



COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF ATTORNEY GENERAL

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Office of Attorney General  
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[REDACTED]

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*Re: ACRE Request – [REDACTED]  
North Coventry Township-Chester County*

Dear Mr. Thompson and Mr. Sager,

[REDACTED] of the [REDACTED] filed two requests with the Office of the Attorney General (“OAG”) pursuant to the Agricultural Communities and Rural Environment (“ACRE”) law, 3 Pa.C.S. § 311, *et seq.* His first ACRE request concerned Ordinance #30 of May 26, 2009 which regulates silvicultural practices within the Township.<sup>1</sup> [REDACTED] second ACRE petition challenged the 2016 “Motor Vehicle Weight Limitation Ordinance of North Coventry.” Township Solicitor Lawrence Sager, Esq., provided the OAG with North Coventry’s response to [REDACTED] ACRE complaints. In the meantime, Mr. Thompson, Esq., began his representation of [REDACTED] in this matter. Mr. Thompson summarized his client’s claims in a letter to the OAG that he also sent to Mr. Sager.

**BACKGROUND**

The [REDACTED] family has owned and operated [REDACTED] for three generations. In 2006, [REDACTED] harvested some timber after receiving approval from the Township. The areas that were harvested in 2006 were areas that [REDACTED] and his consulting forester determined were ready, mature, economically viable, and that required TSI (timber stand

<sup>1</sup> “Silviculture is the art and science of controlling the establishment, growth, composition, health, and quality of forests and woodlands to meet the diverse needs and values of landowners and society such as wildlife habitat, timber, water resources, restoration, and recreation on a sustainable basis.” <https://www.fs.fed.us/forestmanagement/vegetation-management/silviculture/index.shtml>

improvements) like canopy thinning. These actions were done to attain the stewardship goals in [REDACTED] Forest Management Plan.

Consistent with best management practices ("BMP's") in timber farming, [REDACTED] waited ten years before contemplating harvesting timber once again. Just as in 2006, [REDACTED] and his forester decided to harvest areas that were ready, mature, economically viable, and which required TSI. Those ten years are critical for during that time the health of the previously harvested timber stands improves. Both the quality and quantity of trees that were not harvested during the previous cutting improves and new growth thrives. See Pennsylvania State University ("PSU") College of Agriculture Sciences, *Best Management Practices for Pennsylvania Forests* (attached as "Exhibit A"). By adhering to the BMPs, [REDACTED] remains a viable agricultural operation for generations to come.

In discussions with [REDACTED] and his attorney, they have informed the OAG that [REDACTED] consistently works with a professional forester to maintain the health of the [REDACTED] timber stand. This forester drafts a Timber Harvesting Plan ("THP") which outlines the steps necessary to keep the harvest stand economically viable and ecologically sound. "A woodland plan is a living document that can help [a landowner] in achieving [his/her] short and long-range goals, including leaving a legacy for [a landowner's] family." <http://www.ncforestservice.gov/publications/Forestry%20Leaflets/FM20.pdf>, p. 2. "Generally speaking, a forest management plan should be reviewed every five years, to make sure it's current." <https://www.mountain-acreage.com/forest-plans.html>. THPs include information on physical land classification like contours/slope, soil classes, drainage patterns, and forest type and distribution. The plans also cover cadastral<sup>2</sup> land classification like ownership boundaries and conservation areas. <http://www.fao.org/docrep/004/AC142E/ac142e09.htm>, p. 1. THP's are multitiered including long term, operational, and task planning. Long term planning stretches from one (1) to twenty (20) years. Operational planning identifies the particular areas to be harvested. Task plans list the specific tasks that must be completed in order to harvest timber such as road construction, workshop construction, and weed control. *Id.*, p. 2.

[REDACTED] has informed the OAG that the THP are the "directions" the consulting forester gives the logger contracted to do the actual timbering, *i.e.*, what and how many trees to harvest, where to skid or drag the trees, where to make haul roads and landings, delineates sensitive environmental areas, and includes the Erosion & Sedimentation ("E&S") plan. The THP is written each time a harvest is planned. [REDACTED] states that a Forest Management Plan or Forest Stewardship Plan is the consulting forester's "prescription" of how to obtain the goals of stewardship and the desired long term plans of the landowner for his/her forest. It includes desired species mix goals, suggested BMPs, riparian buffer goals, wildlife habitat goals, economic and recreational goals. This is a fluid document which changes as the forest, a living ecosystem, changes; it is also updated to reflect the desires of the landowner.

Pursuant to this THP, in 2016 [REDACTED] prepared to harvest more timber which North Coventry halted until he complied with all provisions of the ordinance. [REDACTED] contractor is planning to begin harvesting on the portion of [REDACTED] land located in Warwick Township in July of 2018. [REDACTED] would like to add the North Coventry Township harvest at the same time but the onerous requirements of the ordinances are making that impossible. Because [REDACTED] cannot harvest in North Coventry, the contractor will have to move all of his equipment out of Warwick Township when that harvest is completed and return to North Coventry in 6 months. [REDACTED] claims that he will lose harvest revenue due to the extra cost

<sup>2</sup> Showing the extent, value, and ownership of land. <https://en.oxforddictionaries.com/definition/cadastral>

of re-mobilizing his contractor's equipment. Because of this, [REDACTED] needs the ability to begin his harvest in July. [REDACTED] tells the OAG that he believes the Township is energetically pursuing a policy of maintaining its bucolic nature and is operating under the incorrect belief that timber harvesting is detrimental to its efforts to preserve an aesthetically pleasing and environmentally sound municipality.

