



Farm preservation

From Penn's Woods to the present

Pennsylvania's identity as a "green" state is as old and storied as any state in the nation. Let's not forget that our state's very name means Penn's Woods after the famous 17th century Quaker and state founder William Penn. Even today, Pennsylvania's mythical origins have been chalked up to fateful treaties being struck between the religiously persecuted and its forests' original inhabitants. In the face of what must have seemed infinite wilderness, so the story goes, American Indians accepted cloth, beads and other European luxuries for the sole ownership of their supple homeland. Although historians debate the accuracy and simplicity of this parable, the significance of it as a founding story and part of a cultural identity is unquestionable. But fast forward 400 years, and those hallowed groves are dwindling.

The reality of urban development and suburban sprawl is a long saga still in the making. It's a symptom of our age and manifests itself throughout the nation and the world beyond.

In the last half century, the acreage devoted to crops and pastures in the contiguous 48 states has shriveled by some 8 percent, according to the United States Department of Agriculture. At the same time, land designated as having urban land uses has quadrupled.

In Pennsylvania, this shift has been especially poignant as our essentially rural state struggles to maintain its identity along the metropolitan sprawl so indicative of the East Coast. We rank sixth in the nation for land lost to development with 1.14 million acres lost in a 15-year period, according to The Brookings Institution, an independent research organization. Incidentally, this translates to an acre lost every seven minutes!

As a result, the people of Pennsylvania have continually called for an emphasis on preserving their native ways of life. And the government has responded.

Legislative origins of government-sponsored preservation

Starting with Act 442 of 1968, Pennsylvania's legislators have attempted to maintain the state's agricultural heritage. This act first authorized state, county or local governments to "preserve, acquire or hold land for open space purposes." At the same time, our leaders have been careful to stay loyal to the freedoms upon which our country is based. Ranking high among these freedoms, our bill of rights tells us, is the right to own property and control its use within reasonable limits. The very premise of our economic system, in fact, is based on private property. As such, even the more extreme advocates of public good would not dare conceive of a be-all, end-all state-sponsored means of land use designation. Instead, government scholars adopted the approach of compensating those with preservation aims, hoping to effectively level the playing field as business interests' deeper pockets came into conflict with more idealistic – but less lucrative – aims, such as farming. In 1974, the Pennsylvania lawmakers gave the commonwealth's equally new and nebulous preservation mission a much-needed boost with the passage of the Farmland and Forest Land Assessment Act – commonly called the Clean and Green Act.

The Clean and Green Act facilitated preservation by offering tax breaks to those willing to transform their land's designation into a protected "green" use. Specifically, a land owner filing for Clean and Green status would have to pay taxes on only the use value of a property as assessed. In areas of rising real estate values and development pressure, these potential savings were – and continue to be – significant. The Act also created tax penalties to those who revoked this status. Specifically, the converted land could be subject to a roll-back in the tax rate based on assessment value for up to seven years. Retroactive interest at 6 percent was added to give the Act further bite. Furthermore, this roll-back is a potential penalty even if the land is only subdivided, which can result in back taxes for both subdivisions.

There were two main issues raised with this tactic, however.

First, the penalties were not enough of a disincentive to enact any sort of long-term changes to the individual properties. Developers began approaching these lands the same as any other, now considering breaking this clause simply the cost of doing business.

The other issue with Clean and Green was that its new status was not always clearly marked to prospective buyers. What was happening, observers noticed, was that the original designation was being lost in the shuffle. The property's new status was recorded on individual docketts that were separate from the original land deed. Sometimes, it was only after significant steps had been taken toward development that this designation surfaced.

Easements emerge as means to preservation

In 1988, the second generation of Pennsylvania's preservation legislative initiative was born in the form of the Agricultural Conservation Easement Purchase Program. By selling an easement – or right of specific authority – on a property, a farmer grants specific control of that aspect to the buyer. In this case, the easement prohibits development of the land as prescribed by certain guidelines.

Such programs – commonly known as a purchase of agricultural conservation easements (PACE) programs – had been around since the mid '70s. Their goal has and remains the same: to use public funds to buy the development rights to land at risk of losing their agricultural application.

