests from landowners in the program prior to October 2004 to amend their easements to eliminate the 25-year provision.

Delaware has retained its 25-year provision, which allows the farm owner to petition for the extinguishment of the easement. According to a program official, although there is an extinguishment provision, the easements are considered permanent. The Delaware statute requires a stringent review of the property to determine whether profitable farming is feasible on the land. This determination is to be based on the land, not the abilities of the particular landowner. In addition, the funds required to be paid to the state in the case of an extinguishment are based on the difference between the appraisal of the current best use of the land and the agricultural use, similar to the provisions in Pennsylvania. The official pointed out that to qualify for the extinguishment, the agricultural value would have to be minimal and, therefore, the landowner would be paying a premium to have the easement extinguished, which provides a financial disincentive. Additionally, the funds are paid to the program for use in purchasing easements, which ensures that the

¹³Two partial releases have occurred in Connecticut. One was to release .3 acres of land to widen a road along a farm for public safety purposes. The other involved a gift of development rights on 500 acres where the owner needed to retain 2.5 acres of land. He went through the termination process but it resulted in him taking the area he needed and giving the program 4 additional acres. Connecticut's process allows the owner of the restricted land or the municipality where it is located to petition for the termination of the easement.

¹⁴Ohio has not had an easement terminate. The Ohio deed of agricultural easement contains the process to terminate, which requires a judicial proceeding, and the requirements for recoupment for the easement value.

Exhibit 5

Term of Easements

Connecticut.....	In perpetuity except public interest results in overriding necessity to relinquish easement
Delaware.....	May be terminated after 25 years based on determination of the feasibility of profitable farming on the land
Maryland.....	In perpetuity ^a
Massachusetts.....	In perpetuity or for a specified number of years
New Jersey.....	20 years or more with no extinguishment provision
New York.....	Perpetuity unless otherwise stated in the easement with modification or extinguishment under certain conditions
Ohio.....	Perpetuity but may be extinguished if unexpected change in conditions of or surrounding the land makes it impossible or impractical to continue to use the land as required by the easement
Pennsylvania.....	Perpetuity but can be extinguished after 25 years if the land is no longer viable agricultural land
Vermont.....	Perpetuity
Virginia.....	Perpetuity unless otherwise stated in the easement
West Virginia.....	Perpetuity

^aPrior to the 2004 amendment, termination of the easement could occur after 25 years based on feasibility of profitable farming on the land.

Source: LB&FC review of statutes.

funding continues to be used for a public purpose. According to the Delaware official, the IRS and the USDA have reviewed the provisions of the Delaware act and concluded that they meet all the tests for permanent status under the tax and funding laws.

6. The Effect of the Absence of Any Current Statutory Per-Acre Cap on the Amount of State Dollars That Can Be Spent to Acquire an ACE

Prior to 2001, the Commonwealth had a statutory cap of \$10,000 per acre in state funds for the purchase of an ACE. This cap was removed by Act 2001-14. The Commonwealth still, however, retains a statutory cap in the sense that the Department cannot pay more per acre than the current appraised difference between the fair market value of the property at its highest use and its agricultural use. This requirement helps ensure that the Commonwealth will not pay more for an easement than the current market values. Moreover, as shown in Exhibit 4, many counties have chosen to retain the \$10,000 cap on state funds.

Since the end of 2001, the Commonwealth has participated in 36 easement purchases totaling 2,613 acres where the Commonwealth's cost has exceeded \$10,000 per acre.¹⁵ The highest of these easements, on a per-acre basis, was \$35,379. Half (18) of these high-cost per acre easements have been in Montgomery County, with most of the rest (13) being in Chester County.

The total cost to the Commonwealth for these 36 easements was \$38.3 million. Had the Commonwealth had a cap of \$10,000 per acre on easements and none of these easements were purchased, this money would have been available to purchase easements on approximately 23,759 acres (based on an average Commonwealth cost of \$1,612 per acre, the statewide average since 2002 for purchases where Commonwealth costs have been less than \$10,000 per acre). Had the \$10,000 cap been in place and easements still purchased on all 36 properties (e.g., with the difference being made up in county or local funds or through landowner donations), the cost to the Commonwealth would have been \$26.1 million rather than \$38.3 million.

The PA Department of Agriculture expressed concern that if fixed legislative caps were instituted, they could quickly become out of step with the market. Under the current arrangement, the State Board and county programs can adjust caps to market conditions in a relatively short time because each county can establish caps lower than the fair market value based on the individual needs and desires of their program.

¹⁵Another figure that has been cited as a reasonable state cap is \$12,000 per acre. The Commonwealth participated in 20 easements totaling \$23.0 million in Commonwealth funds where the Commonwealth's costs exceeded \$12,000 per acre.

7. The Effect of Permitting the Acquisition of an ACE on a Farm of Fewer Than 50 Contiguous Acres in Size

Act 2006-46 amended the Agricultural Area Security Law to allow counties to purchase easements on properties with as few as 35 acres (the prior minimum had been 50 acres). Easement purchases can be for as few as 10 acres if the acres are adjacent to a property with an existing ACE or if the farm is growing a crop that is unique to the area. If the county opts to allow easements on properties of fewer than 50 acres, only 50 percent of the easement purchase can be state funds (easements that are 50 acres or more may be fully funded by the state).

As Exhibit 6 shows, since Act 46 became effective (May 13, 2006), the number of easements on farms of fewer than 50 acres has increased, but not dramatically.

Exhibit 6

Easements on Properties of Fewer Than 50 Acres

	# of Easements for Properties of Fewer Than 50 Acres	# of Acres	Average Price/Acre	State Cost	County Cost	Total Cost
2001 ...	20	835	\$3,952	\$1,981,391	\$1,318,637	\$3,300,028
2002 ...	17	721	3,187	1,017,959	1,279,518	2,297,477
2003 ...	23	1,009	4,325	990,313	3,373,368	4,363,682
2004 ...	13	538	2,482	734,123	601,305	1,335,428
2005 ...	11	497	3,039	1,221,943	288,294	1,510,238
2006 ...	19	791	5,932	2,060,486	2,631,928	4,692,414
2007 ...	26	1,081	6,982	4,455,643	3,092,321	7,547,965

Source: PA Department of Agriculture Master File

The large jumps in total costs in 2006 and 2007 are due to the purchase of three easements, all in Montgomery County, of \$1.8 million in 2006 (40 acres) and \$2.02 million (45 acres) and \$2.07 million (45 acres) in 2007. Montgomery County, citing the success of their smaller farms, would like to see the law changed to allow state money for the purchase of farms as small as 25 acres.

Concern was also expressed regarding the appropriateness of allowing a second residential home to be built on preserved farms of less than 50 acres. Under the program's current guidelines, a second house (i.e., in addition to an existing residential structure) is allowed. However, depending on where the second home is located, it could significantly affect the future viability of the farm. To remedy this problem, one county director suggested that the act be amended to allow counties to prohibit the fragmentation that can occur by building second homes on farms of fewer than 50 acres.

8. The Effect of Requiring Local Government Participation for ACE Purchases Which Exceed a Set Per-Acre Dollar Amount

Many counties have established county caps that effectively require local (i.e., municipal) government participation for high-cost easements (see Exhibit 4). Lehigh County, for example, has placed a cap of \$6,000 per acre for the amount they are willing to pay for an agricultural conservation easement. The Lehigh County official we spoke to cited an instance in which the easement cost \$8,000 per acre, and the local municipality contributed the additional \$2,000 per acre to complete the purchase.

Lancaster County also has a cap, but it is set at \$4,000 and includes all county, municipal and nonprofit funds. The Lancaster Board would therefore not participate in preserving a farm that required over \$4,000 in county and local funds, even if the municipal government was willing to contribute more.

Bucks County has also been cited as being particularly successful in garnering participation by local governments. To date, the county has 18 easements purchased as a joint ownership with townships. PDA reports these partnerships have resulted in gaining \$6.7 million through local government participation, thus allowing the county to use state funds to purchase additional eased land. The Department noted it would like to see many more townships throughout the state join in as grantees in helping to purchase easements and that throughout the state, townships have provided funds to purchase 51 easements jointly with counties and the state.

Requiring local government participation above a set per-acre dollar amount—in essence requiring county caps—has two major difficulties. First, as shown in Exhibit 4, the existing county caps vary widely, so it would be difficult to establish a uniform cap that could be applied to each county. Secondly, requiring local participation, especially if the county cap was set at a low level, could result in some municipalities not participating in the program or participating only minimally. If some of the county's best farmland was located within these nonparticipating municipalities, it could result in the county preserving less desirable farms in townships that are willing and able to make contributions, but having to forgo higher quality farms in townships that, for either financial or political reasons, are not willing to participate in the program.

9. The Options Available to Maximize the Limited Dollars Available for ACE Purchases, Including Consideration of Installment Purchases and the Current Installment Purchase Agreement (IPA) Program

Farmers may choose to receive the proceeds from easement sales in a lump sum payment, in like-kind exchange installments of up to five years, or on a long-

term installment basis. This decision is often determined by the amount of federal tax liability that would be incurred.

Installment Purchase Agreement Program

The IPA installment sales can result in significant tax savings to farmers because it allows them to defer payment of the capital gains tax on the easement purchase for up to 30 years while receiving tax-exempt interest income on the outstanding purchase price.

The ACE program also receives an advantage in an installment sale because the county uses the easement funds to purchase zero-coupon bonds, and therefore can leverage dollars to purchase additional easements in the short term.¹⁶ For example, an easement purchase may be \$500,000. The cost of purchasing \$500,000 in zero-coupon bonds may only be \$200,000, which, therefore, allows the county to leverage \$300,000 for additional easement purchases. During the period the zero-coupon bond is maturing, the county pays the landowner interest payments from the annual ACE appropriation the county receives from the Commonwealth. The farmer does not need to pay capital gains until the IPA matures, which may be for up to 30 years.

