



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL
December 14, 2015

KATHLEEN G. KANE
ATTORNEY GENERAL

Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120

[REDACTED]

Via Email and First Class Mail

Anthony McDonald
Bull, Bull and McDonald
106 Market Street
Berwick, PA 18603

RE: ACRE Review Request
Salem Township Zoning Ordinance, Luzerne County

Dear Mr. McDonald:

As you know, the Office of the Attorney General received a request from [REDACTED] and [REDACTED] to review Salem Township's zoning ordinance provisions for forestry activities 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 unlawfully prohibit or limit a normal agricultural operation in violation of ACRE. This letter will detail the legal problems with the ordinance provisions and propose amendments to resolve this matter by agreement.

I. STATE LAWS PROTECTING/REGULATING TIMBER HARVESTING/FORESTRY

A. Right to Farm Act

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. Forestry activities, including timber harvesting, constitute 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). An agricultural commodity is defined by the RTFA to include "Forestry and forestry products." 3 P.S. § 952. Therefore, timber harvesting is clearly included in the definition of a "normal agricultural

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operation.” The RTFA’s definition for “normal agricultural operation” is also incorporated under ACRE. 3 Pa. C.S. § 312.

B. Municipalities Planning Code and Agricultural Area Security Law

The Municipalities Planning Code (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).¹

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 Agricultural Area Security Law (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”). The 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.

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).

¹ The exhibits referenced in this letter were previously provided to the Township in an email to you and John R. Varaly, AICP, dated May 28, 2013, thus I am providing them as an email attachment with this letter and not in hard copy.

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C. Clean Streams Law and Regulations

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.

II. LEGAL PROBLEMS WITH ZONING ORDINANCE

A. Requiring Conditional Use Approval for Timber Harvesting

Sections 509.3 and 605.14 provide that “[f]orestry activities that equal or exceed two (2) acres in area” are classified as a conditional use under the zoning ordinance and require proceedings before the Board of Supervisors for approval. 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 Township. 53 P.S. § 10603(f). Therefore, all provisions of the zoning ordinance which classify forestry activities as a conditional use should be amended to designate forestry activities a

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permitted use by right in all zoning districts. This will bring the Municipality into compliance with its authority under the MPC.

B. Forest Management Plan Approved by County Conservation District

Section 802.32(B) requires that an applicant's forest management plan be approved "by the Luzerne County Conservation District (IF APPLICABLE)." The Luzerne County Conservation District has no authority to review and approve forest management plans; thus this requirement is never applicable and can never be met by an applicant. For this reason, the requirement is an unreasonable restriction on forestry activities in violation of the MPC and AASL. The Township should delete this requirement from this section.

C. Timber Harvesting Guidelines

Section 802.32(C) states that: "[t]he Forestry Management Plan shall be consistent with the Timber Harvesting Guidelines of the Pennsylvania Forestry Association." These guidelines no longer exist and have been out of print for over 20 years. As with subsection (B), this requirement can never be met by an applicant, thus is an unreasonable restriction on forestry activities in violation of the MPC and AASL. The Township should delete this requirement from this section.

We are including a Penn State publication to assist in educating the Township 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.

Moreover, 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. The Township can amend Section 802.32(C) to provide that: "An applicant shall provide a forestry plan prepared by a professional forester that describes best management practices and demonstrates compliance with the Penn State College of Agricultural Sciences publication entitled *Best Management Practices for Pennsylvania Forests.*" This Penn State

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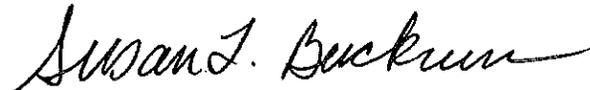
publication is recognized in the industry as representative of the best approach for managing forest stands. (Exhibit D). It was developed by the Forest Issues Working Group which is comprised of a "diverse group of professional natural resource managers, forest landowners, scientists, and environmental organizations." (Exhibit D at 2-4).

III. CONCLUSION

In lieu of enacting the amendments we set forth above, we propose that the Township 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 Board of Supervisors and determine whether the Township will commit to resolving the legal problems with its ordinance in the manner discussed above. You may contact Senior Deputy Attorney General Robert Willig [REDACTED] to discuss Salem Township's position as he will be assuming responsibility on this ACRE action going forward. We appreciate the Township's attention to this matter.

Sincerely,



SUSAN L. BUCKNUM
Senior Deputy Attorney General

SLB/kmag

Enclosures (via email only)

cc:

[REDACTED]
Karen J. Karchner, Zoning Officer (encl. via email only)

John R. Varaly, AICP (encl. via email only)

Via email only: Paul Lyskava, Executive Director, Pennsylvania Forest Products Association (w/o encl.)