



COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF ATTORNEY GENERAL

JOSH SHAPIRO  
ATTORNEY GENERAL

February 7, 2022

Office of Attorney General  
1251 Waterfront Place  
Mezzanine Level  
Pittsburgh, PA 15222

[REDACTED]

*Re: ACRE Case-Upper Makefield Township-[REDACTED]-Denial*

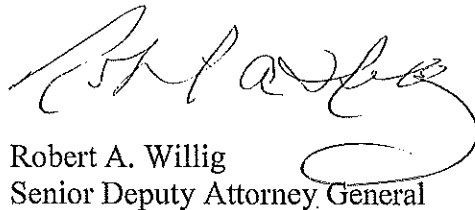
Dear [REDACTED] and [REDACTED]

The high tunnel ACRE complaint is denied. [REDACTED] filed a complaint with the Office of the Attorney General on October 25, 2021. He contended that Upper Makefield imposes illegal requirements on those wanting to erect high tunnels.

Upper Makefield is aware that high tunnels are exempt from storm water provisions if certain circumstances apply. *See* 32 P.S. § 680-11. The Township is also aware that the Uniform Construction Code “shall not apply to...any agricultural building.” *See* 35 P.S. § 7210.104(b)(4). Upper Makefield is not making [REDACTED] satisfy inapplicable storm water management or UCC requirements. Rather, it was asking that he complete an uncomplicated “Application for Plan Examination and Building Permit” that contractors routinely submit so that the Township could simply determine whether the structure proposed was, in fact, a high tunnel exempt from stringent requirements. If it were, Upper Makefield would not impose inapplicable legal requirements. [REDACTED] did not submit this application. Instead, he erected the high tunnel that currently stands on his property without Township review.

The parties should know that in light of this denial [REDACTED] can file a private ACRE suit under that statute if he so chooses. *See* 3 Pa.C.S. § 315(b)

Sincerely,

  
Robert A. Willig  
Senior Deputy Attorney General



COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF ATTORNEY GENERAL

JOSH SHAPIRO  
ATTORNEY GENERAL

December 1, 2021

Office of Attorney General  
1251 Waterfront Place  
Mezzanine Level  
Pittsburgh, PA 15222

Upper Makefield Township  
ATTN: Board of Supervisors  
1076 Eagle Road  
Newtown, PA 18940

[REDACTED]  
[REDACTED]  
[REDACTED]

*Re: ACRE Complaint – Upper Makefield Township – Bucks County*

Dear Board of Supervisors and [REDACTED]

Act 38 of 2005, the Agricultural Communities and Rural Environment (“ACRE”) law, 3 Pa.C.S. § 311 *et seq.*, requires that the Office of Attorney General (“OAG”), upon request, review a local government ordinance for compliance with Act 38. The Act authorizes the Office, in its discretion, to file a lawsuit against the local government unit if, upon review, the Office believes that the ordinance unlawfully prohibits or limits a normal agricultural operation.

We write to inform the Board that we received a request from [REDACTED] on October 25, 2021. A copy of that request is attached for the Board’s review.<sup>1</sup> [REDACTED] contends that Upper Makefield is imposing illegal requirements on him in order to erect a high tunnel/hoop house on the horse farm. He states that the Township is making him submit plot plans, provide proof of insurance, to have storm water management plans, and to provide electrical and plumbing plans. If Upper Makefield can please respond to [REDACTED] ACRE complaint within thirty (30) days of receipt of this letter I would greatly appreciate it.

I offer the following information that may be of assistance when drafting the Township’s response. In 2018, the Legislature changed the storm water management requirements for high tunnels/hoop houses. High tunnels/hoop houses are exempt from the storm water provisions if certain circumstances apply. See 32 P.S. § 680-11, *Effect of watershed storm water plans*. The Pennsylvania Department of Environmental Protection (“DEP”), Bureau of Clean Water, summarized the practical effects of the new law in its *Document Number 383-4200-001, Water Management for Agricultural High Tunnels, April 21, 2018*. I have included § 680-11 and the DEP

<sup>1</sup> [REDACTED] filed a second ACRE complaint with the OAG concerning the requirement that a full-time caretaker live on the horse farm. That OAG denied that ACRE complaint as that issue was subject to the stipulation of settlement in the [REDACTED], Court of Common Pleas of Bucks County, [REDACTED] case.

publication for your review. If [REDACTED] proposed high tunnel meets the exemption requirements of § 680-11, he does not need to submit a storm water management plan.

