



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

KATHLEEN G. KANE
ATTORNEY GENERAL

December 7, 2015

Litigation Section
15th Floor, Strawberry Square
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Via Email and First Class Mail

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RE: ACRE Review Request
Municipality of Monroeville, Allegheny County

Dear Mr. Dice,

As you know, the Office of the Attorney General received a request from the Point Circle Association (PCA) to review the Municipality of Monroeville's Zoning Ordinance and Timber Harvesting Ordinance Number 2529 (together, the Ordinance) pursuant to Section 314 of Act 38 of 2005 (ACRE). As we indicated in previous correspondence, it appears from our review that several provisions of the Ordinance and the Municipality's application of the Ordinance to PCA's request for a timber harvesting permit unlawfully prohibit or limit a normal agricultural operation in violation of ACRE.

We are prepared to bring legal action against the Municipality pursuant to Section 315 of ACRE to invalidate or enjoin the enforcement of the Ordinance provisions. Before doing so and in an effort to start negotiations to resolve this matter, we will detail the legal problems with the Ordinance provisions. We will propose changes to the Ordinance and its application that would be acceptable to the Office of Attorney General to resolve this matter by agreement.

I. PROCEDURAL ISSUES RAISED BY THE MUNICIPALITY

First, we will address several procedural issues raised in your October 6, 2014, correspondence. These issues include a challenge to the Attorney General's authority to review the ACRE request, a question on whether PCA has standing to submit an ACRE request, and an assertion about the impact of a decision by the Allegheny Court of Common Pleas affirming the Municipality's denial of PCA's timber harvesting permit. None of your arguments preclude the Attorney General from taking action against the Municipality pursuant to ACRE.

The Attorney General is granted the authority under ACRE to review municipal ordinances to ensure that they do not constitute unauthorized local ordinances. 3 Pa. C.S. § 312, 314. Section 314(c) provides a 120 day review period for the Attorney General; however, nothing in ACRE precludes the Attorney General from notifying the parties to the ACRE request that additional time is required to complete the review. On January 17, 2014, the Attorney General sent a letter to the Municipality informing it that the Office required more time to conduct the review. As discussed further below, the Supreme Court has held that the Attorney General does not need an ACRE request to review a municipal ordinance and can act at any time to take action to enjoin or invalidate an ordinance that the Office determines is an unauthorized local ordinance. Commonwealth v. Locust Township, 968 A.2d 1263, 1270-71 (Pa. 2009). Accordingly, your argument that the Attorney General is somehow precluded from pursuing the challenge to the Ordinance in this case is misguided.

With respect to PCA's standing, we begin with the fact that timber harvesting constitutes a normal agricultural operation. A "normal agricultural operation" is defined as "[t]he activities, practices, equipment and procedures that farmers adopt, use or engage in the production and preparation for market of poultry, livestock and their products and in the production, harvesting and preparation for market or use of agricultural, agronomic, horticultural, silvicultural and aquacultural crops and commodities." 3 P.S. § 952 (emphasis added); 3 Pa. C.S. § 312. An agricultural commodity is defined to include "Forestry and forestry products." 3 P.S. § 952. Therefore, timber harvesting is clearly included in the definition of a "normal agricultural operation."

ACRE provides that: "An owner or operator of a normal agricultural operation may request the Attorney General to review a local ordinance believed to be an unauthorized local ordinance and to consider whether to bring legal action." 3 Pa. C.S. § 314(a) (emphasis added). The PCA owns the forested land and seeks to have it harvested for timber to maintain the health and sustainability of the forest in order to have a permanent buffer barrier between the homes of the PCA members and the Pennsylvania Turnpike. In fact, the PCA previously harvested timber from the property in 1997 as part of regular maintenance of the forest land, which was approved by Municipality at the time. ACRE does not require a request to be from a "farmer" or an individual person. An owner or operator of forested land that seeks to engage in a timber harvest is engaging in a normal agricultural operation under State law. Moreover, the PCA's non-profit status does not impact its ability to submit an ACRE request. As provided under ACRE, a municipality cannot "restrict or limit the ownership structure of a normal agricultural operation." 3 Pa. C.S. § 312. Thus, the General Assembly recognized that owners or operators of normal

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agricultural operations may form the ownership structure as permitted under State law. Accordingly, the PCA indeed has standing to request the Attorney General's review the Ordinance.

