



KLEINBARD llc

April 5, 2016

VIA EMAIL AND REGULAR MAIL

Susan Bucknum, Senior Deputy Attorney General
Pennsylvania Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
[REDACTED]

**RE: REQUEST FOR ACRE REVIEW OF UNAUTHORIZED LOCAL ORDINANCES
LONGSWAMP TOWNSHIP, BERKS COUNTY**

Dear Ms. Bucknum:

My firm represents [REDACTED], an agricultural farmer in Berks and Lehigh Counties. Pursuant to the Agricultural, Communities and Rural Environment Act ("ACRE"), please accept this letter as a formal request to review and bring an action to invalidate and enjoin several unauthorized local ordinances enacted and being illegally enforced by Longswamp Township in Berks County, Pennsylvania.

[REDACTED] request for review concerns two separate but related matters involving the installation of a new state-of-the art agricultural irrigation system for his crops, which is being developed, supervised and funded by the USDA Natural Resources Conservation Service's ("NRCS") Environmental Quality Incentives Program ("EQIP"), and the drilling of a new well for agricultural irrigation purposes, for which [REDACTED] has sought a well permit. [REDACTED] farm engages in "normal agricultural operations" as that term is defined by the Right to Farm Act and, therefore, he is subject to the protections of ACRE from "nuisance suits" and, more importantly, local ordinances that "prohibit[] or limit[] normal agricultural operation[s.]" See 3 Pa.C.S. §§ 312, 952.

First, [REDACTED] seeks the review and invalidation of Section 202.A.4 of the Longswamp Township Subdivision and Land Development Ordinance No. 231, which over broadly defines "land development" to prohibit and limit the normal agricultural operation of watering crops.¹

¹ A copy of Longswamp Township Subdivision and Land Development Ordinance No. 231 is attached as Exh. A.

On or about September 15, 2015, [REDACTED] unexpectedly received an "Enforcement Notice" from Longswamp Township, alleging that he was in violation of Section 301.B of Ordinance No. 231 because he allegedly made "[i]mprovements in the form of an extensive irrigation system" on his agricultural farm without having submitted a "land development plan" to Longswamp Township.² The basis for the alleged violation was that Section 301.B of Ordinance No. 231 requires the submission of "land development plans" to the Township and "land development," as defined by Section 202.A.4 of Ordinance No. 231, broadly includes:

Any change in the use of the property or any structures thereon that create any impacts relating to stormwater management, erosion, grading, sedimentation control, sanitary sewer facilities, traffic impacts, lighting, noise, and/or any other impact to neighboring or adjacent property. A change in the nature of the use shall presumptively be a land development.

Exh. A at pg. II-10 (emphasis added). According to Longswamp Township, "[g]roundwater or stream withdrawals required for the operation of the irrigation system has the potential to impact neighboring or adjacent properties" and, therefore, under the definition of "land development" provided for in Section 202.A.4 of Ordinance No. 231, the submission of a "land development plan" to the Township by [REDACTED] concerning the new NRCS-approved and funded irrigation system was necessary. Exh. B at pg. 1-2.

On December 7, 2015, [REDACTED] responded to Longswamp Township's "Enforcement Notice," explaining that, not only was the purported notice procedurally incorrect and defective, but that the purported notice lacked any substantive merit in light of a recent on-site, joint inspection conducted by the Berks County and Lehigh County Conservation Districts.³ The Berks County Conservation District allegedly received a complaint "regarding an earth disturbance" on [REDACTED] farm related to his installation of the new NRCS-sponsored irrigation system. However, after fully investigating the matter, the Berks County and Lehigh County Conservation Districts concluded that [REDACTED] was "compliant with the implementation of best management practices for an irrigation system" and that "no further action was required[.]"⁴

The overly broad definition of "land development" provided for in Section 202.A.4 of Ordinance No. 231 must be invalidated and stricken because it significantly impairs the normal agricultural operations of [REDACTED] under the Right to Farm Act. Indeed, the impossibly broad definition of "land development" provided for in Section 202.A.4 serves as a "catch-all" for regulation by Longswamp Township, literally bringing within the Township's purview "any

² A copy of the September 15, 2015 Enforcement Notice is attached as Exh. B.

³ A copy of [REDACTED] December 7, 2015 Letter in response to the Enforcement Notice is attached as Exh. C.

⁴ A copy of the September 15, 2015 Letter from the Berks County Conservation District is attached as Exh. D.

change” to [REDACTED] normal agricultural operations that may in “*any*” way “impact neighboring or adjacent property.” See Exh. A at pg. II-10 (emphasis added).

Moreover, and perhaps most telling, the broad definition of “land development” provided for in Section 202.A.4 of Ordinance No. 231 is specifically omitted from the definition of “land development” as set forth in the Pennsylvania Municipalities Planning Code (“MPC”), 53 P.S. § 10107. Indeed, the definition of “land development” in Section 202.A of Ordinance No. 231 is nearly identical to the MPC in every respect, *except* that the Township’s definition adds a fourth “catch-all” provision (quoted above) that the MPC does not include. See Exh. A at pg. II-10.

Simply put, Section 202.A.4 of Ordinance No. 231, which is entirely inconsistent with the MPC, is facially invalid and must be stricken.