Against this background, [REDACTED] raises the following claims in his ACRE petitions:

1. E&S Plan – the North Coventry ordinance requires an E&S plan, duplicating an existing requirement under state Department of Environmental Protection (“DEP”) regulations;

2. North Coventry's Woodlands and Timber Harvesting ordinances violate or exceed state law by:

a. requiring that a professionally developed timber harvesting plan be filed with the Township;

b. mandating the plan include all natural features and topography of the property, along with the species of each tree to be harvested as well as those to be left standing;

c. having the timber harvester designate a time period to re-establish the forest canopy for approval by the Township.

3. North Coventry's prohibition on: (a) the removal of specimen vegetation unless the harvester demonstrates that such removal is necessary to eliminate a hazardous condition or demonstrate a financial hardship and (b) timber harvesting within riparian buffers and on slopes in excess of 25% exceeds state law;

4. North Coventry's requirements of liability insurance, onerous permit fees, and the payment of all Township permit and timber harvesting plan review expenses amounts to an unauthorized limitation on a Normal Agricultural operation (“NAO”); and

5. The Motor Vehicle Weight Limitation Ordinance as it is being applied to [REDACTED] is contrary to state law.

These are the issues causing [REDACTED] the most immediate harm and which must be addressed in the short term. The OAG would like to come to some type of settlement so that [REDACTED] can harvest his North Coventry timber. The ACRE review of the entirety of North Coventry's timber ordinances is ongoing and if the OAG discovers further problems with the ordinances those will be dealt with in the future.

### **NORMAL AGRICULTURAL OPERATION**

There is a common misperception that the term “agriculture” is confined to the well-known practices of growing crops and raising animals. However, silviculture is a “Normal Agricultural Operation” and “[f]orestry and forestry products” are agricultural commodities as defined by the

Right to Farm Act (“RTFA”). 3 P.S. § 952. The Municipalities Planning Code (“MPC”) explicitly addresses the considerable limitations on municipal authority to regulate timber harvesting as follows:

[z]oning ordinances may not unreasonably restrict forestry activities. To encourage maintenance and management of forested or wooded open space and promote the conduct of forestry as a sound and economically viable use of forested land throughout this Commonwealth, forestry activities, including but not limited to, timber harvesting, shall be a permitted use of right in all zoning districts in every municipality. 53 P.S. § 10603(f).

This provision explicitly states the intent of the General Assembly to encourage and promote timber harvesting throughout the Commonwealth as a use as of right in all zoning districts. As noted in the PSU College of Agricultural Sciences publication, *Dealing with Local Timber Harvesting Ordinances*, p. 4 (attached as “Exhibit B”), “[i]n 1992, the Pennsylvania legislature enacted the first MPC forestry-related provision, referred to as ‘the right to practice forestry’ provision, which prohibits municipalities from unreasonably restricting forestry activities.” Timber harvesting is the only agricultural practice that is a *use as of right* in all zoning districts. Attached is a Penn State publication on timber harvesting practices explaining how most concerns supporting local regulation are addressed by State law requirements, removing the need for local regulation of forestry activities. See PSU College of Agricultural Sciences, *Timber Harvesting in Pennsylvania, Information for Citizens and Local Government Officials* (attached as “Exhibit C”).

Moreover, the objective of the General Assembly to broadly encourage and promote all types of agriculture, including forestry, is made perfectly clear in the RTFA<sup>3</sup> and other provisions of the MPC.<sup>4</sup> The General Assembly’s Historical and Statutory Notes to ACRE declare the Commonwealth has a “vested and sincere interest in ensuring the long-term sustainability of agriculture and normal agricultural operations” and “[i]n furtherance of this goal...has enacted statutes to protect and preserve agricultural operations for the production of food and other agricultural products.” Both the black letter and the spirit of the law require municipalities to encourage and support, not hinder, timber harvesting.

## E&S REQUIREMENT

The North Coventry Township Timber Harvesting Ordinance (“Ordinance”) generally requires an E&S Plan that has been approved by the Chester County Conservation District be included in the application for a timber harvesting permit, *Ordinance # 30, Section 370-29B(7)(g)(2)(a)(ii)*. The Ordinance contains detailed criteria for inclusion in the E&S Plan; these exacting requirements are at a **minimum**. *Id.*, See also (2)(c)(iii)(a-e)(emphasis added).

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<sup>3</sup> “It is the declared policy of the Commonwealth to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products...It is the purpose of this act to reduce the loss to the Commonwealth of its agricultural resources by limiting the circumstances under which agricultural operations may be the subject matter of nuisance suits and ordinances.” 3 P.S. § 951, **Legislative policy**.