More importantly, your standing argument misconstrues the nature of an ACRE action and the Attorney General's role in enforcing the law. ACRE confers upon the Attorney General (1) the power and duty to review local ordinances for compliance with State law, and (2) the authority and discretion to bring a legal action against a local government unit to invalidate or enjoin the enforcement of an unauthorized local ordinance. 3 Pa. C.S. §§ 314(b), 315(a). When the Attorney General brings a legal action against a municipality under ACRE, the action is brought in its official capacity on behalf of the **entire public** subject to the ordinance, not on behalf of the particular owner or operator that requested the review. The Supreme Court squarely addressed this issue in Locust Township explaining:

Although Section 314(a) of ACRE provides that a farmer may request the Attorney General to review a local ordinance, such a review is not a necessary prerequisite to the Attorney General's action. If the Attorney General decides to exercise its discretion and mount a challenge to an ordinance in the Commonwealth Court, it is not acting on behalf of the landowner; rather, it is acting in its own right, as the official charged with administering the program established by Chapter three, in order to defend and maintain the Commonwealth's interest in limiting local regulation of agriculture.

Locust Twp., 968 A.2d at 1270-71.

Similarly, in Commonwealth v. East Brunswick Township, 956 A.2d 1100, 1111 (Pa. Cmwlth. 2008), the Township argued that the Attorney General's action under ACRE was undertaken on behalf of the farmer. The Court rejected this interpretation of the Attorney General's role under ACRE, explaining:

The Attorney General is the "chief law officer of the Commonwealth and shall exercise such powers and perform such duties as may be imposed by law." Pa. Const. art. 4, § 4.1. His responsibility under [ACRE] is an example of a duty "imposed by law." To take action against ordinances that interfere with the General Assembly's policy goal to promote farming is consistent with his duty "to uphold and defend the constitutionality of all statutes so as to prevent their suspension or abrogation. . . ." When the Attorney General carries out his statutory duties, he acts on behalf of the entire public . . . [and] the Attorney General's enforcement of [ACRE] benefits the public interest.

East Brunswick, 956 A.2d at 1111-12 (citations omitted); Commonwealth v. Richmond Township, 917 A.2d 397, 403 (Pa. Cmwlth. 2007) (stating "Although the [farmer] ha[s] an interest in this matter; the same can be said for numerous others including, every farmer and entity subject to these Ordinance provisions").

Because the Attorney General brings an ACRE action against a municipality on behalf of the entire public subject to the ordinance at issue, your arguments about the PCA's lack of "standing" are without merit.

Finally, you assert that the "Ordinance has already been reviewed by the Court of Common Pleas of Allegheny County, and found to be valid." However, the Court of Common Pleas did not review the Ordinance pursuant to ACRE. Specifically, the Court of Common Pleas did not make a determination regarding (1) whether the Ordinance complies with State law in imposing requirements on normal agricultural operations, or (2) whether the Ordinance unlawfully prohibits or limits a normal agricultural operation in violation of ACRE. ACRE actions are brought in the original jurisdiction of the Commonwealth Court, which is not bound by a common pleas court decision. Therefore, the decision of the Court of Common Pleas does not preclude the Attorney General from pursuing this ACRE action.

II. STATE LAWS PROTECTING/REGULATING TIMBER HARVESTING/FORESTRY

We begin our legal analysis with an overview of the State laws that regulate and/or protect timber harvesting and forestry operations. We are aware that the Municipality of Monroeville is a Home Rule Charter Community. However, the Municipality is still bound by the limitations on municipal authority under the Pennsylvania Municipalities Planning Code (MPC). "[T]he home rule charter shall not give any power or authority to the municipality contrary to, or in limitation or enlargement of, powers granted by statutes which are applicable to a class or classes of municipalities," including the MPC. 53 Pa. C.S. § 2962(a), (c).