The IPA option, however, has not been widely used in Pennsylvania. The Department reports that only ten IPA transactions have been completed under this program, and in seven of those, the transaction costs were paid for with pilot money that is no longer available. Two key obstacles to the IPA program are: (1) to implement an IPA program counties must adopt a “Debt Act,” agreeing to incur future debt, not knowing what future budgets will be; and (2) the transaction costs for IPAs are high, typically about \$20,000 per agreement.

IPA programs in other states, however, have been successful. The administrator of Pennsylvania’s IPA program, a private company, also administers IPA programs in Virginia and Maryland where IPAs are used frequently. An official for this company noted that the terms and conditions of the programs are very similar among the three states. He attributed the lack of IPA participation in Pennsylvania to the more conservative nature of Pennsylvania farmers and county officials, specifically the reluctance of landowners to incur the transaction costs and the reluctance of county officials to incur debt.

We also spoke to farmers and county program administrators who noted that in many areas of Pennsylvania land prices are still relatively low, so the tax savings available through an IPA, especially after subtracting transaction costs, are

¹⁶Counties purchase Treasury Separate Trading of Registered Interest and Principal of Securities (STRIPs) typically for about 20 percent below their maturing face value. STRIPs are U.S. Government bonds that allow principal and interest to be sold separately. When the STRIP matures, the funds are then available to purchase the easement.

relatively modest. As land prices escalate, farmers may find the opportunity to defer capital gains taxes to be more attractive.

Transfer of Development Rights

Transfer of Development Rights (TDR) is another tool that can be used to maximize the limited dollars available for ACE purchases. When successful, a TDR preserves land at no cost to taxpayers, gives the landowner a market-based price for a permanent easement, and promotes more efficient development in designated growth areas.

In a traditional TDR program, the landowner sells the property's development rights to a private developer, who then uses those rights to build in a designated growth area, but at a greater density level than would otherwise be permitted. The areas that the community wants to save are designated as "sending areas" and the locations that the community wants to grow are designated as "receiving areas."

Although TDR programs have been enacted in many jurisdictions across the country, including Pennsylvania, with a few exceptions (e.g., Montgomery County, Maryland), TDR programs have generally not been successful. As noted by the American Farmland Trust, one of the most difficult aspects of implementing TDR is developing the right mix of incentives. Farmers must have incentives to sell development rights instead of building lots. Developers must also be able to benefit from buying development rights instead of building houses according to the existing standards. Thus, local governments must predict the likely supply of and demand for development rights in the real estate market, which determines the price. Because the issues are complex, TDR programs are usually done in conjunction with a comprehensive planning process.

TDR programs in Pennsylvania are also limited because the Pennsylvania Municipalities Planning Code, at §10619.1, does not allow development rights to be transferred across municipal lines, except when there is a joint zoning ordinance between the municipalities where the sending and receiving parcels are located. This often limits the options available to identify appropriate sending and receiving parties.

Despite the generally mediocre record of TDR programs, we spoke to a township official in Warwick Township (Lancaster County) who was very enthusiastic about the successes they have had with their TDR program. Warwick's TDR program was reworked and restructured several years ago in response to the backlog of farms trying to get into the ACE program. According to the official, the township has been able to "recycle" its initial investment of \$100,000 multiple times over, and anticipates 18 different TDR transactions in 2008, including four that will total over

\$450,000. Lands from which the TDRs have been severed are permanently restricted from further development through a conservation easement.

The official, together with the Lancaster County Agricultural Preservation Board, has developed a handbook for local officials when conducting TDR transactions. According to this official, TDR programs do not need to be complex or difficult to administer, but they do require zoning ordinances that identify both sending (where a community wants to have land protected) and receiving (where residential and other growth is to occur) areas. One of the keys to the success of the Warwick program has been to focus on TDRs involving commercial and industrial property, not residential. Another key is that the township purchases the development rights from the farmer, and holds the credits until an appropriate developer is identified.¹⁷

The Department of Agriculture notes that if legislation were developed to incorporate the TDR concept into the Agricultural Conservation Easement Purchase Program, it could address many of the current obstacles faced by the TDR program as enacted in the Municipalities Planning Code. The Department would like to see legislation proposed that would allow state funds to be used in acquiring ACE land in cooperation with the TDR program and local governments. The eased land in this case would also be the sending area as designated by the local government. The local government would reimburse the ACE program for the value of the TDR as determined by the local government. ACE land would be processed the same as it is being done now for ACE purchase. The cost of purchasing the TDR, and thus the ACE, would be borne by the local government. The county and the State Board would still be required to review and approve any purchases.

Limiting ACE Payments to a Percentage of Development Rights

Pennsylvania's ACE program allows counties to use state funds to pay landowners up to 100 percent of the value of the development rights on a preserved farm. In contrast, New York and Ohio, for example, limit the amount of state dollars to 75 percent of the value of development rights on the farmland, with the remaining 25 percent as a local share (including farmer donations).

Such a restriction, however, may not have a significant impact in Pennsylvania because, since 2000, state dollars have only funded 65 percent of the cost of ACE purchases. Moreover, according to the Department of Agriculture, about 50 percent of the easements are bargain sale agreements. A bargain sale occurs when the easement is purchased at less than 100 percent of the appraised easement value. In these bargain sale agreements, the landowners received an average of 82 percent of the appraised easement value. Given these two factors (county contributions and

¹⁷Oftentimes, TDR programs are structured as private arrangements between the landowner and the developer, without the direct involvement of the local government.

bargain sale agreements), it would appear to be relatively unusual for Commonwealth funds to exceed 75 percent of the appraised development rights.

The federal Farm and Ranch Land Protection Program and several states (e.g., Maine, New Mexico, and Colorado) limit payments or tax credits to 50 percent of the easement's fair market value. While restricting state payments to only half of the development rights value would undoubtedly affect the willingness of at least some landowners to participate in the program, the potential impact of such a provision is difficult to assess because preserved farms, at least in some locales, are selling at prices approaching the prices of nonpreserved farms. Thus, receiving only 50 percent of the easement's assessed value may still be financially attractive in some markets.

For example, a recent study¹⁸ of preserved farms in Maryland found that preserved parcels with easements typically sell for 15-20 percent less than those without restrictions. The appraisals, however, often placed the development value at 50-90 percent of the land value, not 20 percent. The policy implications of these findings, according to the researchers, are that Maryland's farmland preservation program should consider paying less for these development rights (i.e., the program may be paying more than the lost value to the farmer).

Requiring Counties to Award Points for Bargain Sale Arrangements

Counties are allowed, but are not required, to award ranking points to farms that offer to donate a portion of their development rights value. Lancaster County, for example, includes "tiered pricing" as a ranking criterion that takes into consideration the willingness of the landowner to accept less than the full appraised development value, awarding points based on the percentage of the appraisal the owner is willing to accept. The points awarded increase as the percentage of the appraisal the landowner is willing to accept decreases. Some counties, however, generally offer 90 to 100 percent of the land's appraised development value, beginning with the top ranked farms and working their way down the list until funds are exhausted. While awarding ranking points to farms that offer to accept significantly less than the appraised development value adds a degree of complexity to the program, it could also result in more acres being preserved.

¹⁸*An Evaluation of Working Land and Open Space Preservation Programs in Maryland: Are They Paying Too Much?*, by Lori Lynch (University of Maryland), Wayne Gray (Clark University), and Jacqueline Geoghegan (Clark University), November 2007.

10. The Feasibility of Mandating Transitional Guidance to All Eased Farm Owners at the Time a Farm Is Being Conveyed to a New Owner

The Pennsylvania Department of Agriculture's Center for Farm Transitions assists farmers in developing transition plans for their farms. The Center provides a one-stop source of information and services to Pennsylvania farmers interested in succession planning, business planning, getting started as a farmer, and changing careers. The Center researches questions, makes referrals to the appropriate types of professionals (not to specific practitioners), and provides on-site consultations.

According to a Center official, owners of preserved farms seek assistance in staying viable and finding a successor from the Center in higher proportion than owners of non-preserved farms. A survey conducted by the Center for Farm Transitions and the Center for Rural Pennsylvania in 2006 found that 66 percent of the farmers with easements responding to the survey had some type of formal estate plan, and 34 percent did not.¹⁹ Fifty-two percent of the respondents had identified a potential successor who will eventually take over management of the farm, and 48 percent had not. Thirty-eight percent had both a plan and an identified successor.

Although many of the stakeholders we spoke with support offering transitional guidance, both at the time of the conservation easement and when the property is transferred to a new owner, there was little support for making such guidance mandatory. The concern was that any additional requirement would be a disincentive for farmers to participate in the program and that the farmer would need to willingly participate in such activities for the service to be meaningful. It was suggested, however, that having an annual meeting in the regions for the owners of preserved farms to discuss topics related to transitions of farms could be useful. The need to educate real estate agents and attorneys about preserved farms was also mentioned by several stakeholders.

The counties currently provide information about the requirements of the easement program, and the restrictions on the use of the land, to farmers who are seeking to participate in the program. One suggestion the counties had was to provide a listing of all "agricultural assistance" programs to the farmers so they would be aware of what may be available to them.

The Department of Agriculture, however, expressed concern that there is currently no requirement that the county or state provide new owners of eased farms with information concerning the requirements or restrictions of the easements.

¹⁹The purpose of the survey was to: (a) determine how many farmers in the ACE Program have an estate plan and/or a successor; (b) identify the characteristics of farm owners with and without estate plans and/or successors; (c) identify common elements of estate plans and successor plans; and (d) help identify specific types of services that may be needed to assist farmers in developing transition plans. A similar survey of farmers who are not in the ACE Program is underway.

