



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

JOSH SHAPIRO
ATTORNEY GENERAL

November 28, 2017

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Pittsburgh, PA 15219

Donald Miles, Esq.
1814 Homestead Avenue
Bethlehem, PA 18018

Jill Nagy, Esq.
Summers Nagy Law Offices
Suite #202
200 Spring Drive
Reading, PA 19610

Re: ACRE Review Request
Longswamp Township-Berks County

Dear Mr. Miles and Ms. Nagy,

[REDACTED] is a farmer in Longswamp Township ("Township"). He installed an irrigation system for his crops which was developed, supervised, and funded by the USDA Natural Resources Conservation Service's Environmental Quality Incentives Program.¹ [REDACTED] also drilled a well for agricultural irrigation purposes.

The Township cited [REDACTED] for making improvements on his land, i.e. the irrigation system, without first having submitted a "land development plan." [REDACTED] informed the Township that both the Berks and Lehigh County Conservation Districts inspected the irrigation system, concluding that he was compliant with the best management practices for irrigation. It appears this explanation did not satisfy the Township.

As the OAG understands it, [REDACTED] informed the Township that he was going to drill a well for irrigation purposes in addition to a test well. The Township told [REDACTED] to review Ordinances 200, 237, and 268 and to secure whatever permits were required pursuant to those Ordinances. Despite his belief that these ordinances were inapplicable, [REDACTED] applied for the required permit. The Township issued the permit and several months later it sent [REDACTED] a bill for \$1,172.73. This amount represented the engineering services LTL Consultants, Ltd. provided for reviewing the well construction permit and operation license application.

¹ <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/financial/eqip/>

The Office of the Attorney General (OAG) received Agricultural, Communities, and Rural Environment (ACRE), 3 Pa.C.S. § 311, *et.seq.*, complaints from [REDACTED] through his previous attorney. [REDACTED] challenges three ordinances:

1. *Longswamp Township Subdivision and Land Development Ordinance, Ordinance No. 231*, Article II, Definitions, Specific Terms, "Land Development," Section 202 A.4. [REDACTED] asserts that subsection 4 adds a definition of "land development" that is not included in the Municipalities Planning Code ("MPC"), 53 P.S. § 10107, and as a result unlawfully prohibits and limits the normal agricultural operation of irrigating crops;
2. **Ordinance Nos. 200, 237, and 268** which deal with water conservation, usage, and well drilling within the Township. [REDACTED] contends that these ordinances prohibit and limit the normal agricultural operation of irrigating crops, and;
3. Section 9 of **Ordinance 268** which [REDACTED] states the Township relied upon to charge him \$1,172.73 for engineering services performed by LTL Consultants, Ltd.

NORMAL AGRICULTURAL OPERAION

The first question that must be answered in an ACRE analysis is whether the activity in question constitutes a "normal agricultural operation" (NAO). 3 Pa.C.S. §§ 311-313. If the farmer is engaged in an NAO, ACRE applies. If the farming operation does not qualify as an NAO, ACRE is inapplicable. The Right to Farm Act (RTFA), 3 P.S. § 951, *et.seq.*, defines what constitutes an NAO. The RTFA states that an NAO is "[t]he activities, practices, equipment and procedures that farmers adopt, use or engage in the production and preparation for market of...their products and in the production...for market or use of agricultural...crops and commodities...." *Id.*, § 952.² Under the RFTA the term NAO "includes new activities, practices, equipment and procedures consistent with technological development within the agricultural industry." *Id.* The OAG respectfully submits that it is indisputable that agricultural irrigation and the drilling of wells to support that irrigation constitutes an NAO. Irrigation and wells have existed for as long as agriculture has existed. The Court in *Alburger v. Philadelphia Elec. Co.*, 535 A.2d 729, 737 (1988) quoted with approval a jury charge given in 1848 which read "[t]he right which every man has to the reasonable use of [water] for irrigation...is well understood..." What was applicable in 1848 is just as applicable in 2017. Irrigation and wells in farming are certainly not "new" practices under the RTFA, but rather, a time honored method that farmers have used to produce their crops. There is no doubt that agricultural irrigation and the wells drilled in support of that irrigation are NAOs.

² The RTFA also has a "ten contiguous acres in area" or if less than ten acres a "yearly gross income of at least \$10,000" requirement for an activity to qualify as an NAO. 3 P.S. § 952. As the OAG understands it, the [REDACTED] farm is over ten contiguous acres and in any event grosses more than \$10,000 a year.

IRRIGATION

The Township cited [REDACTED] for installing the irrigation system without first submitting a "land development plan" pursuant to various ordinances - from the Township's perspective, his irrigation system constitutes a "land development" as defined in § 202 A.4. Subsection A.4 exceeds the definition of what constitutes "land development" under the MPC. In contrast, subsections A.1-3 of the ordinance essentially mirror the three, and only three, definitions of "land development" found in the MPC. See 53 P.S. § 10107, (**Land development.**) There is no fourth definition of "land development" in the MPC as there is in the Township's ordinance. "Generally, the best indication of the General Assembly's intent is the plain language of the statute. 'When the words of a statute are clear and free from all ambiguity, they are presumed to be the best indication of legislative intent.' *Chanceford Aviation v. Chanceford Twp. Bd. of Supervisors*, 592 Pa. 100, 923 A.2d 1099, 1104 (2007) (citations omitted)." *Allstate Life Ins. Co. v. Com.*, 52 A.3d 1077, 1080 (2012). The MPC's "land development" language is clear and free from all ambiguity. The Legislature defined "land development" in only three ways. Had the Legislature wanted to expand the definition of "land development" it would have done so; the Township's addition of a fourth definition exceeds its authority. "Because townships are created by the Commonwealth, a township has only those powers authorized by the Legislature," *Stroud Twp. v. Stroud Twp. Police Dep't Ass'n*, 629 A.2d 262, 263-64 (1993). As a result, "the provisions of the MPC take precedence over and invalidate all local zoning enactments to the extent of their inconsistency," *Takacs v. Indian Lake Borough Zoning Hearing Bd.*, 11 A.3d 587, 593 (Pa. Commw. Ct. 2010), and subsection 4 cannot be used as a reason to deny [REDACTED] the ability to irrigate his crops.³ In fact, subsection 4 of the Longswamp "land development" definition is a nullity and must be deleted.