The MPC explicitly addresses the limit on municipal authority to regulate forestry activities, including timber harvesting, as it provides:

Zoning 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 by right in all zoning districts in every municipality.

53 P.S. § 10603(f). Clearly, this provision indicates the intent of the General Assembly to encourage the preservation of forested land and provide protections to permit the owners of forested land to maintain and manage those woodlands through timber harvesting as of right regardless of the particular zoning district. See Penn State College of Agricultural Sciences, *Dealing with Local Timber Harvesting Ordinances* (2004) (Exhibit A).

The Right to Farm Act (RTFA) precludes a municipality from regulating normal agricultural operations as a nuisance and protects direct commercial sales of agricultural commodities. 3 P.S. § 953. The definition of agricultural commodities includes "forestry and forestry products." 3 P.S. § 952. The Agricultural Area Security Law (AASL) precludes a municipality from enacting ordinances which would unreasonably restrict farm structures or

farm practices within the area. 3 P.S. § 911. The AASL defines normal farming operations to include silvicultural activities and crops to include “[t]imber, wood and other wood products derived from trees.” Id. § 903. The MPC also provides that no public health or safety issues shall require a municipality to adopt a zoning ordinance that violates or exceeds the provisions of the AASL or RTFA. 53 P.S. § 10603(h); Commonwealth v. Richmond Township, 975 A.2d 607, 616 n.13 (Pa. Cmwlth. 2009) (explaining that through section 10603(h) of the MPC, the “legislature implicitly has determined that an agricultural operation complying with these acts does not constitute an operation that has a direct adverse effect on public health and safety”).

It is also well-settled that a municipality’s “power to . . . regulate does not extend to an arbitrary, unnecessary, or unreasonable intermeddling with the private ownership of property.” Eller v. Bd. of Adjustment, 198 A.2d 863, 865-66 (Pa. 1964); Van Sciver v. Zoning Bd. of Adjustment, 152 A.2d 717, 724 (Pa. 1959) (same); Schmalz v. Buckingham Twp. Zoning Bd., 132 A.2d 233, 235 (Pa. 1957) (same).

Finally, pursuant to its authority under the Clean Streams Law, 35 P.S. § 691.1, *et seq.*, the Department of Environmental Protection (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 Erosion and Sediment Control (E&S) regulations. Id. § 102.4(b), .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 erosion and sediment (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 that an E&S plan must 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 plan for the “types, depth, slope, locations and limitations of the soils.” Id. § 102.4(b)(5)(ii). A timber harvesting operation that involves 25 acres or more of earth disturbance activity must obtain an E&S permit from DEP in addition to the E&S plan. See DEP, *Timber Harvest Operations Field Guide for Waterways, Wetlands and Erosion Control* (2009) (Exhibit B).

Against this background, we turn to the legal problems with the Ordinance, and to a suggested compromise that would correct those problems. The starting point is the ACRE law, which prohibits a municipality from adopting or enforcing a local ordinance prohibited or preempted by State law. 3 Pa. C.S. §§ 312, 313. The State laws implicated under our ACRE analysis are set forth above.

III. LEGAL PROBLEMS WITH ZONING ORDINANCE

A. Requiring Conditional Use Approval for Timber Harvesting

Section 359-11 of the Municipality's Zoning Ordinance improperly categorizes timber harvesting operations as requiring a conditional use. Specifically, Tables 201A through 201D lists "major timbering and logging operation" as a conditional use in each of the Municipality's zoning areas, except R-4 Multi-Family Residential, which does not provide for timber harvesting as a use in the zone. There is no mention of timber harvesting or forestry under the listed permitted uses in any zoning district. As set forth above, it is explicit under the MPC that forestry activities, including timber harvesting, cannot be designated as conditional uses; rather, they must be allowed as permitted uses by right in all zoning districts in the Municipality. 53 P.S. § 10603(f). Therefore, the Municipality should amend Tables 201A through 201D to delete "major timbering and logging operation" from its list of conditional uses in all zones and add the use "forestry activities and timber harvesting" as a permitted use by right in all zones, including the R-4 Multi-Family Residential. This will bring the Municipality into compliance with its authority under the MPC.