Electrical and plumbing requirements normally fall under the purview of the Uniform Construction Code ("UCC") Act, 35 P.S. §§ 7210.101, *et seq.*, and the accompanying regulations. Importantly however, the UCC "shall not apply to...any agricultural building." 35 P.S. § 7210.104(b)(4). [REDACTED] writes that the high tunnel "will be used to store hay and shavings for the care of the horses." The UCC defines an "agricultural building" as a "structure utilized to store...hay...or other agricultural...products." 35 P.S. § 7210.103, **Definitions, Agricultural building**, and a law review article has correctly characterized "hoop houses" as "temporary agricultural buildings." University of Arkansas School of Law, *Journal of Food Law & Policy*, Fall 2019, Clint Simpson, *Updating the Building Code to Include Indoor Farming Operations*, Clint Simpson, n. 14. I have included §§ 7210.103 & 104(b)(4) with this letter. Not only is the proposed high tunnel an agricultural building it is a temporary one at that. The high tunnel would not be subject to the UCC nor subject to standards that essentially rise to the level of UCC requirements. As noted in the law review article, "temporary agricultural buildings such as hoop houses are regulated much more loosely by the bulk of statutory land-use schemes." *Id.* Perhaps Upper Makefield can consider whether its current high tunnel requirements are proper or not and it can advise the OAG how it intends to proceed with [REDACTED] permit application.

I thank you in advance for your assistance in this matter and I look forward to Upper Makefield's response.

Sincerely,



Robert A. Willig  
Senior Deputy Attorney General

Purdon's Pennsylvania Statutes and Consolidated Statutes  
Title 32 P.S. Forests, Waters and State Parks  
Part II. Waters (Refs & Annos)  
Chapter 24B. Storm Water Management (Refs & Annos)

32 P.S. § 680.11

§ 680.11. Effect of watershed storm water plans

Effective: June 18, 2018

Currentness

(a) After adoption and approval of a watershed storm water plan in accordance with this act, the location, design and construction within the watershed of storm water management systems, obstructions, flood control projects, subdivisions and major land developments, highways and transportation facilities, facilities for the provision of public utility services and facilities owned or financed in whole or in part by funds from the Commonwealth shall be conducted in a manner consistent with the watershed storm water plan.

(b) Within six months following adoption and approval of the watershed storm water plan, each municipality shall adopt or amend, and shall implement such ordinances and regulations, including zoning, subdivision and development, building code, and erosion and sedimentation ordinances, as are necessary to regulate development within the municipality in a manner consistent with the applicable watershed storm water plan and the provisions of this act.

(c) The following shall apply:

(1) A high tunnel shall be exempted from the provisions of this act if:

(i) the high tunnel or its flooring does not result in an impervious area exceeding 25% of all structures located on the owner's total contiguous land area; and

(ii) the high tunnel meets one of the following:

(A) The high tunnel is located at least 100 feet from any perennial stream or watercourse, public road or neighboring property line.

(B) The high tunnel is located at least 35 feet from any perennial stream or watercourse, public road or neighboring property line and located on land with a slope not greater than 7%.

(C) The high tunnel is supported with a buffer or diversion system that does not directly drain into a stream or other watercourse by managing storm water runoff in a manner consistent with requirements of this act.

(2) A municipality that has adopted a local ordinance or regulation that regulates **high tunnels** pursuant to a watershed storm water plan under this section prior to the effective date of this subsection<sup>1</sup> shall amend the ordinance or regulation to comply with this subsection.

(3) Nothing in this subsection shall be construed to exempt **high tunnels** from other requirements applicable under Federal, State or municipal laws.

**Credits**

1978, Oct. 4, P.L. 864, No. 167, § 11, imd. effective. Amended 2018, April 18, P.L. 91, No. 15, § 2, effective in 60 days [June 18, 2018].