<sup>4</sup> “It is the intent, purpose and scope of this act...to promote the preservation of this Commonwealth’s...prime agricultural land...to encourage the preservation of prime agricultural land...” 53 P.S. § 10105, **Purpose of act**. “Zoning ordinances shall encourage the continuity, development and viability of agricultural operations.” 53 P.S. § 10603(h). **Ordinance provisions**.

Under the Clean Streams Law, 35 P.S. § 691.1, *et seq.*, the DEP regulates erosion and sediment control and “requires persons proposing or conducting earth disturbance activities to develop, implement and maintain [best management practices] to minimize the potential for accelerated erosion and sedimentation and to manage post construction stormwater.” 25 Pa. Code § 102.2(a). Timber harvesting is subject to the DEP’s E&S regulations. *Id.* § 102.4(b), 102.5(b), & (d). DEP defines “timber harvesting activities” as “[e]arth disturbance activities including the construction of skid trails, logging roads, landing areas and other similar logging or silvicultural practices.” *Id.* § 102.1.

A timber harvest operation that disturbs more than 5,000 square feet must develop and implement a written E&S plan. *Id.* § 102.4(b)(2)(i). An E&S plan is “[a] site specific plan consisting of both drawings and a narrative that identifies BMPs to minimize accelerated erosion and sedimentation before, during and after earth disturbance activities.” *Id.* § 102.1. DEP requires an E&S plan to be “prepared by a person trained and experienced in E&S control methods and techniques applicable to the size and scope of the project being designed.” *Id.* § 102.4(b)(3). The E&S plan must identify and account for the “types, depth, slope, locations and limitations of the soils.” *Id.* § 102.4(b)(5)(ii). A timber harvesting operation involving 25 acres or more of earth disturbance activity must obtain an E&S permit from DEP, in addition to the E&S plan. *Id.* § 102.5(b).

North Coventry requires [REDACTED] E&S Plan to receive prior approval from the Chester County Conservation District. Conversely, the DEP’s erosion and sediment control regulations do not require submission of an E&S plan to the Conservation District and the Conservation District has no role in DEP’s approving of such plans. 25 Pa. Code § 102.4(b)(8). The DEP requires the written E&S plan, inspection reports and monitoring records be available “at the project site during all stages of the earth disturbance activities.” *Id.*, § 102.4(b)(8). The Township may, at its own expense, submit an applicant’s E&S Plan to the Conservation District for review to check compliance with the regulations. What North Coventry cannot do is require [REDACTED] to get approval from the Conservation District prior to harvesting. That portion of subsection (2)(a)(ii) requiring Conservation District approval exceeds state regulatory requirements and must be deleted.

*Ordinance # 30, Section 370-29B(7)(g)(2)(c)(iii)(a-e)* lists the minimum requirements for an E&S Plan. While the Township is within its authority to request copies of these plans and permits, the requirements under subsections (a-e) are fully addressed through a written E&S plan prepared in compliance with DEP’s erosion and sediment control regulatory structure. *See* 25 Pa. Code § 102.4. The Township does not have authority to duplicate the DEP’s regulatory requirements through its Ordinance. *See Commonwealth v. East Brunswick Township*, 980 A.2d 720, 733 (Pa. Cmwlth. 2009) (explaining that a township cannot duplicate the regulatory regime established by the Solid Waste Management Act and cannot impose more stringent requirements than the SWMA.”). As a result, subsection (c)(iii)(a-e) must be deleted.

### **CONSULTING PROFESSIONAL FORESTER**

North Coventry requires that an applicant’s timber harvesting plan to be “prepared by a Professional Consulting Forester...” *Ordinance # 30, Section 370-29B(7)(g)(2)(a)(i)*. The *Definitions* Section of the Ordinance states that a:

“Professional Consulting Forester” is “[a] forester who has obtained the professional certification of Certified Foresters®, by the Society of American Foresters (SAF) or full membership in the Association of Consulting Foresters of America (ACF) for the purposes of this ordinance shall be considered a Professional Consulting Forester. Alternatively, and prior to filing any permit application, an individual can petition the Board of Supervisors to qualify as a professional consulting forester under this Chapter by submitting their educational and professional qualification, samples of previous timber harvest plans and references from Pennsylvania townships/boroughs for review. The minimum requirements for consideration are: (1) A person who has a Bachelor of Science degree in Forestry from a college accredited by the Society of American Foresters; (2) engaged in forestry consulting work to the general public on a fee or contractual basis; (3) must not have an economic interest in timber purchasing or procurement entity; and (4) prepared a minimum of five approved Timber Harvesting Plans within the state.”