B. Article II of the Timber Harvesting Ordinance

At the outset, we want to make it clear that we do not have an issue with the general principle that the Municipality's Timber Harvesting Ordinance requires a permit for timber harvesting operations. However, the Ordinance permit requirements for "major timber harvesting operations" are overly restrictive and unreasonable, thus beyond the Municipality's authority under the MPC, violate the AASL, and conflict with the DEP's comprehensive Erosion and Sediment Control regulatory scheme.

1. Section 002-1 Permit Required

Section 002-1(C) defines "major timber harvesting operation" as follows:

A timber harvesting operation that meets any of the following criteria:

1. The operation will encompass a land area in excess of two (2) acres.
2. The operation will take place on any land exceeding a 4H:1V slope.
3. The operation will involve the clear-cutting or seed-tree cutting methods or any other method deemed by the Municipality to be similarly intensive.

Section 002-1(C)(1)-(3).

Section 002-1(C)(4) provides that a "Timber Harvesting Permit for a major timber harvesting operation is issued only after review by the Municipal Engineer, Municipal Planning Commission and approval of the Council of the Municipality of Monroeville as provided for in §

002-5 of this Ordinance.” These review requirements for issuance of a permit effectively change a major timber harvesting operation from a permitted use by right to a conditional use, which is expressly prohibited by the MPC. 53 P.S. § 10603(f). A use permitted by right is a use that is not required to be “allowed or denied by the governing body after recommendations by the planning agency and hearing.” 53 P.S. § 10603(c)(1). This type of review is specifically and only for uses designated as conditional uses as provided under the MPC. Id.

Section 002-1(C)(4) should be amended to provide that: “The Timber Harvesting Permit for a major timber harvesting operation shall be issued by the zoning officer following the applicant’s submittal of a forest plan prepared by a Professional Forester, proof of a written E&S Plan, and, only if required, an E&S Permit issued by Department of Environmental Protection.”

2. Section 002-5 Major Timber Harvesting Permit Additional Review Requirements

For the same reasons, Section 002-5 is also beyond the Municipality’s authority as this section imposes notice, review, and hearing requirements prior to approval of a major timber harvesting permit. Again, this converts timber harvesting as a permitted use by right into a conditional use. The Municipality does not have authority to require a conditional use for forestry or timber harvesting activities, thus this is an unreasonable restriction in violation of the MPC and AASL. 53 P.S. § 10603(f). The Municipality should amend this Section to delete it in its entirety.

3. Section 002-6 Issuance of Permit

Section 002-6 also contains improper additional requirements for the issuance of a timber harvesting permit. Subsection 002-6(A)(2) requiring the posting of a bond and certificate of insurance is beyond the Municipality’s authority, thus this subsection should be deleted.¹

For the reasons discussed above, subsection 002-6A(4) should be deleted in its entirety.

Subsection 002-6(A)(7) states that the Municipality may impose conditions on a timber harvesting permit, including the following:

- c. Construction of additional drainage facilities, berms, or stabilizations.
- d. Restrictions upon the size, type and number of pieces of equipment to be used, including trucks on public streets or thoroughfares.