**Footnotes**

<sup>1</sup> Subsec. (c) added by 2018, April 18, P.L. 91, No. 15, § 2, effective in 60 days [June 18, 2018].  
32 P.S. § 680.11, PA ST 32 P.S. § 680.11  
Current through 2021 Regular Session Act 90. Some statute sections may be more current, see credits for details.

## ***High Tunnel Farming Systems and How They are Addressed Under Pennsylvania's Water Management Laws***

Hoop or high tunnel facilities used on agricultural operations either as an enhancement to a cropping system or as an alternative for conventional storage and animal housing facilities are being used throughout the state as a cost-effective means of addressing various protection and storage needs. The purpose of this document is to describe the water management regulatory requirements relating to these structures and what exemptions may be considered for certain high tunnel structures.

There are primarily three environmental statutes that address water management related to the construction and location of high tunnel structures in Pennsylvania: the Clean Streams Law (CSL), the Dam Safety and Encroachment Act (DSEA) and the Storm Water Management Act (Storm Water Act).

**The Pennsylvania Chapter 102 Erosion and Sedimentation Control regulations** implement certain provisions of the CSL. Under these regulations, any person proposing an earth disturbance activity disturbing one (1) acre or more, either as one activity or as a staged activity affecting one (1) acre or more in total, is required to obtain a National Pollutant Discharge Elimination System (NPDES) permit which includes an erosion and sedimentation control (E&S) plan, as well as a post construction stormwater management (PCSM) plan. The PCSM plan outlines stormwater control practices which must be constructed and continually maintained, to limit the impacts of stormwater runoff to local and regional water courses. High tunnel systems triggering these requirements are required to follow the provisions of this regulation and the permit obligations. It is important to note that if a high tunnel structure causes accelerated erosion and sedimentation or other pollution, whether the structure triggers a Chapter 102 permit or not or is exempt from the Storm Water Act requirements, it may still be subject to enforcement under the CSL.

In addition, the **Pennsylvania Chapter 105 Dam Safety and Waterway Management regulations** implement provisions of the DSEA. Under these regulations, any person planning to construct or operate a structure in, along or across, or projecting into a watercourse, floodway or body of water, whether temporary or permanent, must obtain a Chapter 105 permit from the Department in order to prevent unreasonable interference with water flow and to protect navigation. High tunnel systems triggering these requirements must obtain and follow the appropriate permit from the Department in order to construct or operate the facility.

Lastly, the **Storm Water Act** requires counties to prepare and adopt watershed or county based stormwater management plans for the management of stormwater when land uses are modified. It also requires municipalities to adopt and implement ordinances to regulate development consistent with these county plans. Anyone engaged in construction activities in the watershed is required to implement stormwater management measures consistent with the approved county stormwater management plan and any associated local ordinances. This law affects all structures constructed within the Commonwealth, including high tunnel systems on agricultural lands.

The General Assembly, through an April 2018 amendment to the Storm Water Act, authorized the exemption of certain high tunnel systems from the provisions of the Storm Water Act, if they are constructed and sited in accordance with the provisions of the amendment.

***Storm Water Act applicability to various types of high tunnel structures:***

While all high tunnel systems fall under the permitting obligations of the CSL and DSEA, there are certain high tunnel structures that may be considered for exclusion from the provisions of the Storm Water Act. In accordance with Act 15 of 2018, those high tunnel structures that may be considered by the municipalities or counties for exemption status under the Storm Water Act include those that meet the following three factors:

**Factor 1, Usage: High tunnel structures must be used for one of the following purposes to be considered for exemption from the provisions of the Storm Water Act:**

High tunnel systems that are used for the production, processing, keeping, storing, sale or shelter of an agricultural commodity can be considered for an exclusion from the provisions of the Storm Water Act.

The definition of an agricultural commodity includes the production of plants used for human or animal feed, forestry, and horticultural purposes. The agricultural commodity definition also includes the production and raising of livestock and poultry and the products that they generate.

High tunnel facilities used for the storage of farm equipment and farm supplies can also be considered for this exemption of the Storm Water Act.