Pennsylvania does not have a license or registration requirement for foresters. The requirements of this definition are overly broad and unduly burdensome and are therefore unreasonable. The requirement for an individual to petition the Board of Supervisors for approval prior to filing any permit or application is tantamount to requiring conditional use approval to harvest timber - this is unlawful for timber harvesting is a use as of right in all zoning districts under the MPC. The absence of state licensing or registration requirements does not allow a municipality to enact unnecessarily restrictive and ambiguous licensing qualifications. Forestry experts at the PSU College of Agricultural Science have advised the OAG<sup>5</sup> that a forester may hold a degree in various related forestry studies and have demonstrated experience working in the field of forestry in order to be qualified to write a timber harvesting plan. The Ordinance definition may be amended to require as follows:

“Professional Forester” is a forester meeting one of the following requirements:

- (a) Two years of technical forestry experience and an associate’s degree in forest technology, forestry, forest management, forest ecosystem management, urban forestry, forest science, agroforestry, or a related forestry or natural sciences degree; or
- (b) A bachelor’s degree in forest technology, forestry, forest management, forest ecosystem management, urban forestry, forest science, agroforestry, or a related forestry or natural sciences degree; or
- (c) A master’s degree in forest technology, forestry, forest management, forest ecosystem management, urban forestry, forest science, agroforestry, or a related forestry or natural sciences degree.

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<sup>5</sup> Under the ACRE law, “the College of Agricultural Sciences at The Pennsylvania State University shall, upon request of the Attorney General, provide expert consultation regarding normal agricultural operations in this Commonwealth.” 3 Pa.C.S §314(d). The OAG has been dealing with timber cases under ACRE for several years. Given the highly technical nature of forestry issues this Office has consulted with PSU professors pursuant to §314(d) for assistance in properly analyzing timber ordinances under ACRE.

This definition is based on the Pennsylvania Civil Service Commission's criteria for what constitutes a "Professional Forester." The Pennsylvania Department of Conservation and Natural Resources ("DCNR"), Bureau of Forestry, utilizes this exact definition when determining who qualifies as a "Professional Forester." This definition represents the best and most objective way to describe the necessary qualifications for a Professional Forester; as such, it supersedes the Township's attempt to define it differently.

### **NATURAL FEATURES/TOPOGRAPHY, SPECIES TO BE HARVESTED AND THOSE TREES TO REMAIN**

*Ordinance # 30, Section 370-29B(7)(g)(2)(c)(ii)(c)* mandates that the "legibly drawn Site Plan" include "[a]ll natural features and topography of the property." This section also requires the natural features and topography map to "be from published USGS maps contour lines at intervals of not more than five (5) feet." The MPC prohibits ordinances from "unreasonably restrict[ing] forestry activities." 53 P.S. § 10603(f). The OAG consulted with a timber harvesting expert at PSU who explained that the five foot interval requirement for the topographic map is excessive and cost prohibitive. The intervals on most topographic maps in Pennsylvania are twenty feet. The expert opines that while a map with five feet intervals may be a reasonable requirement for a residential development, such a short interval is not necessary for a timber harvest even including road planning on a harvest. Complying with the Ordinance forces the applicant to incur the added expense of completing a site specific survey; topographic maps with twenty foot intervals do not. In order to procure a site specific survey, [REDACTED] would have to hire a professional land surveyor. The Pennsylvania Society of Land Surveyors explains on its website that "[d]epending on the nature and extent of the work, [a survey would cost] anywhere from a few hundred to several thousand dollars." <https://psls.org/whysurveyor>. [REDACTED] would not be paying for a simple boundary/metes and bounds survey, but rather, the more complicated and labor intensive topographic survey. The cost would necessarily be on the higher rather than the lower end. Forcing a landowner to expend additional resources of time and money for a site specific survey instead of allowing that owner to rely upon already existent 20 foot maps constitutes an unreasonable restriction on timber harvesting. To bring the existing ordinance into compliance with state law, it should be amended to provide "topography with twenty foot contour intervals customarily used for timber harvest mapping."

*Ordinance # 30, Section 370-29B(7)(g)(2)(c)(i)(g)* requires the timber harvesting plan to have "[a] table or list, including the size at DBH<sup>6</sup> and species of each tree to be harvested and the trees that are to remain." The PSU expert advises that the obligation to tally both the cut and residual trees represents an unreasonable, cost-prohibitive exercise for the timber harvesting operation. A timber harvesting contract describes the trees to be cut such that the residual tree stand conditions can be determined using a plot-based estimate. This plot-based estimate involves estimating the residual basal area<sup>7</sup>, the average residual tree diameter, and the number of trees per acre; all of this information derives from plots at the site. The use of point sampling, random plots, and estimation are statistically sound common practices used by professional foresters. By taking the pre-harvest stand description of basal area with the number of trees per acre by species from the plots it is possible to estimate the average stand diameter. Upon review of the pre-harvest and post-harvest numbers, a professional forester determines the existing forest conditions and the

<sup>6</sup> Diameter at Breast Height

<sup>7</sup> Residual basal area is the cross-sectional area of trees expressed in square feet per acre.

conditions following the harvest. This process allows a professional forester to assess the future sustainability for the tree stand consistent with the harvesting plan. To comply with state law, this subsection should be amended to require that a plot-based estimate of the residual tree stand conditions be included in the timber plan.

### **TIME PERIOD FOR REESTABLISHMENT OF THE FOREST CANOPY**

*Ordinance # 30, Section 370-29B(7)(g)(2)(c)(i)(i)* requires the timber harvesting plan to include long range “forest regeneration” strategies including, but certainly not limited to, “a time period sufficient to reestablish the pre-existing canopy to assure the woodland preservation subsequent to the harvest.”