Although the deed of easement includes these requirements and restrictions, new owners need to be contacted by the county board to solidify the provisions of the deed of easement. The Department suggests that county ranking systems include provisions that would reward landowners with succession plans with higher scores.

11. The Feasibility of Additional Dedicated Sources of Revenue to Fund the Program

Table 4 shows the history of state and county funding for the ACE program.

Table 4

State and County ACE Funding					
Calendar Year	State Funding	County Funding	Calendar Year	State Funding	County Funding
1989.....	\$25,000,000	\$ 3,417,138	2000.....	\$ 45,000,000	\$ 24,307,112
1990.....	20,000,000	2,454,369	2001.....	47,000,000	23,730,741
1991.....	21,000,000	3,973,515	2002.....	40,000,000	23,912,272
1992.....	15,000,000	3,822,000	2003.....	40,000,000	25,630,314
1993.....	19,000,000	5,082,442	2004.....	43,000,000	25,762,300
1994.....	20,000,000	5,498,113	2005.....	36,000,000	26,236,539
1995.....	21,000,000	5,792,476	2006 ^a	102,000,000	45,067,886
1996.....	31,000,000	6,318,987	2007.....	40,000,000	37,263,323
1997.....	35,000,000	7,404,865	2008.....	33,000,000	41,268,987
1998.....	28,000,000	9,240,574			
1999.....	70,000,000	16,370,616	Total.....	\$731,000,000	\$342,554,569

^aThe increased funding in 2006 is attributable to Growing Greener II, which included \$80 million for the ACE Program, \$65 million of which was allocated for 2006, \$4 million of which was included in the 2007 allocation, and \$11 million of which was allotted to the County Environmental Initiative.

Source: PA Department of Agriculture.

Current Sources of Funding

State-Level Funding. Dedicated funding²⁰ for the ACE program comes from two primary sources:

- Cigarette taxes. Beginning in 1993, a 2-cent per pack tax on cigarette was dedicated to the ACE program. In 2002, the provisions of the cigarette tax revenue were changed so that rather than receiving 2 cents per pack, the program now receives a flat amount of \$20.5 million. For 2007, this was approximately \$5 million more than what would have been received under the 2 cent per pack allocation.

²⁰Over the years, the program has also occasionally received one-time appropriations.

- **Environmental Stewardship Fund.** The Environmental Stewardship Fund is a special revenue fund composed of monies transferred from certain landfill fees. The fund provides for farmland preservation projects, open space protection, abandoned mine reclamation, watershed protection and restoration, water and sewer infrastructure, and the improvement and conservation of Commonwealth and community parks and recreational facilities. The ACE program is to receive 14.8 percent of the Environmental Stewardship Fund revenues. The ACE program received \$6.9 million from this source in 2008.

As shown in Table 5, at the state level, the ACE program also receives some funds from interest on securities, federal reimbursements, and other miscellaneous revenues.²¹

Table 5

2008 Funding Sources	
Cigarette Tax.....	\$20,485,000
Environmental Steward	6,923,000
Interest on Securities.....	2,860,286
Unencumbered.....	1,596,590
Federal	787,286
Other	<u>751,805</u>
Total	\$33,403,967

Source: Pennsylvania Department of Agriculture.

Local Funding. In addition to this state-level funding, local governments (excluding counties and county authorities) are permitted to levy an earned income tax, subject to certain maximum limits, which can be used for, among other purposes, purchasing agricultural easements under the ACE program. Many municipalities, particularly in Northampton and the suburban Philadelphia counties, have increased their local EIT through this referendum process in recent years, with the referendums often passing by wide margins. Several other municipalities have issued bonds to support the conservation efforts, including farmland preservation.

Dedicated Funding in Other States

States fund their farmland preservation programs in a variety of ways. Examples of funding sources in neighboring states are shown below.

Maryland. Maryland’s program for purchasing development rights is funded primarily from a real estate transfer tax. Other funding comes from an agricultural

²¹House Bill 1007 would create a special farmland preservation license plate with the \$15 plate fee being deposited in the Agricultural Conservation Easement Purchase Fund.

transfer tax,²² proceeds from bonds, appropriations, and funding from the Federal Farm and Ranch Lands Protection Program. For its 2007 fiscal year, Maryland has \$115.5 million in its purchase of development rights programs, with \$89.5 million appropriated to the Maryland Agricultural Land Preservation Foundation (MALPF) and \$26 million appropriated to its Rural Legacy program.²³

Delaware. Delaware also uses state transfer taxes as a major source of funding for its agricultural conservation program. By law, \$10 million in state realty transfer taxes are transferred to the Farmland Preservation Fund. Delaware's program also receives revenue from other sources, including the sale of farmland preservation license plates.

New York. The Environmental Protection Fund (EPF) was created by the State of New York in 1993 to use a portion of the state's annual real estate transfer tax revenues to pay for a variety of environmental projects, including the acquisition of open space, natural areas, wildlife habitat, and development rights to farmland. The dedicated tax generates significant revenues each year. However, because the fund can be used for multiple purposes, some have concern over the predictability of the amount allocated to land preservation programs each year.

New Jersey. New Jersey dedicates \$98 million from sales tax revenue each year for 30 years (ending in 2029) to support the issuance of bonds and to provide some "pay as you go" cash to continue the Green Acres and Farmland Preservation land acquisition programs.

Dedicated Local Taxes in Other States

State legislatures in Connecticut, Massachusetts and South Carolina have enacted laws authorizing their local governments to impose recording fee surcharges to fund farmland protection.

In Washington, all counties are authorized to levy a tax of up to 1 percent of real estate sales to fund land acquisition and maintenance of conservation areas contingent upon voter approval. Ohio law authorizes a board of county commissioners, subject to voter approval, to levy a sales and use tax of .25 percent or .5 percent, or to increase the existing rate by .25 percent or .5 percent for a variety of purposes, one of which is for the acquisition of agricultural easements. The Sonoma County (California) Agricultural Preservation and Open Space District has enacted a countywide 0.25-cent sales tax, approved by voters in 1990. Kane County, Illinois, uses gaming revenue to pay for farmland protection.

²²The Agricultural Transfer tax is a tax on any agriculturally assessed land that is converted to another use. It serves a dual role first, as a deterrent to conversion of the land and second as a source of revenue for the Maryland Agricultural Land Preservation Program.

²³Through the Rural Legacy program, greenbelts and greenways dominated by farms and forests are conserved through the voluntary purchase of conservation easements or fee estate interests in land preservation.

12. The Feasibility of Providing Property Tax Incentives for Preserved Farms, Including an Automatic Use-Value Assessment and Millage Freeze

Preserved farms already qualify for substantial property tax incentives through the Clean and Green program and the Preserved Farmland Tax Stabilization Act. Owners of agricultural lands (both preserved and non-preserved) can apply for preferential assessment under Pennsylvania's Clean and Green Program (Act 1974-319). If the application is approved, the land receives an assessment based upon its use value, rather than its market value. The use values that apply to Clean and Green are set by the Pennsylvania Department of Agriculture, but county assessors may establish use values that are less (but not more) than those established by the Department of Agriculture. Land taken out of the permitted use becomes subject to a rollback tax, imposed for up to seven years, and an interest penalty. The Department of Agriculture does not maintain statewide figures on property taxes saved as a result of the Clean and Green program but, as an example, in 2006 landowners who were enrolled in the Clean and Green program in Greene County saved 66 percent of their land taxes by being taxed on use value rather than fair market value.

Eight counties do not currently participate in the Clean and Green program (see page 18). However, the preserved farms in these counties are eligible for the tax preferences available through the Preserved Farmland Tax Stabilization Act, which also requires that agricultural conservation easements be assessed at the land's restricted farmland value. This, however, does not usually result in an assessment as low as a "use value assessment" under the Clean and Green program. Both of these programs apply to property taxes on the land, but not the homestead.

Automatic Use-Value Assessment

Several county farmland preservation directors agreed that an automatic use-value assessment would probably have little, if any, impact on preserved farms or the school districts or municipalities where they are located. This is because virtually every farm that applies for the ACE program has already enrolled for the property tax advantages available under the Clean and Green program. The county officials noted that automatic use-value assessment would, however, ensure that all preserved farms are enrolled in the Clean and Green program in the unlikely event that they are not already enrolled.

Millage Freeze

Act 2006-4 amended Pennsylvania's Open Space Law, Act 1996-153. Under the original act, school districts could vote to waive millage increases on properties covered by agricultural conservation easements. Now, all three taxing bodies (the

county, municipality, and school district) are authorized to freeze taxes, but all three must approve the exemption before it can be effective for any of the bodies.

According to the Pennsylvania Land Trust Association, the intent of the act was to ease tax assessors' administrative burden by simplifying the calculation of millage bases. Whether the amendment ultimately will lead to fewer millage freezes remains to be seen, but that was not the intent of the sponsor of the legislation, according to the Association.

Lehigh County was the first county to adopt an Act 4 ordinance to freeze the millage on preserved farms, and three school districts in Lehigh County have approved a freeze. In those three districts, a total of five municipalities have agreed to freeze the millage rate. A fourth Lehigh County school district with a large number of farms rejected a millage freeze out of concerns that it would hamper the district financially.

Bucks County has also passed a millage freeze for preserved farms, along with three school districts (Council Rock, Central Bucks, and New Hope-Solebury) and several municipalities within those districts. Generally, the freezes are limited to a year or two, but can be extended.

Millage freezes can add complexity to the program, both at the time of sale (a millage freeze would be a factor in valuing the easement) and in future years due to the paperwork requirements involved in tracking different millage rates for different municipalities within a school district.