**Factor 2, Construction: High tunnel structures must be constructed following all of the below criteria in order to be considered for exemption from the provisions of the Storm Water Act:**

1. Constructed using a metal, wood or plastic frame;
2. The materials used for covering the frames of the high tunnels include plastic, woven textile or other flexible covering; and
3. The floor of the high tunnel needs to be composed of either soil, crushed stone, matting, pavers, a floating concrete slab or a combination of these materials.

**Factor 3, Siting: High tunnel structures must be sited following the below criteria to be considered for exemption from the provisions of the Storm Water Act:**

1. High tunnel structures that result in an impervious area less than or equal to 25% of all structures located on the owner's total contiguous land area; and
2. The high tunnel facility must meet at least one of the following criteria:
  - a. Must be located at least 100 feet from any perennial stream or other watercourse, public road or neighboring property line; or
  - b. Must be located at least 35 feet from any perennial stream or other watercourse, public road or neighboring property line where the slope of the area where the facility is placed is not greater than 7 percent; or
  - c. There is a diversion system or buffer built and managed consistent with the Storm Water Act that ensures that runoff from the high tunnel does not directly drain into a stream or other watercourse.

***The following are some additional recommended construction and operational criteria used for agriculture high tunnel systems to ensure protection of waters of the Commonwealth in Pennsylvania:***

- Vegetative filter areas, diversions, buffers, water catchment basins or tanks, or other conservation measures installed around the structures allow for the management or infiltration of the runoff coming from the coverings on these structures.
- The end walls of these structures used for crop production are generally designed with doors to allow human access and some machinery access to support the planting, management, and harvesting of the crops growing within these structures.
- High tunnels used for the raising of poultry or livestock vary in size and are designed to meet the needs of the animals, the land where they will be used, and may provide for the mobility of these facilities. Frequent movement of these structures allows for maximum plant intake by the animals, minimum denuding of the vegetative areas where the animals have access, and the proper distribution of the manure generated by the animals. To provide for frequent relocation, DEP recommends that these structures be limited in size.
- Where plants are grown within these facilities, watering of the plants will be critical to ensure vigorous plant growth. This can be accomplished through the rolling up or down of the plastic or fabric covering on these facilities to allow for controlled amounts of precipitation to enter the planted area; otherwise irrigation will be necessary. Capturing of runoff from these facilities in a basin or tank can help supplement the water needed to irrigate the plants within the structure, and may also enhance stormwater management.
- When more than one structure is located on a given or adjacent property, maintaining a vegetated area of at least 20 feet between adjacent high tunnels helps to minimize the effect of runoff coming from multiple structures in the same area.
- The walls of the high tunnels are designed to allow for them to be raised or lowered to allow for humidity and temperature adjustment within the structure. Also, seeing that these structures are not typically designed to handle snow load, the sides are often raised, lowered or removed during the winter season to protect the integrity of the supporting frame of the structure.

***What assistance is available to municipalities or others in further understanding high tunnel systems excluded from the Storm Water Act?***

DEP's Bureau of Clean Water or the Bureau of Waterways Engineering and Wetlands staff can provide further direction on the implementation of these laws and the possible exclusion of certain types of high tunnel structures from the provisions of the Storm Water Act. The USDA Natural Resources Conservation Service can provide additional direction on the criteria involved in developing, managing, and financing high tunnel systems used for the production of crops.



(5) To eliminate unnecessary duplication of effort and fees related to the review of construction plans and the inspection of construction projects.

(6) To assure that officials charged with the administration and enforcement of the technical provisions of this act are adequately trained and supervised.

(7) To insure that existing Commonwealth laws and regulations, including those which would be repealed or rescinded by this act, would be fully enforced during the transition to Statewide administration and enforcement of a Uniform Construction Code. Further, it is the intent of this act that the Uniform Construction Code requirements for making buildings accessible to and usable by persons with disabilities do not diminish from those requirements previously in effect under the former provisions of the act of September 1, 1965 (P.L. 459, No. 235), entitled, as amended, "An act requiring that certain buildings and facilities adhere to certain principles, standards and specifications to make the same accessible to and usable by persons with physical handicaps, and providing for enforcement."