A timber harvesting plan is distinct from a woodland management plan. The PSU expert advises that in Pennsylvania, woodland management plans are developed to achieve desired forest regeneration. According to the expert, “regeneration” suggests what is known as “artificial regeneration” like replanting or reseeding an area that has been harvested. However, most forests will regenerate naturally and requiring artificial regeneration is an unreasonable restriction. As the PSU School of Agriculture explains:

[a]rtificial regeneration, reseeding or replanting an area where a forestry operation took place, is often written into timber ordinances as a requirement. An ordinance requiring artificial regeneration, however, is typically not necessary in Pennsylvania. When acceptable silvicultural practices are used, most of Pennsylvania’s forest will regenerate naturally from seeds already in the soil or sprouts from stumps. These naturally regenerated trees have been shown to grow faster and survive better than the planted trees. Therefore, it is unreasonable, both economically and ecologically, to require a forestry operation to artificially regenerate the site. Species requirements also prevent landowners from improving the overall quality of their woodlot...Requiring artificial regeneration can create an unnecessary economic obstacle for a timber harvesting operation. As a result, this requirement is unreasonable and should not be included under local timber harvesting ordinances.

PSU College of Agricultural Sciences, *Dealing with Local Timber Harvesting Ordinances*, p. 18 (Exhibit B).

Presently North Coventry has elevated the broader question of forest resource management - with an implementation timeframe that often extends across 10 or more years - to the level of an enforceable legal requirement, i.e. an ordinance. This unreasonable restriction on timber harvesting runs contrary to the clear legislative intent of promoting and encouraging timber. *Ordinance # 30, Section 370-29B(7)(g)(2)(c)(i)(i)* must be deleted.

### **SPECIMEN VEGETATION**

*Ordinance # 30, Section 370-29B(7)(g)(2)(d)(viii)* prohibits specimen vegetation from being harvested “unless the Applicant can demonstrate to the satisfaction of the Township that such removal is essential to eliminate a hazardous condition(s) or there is a demonstrable financial hardship if the vegetation is not removed.” PSU experts advise that requiring identification of

specimen vegetation is time and cost prohibitive to a timber harvesting operation; precluding the harvesting of “specimen vegetation” impacts the economic value of a timber harvest and interferes with prescribed silvicultural practices for forest management and regeneration.<sup>8</sup>

North Coventry’s ordinance defines “Specimen Vegetation” as “[i]ndividual trees or other vegetation determined to be of specimen quality as determined by a registered landscape architect...or generally fall within the parameters of the following table...” *Ordinance # 30, Section 370-29B(7)(a)*. The Table entitled *Examples of Specimen Trees*, list seventeen different “specimen” tree species and the minimum DBH these species must obtain prior to harvesting. These listed trees are only “examples of what constitutes a specimen tree and is not considered all inclusive.” As a result, a “specimen tree/vegetation” is whatever the Township deems it to be at that particular point in time. It certainly is not restricted to seventeen species of a certain diameter; nor is it limited to the common understanding of a “specimen” tree: a tree that is the focus of interest in someone’s garden or that has unique or noteworthy characteristics. See e.g. <https://www.gardeningknowhow.com/ornamental/trees/tgen/what-is-a-specimen-tree.htm> and [https://www.matthewsnc.gov/files/documents/Chapter99\\_TreeOrdinance1315113715012717AM.pdf](https://www.matthewsnc.gov/files/documents/Chapter99_TreeOrdinance1315113715012717AM.pdf).

North Coventry’s imprecise definition of “specimen tree/vegetation” places an unreasonable restriction on timber harvesting in violation of the MPC. Township ordinances cannot be vague and ambiguous. “A local government unit has no authority to adopt an ordinance that is arbitrary, vague or unreasonable or inviting of discriminatory enforcement. *Exton Quarries, Inc. v. Zoning Board of Adjustment*, 425 Pa. 43, 228 A.2d 169 (1967). A vague ordinance is one that proscribes activity in terms so ambiguous that reasonable persons may differ as to what is actually prohibited. *Scurfield Coal, Inc. v. Commonwealth*, 582 A.2d 694 (Pa.Cmwlt. 1990).” *Com., Office of Atty. Gen. ex rel. Corbett v. Richmond Twp.*, 2 A.3d 678, 681 (Pa. Cmwlt. 2010). This ordinance contains no definable standard to determine what is, or is not, a specimen tree. Such a vague definition will lead to the arbitrary and/or discriminatory enforcement of the ordinance. *Ordinance # 30, Section 370-29B(7)(g)(2)(d)(viii)* and *Ordinance # 30, Section 370-29B(7)(a)* must be deleted.

### **SLOPES IN EXCESS OF 25% AND RIPARIAN BUFFERS**

*Ordinance # 30, Section 370-29B(7)(g)(2)(d)(iii)* prohibits timber harvesting “on areas with slopes greater than 25%.” This blanket restriction violates the MPC by unreasonably limiting forestry activities in conflict with recognized forestry BMP’s.