Of greater concern, however, is the requirement that all three taxing bodies (county, school district, and municipality) must approve the freeze. Several county administrators told us that because of the turnover of elected officials at the county, school district and municipality level, it is very difficult to get the agreement of all parties to a millage freeze. In Lancaster County, for example, the county has decided not to approve any millage freezes on ACE preserved farms because one of the Commissioners said he would not support such a freeze unless it included all preserved farms, not just the ACE farms. In short, the administrators we spoke to much preferred the prior law in which a school district could unilaterally establish a millage freeze.

Agricultural Preservation Property Tax Assistance Program

In 2005, the Pennsylvania Senate proposed an Agricultural Preservation Property Tax Assistance Program that would allow farmers to receive an annual property tax rebate over a period of five to 30 years in lieu of receiving a cash payment for the sale of the conservation easement. While supporting the basic principal of the program, the Secretary of Agriculture urged modifications to the Senate proposal to ease the administrative burden on counties and to make it less likely

landowners would experience capital gains tax liabilities. The proposal stalled, however, due to other property tax reform occurring at that time.

13. Feasibility of Providing Tax Credits in Lieu of Cash Payment for ACE Purchases

Twelve states (California, Colorado, Connecticut, Delaware, Georgia, Maryland, Mississippi, New Mexico, New York, North Carolina, South Carolina, and Virginia) offer state income tax credits, known as Conservation Credits, to landowners who donate lands for conservation. Georgia and New York have most recently enacted such programs, having done so in 2006. One state, Arizona, makes the program available to agricultural landowners only.

In 2007, The Conservation Resource Center issued a report entitled *State Conservation Tax Credits: Impact and Analysis*. That report found that the effectiveness of such credit programs varies widely among these 12 states and attributes the variation to differences among the programs. Two key variables are: (1) the amount of the credit available, and (2) whether the credit is transferable to a subsequent purchaser.

Credit Value

All but three of the 12 programs base credit values on some percentage of fair market value of the donated land. For example, when credits are valued at 50 percent of the fair market value of the donated land, the public receives \$2 of land protection for every \$1 offered as a tax incentive. Credit valuations range from 25 percent of the donated value in North Carolina to 100 percent in Maryland. The average credit value is 48 percent of the donated value.

Credit Cap

All but 5 of the 12 states have some type of cap on the total value of the credit. Individual and corporate caps range from \$50,000 in Delaware to an unlimited credit in Virginia, Connecticut and California. New York and South Carolina also do not set explicit limits on credits, but credits are kept low through valuation methods. Three states have caps on the total value of credits that may be earned statewide annually: California, \$100 million; Delaware, \$1 million; and Virginia, \$100 million. Beginning in 2008, Virginia's statewide cap will be indexed to inflation.

In North Carolina, the average number of conservation easement donations more than doubled (from fewer than 20 per year to about 40 per year) when the credit cap was raised from \$25,000 to \$100,000 per individual and from \$25,000 to \$250,000 per corporation. The average number of donations doubled again (to over

80 per year) when the cap was raised to \$250,000 for an individual and \$500,000 for a corporation.

Transferability of Credits

The Conservation Resource Center found that by far the most important element of a successful Conservation Credit program is making the credits transferable. Having a carry-forward provision helps (all programs allow their credits to be applied to state income tax for at least five years), but a carry-over provision alone is insufficient to significantly improve the performance of a program.

In those states that allow transferable credits (South Carolina, Colorado, and Virginia), landowners can transfer credits to third parties and thereby realize an immediate financial benefit for their credits. Third parties purchase the credits at a discount (typically between 70-80 percent of the credit value), and in turn can reduce their own tax liability. In Virginia, the average number of donations doubled and the acres protected tripled once credits were made transferable. An average of 76 percent of the total credit value earned in Virginia is transferred each year.

In addition to its *Impact and Analysis* report, the Conservation Resource Center is developing model conservation tax credit legislation that states may use as a starting point for new legislation or to amend existing programs.

14. The Effect of Expanding the Current Provision Authorizing Coal Mining on Acre-Restricted Land to the Extraction of Additional Rock, Minerals, and Gases

The Agricultural Area Security Law authorizes the exploration, development, storage or removal of coal (by underground mining methods), oil and gas by the owner of the subject land or the owner of the underlying rights to the coal, oil or gas. The underground mining methods restriction is intended to reduce the impact the mining would have on the surface and the agricultural operations. A similar restriction exists for utility efforts. Many farms in western Pennsylvania are subject to third party coal rights. If the third party has rights to the surface, the farm owner must first obtain quiet title or a quitclaim deed demonstrating they have purchased those rights before they may proceed with preserving their farm.

Although the program does not maintain statistics on the number of preserved farms with mining, oil and gas leases, program officials noted that it is not unusual for farms in the program to have them, particularly in the western part of the state. According to the director of the Westmoreland program, each of their preserved farms has at least one gas lease and an average of three on the property.

According to the county program director, although a limited portion of the farm may be affected with the completed well head, all the land that is reclaimed after installation does not return to the same condition it was in prior to the disruption. She stated that she can go to a farm and visually identify the area that was disrupted even after remediation (e.g., corn that is not as tall as the corn next to it). She noted, however, that some of the oil and gas companies have done a wonderful job in disturbing as little of the farm as possible and leaving the land in good condition. Coal bed methane drilling has recently become a major concern in Westmoreland County and there has been significant interest shown in the Marcellus Shale formation, which can be accessed on preserved farms. The extraction of the Marcellus Shale, in particular, results in more surface impacts than occur with shallower wells, affecting approximately five acres per site.

The Lancaster Land Trust allows 1 percent of the property to be disturbed at any one time for mining operations on its preserved farms. However, the mining must not impact the surface for agricultural use. They are concerned, however, that too much mining, such as for limestone, could affect the stability of the surface. Berks County has limestone deposits and the county director voiced similar concerns about attempting to mine it. She has not, however, been approached by landowners with easements seeking to mine on their preserved farms. Given the high cost of mining limestone “sideways” (like for coal), it is unlikely that, even if permitted, there would be much interest in underground mining for limestone.

In responding to our questionnaire regarding whether expanding the mining provision to include other rocks, minerals or gases would cause significant problems, 46 percent of the county directors thought it would, 36 percent thought it would not and about 18 percent had no opinion. Several of those who thought it would cause significant problems noted concerns about the effect on water resources. The vast majority, about 80 percent, of the county directors responding to the questionnaire had not been approached by farmers interested in expanding this provision. PDA does not favor expanding the mining provision due to similar concerns about the potential to hinder production agriculture on the eased farm.

15. The Effectiveness of the Agricultural Lands Condemnation Approval Board to Adequately Protect ACE-Restricted Land From Condemnation

The Agricultural Lands Condemnation Approval Board (ALCA Board), as authorized by the Agricultural Area Security Law, must approve the condemnation by a Commonwealth agency of land within an ASA that is being used for productive agricultural purposes (not including the growing of timber).²⁴ Land within an ASA is not subject to eminent domain by a political subdivision, authority, public utility

²⁴The ALCA Board, under the Administrative Code, must also approve the condemnation of agricultural lands for highways and solid and liquid waste disposal facilities.

or other body without approval of the ALCA Board and from the following bodies: the governing bodies of the local government units encompassing the ASA, the county governing body, and the ASA Advisory Committee.²⁵

The ALCA Board is an independent, six member administrative board. Its members include the Director of the Office of Policy and Planning in the Governor's Office, or his designee, the Secretaries of Agriculture, Environmental Protection and Transportation, or their designees, and two active farmers appointed by the Governor with the advice and consent of the Senate for a term of four years. The Secretary of Agriculture serves as the Board's chair.

The ALCA Board applies the following standards when reviewing a condemnation proposal:

In the case of condemnation for highway purposes, not including activities related to existing highways such as widening the roadway, and disposal of solid and liquid waste, the proposed condemnation shall be approved only if it is determined that there is no reasonable and prudent alternative for the utilization of the land within the ASA for the project.²⁶

In all other cases, the proposed condemnation shall only be approved if it would not have an unreasonably adverse affect upon the preservation and enhancement of agricultural or municipal resources within the area or upon the environmental and comprehensive plans of the county, municipality and the Commonwealth or upon the goals, resource plans, policies or objectives thereof or there is no reasonable and prudent alternative to the utilization of the lands within the ASA for the project.

The standards are the same for both preserved and nonpreserved farms in an ASA.

Additionally, the Governor's Agricultural Land Preservation Policy states that:

It is the policy of the Commonwealth to protect through the administration of all agency programs and regulations, the Commonwealth's

²⁵These approvals are not applicable to an underground public utility facility that does not permanently impact the tilling of soil or for any facility of an electric cooperative corporation or for any public utility facility the necessity for and the propriety and environmental effects of which has been reviewed and ratified or approved by the Public Utility Commission or the Federal Energy Regulatory Commission.

²⁶The White v. Pennsylvania Department of Transportation case held that the "existing highways exception . . . clearly contemplates only those activities that take place within the existing roadbed." This has created some uncertainty as to the need for ALCAB review of certain activities since the court did not define "existing roadbed." The standard used prior to this case by the program staff was whether the project remained in the right-of-way.

“prime agricultural land” from irreversible conversion to uses that result in its loss as an environmental and essential food and fiber resource.

The policy prioritizes protected agricultural lands with preserved farms being given the highest priority. The ALCA Board is directed to consider this policy in its review of agricultural lands proposed for condemnation.

In the last three calendar years, seven cases²⁷ have come before the Board. Only two of those cases involved preserved farms. In one case, the property taken in eminent domain for a new road was replaced with other, similar property with no actual loss in acreage to the preserved farm. In the second case, condemnation of 4.06 acres was approved for a municipal authority to install a municipal water supply well on the property. The majority of the condemned land, however, will continue to be available to be farmed organically. The landowner was also provided an annual compensation package for the use of the land.