This served as recourse to the problems of Clean and Green in two ways.

First, the new designation now required that the language forbidding development be written into the deed as an addendum. As a result, new copies of the deed as it is transferred from owner to owner clearly state that such an easement exists. Second, the designation now remains in effect for perpetuity or, hypothetically at least, forever. (Of course, nothing in the legal system – or, arguably, anywhere – is truly forever. On this note, legal scholars continue to debate the effectiveness of this clause. It is clear, however, that the easement program offers much more protection against development than prior approaches.)

Although relatively late to the realm of PACE programs, Pennsylvania has shown a remarkable affinity for the model. As a result, Pennsylvania now leads the nation in the total acreage of land development rights preserved in this manner, according to the national conservation advocacy group American Farmland Trust. As of the summer of 2007, more than 360,000 acres on 3,200-plus farms had been preserved in this manner.

Now, if relinquishing some development rights to your property results in a lower market value in the event of liquidation, why should you consider it?

There are several answers to this question that may or may not hold value in your eyes: As with any financial decision, considering a conservation program should be a carefully considered decision that benefits from the input of individual experts – not just informational publications.

- Cash – Although the process for entering into a preservation program (in detail below) is not necessarily quick, it is quicker than many capital investment strategies in the financially top-heavy world of farming. The money resulting from this sale can be used for anything from upgrading a farm operation or purchasing more land to paying down debt or saving in preparation for future expenses.
- Philosophical reasons – It's true, farmers are inherently more in tune with the land and devoted to it. So if you can't bear the thought of your productive farmlands being paved for parking lots, a conservation easement can buy peace of mind.
- Estate planning – Due to the tax breaks available in both programs discussed thus far, passing on a tract of land is easier and cheaper when it is worth less to an assessor. And if a preservation easement is donated, the one-time difference in real estate values can be deducted from property taxes in addition to:
- Tax savings – Both Clean and Green and Pennsylvania's PACE program allow land owners to pay property taxes on only the use value of a property. This serves as a hedge against real estate booms that can suddenly inflate land prices without changing your business' potential productivity.

Why wouldn't I want to limit my property development rights?

As with any issue, there is no uniform agreement that such conservation programs are in everybody's best interest. Clearly those who would want to use your land for purposes other than farming are against it. And by extension, this could make you feel the same way. Was your life to change drastically – imagine an unforeseeable but large expense in your personal life – your ability to liquidize your property holdings may be dramatically limited with an easement in place. Consider not only the reduced price that your property would then have in the market place, but also even whether it would still be sellable.

For example, if the profitability of agriculture in general – or your niche in particular – were to take a big hit from, say, falling commodity prices, there may be no one willing to get into that line of farming. An easement would prevent you or your successors from selling to the highest use of your land as prescribed under our nation's free-market system. Even a potentially ideal buyer from a philosophical standpoint – such as, say, a private school – could be shut out depending on the exact wording of your easement and the laws in place. (This point is especially salient if third parties are allowed to adopt the enforcement issue of preservation easements as their own. While this issue has not been definitively settled, there is a common consensus that the willful

relinquishing of both parties in the easement agreement does not necessarily negate that initial agreement.)

There are even advocacy groups that are fiercely against the concept of limiting land use. Frequently these groups have ulterior motives and/or funding sources, but their techniques of persuasion are nonetheless effective. For example, there are anecdotal cases of such groups circulating “anonymous” letters to farmers warning of imminent government land seizures. While the government has some right to seize land for public use, this is a separate issue altogether from conservation easements, which are offered on a strictly voluntary basis. Again, only a thorough assessment of your particular situation can reveal whether or not conservation easements are appropriate – let alone preferable.