The PSU expert states that an E&S plan in conjunction with the timber harvesting plan adequately addresses harvesting on steep slopes. The E&S Plan requires BMP’s for runoff or soil degradation. 25 Pa.Code § 102.4. Those BMP’s include precluding use of operating equipment and haul and skid roads on steep slopes. Timber harvesting on steep slopes typically involves using cables to remove logs from the felling site. See *Timber Harvesting Operations Field Guide For Waterways, Wetlands and Erosion Control*, DEP Bureau of Watershed Management-2009 (Attached as “Exhibit D”) The expert maintains that removing timber in accordance with the BMP’s does little to change water infiltration or destabilize soils because tree roots, even from

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<sup>8</sup> Prescribed silvicultural practices such as intermediate treatments (cleanings, thinning and improvement cuts); regeneration methods (single tree and group selections; shelterwood, seed tree, and clear cut methods); and the crops tree method. See PSU College of Agriculture Sciences, *Best Management Practices for Pennsylvania Forests*, pp. 11-13 (Exhibit A).

harvested trees, continue to hold the soil in place. Conversely, fallen trees pull up their roots in what foresters call a “root ball” and are more likely to destabilize the soils from water infiltration. As explained in *Dealing with Local Timber Harvesting Ordinances*, “[c]ertain sites require specific silvicultural methods to ensure proper regeneration of species and forest stands. Timber harvesting operations should be given flexibility to determine what method or methods will best allow for future forest stands.” Exhibit B, p. 17

The Township can amend *Ordinance # 30, Section 370-29B(7)(g)(2)(d)(iii)* to require that “[a]ny timber harvesting proposed on slopes of 25% or greater must provide an explanation of the Erosion and Sediment Control best management practices to be employed on the slopes, the reasons for harvesting on the slopes, and method for retrieving the logs that are felled on the slopes.”

*Ordinance # 30, Section 370-29B(7)(g)(2)(d)(iv) & (v)* prohibits harvesting within a Zone-One Riparian Buffer and permits harvesting only “within the 10% disturbance allowance in a Zone-Two Riparian Buffer.” This conflicts with the DEP’s Erosion and Sediment Control and Waterway Management regulatory schemes which establish best management practices for timber harvesting near streams, ponds, wetlands, floodplains, and other waters of the Commonwealth. 25 Pa. Code §§ 102; 105. These regulations do not preclude timber harvesting activities in these water-sensitive areas. Instead, the amount of buffer zone that DEP requires near water sources depends on many variables, including soil type, slope, vegetative cover, and stream character. *See* Exhibit D, p. 21. All timber harvesting activities are required to have a written E&S Plan to establish controls for activities near water sources. Exhibit D, p. 1; 25 Pa. Code § 102.4(b). Certain activities such as the “deposition of solid fill, gravel, soil, slate and other such material in wetlands, streams and floodways for construction of temporary and permanent roads” associated with timber harvest operations may also require a permit under the Waterway Management regulations. Exhibit D, p. 8; 25 Pa. Code § 105.11 & 13 Permits are not required to “cut timber and other vegetation;” this includes cutting in wetlands.<sup>9</sup> 25 Pa. Code § 105(a)(8).

The BMPs for the Waterway Management regulations require adequate buffer zones “where roads, skid trails, or log landings will be located near streams or wetlands.” Exhibit D, p. 19. The buffer zone width “depends on the slope between the forestry activity and the stream/wetland.” *Id.*)

As explained in the manual:

Buffer zones are land areas adjacent to both flowing and nonflowing water bodies where specific management strategies should be applied. Buffer zones protect wetlands, streams, lakes and ponds by helping to:

- protect water quality by filtering sediments and other pollutants from surface runoff;
- maintain proper water temperatures and degree of shading for both aquatic plant and animal life; and
- help retain sources of food and cover for wildlife species that use forested wetlands.

*Id.*, p. 20.

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<sup>9</sup> The Federal Clean Water Act exempts silvicultural activities within wetland areas from permit and regulatory requirements when managed under best management practices. 33 U.S.C. § 1344(f)(10)(A).

The DEP requires certain best management practices when felling trees near wetlands or other water sources, which includes buffer zone requirements. *Id.*, pp. 21, 27-28; 25 Pa.Code § 102.14. Harvesting timber within a water source buffer zone is permitted subject to retaining 60% of the tree canopy “to prevent an increase in water and ground surface temperature.” *Id.*, p. 21; 25 Pa.Code § 102.14(b)(1). Timber harvesting should be “done with regard to season, soil type, soil moisture, and type of equipment used.” *Id.*, pp. 24-25. The “[c]areful implementation of BMPs will protect and enhance important wetland functions while allowing for cost-effective timber harvesting.” *Id.*, p. 25.