According to ACE staff, although parts of preserved farms have been subject to condemnation as discussed above, no preserved farm has been condemned in its entirety. ACE staff cautions that the success of the Board in protecting preserved farms may not be fully reflected by only looking at the cases that come before the Board. They contend that due to the ALCA Board review requirement, preserved farms may be avoided when plans for construction, etc., are considered.

A farmer representative on the ALCA Board noted that the presentations from state agencies have improved during his tenure, with the agencies presenting more and better alternatives to avoid taking the preserved land. According to PennDOT counsel, although productive agricultural land plays a part in selecting the alternative approach to a project, Federal National Environmental Policy Act and Federal Highway Act requirements tend to drive the process since the bulk of transportation funding is federal. He stated that these interests are not elevated above other environmental interests.

The ALCA Board, however, is not required to be involved when work is occurring on an existing roadway. Therefore, many highway projects that may affect preserved farms are not required to come before the Board. Currently a project to widen an existing roadway is proposing to condemn 80 feet for four miles along one side of the roadway. Although this involves a preserved farm and other lands in an ASA, it is not required to have ALCA Board approval.

Although modifying an existing roadway is often the most efficient approach to highway needs and can disturb less land than seeking a completely new location,

²⁷One case (Central Susquehanna Valley Transportation Project in Snyder, Union and Northumberland Counties) came before the Board twice during this time frame for a total of eight cases.

stakeholders have suggested that the ALCA Board should be involved once a certain threshold of preserved farmland is affected by the proposed project. On the other hand, other highway projects that do not involve existing roadways have no de minimus standard, so all of those projects are required to go before the Board. Setting these types of standards could more directly focus the Board on carrying out its purpose to protect lands in ASAs. However, as noted by PennDOT counsel, a de minimus taking of land could still have a significant impact on the agricultural land if, for example, it affected the water source or an access road. This type of exception reportedly would apply to many bridge and storm water actions.

16. The Effect of Mandating a Limitation on the Amount of Impervious Surface, Including Paved Roads, Farm Buildings and Other Construction That Can Be Established on ACE-restricted Land

Pennsylvania's farmland preservation program does not place a specific limitation on the amount of impervious surface allowed on ACE-restricted land. Instead, the law provides for the landowner to construct buildings or other structures:

- for agricultural production;²⁸
- for a principal residence; or
- for the purpose of providing necessary housing for seasonal or full-time employees, provided that only one such structure may be constructed on no more than two acres during the term of the agricultural conservation easement.²⁹

Guidelines for the federal Farm and Ranch Land Protection Program (FRPP) limit impervious coverage on properties of greater than 50 acres to 2 percent, and for properties of 50 acres or less, a maximum of one acre but not greater than 6 percent.³⁰ In Pennsylvania, however, impervious guidelines are still not allowed to exceed 6 percent. NRCS and PDA have negotiated a specific formula based on total acres eased for federal funding which is more flexible for the landowner.

Several county programs reported that they have established some type of a numerical impervious surface limits for their program (e.g., Lehigh County has a 10 percent building coverage limit and Union County has a 10 percent limit for all types of structures, yards, driveways, etc.). At least one private land trust, the Lancaster Farmland Trust, also has an impervious surface limit of 6 percent, not including unpaved roads and manure buildings.

²⁸Under the program regulations, the county program may restrict the maximum building coverage.

²⁹The Agricultural Area Security Law also allows a county to permit subdivision of a preserved farm for the purpose of the construction of a principal residence for the landowner or an immediate family member.

³⁰To be allowed six percent requires a waiver and must be justified based on factors such as population density, the ratio of open prime and important soil versus impervious surface, and parcel size.

However, most everyone we spoke to associated with ACE program thought that, because the average farm in Pennsylvania is relatively small, a strict numeric limit, particularly a limit of below 6 percent, was impractical in Pennsylvania. Several county directors cited the FRPP impervious surface requirements as one of the main reasons the farms in their county fail to participate for the federal program. Chester County cited the difficulty an impervious surface requirement might have for mushroom growers, and several county program directors expressed concern over the administrative burden that could result in trying to assess and enforce an impervious surface limit.³¹ One county director also noted that there are a number of individuals, groups, and municipal entities that are trying to halt the development of certain kinds of agricultural production, particularly swine and poultry operations, through impervious surface restrictions.

17. The Effect of Nonprofit Organization Participation in ACE Purchases Under the Agricultural Area Security Law

Land trusts are established for a variety of reasons. Many trusts have no specific involvement in agricultural land at all, and others have only a minor interest in preserving agricultural lands. Still others exist for the sole purpose of preserving farmland. The Pennsylvania Land Trust Association recognizes 62 land trusts in Pennsylvania that, as of December 31, 2007, have protected 176,340 acres through 2,236 easements.³²

Land Trust Reimbursement Grant Program

Under Act 1999-15, which established the Land Trust Reimbursement Grant Program, qualified land trusts can be reimbursed for up to \$5,000 for expenses incurred in the acquisition of agricultural conservation easements. Act 2006-46 further amended the Agricultural Area Security Law by authorizing the State Agricultural Land Preservation Board to allocate \$200,000 per year to the LTRG program. The program will reimburse qualified land trusts up to \$5,000 for expenses incurred in the acquisition of agricultural conservation easements. These expenses include appraisal costs, legal services, title searches, document preparation, title insurance, closing costs, and survey costs. These lands must meet certain minimum criteria as published in the *Pennsylvania Bulletin*.

Twenty-two land trusts are registered with the State Farmland Preservation Board. As shown on Table 6, 11 of these trusts have received ACE application reimbursements totaling \$890,151.

³¹It is also possible that an impervious surface requirement could conflict with the provisions of the Agricultural Communities and the Rural Environment (ACRE) law.

³²The Trust does not maintain records as to how many of these acres are farmland.

Table 6

Land Trusts Receiving ACE Application Reimbursements

<u>Trust</u>	<u># of Acres</u>	<u>Reimbursement</u>
Berks County Conservancy	168	\$ 9,945
Brandywine Conservancy	1,698	92,755
Central Pennsylvania Conservancy	728	35,982
Centre County Farmland Trust	147	5,000
Delaware Highlands Conservancy	107	5,000
Farm and Natural Lands Trust of York County	2,911	152,131
Lancaster Farmland Trust	5,171	408,722
Land Conservancy of Adams County	2,410	101,573
Montgomery County Lands Trust	57	4,104
Natural Lands Trust	197	4,989
Wildlands Conservancy	<u>69</u>	<u>5,978</u>
Total	13,663	\$890,151

Source: PA Department of Agriculture.

Act 154. The role of private land trust with regard to the ACE program has also been strengthened as a result of Act 2006-154. This act empowers local government units to:

- appropriate money to a land trust “for the acquisition or conservation and preservation of interests in real property for the purpose of achieving open space benefits . . . ;
- transfer open space property interests to a land trust with or without consideration; and
- create a “Local Land Trust” subject to various accountability measures.

The Pennsylvania Land Trust Association notes that while a number of land trusts and local governments have formed relationships over the years, many—concerned about the lack of statutory authorization or balking at cumbersome work-arounds—chose not to. An official with the Association notes that Act 2006-154 now establishes clear authorization for government-land trust partnerships, although it is still too early to assess what impact the act will have on the relationships between private land trusts and local governments.

Comments by Private Land Trusts Regarding Their Role in the ACE Program

Several of the private land trusts we contacted noted that some farmers, particularly Plain Sect farmers, are more comfortable dealing with nongovernment entities, and, therefore, private trusts may be able to preserve farms, either with private or public funds, that may otherwise be difficult to enroll in the ACE program. The Lancaster Farmland Trust, in particular, was created primarily to work with Plain Sect farmers and others who prefer not to be involved with government programs. The LFT has preserved 18,300 acres on 290 farms, primarily from funds they have raised privately.

The LFT reported it is able to preserve a farm at a fraction of the cost to the county programs (\$800 per acre versus \$3,500 per acre for similar quality farms). They attribute this to:

- working with the Plain Sect community;
- ability to purchase in non-ASA areas;
- ability to be more responsive (the county Agricultural Preservation Board has a long waiting list); and
- greater flexibility in their requirements, e.g., allowing an extra subdivision.

The LFT reported it uses criteria similar to that of the state for its program. They have held some joint easements in the past, and this is becoming more frequent with the change in the law that allows them to be joint owners with local governments. One advantage of joint ownership is that the LFT now has enforcement authority. Although it happens only rarely, the LFT noted they have had instances where they have had to work with landowners to resolve land use violations.

The Montgomery County Land Trust noted that they have worked closely with the ACE program, particularly in acting as an informal liaison between farmers and county government. MCLT is very supportive of the Act 154 changes that clarified joint ownership of easements between private land trusts and local governments, noting that they are often in a better position to monitor, enforce, and defend the easements than the local governments.

The Farm and Natural Lands Trust of York has similarly worked with the York County program to raise awareness of farmland preservation programs and opportunities in York. The Trust generally focuses on smaller tracts and properties with more marginal soil qualities, thereby allowing the ACE program to target the larger farms with higher soil qualities. The Trust typically purchases conservation easements for 33 percent of the development value whereas the county typically

pays 90 percent of the development value. The Trust has also entered into joint ownership arrangements on ACE preserved farmlands, and has a contract with York County to operate a bargain sale conservation easement purchase program.

18. The Effect of Permitting Wind Turbines Used for Generating Electricity to Be Constructed on ACE-restricted Land

Under the ACE program's current regulations, a wind turbine that produces energy for an on-site agricultural use would be considered a farm structure and therefore allowable under the Act. The Agricultural Area Security Law also permits county programs, with state board approval, to allow certain rural enterprises, including the production of energy from renewable sources for nonfarm uses.