Subsection 002-6(A)(7). Our forestry expert at Penn State College of Agricultural Science has advised that subsection (c) exceeds the requirements for E&S plans under DEP’s Erosion and Sediment Control program, thus it is preempted. He also advised that placing restrictions on equipment to be used for the timber harvest can adversely impact the proposed best management

¹ Section 002-10 should also be deleted for the same reasons.

practices to be used for the harvest, thus this requirement is an unreasonable restriction on timber harvesting in violation of the MPC. Moreover, a municipality's zoning power is limited to planning for uses and not regulating the details of an operation. In re Thompson, 896 A.2d 659, (Pa. Cmwlth. 2006) (explaining that "[z]oning only regulates the *use* of land and not the particulars of development and construction."). "Zoning is a regulation of uses, not a means of regulating the manner in which business is conducted." ROBERT S. RYAN, 1 PENNSYLVANIA ZONING LAW AND PRACTICE § 3.3.14A (George T. Bisel Company, Inc. 2001). For these reasons, the Municipality should amend the ordinance by deleting these subsections.

4. Section 002-12 Maintenance Requirements

Section 002-12 requires that property owners maintain the site in "good condition." Subsections (1)-(3) require that drainage courses, culverts, graded surfaces, and erosion and sedimentation control devices be kept in "good condition" and "good repair," as well as requiring that "adequate provisions" be incorporated to prevent the infiltration of sediment into existing streams. Aside from the fact that these subsections use vague and ambiguous language to set a standard for a property owner to comply with, these issues are already fully addressed through a written E&S plan prepared in compliance with DEP's erosion and sediment control regulatory scheme. 25 Pa. Code § 102.4. 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. The plan requires identification of a "sequence of BMP installation and removal in relation to the scheduling of earth disturbance activities, prior to, during and after earth disturbance activities that ensure the proper functioning of all BMPs." Id. § 102.4(b)(5)(vii). The plan also must establish a "maintenance program which provides for the operation and maintenance of BMPs and the inspection of BMPs on a weekly basis and after each stormwater event, including the repair or replacement of BMPs to ensure effective and efficient operation. The maintenance program must provide for completion of a written report documenting each inspection and all BMPs repair, or replacement and maintenance activities." Id. § 102.4(b)(5)(x). The DEP requires that 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).

In light of DEP's comprehensive regulatory scheme, we suggest that the Municipality amend Section 002-12(A) to require only that the owner or operator of a timber harvesting operation provide the Municipality with copies of all documentation required by DEP to be kept on site during the earth disturbance activities. This will resolve the Municipality's concern for ensuring that timber harvesting activities are complying with DEP's erosion and sedimentation control requirements. It also provides a more definitive standard by which to ensure the E&S plan BMPs are being properly maintained rather than having a municipal official enforce the current vague and ambiguous standard language to keep the property in "good condition" and in "good repair."

5. Section 002-13 Enforcement Remedies

Subsection 002-13(D) provides that a person that is convicted of a violation of the Ordinance and fails to pay the fine will be imprisoned for at least ninety days. The Municipality does not have authority to impose a term of imprisonment for violation of Ordinance provisions. The MPC sets forth the scope of a municipality's enforcement authority. A municipality's only authority for a defendant that does not pay a fine is to "enforce the judgment pursuant to the applicable rules of civil procedure." 53 P.S. § 10617.2(a). The Ordinance should be amended to delete the second sentence of Subsection 002-13(D) and replace it with the following language: "If the defendant neither pays nor timely appeals the judgment, the municipality may enforce the judgment pursuant to the applicable rules of civil procedure."

C. Article III of the Timber Harvesting Standards

As each forest stand is different, so too will each timber harvest be different. As a result, an ordinance that includes provisions allowing, requiring, or disallowing certain forestry practices throughout a municipality fails to take into consideration the unique circumstances and ecological requirements of a particular site. Restrictions on the type of forestry practices a landowner may engage in for a timber harvest can be an obstacle to the best silvicultural methods suitable for the stand at that time, thus would constitute an unreasonable restriction in violation of the MPC. We are including a Penn State publication to assist in educating the Municipality regarding timber harvesting practices and explaining the reasons why local regulation of forestry activities should be kept to a minimum, if used at all, because many of the concerns supporting the local regulation are already addressed through State law requirements. Penn State College of Agricultural Sciences, *Timber Harvesting in Pennsylvania, Information for Citizens and Local Government Officials* (2004) (Exhibit C). To be sure, the MPC was amended to allow for forestry activities as a permitted use by right in all zoning districts with the "intent to make it easier to carry out all forestry activities by limiting the scope of zoning and other regulations." Id. at 9.