Due to the varying conditions in a particular forest the BMP’s necessary to protect environmental resources will also vary. For this reason, the Township’s blanket prohibition on harvesting in Zone-One riparian buffers and harvesting only within the 10% disturbance allowance in a Zone-Two riparian buffers is unsupportable. This Ordinance directly conflicts with the DEP’s Erosion and Sediment Control and Waterway Management regulatory schemes; this regulatory framework allows timber harvesting activities near water sources using required best management practices determined by the unique site conditions of a specific property. Therefore, this Ordinance is an unreasonable restriction on timber harvesting. We suggest that the Township amend this provision to provide that “[a] Timber Harvesting Plan proposing to engage in timber harvesting activities near zone one or zone two riparian buffer shall include a description of the best management practices required for the activity under both an Erosion and Sediment Control Plan and pursuant to the Dam Safety and Waterway Management regulations and best practices manual for timber harvesting operations.”

### **INSURANCE, FEES, EXPENSES**

*Ordinance # 30, Section 370-29B(7)(g)(2)(a)(iii)* mandates the harvester provide “[p]roof of public liability insurance with sufficient coverage to include any damage to streams and public property.” The OAG is not aware of any authority to support the Township’s requirement for proof of liability insurance; rather the opposite is true. The Township has no authority to impose personal liability. It has only the authority to enforce zoning ordinance provisions as provided by the MPC. 53 P.S. §§ 10616.1; 10617.2. Enforcement for purported violations of zoning ordinance provisions requires the Township to initiate enforcement proceedings, including providing an enforcement notice and other due process requirements. *Id.* The insurance subsection cannot be considered as the enforcement of a zoning ordinance and must be deleted in its entirety.

The OAG does not take issue with the general principle of requiring a permit for timber harvesting operations. However, the Ordinance permit costs for timber harvesting operations are overly restrictive and unreasonable and beyond the Township’s authority under state law. The “[c]omprehensive state regulations already cover many aspects of a timber harvesting operation,” thus “in most cases...these permits should only serve to verify that state laws are being followed.” *Dealing with Local Timber Harvesting Ordinances*, Exhibit B, p. 14.

North Coventry’s Schedule of Fees requires “\$1,000 [p]lus a \$1,000 escrow for review by the Township Forester” to pay for the “Tree Harvesting Permit/Review;” i.e. a cost of \$2000 simply “to verify that state laws are being followed.” A Township may require a permit for timber harvesting operations and charge a fee to secure that permit. Permitting is required for numerous activities; charging a fee to process the application for the permit is accepted practice. However, the MPC is quite clear that a Township “may prescribe [only] **reasonable** fees with respect to the administration of a zoning ordinance....” 53 P.S. § 10617.3(e)(emphasis added). *See Golla v.*

*Hopewell Township Board of Supervisors*, 452 A.2d 273 (Pa.Cmwlt. 1982)(A municipality has authority under the MPC to impose a reasonable fee with respect to applications.) Previous OAG ordinance reviews held permit fees in the \$100 range as reasonable under the MPC; a fee ten times that figure is an exorbitant amount and necessarily discourages timber harvesting contrary to the laws promoting that particular type of NAO. North Coventry must reduce its permit fee to a “reasonable” amount. As most townships charge \$100 to review permit applications, the OAG recommends that amount.

The “\$1,000 escrow for review by the Township Forester” violates state law as well. The MPC expressly prohibits Townships from charging a landowner “expenses for engineering...or other technical consultants...costs” in administering a zoning ordinance. 53 P.S. § 10617.3(e). Here, the Township charges \$1,000.00 to have the Township Forester review the application. This review, by necessity, must be done by an engineer or technical consultant with expertise in timber harvesting operations. Timber harvesting is a permitted use by right in all zoning districts. North Coventry’s attempt to escrow funds for reviewing a permit application for a permitted use by right is tantamount to converting the application into one for a conditional use, which it cannot do. The Township must delete the \$1,000.00 review escrow and no longer charge those seeking to harvest timber that amount.

### **MOTOR VEHICLE WEIGHT LIMITATION**

North Coventry passed the “Motor Vehicle Weight Limitation Ordinance of North Coventry” in January, 2016. Therein the Township states that the weight limitation for vehicles travelling on Hill Camp Road is ten (10) tons. *Chapter 340-18, Section D, Findings of the Board of Supervisors of North Coventry Township*. [REDACTED] is located on [REDACTED] and is the sole method of ingress into and egress from the property. The Ordinance generally exempts “Local Traffic” from the weight restriction which includes “vehicles and combinations going to or coming from a...farm...which can only be reached via a posted highway.” *Id, Section C, Definitions*. The Ordinance on its face does not violate state law and in fact largely mirrors it. *See 75 Pa.C.S. § 4902, Restrictions on use of highways and bridges; 67 Pa.Code § 189.2(4), Definitions, Local Traffic*. The manner in which North Coventry has implemented its ordinance, however, constitutes an “as applied” ACRE violation.