The Lancaster County Agricultural Preserve Board, for example, allows ACE farms to construct wind turbines with excess energy metered and credited to the owner, so long as the enterprise is incidental to the agricultural use and character of the farm, the equipment is located within the curtilage of existing farm buildings, and that the total site coverage of all Energy Rural Enterprises on the property is no more than 2 percent of the area of the property.

A bill currently before the New Jersey legislature goes further in that it defines solar and wind energy generation as an allowable agricultural use on a preserved farm, thereby allowing the owners of preserved farmland to operate large-scale solar or wind energy facilities and sell the power to a utility company. The law also would protect solar and wind power generation on farms from nuisance complaints from neighbors, similar to protections New Jersey farmers now have from complaints about the smell of manure. The bill has been passed by the necessary State Senate committee, but has not yet passed the full State Senate or the State Assembly.

While most of the comments we received were negative toward allowing commercial wind turbines on preserved farms, others were receptive to the idea, provided the turbines were placed on ridgetops or in other locations that would not take any land out of agricultural production. The advocates cite wind energy as being a clean and renewable energy source, and that wind royalties could help farmers retain their land as working farms. The Clean and Green program, however, although it does not specifically address utility-scale wind energy production on the farms enrolled in that program, does restrict activities on the farms to agricultural operations. House Bill 2007-656 proposes to amend the Clean and Green Act to specifically permit this activity.

It was also suggested that preserved farms are good candidates to generate other alternative energy sources, particularly methane. Methane can be generated with a methane digester. When used on a farm, a methane digester processes animal waste under anaerobic conditions, yielding methane gas and reducing the volume of solids and treated liquids.

The methane can then be sold or used to generate electricity for the farm or to go into the electric grid. Digester technology also reportedly has environmental advantages by capturing or burning methane, a powerful greenhouse gas, and by reducing farm odors. Advocates argue that allowing manure digesters on preserved farms makes particular sense because manure digesters are sizable investments, and on a preserved farm, the landowner or other investor knows that the unit will be able to operate over the long-term. If the digester could be placed on farm curtilage, it could conceivably be done without taking any land out of agricultural production.

19. The Effect of Authorizing Counties to Utilize a Portion of Their Annual State Appropriations to Fund Legal Costs Incurred in ACE Enforcement

The act restricts, with some exceptions, the ability for Agricultural Conservation Easement Purchase Fund monies to be used for program administrative costs. Reimbursement for legal costs incurred by the county in the enforcement of the easement, for example, is not permitted. A 2006 amendment to the act does, however, allow the use of Clean and Green funds received by the county to monitor and enforce agricultural easements including the payment of legal costs associated with defending the easement.

No specific provision is made for the recovery of legal expenses from the Agricultural Conservation Easement Purchase Fund (ACEPF) to cover costs associated with enforcement of the program requirements by county staff. As noted earlier, however, few enforcement actions have been taken. Most of the compliance issues reported concern problems with the conservation plans and are corrected without formal legal action. We spoke with several county program directors who acknowledged that, to date, these costs have been minimal. However, most noted that if enforcement matters called for legal services, they would need additional funding to pay for them.

The county directors noted that as the program shifts from one of acquisition to one of maintenance, this situation may change. If the statute was changed to allow those costs to be funded from the ACEPF, it could impact the number of acres purchased for easements. If legal costs to enforce an easement became a problem, it was suggested that the Commonwealth incur the legal costs for easements owned by the Commonwealth, and counties incur the legal costs for the easements they own. For those easement owned jointly, the cost could be prorated. The ACE state program staff favor using ACEPF monies to offset county enforcement costs noting that if the counties do not have the resources to enforce the easement provisions, the state will be required to do so at the state's expense.

III. Background

The Pennsylvania Agricultural Conservation Easement Purchase Program was developed in 1988 to help slow the loss of prime farmland to non-agricultural uses. The program enables state, county, and local governments to purchase conservation easements (sometimes called development rights) from owners of quality farmland. The first easements were purchased in 1989. Counties participating in the program have appointed agricultural land preservation boards with a state board created to oversee this program. The State Board is responsible for distribution of state funds and approval and monitoring of county programs and specific easement purchases.

Aside from being part of an agricultural security area, the farm being considered for conservation easement status is rated against other eligible parcels according to the following criteria:

- *Quality of the Farmland.* State regulations require that easements be purchased on farms of a minimum of 50 acres in size or at least 35 acres if a county adopts to allow farms of that size into their program. Parcels as small as 10 acres may be preserved if adjacent to existing preserved farmland or used for the production of crops unique to the area. At least half the tract must either be harvested cropland, pasture, or grazing land and it must contain 50 percent soil capability classes I-IV.
- *Stewardship.* Farms are rated on the use of conservation practices and best management practices of nutrient management and control of soil erosion and sedimentation.
- *Likelihood of Conversion.* Easements offered for sale to counties will be scored and ranked for acquisition based on a variety of factors such as:
 - Proximity of farm to sewer and water lines.
 - Extent and type of non-agricultural uses nearby.
 - Amount and type of agricultural use in the vicinity.
 - The amount of other preserved farmland in close proximity.

Farmers may choose to receive the proceeds from easement sales in a lump sum payment, like-kind exchange, installments up to five years, or on a long-term installment basis. Many farmers use the proceeds from easement sales to reduce debt loads, expand operations, and as a way to pass on farms to the next generation.

As recognized by the American Farmland Trust, Pennsylvania's conservation easement purchase program has protected more farmland than any other state-level program in the country. What follows is a summary of the statutory provisions that govern the establishment and administration of agriculture easements.

Statutory Provisions

Pursuant to the Agricultural Area Security Law, Act 1981-43, as amended, the Commonwealth seeks “to conserve and protect and to encourage the development and improvement of its agricultural lands for the production of food and other agricultural products.” Through this law, the Commonwealth also seeks “to conserve and protect agricultural lands as valued natural and ecological resources which provide needed open spaces for clean air, as well as for aesthetic purposes.” It is the stated purpose of the law to:

- Provide the means by which agricultural land may be protected and enhanced as a viable segment of the Commonwealth’s economy and as an economic and environmental resource of major importance.
- Encourage landowners to make a long-term commitment to agriculture by offering them financial incentives and security of land use.
- Protect farming operations in agricultural security areas from incompatible non-farm land uses that may render farming impracticable.
- Assure permanent conservation of productive agricultural lands in order to protect the agricultural economy of this Commonwealth.
- Provide compensation to landowners in exchange for their relinquishment of the right to develop their private property.
- Leverage state agricultural easement purchase funds and protect the investment of taxpayers in agricultural conservation easements.
- Encourage financial partnerships between State and local governments with nonprofit entities in order to increase the funds available for agricultural conservation easement purchases.

An agricultural conservation easement is subject to the following terms, conditions, restrictions and limitations, among others:

- The term of an agricultural conservation easement shall be perpetual.
- An agricultural conservation easement shall not be sold, conveyed, extinguished, leased, encumbered, or restricted in whole or in part for a period of 25 years beginning on the date of purchase of the easement.
- If the land subject to the agricultural conservation easement is no longer viable agricultural land, the Commonwealth, subject to the approval of the state board, and the county, subject to the approval of the county board, may sell, convey, extinguish, lease, encumber or restrict an agricultural conservation easement to the current owner of record of the farmland subject to the easement after the expiration of 25 years from the date of purchase of the easement for a purchase price equal to the value at the time of resale determined pursuant to subsection (f) at the time of conveyance. The purchase price shall be payable to the Commonwealth and the county as their respective legal interests in the agricultural conservation easement appear.¹

¹Any payment received by the Commonwealth pursuant to this provision shall be paid into the Agricultural Conservation Easement Fund.

- Instruments and documents for the purchase, sale, and conveyance of agricultural conservation easements shall be approved by the state board or the county board, as the case may be, prior to execution and delivery.

The establishment of an agricultural conservation easement shall not prevent underground mining activities including those involving gas or oil; granting rights-of-way through the land for the installation of, transportation of, or use of water, sewage, electric, or telephone lines; construction and use of structures necessary for agricultural production or a commercial equine activity and the conduct of that activity, among other uses. However, land subject to an agricultural conservation easement shall not be subdivided for any purpose that may harm the economic viability of the farmland for agricultural production.

Act 1988-64 created the Agricultural Conservation Easement Purchase Fund. This fund is the source² from which all moneys are authorized with the approval of the Governor for purchase of agricultural conservation easements and for paying all costs, except administrative costs, incurred by the Commonwealth or a county incident to the purchase of agricultural conservation easements. The monies in the fund may also be used for the purpose of reimbursing nonprofit land conservation organizations for expenses incurred in acquiring and transferring agricultural conservation easements to the Commonwealth or a county.³

Agricultural Security Area Advisory Committee. The governing body of any local government may establish an Agricultural Security Area Advisory Committee consisting of three active farmers, each representing a different private or corporate farm, and one citizen residing within the unit of local government and one member of the governing body of such local government, who shall serve as the chairman of the committee. An advisory committee shall be established when a proposal is received by the governing body for the creation of an agricultural security area. The committee members must be appointed by and shall serve at the pleasure of the chairman of the governing body and serve without salary; however, members may receive reimbursement for actual and necessary expenses incurred in the performance of official duties.

Advisory committees are to advise the governing body and work with the planning commission in relation to the proposed establishment, modification, and termination of agricultural security areas. Specifically, the committee shall render expert advice relating to the desirability of such action, including advice as to the nature of farming and farm resources within the proposed area and the relation of farming in such area to the local government unit as a whole.

²The Commonwealth is authorized to issue bonds up to \$100 million for the purpose of generating revenue for this fund. This authorization ended in February 2004.