1. Section 003-1(A)(2) No Harvesting on Landslide Prone Soils

Subsection 003-1(A)(2) provides that: "Timber harvesting operations may not be performed on landslide prone areas out of a concern for destabilizing the earth." This blanket restriction in the Ordinance is an unreasonable restriction on forestry activities in violation of the MPC because it conflicts with best management practices (BMPs) recognized in the field of forestry.

Our Penn State forestry expert has advised us that a complete ban for harvesting on landslide prone soils is unreasonable because it fails to consider the purpose and method proposed for the harvest. Timber harvesting can be done on landslide prone soils using BMPs to ensure soil stability. In fact, our expert explained that removing timber following BMPs does little to change water infiltration or to destabilize soils. This is because tree roots, even from harvested trees, continue to hold the soil in place. However, fallen trees pull up roots in what foresters call a root ball and are more likely to destabilize the soils than harvesting. Thus, the

older, dead, sick or infected trees left on a stand to fall pose a greater risk of landslide than a timber harvest used to remove those trees. Also, our expert explained that timber harvesting is a well-recognized forest management practice that, when properly planned, results in renewing and improving the vigor, diversity, and beauty of a forest. It is well-accepted that timber harvesting is utilized to maintain the health and sustainability of forested land.

A forest plan for a timber harvesting operation is developed by a professional forester and requires the assessment of the overall health of the forest and identification of the best management practices to be implemented to sustain and improve the health of the forest. This includes, for example, identifying which trees to remove, how much canopy to retain, addressing environmentally sensitive areas, and the overall management goals to sustain that forested land. The management goals will vary depending on the site specific conditions at a particular forest. See Penn State College of Agricultural Sciences, *Best Management Practices for Pennsylvania Forests* (2001) (Exhibit D). For these reasons, an ordinance attempting to place uniform standards on forestry activities when conditions will vary depending on the particular forest is unreasonable. The BMPs necessary for a particular forest will be set forth in properly prepared forest management and E&S plans.

Here, PCA is proposing to remove less than 10% of the trees on its forested land, which our expert describes as an "improvement" cut to release regeneration. PCA's proposal will remove about 10-15 trees per acre in the harvest, which our expert explained is a "thinning" proposal. Our expert reviewed PCA's timber harvesting proposal and explained that it is a select cut method aimed to thin the forest for its health and sustainability. Our expert explained that the select cut method along with the fact that the skid trails and logging roads already exist on the site render PCA's proposal a benign operation with good silvicultural purposes. PCA proposes to leave the stumps in the ground, which as explained, keeps soils stable. As explained by PCA, the proposed harvest "is a single tree selection timber harvest to decrease the competition from overcrowding, and to allow sunlight to the established regeneration on the forest floor, releasing it to grow unhindered." PCA Permit Application at #B-1.

We propose that the Municipality amend Subsection 003-1(A)(2) to state that: "An applicant proposing to engage in timber harvesting on landslide prone soils must provide a forestry plan prepared by a professional forester that describes the best management practices to be employed to ensure stabilization of the soils and demonstrates compliance with the Penn State College of Agricultural Sciences publication entitled *Best Management Practices for Pennsylvania Forests*." This Penn State publication is recognized in the industry as representative of the best approach for managing forest stands. (Exhibit D). It was developed by the Forest Issues Working Group which is comprised of a "diverse group of professional natural resource managers, forest landowners, scientists, and environmental organizations." (Exhibit D at 2-4).²

² For the same reasons, Subsection 003-1(A)(3) that restricts the methods of timber harvesting on slopes exceeding 4H:IV should be amended to add the phrase at the end of the first sentence stating: "unless the applicant can demonstrate that the proposed method employs best management practices to ensure stabilization of the slope and is the method recommended by the professional forester to sustain the forest."