(8) To start a process leading to the design, construction and alteration of buildings under a uniform standard.

### § 7210.103. Definitions

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Addition." An extension or increase in floor area or height of a building or structure.

"Advisory board." The Accessibility Advisory Board created in section 106.

"Agricultural building." A structure utilized to store farm implements, hay, feed, grain or other agricultural or horticultural products or to house poultry, livestock or other farm animals, a milk house and a structure used to grow mushrooms. The term includes a carriage house owned and used by members of a recognized religious sect for the purposes of housing horses and storing buggies. The term shall not include habitable space or spaces in which agricultural products are processed, treated or packaged and shall not be construed to mean a place of occupancy by the general public.

"Alteration." Any construction or renovation to an existing structure other than repair or addition.

"Board of appeals." The body created by a municipality or more than one municipality to hear appeals from decisions of the code administrator as provided for by Chapter 1 of the 1999 Building Officials and Code Administrators International, Inc., National Building Code, Fourteenth Edition.

"BOCA." Building Officials and Code Administrators International, Inc.

"Code administrator." A municipal code official, a construction code official, a third-party agency or the Department of Labor and Industry.

"Construction code official." An individual certified by the Department of Labor and Industry in an appropriate category established pursuant to section 701(b) of this act to perform plan review of construction documents, inspect construction or administer and enforce codes and regulations in such code category under this act or related acts.

"Council." The Uniform Construction Code Review and Advisory Council established under this act.

"Department." The Department of Labor and Industry of the Commonwealth.

"Habitable space." Space in a structure for living, sleeping, eating or cooking. Bathrooms, toilet compartments, closets, halls, storage or utility spaces and similar areas shall not be construed as habitable spaces.

"Uncertified building." An existing building which, prior to April 9, 2004, was not approved for use and occupancy by the Department of Labor and Industry or a municipality which was enforcing a building code. The term does not include a residential building.

"Uniform Construction Code." The code established in section 301.

"Utility and miscellaneous use structures." Buildings or structures of an accessory character and miscellaneous structures not classified by the Building Officials and Code Administrators International, Inc., in any specific use group. The term includes carports, detached private garages, greenhouses and sheds having a building area less than 1,000 square feet. The term does not include swimming pools or spas.

#### **§ 7210.104. Application**

(a) GENERAL RULE.— This act shall apply to the construction, alteration, repair and occupancy of all buildings in this Commonwealth.

(b) EXCLUSIONS.— This act shall not apply to:

(1) new buildings or renovations to existing buildings for which an application for a building permit has been made to the municipality prior to the effective date of the regulations promulgated under this act;

(2) new buildings or renovations to existing buildings on which a contract for design or construction has been signed prior to the effective date of the regulations promulgated under this act on projects requiring department approval;

(3) utility and miscellaneous use structures that are accessory to detached one-family dwellings;

(4) any agricultural building;

(5) alterations to residential buildings which do not make structural changes or changes to means of egress, except as might be required by ordinances in effect pursuant to section 303(b)(1) or adopted pursuant to section 503. For purposes of this paragraph, a structural change does not include a minor framing change needed to replace existing windows or doors;

(6) repairs to residential buildings, except as might be required by ordinances in effect pursuant to section 303(b)(1) or adopted pursuant to section 503;

(6.1) the installation of aluminum or vinyl siding onto an existing residential or an existing commercial building, except as might be required by ordinances in effect pursuant to section 301 or adopted pursuant to section 503.

(7) any recreational cabin if:

(i) the cabin is equipped with at least one smoke detector, one fire extinguisher and one carbon monoxide detector in both the kitchen and sleeping quarters; and

(ii) the owner of the cabin files with the municipality either:

(A) an affidavit on a form prescribed by the department attesting to the fact that the cabin meets the definition of a "recreational cabin" in section 103; or

(B) a valid proof of insurance for the recreational cabin, written and issued by an insurer authorized to do business in this Commonwealth, stating that the structure meets the definition of a "recreational cabin" as defined in section 103.

(8) Temporary structures which are:

(i) Erected for the purpose of participation in a fair, flea market, arts and crafts festival or other public celebration.