³Each fiscal year, up to \$200,000 of the money in the fund may be used for the purpose of reimbursement allocation for the Land Trust Reimbursement Program. Up to 10 percent of these funds may be used for administrative expenses of the department incurred under this program.

State Agricultural Land Preservation Board. The Department of Agriculture and the State Agricultural Land Preservation Board are required to administer a program for the purchase of agricultural conservation easements by the Commonwealth. The Board is established within the Department of Agriculture as a departmental board, consisting of the following 17 members:

- Secretary of Agriculture, who shall serve as the board chairman;
- Secretary of Community and Economic Development, or his designee;
- Secretary of Environmental Protection, or his designee;
- Chair and Minority Chair of the House Agriculture and Rural Affairs Committee, or their designees;
- Chair and Minority Chair of the Senate Agriculture and Rural Affairs Committee, or their designees; and
- Dean of the College of Agricultural Sciences of the Pennsylvania State University, or his designee.
- Five members appointed by the Governor including a current member of the governing body of a county, a person who is recognized as having significant knowledge in agricultural fiscal and financial matters, one member who is an active resident farmer of this Commonwealth, one member who is a residential, commercial or industrial building contractor, and one member who is a current member of a governing body.
- One member each appointed by the Speaker of the House of Representatives, the Minority Leader of the House of Representatives, the President pro tempore of the Senate and the Minority Leader of the Senate, who must be resident farm owners and operators of at least one commercial farm in this Commonwealth.

Members serve four-year terms, and members may be reappointed to successive terms. Nine members constitute a quorum for purposes of conducting meetings and official actions. The board has the following powers:

- To adopt rules and regulations as necessary.
- To adopt rules of procedure and bylaws governing the operations of the state board and the conduct of its meetings.
- To review, and accept or reject, the recommendation made by a county board for the purchase of an agricultural conservation easement by the Commonwealth.
- To execute agreements to purchase agricultural conservation easements in the name of the Commonwealth if recommended by a county and approved by the state board.
- To purchase in the name of the Commonwealth agricultural conservation easements if recommended by a county and approved by the state board.
- To purchase agricultural conservation easements jointly with a county, or jointly with a county and a local government unit, or jointly with a county and an eligible nonprofit entity, or jointly with a county, a local government unit and an eligible nonprofit entity, if recommended by a county and approved by the state board.
- To allocate state moneys among counties for the purchase of agricultural conservation easements.

- To establish and maintain a central repository of records containing records of county programs for purchasing agricultural conservation easements, records of agricultural conservation easements purchased by local government units, by local government units and counties, by local government units and the Commonwealth, by eligible nonprofit entities, and records of agricultural conservation easements purchased by the Commonwealth. All records indicating the purchase of agricultural conservation easements shall refer to and describe the farm land subject to the agricultural conservation easement.
- To record agricultural conservation easements purchased by the Commonwealth or jointly owned, in the office of the recorder of deeds of the county wherein the agricultural conservation easements are located.
- To establish and publish the standards, criteria and requirements necessary for state board approval of county programs for purchasing agricultural conservation easements.
- To review and certify and approve, or disapprove, county programs for purchasing agricultural conservation easements.
- To exercise other discretionary powers as may be necessary and appropriate for the exercise and performance of its duties, powers, and responsibilities under this act.
- To determine an annual easement purchase threshold.
- To review and approve or disapprove for recertification each county program for the purchase of agricultural conservation easements.
- To authorize the development of a guidebook defining all technical elements necessary for a complete application for purchase of an agricultural conservation easement. Such guidebook shall include model formats of the specific components of applications. Guidebooks shall be distributed to every county with an approved program for purchasing agricultural conservation easements.

Additionally, the state board is authorized to take the actions necessary to qualify for federal guarantees and interest rate assistance for agricultural easement purchase loans under Chapter 2 of the Food, Agriculture, Conservation, and Trade Act of 1990, and to segregate from the Agricultural Conservation Easement Purchase Fund, into a Farms for the Future Trust Fund, funds necessary to qualify for the maximum amount of funding made available under the federal act. There shall be deposited in this trust fund, and are appropriated for the purposes of this act, any interest rate assistance subsidies provided by participation in the federal program. The state board is authorized to deposit interest accruing on moneys in the trust fund, in excess of the amounts needed to satisfy interest payments, in the Agricultural Conservation Easement Purchase Fund.

The state board is required to submit to the General Assembly an annual report no later than May 1. The report shall include, but not be limited to, the following information:

- The location of agricultural security areas and agricultural conservation easements in the Commonwealth.

- The number of acres throughout the Commonwealth that are located within agricultural security areas.
- The number of acres throughout the Commonwealth that are subject to agricultural conservation easements.
- The number of agricultural conservation easements in the Commonwealth.
- The number of acres included within each agricultural conservation easement throughout the Commonwealth.
- The number and value of agricultural conservation easements purchased by the Commonwealth, including the number and value of purchases made during the preceding calendar and the preceding fiscal year of the Commonwealth, and the extent of local government unit or eligible nonprofit entity participation in the transaction.
- The number and value of agricultural conservation easements purchased jointly by the Commonwealth and the counties, including the number and value of purchases made during the preceding calendar and the preceding fiscal year of the Commonwealth.
- The identity of counties participating in the state program for purchasing agricultural conservation easements.
- The dollar value of the annual appropriation made by counties for the purchase of agricultural conservation easements.
- The quality of the farmlands subject to agricultural conservation easement, including the soil classifications and productivity of the farmlands.
- The nature, scope, and extent of development activity within the area where agricultural conservation easements have been purchased.
- The nature and extent of conservation practices and best land management practices, including, but not limited to, soil erosion and sedimentation control and nutrient management practices, that are practiced on farmlands subject to agricultural conservation easements.
- The total number of recommendations filed by counties for purchase of agricultural conservation easements and the number approved and disapproved, and the reasons for disapproval.

County Programs. After establishing an agricultural security area, the county governing body may authorize a program to be administered by the county board for purchasing agricultural conservation easements from landowners whose land is either within an agricultural security area or in compliance with certain criteria as set forth in the act. The county board shall be composed of five, seven or nine members appointed by the county governing body from among the following groups: the number of farmers shall constitute one less than a majority of the board; one member shall be a current member of the governing body of a township or borough located within the county; one member shall be a commercial, industrial or residential building contractor; and the other members shall be selected at the pleasure of the county governing body. The members serve terms of three years. The county board has the following powers and duties:

- To adopt rules and regulations for the administration of a county program for the purchase of agricultural conservation easements including, but not limited to,

- rules and regulations for the submission of applications by landowners, establishing standards and procedures for the appraisal of property eligible for purchase as an agricultural conservation easement, establishing minimum criteria for eligibility of viable agricultural land a portion of which is used for commercial equine activity, and establishing standards and procedures for the selection or purchase of agricultural conservation easements.
- To adopt rules of procedure and bylaws governing the operation of the county board and the conduct of its meetings.
 - To execute agreements to purchase agricultural conservation easements in the name of the county.
 - To purchase in the name of the county agricultural conservation easements either within agricultural security areas or pursuant to certain criteria set forth in the act.
 - To use moneys appropriated by the county governing body from the county general fund to hire staff and administer the county program.
 - To use moneys appropriated by the county governing body from the county general fund or the proceeds of indebtedness incurred by the county and approved by the county governing body for the purchase of agricultural conservation easements either within agricultural security areas or pursuant to certain criteria set forth in the act.
 - To establish and maintain a repository of records of farm lands which are subject to agricultural conservation easements purchased by the county.
 - To record agricultural conservation easements purchased by the county in the office of the recorder of deeds of the county wherein the agricultural conservation easements are located and to submit to the state board a certified copy of agricultural conservation easements within 30 days after recording. The county board shall attach to all certified copies of the agricultural conservation easements submitted to the state board a description of the farm land subject to the agricultural conservation easements.
 - To submit to the state board for review the initial county program and any proposed revisions to approved county programs for purchasing agricultural conservation easements.
 - To recommend to the state board for purchase by the Commonwealth agricultural conservation easements within agricultural security areas located within the county.
 - To recommend to the state board the purchase of agricultural conservation easements by the Commonwealth and the county jointly, or jointly by the Commonwealth, the county and a local government unit, or jointly by the Commonwealth, the county and an eligible nonprofit entity, or jointly by the Commonwealth, the county, a local government unit and an eligible nonprofit entity.
 - To purchase agricultural conservation easements jointly with the Commonwealth, or jointly by the Commonwealth, the county and a local government unit, or jointly by the Commonwealth, the county and an eligible nonprofit entity, or jointly by the Commonwealth, the county, a local government unit and an eligible nonprofit entity.
 - To exercise other powers which are necessary and appropriate for the exercise and performance of its duties, powers, and responsibilities under this act.

- To submit to the state board applications for agricultural conservation easements in accordance with the guidebook (as mentioned above).
- To exercise primary enforcement responsibility with respect to the agricultural conservation easements within the county or extending into an adjoining county.
- To use any portion of accrued interest from the Pennsylvania Farmland and Forest Land Assessment Act of 1974 to develop conservation plans and to monitor and enforce agricultural conservation easements, including the payment of legal costs associated with defending an agricultural conservation easement.
- To incur debt pursuant to the Local Government Unit Debt Act to purchase agricultural conservation easements.

Local Government Unit Participation. Any local government unit that has created an agricultural security area may participate along with an eligible county and the Commonwealth, and an eligible nonprofit entity, in the preservation of farmland through the purchase of agricultural conservation easements. The local government unit, in conjunction with a county board, may participate with the state board in the purchase of agricultural conservation easements. The local government unit is required to recommend to the county board the purchase of agricultural conservation easements by the eligible county and the local government unit as joint ownership, and the local government unit is required to recommend to the county board the purchase of agricultural conservation easements by the local government unit and the Commonwealth as joint ownership.