A further rationale against such programs is the fear that they can be abused by the very people they are designed to combat: developers. For example, accusations have surfaced of development easements being sold in cases other than where the enacting legislatures intended. For example, the developer of a golf course or a vacation resort might find ways to qualify for and obtain a development easement even though the current use is clearly not agricultural. There have also been scandals centering around the buy-it-and-redeem-it approach to easement protection wherein a speculator buys a property, obtains an easement and then gets a tax write-off that is greater than the property’s purchase price. Nonetheless, even staunch critics of such programs would be hard-pressed to argue that easements in legislatively intended manners do not encourage agricultural retention.

Who can and cannot participate in a conservation designation

Even if you have thus far decided that some form of conservation designation – and the benefits associated therewith – is right for your farm, it doesn’t mean you will qualify.

Owing in part due to the limited availability of public funding, state, county and local governments are empowered to buy a finite amount of land. In addition, legislative restraints limit the entry into both programs discussed.

Qualifications for Clean and Green eligibility

First and foremost, your land must be devoted to one of three uses as defined by the law:

Agricultural use – The land must be used for producing an agricultural commodity or be under a soil conservation program with an agency of the federal government. Both

categories must be verifiable for three years prior to application.

Agricultural reserve use – The land must be designated for recreation, open to the public and free. The landowner, however, can still enact certain limitations under this category, such as prohibiting hunting, access and insulating against lifestyle nuisances. Or forest reserve use – The land must be stocked with forest trees that could be harvested as a commodity.

Furthermore, the land must be either a minimum of 10 contiguous acres or capable of producing agricultural products of \$2,000 or more annually.

What to expect under Clean and Green

Once an application is approved, the land will qualify for the tax break in the following calendar (applications accepted up through June 1 for the following calendar year).

That break is dependent on the new assessed value, which is based on soil grading as performed by the Pennsylvania Department of Agriculture. This assessment can then be further lowered – but not raised – by the county’s assessment board.

Qualifications under Pennsylvania’s PACE program

Entrance into this program is even more selective – and it can be even more lucrative. Selection by the interested parties (typically state, county or local governments) is based on the most qualified applicants as determined by the state Bureau of Farmland Preservation under the following criteria:

Land size – The land must be at least 50 acres in size unless it is 10 acres in size and contiguous to a previously preserved property or used for a “crop unique to the area.” Furthermore, the land must be in an Agricultural Security Area (ASA) spanning 500 acres or more. (This “ASA” classification is defined under a 1981 program and requires interested landowners to voluntarily bind together and, with a minimum of 250 acres, commit to potentially agricultural uses. The soil quality must further be of a quality designated by the county soil surveys. In return, ASA members receive a protected status from local and state agencies as well as other “nuisance” challenges.) Furthermore, either 50 percent or 10 acres – whichever figure is greater – of the land acreage must be used for harvesting crops, pasture or grazing.

Land quality – This category is based on both the current use of surrounding lands and the soil classification. Points are further awarded for the use of good

conservation practices, good management practices with regard to nutrient management and control of soil erosion and sedimentation.

Likelihood of development – A variety of factors can be weighed to determine standing in this category. Typically, though, the Bureau considers the land’s proximity to existing utility lines, the extent and type of development in the surrounding area and the amount of existing preserved farmland in the vicinity.

What to expect under Pennsylvania’s PACE program

In addition to the tax benefits already discussed, participants receive actual payment for allowing the easement. The value of this variable offer is typically capped at the difference between the land’s assessed and use value but at the discretion of the potential buyer. This sum can be taken in a single payment or spread out over a period of time – a common method to subsidize existing farming operations.

Other PACE programs

Although much has been written here on PACE programs in general and on our state-funded program in particular, there are other kinds of easement purchasing programs.

Much as the state has the ability – and proven track record – of getting voter-approved tax funding for the program, so, too, can county and even local governments. There are even nonprofit advocacy groups that have come up with alternative funding means and enacted PACE programs across the commonwealth.

For more information on what may be available in your area, contact your county’s Agricultural Land Preservation Board to learn about your local Agricultural Conservation Easement Program and local eligibility requirements.

Together, members of our government, farmers and Pennsylvania citizens at large can take a leading role in preserving our heritage.

It makes sense beyond a level of mere aesthetics: Farming has long been the Commonwealth’s leading industry and will likely remain so well into the future.