The OAG understands that North Coventry has posted the ten ton weight limit on [REDACTED] with no exceptions for local traffic; the road signage simply states the weight limit with no “local deliveries exempt” language. In order to be in compliance with state law and its own ordinance, North Coventry has to put the “local deliveries exempt” language on the signs. “Local Traffic” under state law and North Coventry’s Ordinance includes vehicles going to or coming from [REDACTED] because it can only be reached from [REDACTED]. In practice, North Coventry does not recognize this exception. On at least one occasion, a company delivering a piece of equipment to [REDACTED] in excess of ten tons saw the weight restriction sign and noted there was no “local delivery exempt” language. The driver refused to traverse the road, as he would not run the risk of losing his CDL license or being otherwise cited for a violation. He is steadfast in his refusal and will not drive on the road without the local deliveries exemption being explicitly recognized. The local delivery exemption is written into the Ordinance, but not recognized in practice. Vehicles in excess of ten tons are permitted to come and go from [REDACTED] as they meet the local traffic exemption in state law and North Coventry’s Ordinance.

Under the Ordinance if the Township “determines that any [exempted] local traffic is likely to damage the road” then North Coventry can allow these vehicles to use that road as long as “such undertaking or security as they deem necessary to cover the costs of anticipated or probable repairs and restoration necessitated by the permitted movement of vehicles” is posted. *Chapter 340-18, Section F, Permits and Security*. On its face, this language is also consistent with state law. See 67 Pa.Code § 189.3, *Local Traffic*. Local Municipalities may impose “excess maintenance agreements” upon farmers to pay for damage attributable to the “local traffic” coming to and leaving from the farm. See 67 Pa.Code § 189.4, *Use under permit*. Truck traffic taking agricultural material to Westlake Farms is sporadic, amounting to no more than one trip a week. This is no more than, for example, the trash/recycling or heating oil trucks that service the residential neighborhoods on [REDACTED]. Moreover, the weight of the agricultural, garbage/recycling, and oil trucks is roughly be the same, *i.e.* fifteen to twenty-five tons. If North Coventry intends to enforce this ordinance, it needs to do so uniformly and cannot simply single out [REDACTED].<sup>10</sup>

It appears that North Coventry may be operating under the same misimpression that many townships have: that timber harvesting, in whatever form, is harmful and must be heavily regulated, even regulated out of existence. Responsible ownership of land and responsibly and equitably regulated timber harvesting is good for the economy and good for the environment. “Forests are an essential and significant part of Pennsylvania’s environment and economy. The Pennsylvania legislature acknowledges that carefully planned and executed timber harvesting is crucial for conserving not only the aesthetic values but also the economic values of Penn’s Woods.” Exhibit B, *Dealing with Local Timber Harvesting Ordinances*, p. 3. The annual economic contribution of timber products in the Commonwealth is \$5 billion. Moreover, timber harvesting encourages the preservation of open space, provides tax benefits to local governments, increases habitat diversity and provides other wildlife benefits, and it mimics the natural disturbances that sustain forests. Exhibit C, *Timber Harvesting in Pennsylvania, Information for Citizens and Local Government Officials*, p. 3. [REDACTED] is a responsible steward of his land who wants to preserve his property for future generations of his family as well as for the citizens of North Coventry. His forest and timber harvesting plans are living documents produced by a professional forester which are amended as conditions on the ground warrant. The forester visits [REDACTED] at regular intervals to tour the property and determine the current health of the timber stands. Based on what this professional sees, he makes recommendations to maintain the health of the stand. [REDACTED] implements those recommendations.

This is not a binary situation, that is, if [REDACTED] harvests timber North Coventry’s open spaces initiative is ruined and if he does not the initiative is preserved. Rather, [REDACTED] may harvest timber *and* the Township’s laudable goal of maintaining a rural environment can peacefully coexist.

## CONCLUSION

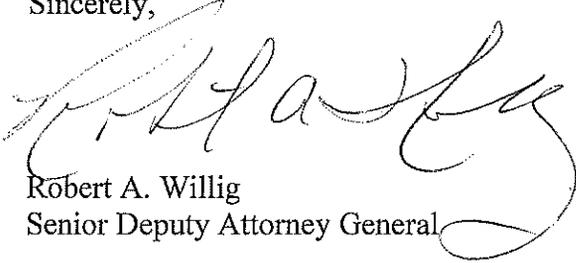
North Coventry has two options on how it wants to proceed at this point with this ACRE complaint. Option # 1 – change its ordinances as explained above. In the alternative, North Coventry can chose Option # 2 which is to repeal North Coventry’s existing timber ordinances in

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<sup>10</sup> Failure to apply this ordinance uniformly would constitute an “as applied” ACRE violation and could even give rise to an equal protection claim under the 14<sup>th</sup> Amendment and Article I, Section 26 of the Pennsylvania Constitution. See *Knipple v. Geistown Borough Zoning Hearing Board*, 624 A.2d 766, 768-769 (Pa.Cmwlt. 1993)

their entirety and implement the PSU model timber ordinances which have been attached for your review as Exhibit E. The PSU model ordinances comply with state law and resolve the instant ACRE complaint as well as precluding the necessity of further OAG review of the remainder of the timber harvesting ordinance. The OAG has made this recommendation to several other Townships. Please respond to this letter within thirty days of receipt with North Coventry's position so that we can see if we can resolve this matter without resorting to litigation in the Commonwealth Court.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Willig", written in a cursive style. The signature is positioned above the typed name and title.

Robert A. Willig  
Senior Deputy Attorney General