The local government unit may purchase an agricultural conservation easement, provided that: the agricultural conservation easement is located within an agricultural security area of at least 500 acres or the easement purchase is a joint purchase with either a county or both a county and the Commonwealth; and the deed of agricultural conservation easement is at least as restrictive as the deed of the agricultural conservation easement prescribed by the state board for agricultural conservation easements purchased by the Commonwealth.

Eligible Nonprofit Entity Participation. An eligible nonprofit entity may participate along with an eligible county, the Commonwealth and a local government unit in the preservation of farmland through the purchase of agricultural conservation easements. The eligible nonprofit entity may purchase an agricultural conservation easement if: the agricultural conservation easement is a joint purchase with the county, and may include the Commonwealth or a local government unit, or both; and the deed of agricultural conservation easement is as prescribed by the state board for agricultural conservation easements purchased by the Commonwealth.

Land Trust Reimbursement Program. Under this program, the state board may allocate funds to reimburse land trusts for expenses incurred in acquiring agricultural conservation easements in this Commonwealth. Eligible expenses include: appraisals; legal services; title searches; document preparation; title insurance; closing fees; and survey costs. The reimbursement is limited to \$5,000 per easement.

To be eligible to receive reimbursement, a land trust must be an eligible nonprofit entity and must register with the state board; coordinate agricultural conservation easement purchase activities with the eligible county; and submit an application to the state board, with the statement of costs incidental to acquisition, the deed of easement and any other documentation required by the state board, within 60 days of closing on the easement.

Easement Acquisitions by Donation. Upon the recommendation by an eligible county, the donation of an agricultural conservation easement may be acquired by the county, state board, an eligible nonprofit entity or a local government unit if the land is used for agricultural production; the term of the agricultural conservation easement is perpetual; the applicable county program provides for the acquisition by donation of an agricultural conservation easement; the agricultural conservation easement is being acquired by donation by an eligible county or by the eligible county in conjunction with the Commonwealth, an eligible nonprofit entity or a local government unit, or any combination of these; instruments and documents for the acquisition by donation of an agricultural conservation easement are approved by the state board or the county board prior to execution and delivery; the agricultural conservation easement has title insurance; the deed of agricultural conservation easement is as prescribed by the state board for agricultural conservation easements purchased by the Commonwealth; and the applicable county board records an agricultural conservation easement acquired by donation by the county in the office of the recorder of deeds of the county wherein the agricultural conservation easement is located and submits to the state board a certified copy of the agricultural conservation easement within 30 days after recording.

IV. Appendices

APPENDIX A

Senate Resolution No. 195

THE GENERAL ASSEMBLY OF PENNSYLVANIA

Session of 2007

INTRODUCED BY BRUBAKER, FOLMER, CORMAN, FERLO, PUNT, WONDERLING, MADIGAN, MUSTO, BOSCOLA, ORIE, ERICKSON, EARLL, KITCHEN, BAKER, ROBBINS, WOZNIAK, ARMSTRONG, REGOLA, M. WHITE, O'PAKE, BROWNE AND C. WILLIAMS, OCTOBER 16, 2007

REFERRED TO AGRICULTURE AND RURAL AFFAIRS, OCTOBER 16, 2007

A RESOLUTION

RESOLVED, SR 195 directs the Legislative Budget and Finance Committee to undertake a comprehensive review of the Agricultural Conservation Easement Purchase Program

This review is to include the following:

- (1) an analysis of the criteria used to prioritize which farms are selected for Agricultural Conservation Easement (ACE) purchase;
- (2) the land use relationship between farms selected for ACE purchase and adjoining neighboring tracts of land;
- (3) the number of farms and acreage currently preserved which are still in agricultural operation,
- (4) the effect on the economic viability of preserved farms where the uses of surrounding lands have been converted from agricultural uses to nonagricultural uses;
- (5) the effect of current statutory language that provides for the extinguishment of an ACE under certain circumstances after 25 years;
- (6) the effect of the absence of any current statutory per-acre cap on the amount State dollars that can be spent to acquire an ACE;
- (7) the effect of permitting the acquisition of an ACE on a farm of fewer than 50 contiguous acres in size;
- (8) the effect of requiring local government participation for ACE purchases which exceed a set per-acre dollar amount;
- (9) the options available to maximize the limited dollars available for ACE purchase, including:
- (10) consideration of installment purchases and the current Installment Purchase Agreement Program,
- (11) the feasibility of mandating transitional guidance to all eased farm owners at the time a farm is being conveyed to an new owner;
- (12) the feasibility of additional dedicated sources of revenue to fund the program;

Appendix A (Continued)

(13) the feasibility of providing property tax incentives for preserved farms, including an automatic use-value assessment and millage freeze;

(14) the feasibility of providing tax credits in lieu of cash payment for ACE purchases, the effect of expanding the current provision authorizing coal mining on ACE-restricted land to the extraction of additional rock, minerals or gases;

(15) the effectiveness of the Agricultural Lands Condemnation Approval Board to adequately protect ACE-restricted land from condemnation;

(16) the effect of mandating a limitation on the amount of impervious surface, including paved roads, farm buildings and other construction which can be established on ACE-restricted land;

(17) the effect of nonprofit organization participation in ACE purchases under the Agricultural Area Security Law;

(18) the effect of permitting wind turbines used for generating electricity to be constructed on ACE-restricted land;

(19) the effect of authorizing counties to utilize a portion of their annual State appropriations to fund legal costs incurred in ACE enforcement; and be it further RESOLVED,

That the Legislative Budget and Finance Committee complete its review and issue a report to the chairman and minority chairman of the Agriculture and Rural Affairs Committee of the Senate by August 31, 2008.

APPENDIX B

Pending Legislation Relating to Agriculture Easements

(As of June 30, 2008)

- **Senate Bill 863:** Amends the Agricultural Area Security Law, provides for proceeds from sales by the Department of Agriculture and for grants for agricultural land conservation assistance.
- **Senate Bill 1168:** Amends the Agricultural Area Security Law to define “conservation easement,” and exempts certain real property from local taxes if it is subject to a conservation easement and that easement is perpetual.
- **Senate Bill 1513:** Gives county boards the responsibility to include in such rules and regulations a requirement that discrete tracts of land that are aggregated in a single agricultural conservation easement purchase application shall be merged, prior to the sale of the agricultural conservation easement, such that the subdivision and the subdivision review procedures are required for any tract of land that is less than all of the land described in the deed of the agricultural conservation easement to be transferred to another. Also deletes the provisions relating to the 25-year term of the easement.
- **Senate Bill 1514:** Deletes certain provisions relating to condemnation approvals relating to underground public utility facilities.
- **House Bill 1007:** Provides for special farmland preservation registration plates and provides that \$15 of the plate fee shall be deposited into the Agricultural Conservation Easement Purchase Fund.
- **House Bill 2524:** Provides that certain lands subject to agricultural conservation easements may be used for non-motorized recreational trails. The bill also provides that, notwithstanding the Municipalities Planning Code, an ordinance may not authorize the transfer of development rights from land subject to an agricultural conservation easement.

APPENDIX C

Response to This Report

Commonwealth of Pennsylvania



DEPARTMENT OF AGRICULTURE

OFFICE OF THE SECRETARY

DENNIS C WOLFF

September 18, 2008

Mr. Philip Durgin, Executive Director
Legislative Budget and Finance Committee
Finance Building, Room 400A
P.O. Box 8737
Harrisburg, PA 17105-8737

Dear Mr. Durgin:

On behalf of the Department, thank you for conducting a review of the Farmland Preservation Program. We appreciate your good work and the opportunity to comment on the draft report. We believe the report is a fair and accurate assessment of the program.

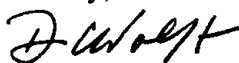
Pennsylvania leads the nation in Farmland Preservation. Last month, the program recognized its 400,000 acre milestone at the State Board meeting in Northampton County. The Commonwealth, counties and municipalities have invested over \$1 billion in this effort -- more than any other state in the nation. Farmland Preservation in Pennsylvania is a shining example of what may be accomplished through strong partnerships between all levels of government and non-profit entities. The program continues to earn widespread support with fifty-seven participating counties. For the first time ever, in 2008, county contributions exceed the amount the Commonwealth is able to match. There is much more work to be done. Although 3,634 farms have been protected, an estimated 2,000 more farms remain on the backlog list.

Now in its 20th year, the task of protecting farms already subject to easement nearly equals that of acquiring new applicants. Through time, this trend will continue to increase. Each year farms change ownership and the annual inspection may be the only communication the county has with the property owner. As farms continue to transition to the next generation, the annual inspection plays a vital role in assuring compliance with the terms of the deed of easement. As cited in the report, the annual inspection process is becoming a challenge for counties. The Department recommends that technology play a role in this effort. A standardized web-based or software program that allows county staff to enter inspection information and forward to the Bureau for review will go far in assuring that contact with eased farm owners is not lost. It will also enable a statewide database that reflects the most current property owner contact information. In general, technology will play a much greater role in improving the efficiency of the program -- from the application stage through state board approval and annual inspections. This recommendation should be referenced in the program audit.

The Department is pleased the report references the issues related to the 25-year provision. This provision allows for the extinguishment of an easement after 25 years if the farm is no longer viable. Although a situation where this may occur is remote, as all eased farms should be viable for agriculture in the future, the Department fully supports effort through legislation to remove the provision for reasons cited in the report.

In conclusion, the Department would like to again thank the Committee for the opportunity to comment on this draft report. We look forward to the presentation of the final draft on September 23rd, 2008.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Wolff".

Dennis C Wolff
Secretary