2. Section 003-1(A)(5) Buffer Zone Requirements

Subsection 003-1(A)(5)(a) imposes a 25 foot buffer requirement. This setback buffer zone requirement is unreasonable because it precludes timber harvesting in the buffer zone in which there may be trees that should be removed to maintain the long term health of the forest, thus it is contrary to sustainable forestry practices. Moreover, there may be safety or other reasons which require the harvesting of trees in the buffer zone, including the prevention of accelerated erosion and sediment control. This is the situation for PCA's proposal. PCA has explained that certain trees must be removed along the Northeast property line in order to remove trees that are dead, sick, infected or constitute a danger to the neighboring property. PCA Permit Application at #B-2.

We recommend that the Municipality amend this Subsection to provide an exception to the 25 foot buffer requirement. Thus, the Municipality can add a parenthetical to this provision that states: "unless a reason for harvesting within the buffer zone exists and is explained in the forest plan)."

Subsection 003-1(A)(5)(b) imposes a 150 foot buffer around wetlands and water sources. The amount of buffer zone that DEP requires near water sources depends on many variables, including soil type, slope, vegetative cover, and stream character. (Exhibit B at 19-21). Our expert has advised that BMPs recommend a 50 foot buffer from wetlands. In addition, the BMPs require the retention of 50% of tree canopy cover. Therefore, it is possible to harvest trees from the buffer area, but the BMPs would require that the canopy not fall below 50% cover. The BMPs also provide that no equipment should enter the buffer zone and that harvested trees should be pulled out from the buffer zone by a winch.

Again, due to the varying conditions in a particular forest the BMPs necessary to protect environmental resources will also vary. For this reason, the blanket wetland/water source buffer zone contained in Subsection 5(b) is excessive, unreasonable, arbitrary, and contrary to BMPs. The Municipality should amend this Subsection to delete the phrase after the comma imposing the 150 foot buffer zone and replace it to state: "an applicant shall provide proof that buffer distances that are required under Department of Environmental Protection's regulations and those recommended in the Penn State College of Agricultural Sciences publication entitled *Best Management Practices for Pennsylvania Forests* are included in the forest and E&S plans."

IV. CONCLUSION

As evident from the discussion above, local ordinances that attempt to regulate the how, when, and where of activities already subject to State comprehensive regulatory schemes "have not fared well under preemption challenges." Commonwealth v. East Brunswick Township, 980 A.2d 720, 730 (Pa. Cmwlth. 2009); Commonwealth v. Richmond Township, 2 A.3d 678, 684-88 (Pa. Cmwlth. 2010). The Municipality does not have authority to establish its own regulatory scheme for timber harvesting that duplicates, exceeds, or conflicts with the MPC, RTFA, AASL, or DEP's regulatory schemes.

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In lieu of enacting the amendments we set forth above, we propose that the Municipality may consider enacting the "Pennsylvania Model Forestry Regulations" that was developed by the Penn State School of Forest Resources. (Penn State School of Forest Resources, Pennsylvania Model Forestry Regulations (2000) (Exhibit E). "The model is intended to address fairly the needs and concerns of local citizens as well as forest landowners and the forestry industry." Id. at 1. "It is also designed to be consistent with the so-called 'Right to Practice Forestry' provision (P.S. § 10603(f)) of the Municipalities Planning Code." Id.

Please review the enclosed information with the Municipal Council and let me know whether the Municipality will commit to resolving the legal problems with its ordinance in the manner discussed above. As stated above, we plan to file a lawsuit against the Municipality of Monroeville unless it notifies us that it will take the necessary steps to resolve this review with our Office. We appreciate the Municipality's attention to this matter.

Sincerely,



SUSAN L. BUCKNUM
Senior Deputy Attorney General

SLB/kmag

cc: 