Second, [REDACTED] seeks the review and invalidation of Longswamp Township Ordinances No. 268, 237, and 200, which, again, prohibit and limit the normal agricultural operation of drilling a well in order to water crops.⁵

In January 2016, [REDACTED] filed an application with Longswamp Township to drill a well on his farm for agricultural irrigation purposes. In response, on or about January 26, 2016, Longswamp Township sent [REDACTED] a letter confirming receipt of his well application and enclosing Longswamp Township Ordinances No. 268, 237, and 200.⁶ The letter directed [REDACTED] to “take the time to review the Ordinances and consult with your driller in order to provide the required information for review so that we may process your permit.” Exh. H.

After [REDACTED] contacted Longswamp Township about drilling a test well on his farm, the Township sent [REDACTED] a second letter dated February 10, 2016.⁷ In that letter, Longswamp Township claimed that [REDACTED] needed to obtain a permit for his well under Section 4 of Ordinance No. 268, and that, even though Ordinance No. 200 exempted out the Township’s regulation of wells capable of withdrawing more than 100,000 gallons of water per day, Ordinance No. 268 amended Ordinance No. 200 and now requires a Township permit for such wells. See Exh. I.

It is clear from the plain text of Longswamp Township Ordinances No. 268, 237, and 200 that these Ordinances were meant to govern the regulation of permits for “water supply wells” to be used for purposes of potable drinking water or consumption. The Ordinances neither address nor contemplate the use of wells or well water for agricultural irrigation purposes. Indeed, the term “irrigation” is mentioned nowhere in any of the three Ordinances. For this reason alone, the Ordinances should be invalidated and enjoined as applied to [REDACTED]

⁵ Copies of Longswamp Township Ordinances No. 268, 237, and 200 are attached as Exhs. E, F and G, respectively.

⁶ A copy of the January 26, 2016 Letter from Longswamp Township is attached as Exh. H.

⁷ A copy of the February 10, 2016 Letter from Longswamp Township is attached as Exh. I.

Further, the Ordinances are inherently inconsistent. Ordinance No. 200 expressly states that: "The Delaware River Basin Commission shall regulate all wells over 100,000 gallons of water per day." Exh. G at pg. 3. Yet, Ordinance No. 268, without acknowledging or referencing that it supersedes Ordinance No. 200, states that: "This Ordinance shall apply to all existing and proposed water supply wells located in Longswamp Township whose design or actual use is over two thousand (2,000) gallons per day." Exh. E at pg. 2. Ordinance No. 268 does not expressly state that wells over 100,000 gallons are now being regulated by Longswamp Township instead of the Delaware River Basin Commission. Moreover, Ordinance No. 200 states that it "applies to all new, reactivated, redrilled or expanded wells within the Township[.]" whereas Ordinance No. 268 states that it applies "to all existing and proposed *water supply wells* located in Longswamp Township[.]" which, as discussed above, [REDACTED] proposed irrigation well is not. Exh. G at pg. 3; Exh. E at pg. 2 (emphasis added). Thus, if anything, it appears that the Delaware River Basin Commission, not Longswamp Township, would be the sole regulator of [REDACTED] proposed irrigation well.

Finally, in addition to impairing the normal agricultural operations of [REDACTED] under the Right to Farm Act, Longswamp Township Ordinances No. 268, 237, and 200 are preempted by the Water Resources Planning Act ("WRPA"). Section 3136(b) of the WRPA provides that "no political subdivision shall have any power to allocate water resources or to regulate the location, amount, timing, terms or conditions of any water withdrawal by any person." 27 Pa.C.S. § 3136(b). Longswamp Township Ordinances No. 268, 237, and 200 are no different than the ordinance at issue in *Com., Office of Atty. Gen. ex rel. Corbett v. Locust Twp.*, 49 A.3d 502, 513-14 (Pa. Cmwlth. 2012), which ordinance impermissibly sought to "impose water withdrawal and use requirements on agricultural uses[.]" The Commonwealth Court found the ordinance in *Locust Twp.* preempted by the WRPA. *See id.* The nearly identical Ordinances No. 268, 237, and 200 should be equally preempted by the WRPA.

In closing, it should be noted that [REDACTED] believes that the manner in which Longswamp Township has repeatedly sought to haphazardly enforce its Ordinances against him has been harassing and vexatious, and meant to target him and his farm. [REDACTED] firmly believes that certain individuals within Longswamp Township, including the Township Supervisors, are arbitrarily applying the Township's Ordinances in a manner to attack [REDACTED] personally and damage his livelihood as a farmer.

As evidence of this personal animus, when [REDACTED] submitted his permit application to Longswamp Township for the agricultural irrigation well, he also submitted the appropriate \$75 fee for non-residential well permits, as provided for in the Longswamp Township Permit Fee Worksheet.⁸ Yet, when Longswamp Township processed the permit application, the Township created a new well permit fee of \$500 (\$425 more than the typical non-residential well permit fee) for purported commercial wells. *See* Exh. J. Indeed, the Longswamp Township Permit Fee Worksheet did not even provide for such a permit fee for

⁸ A copy of the Longswamp Township Permit Fee Worksheet is attached as Exh. J.

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purported commercial wells, so the Township simply wrote in by hand the new "commercial well" fee of "\$500," without any explanation or justification. *See id.*

Accordingly, for the foregoing reasons, [REDACTED] respectfully requests that the Office of Attorney General review and ultimately bring an action to invalidate and enjoin Section 202.A.4 of the Longswamp Township Subdivision and Land Development Ordinance No. 231 and Longswamp Township Ordinances No. 268, 237, and 200.

Thank you for your attention to this matter and please do not hesitate to contact me with any question or concerns.

Very truly yours,

[REDACTED]
[REDACTED]

Enclosures

cc: [REDACTED]
[REDACTED]