WELL DRILLING

The Water Resources Planning Act ("WRPA") governs the quantity of water used in agriculture. The WRPA precludes municipalities from allocating water resources and regulating "the location, amount, timing, terms or conditions of any water withdrawal by any person." 27 Pa.C.S. § 3136(b). The Department of Environmental Protection (DEP) regulates consumptive water use pursuant to the WRPA and the Water Resources Planning regulations. 27 Pa.C.S. §§ 3118, 3131, 3133-34; 25 Pa.Code § 110, *et seq.* The regulations establish the framework for permissible water withdrawal and use activities, along with registration, monitoring, record-keeping, and reporting requirements. 25 Pa.Code § 110.201(3). Therefore, the WRPA and the applicable regulations preempt Longswamp's **Ordinances 200, 237, and 300** pertaining to the withdrawal of ground waters. *See Commonwealth v. Locust Township*, 49 A.3d 502, 514 (Pa.Cmwlt. 2012)(*en banc*)(Local underground water ordinance as applied to agricultural operations preempted by the WRPA and the DEP's regulatory scheme).

DEP regulations state that a person "whose total withdrawal from a point of withdrawal ... within a watershed [which] exceeds an average rate of 10,000 gallon per day in any 30-day period" is required to register with the DEP and provide the information specified under Section 110.203 of the regulations. 25 Pa. Code § 110.201(3). DEP also requires registrants to submit annual reports regarding water withdrawal and use. 25 Pa. Code § 110.301-305. The Township's

³ Nor can subsections 1-3 of the Ordinance be used to deny the irrigation project. [REDACTED] is not constructing buildings or subdividing land, streets, common areas, leaseholds, condominiums, or building groups.

ordinances require agricultural operations using over 100,000 gallons per day to be subject to the Delaware River Basin Commission's consumptive use regulations. *See Ordinance 200*, p.1 & Section 4, p. 3 ("The Delaware River Basin Commission shall regulate all wells over 100,000 gallons of water per day."); *Ordinance 237*, p.1 ("...the Delaware River Basin Commission which only regulates wells producing over 100,000 gallons per day.")⁴ The Township imposes an additional layer of regulation when speaking of wells producing less than 100,000 gallons per day by mandating that any well withdrawing less than 2,000 gallons a day is subject to certain restrictions, *see Ordinance 200*, p. 3, Sections 4 & 5, and that wells withdrawing between 2,000 and 100,000 gallons are subject other Township requirements. *See Ordinance 200*, p. 3, Sections 4.B (2) & 5.B; *Ordinance 268*, p. 2, Section 1

The Township's attempts to locally regulate through its own ordinances water usage contravenes the WRPA and the accompanying regulations.

CHARGES FOR LTL CONSULTING

The Municipalities Planning Code ("MPC") states a Township "may prescribe reasonable fees with respect to the administration of a zoning ordinance...." 53 P.S. § 10617.3(e). *See Golla v. Hopewell Township Board of Supervisors*, 452 A.2d 273 (Pa.Cmwlth.1982)(A municipality has authority under the MPC to impose a reasonable fee with respect to applications.). The MPC, however, 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).

Ordinance 268, p. 7, Section 9, states that "any and all professional fees incurred by the Township including those for...review by the Township Engineer...and/or any other professional person engaged by the Township to review such application" will be paid by the permit seeking applicant. The Township has charged [REDACTED] \$1,172.73 for engineering services performed by LTL Consultants, Ltd. While "reasonable fees" in processing a permit application may be charged the MPC expressly prohibits charging [REDACTED] for engineering or other technical consultants. This is exactly what the Township is attempting to do.

CONCLUSION

In order to comply with state law, Longswamp Township must take the following action:

1. Delete Section 202 A.4 from the *Longswamp Township Subdivision and Land Development Ordinance, Ordinance No. 231*, Article II, Definitions, Specific Terms, "Land Development."
2. Delete references in *Ordinances 200, 237, and 268* to the Township's ability to regulate water withdrawal. Replace those deleted references with the language "[c]onsumptive water use up to 100,000 gallons is regulated by the Department of Environmental Protection pursuant to the Water Resources

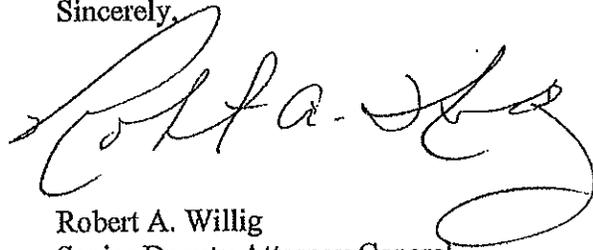
⁴ Longswamp is correct in recognizing that the Delaware River Basin Commission regulates water usage of 100,000 gallons a day or more for any thirty day period. *See Delaware River Basin Commission, Administrative Manual, Rules of Practice and Procedure*, 18 CFR § 401.35 (a)(2) & (3).

Protection Act and the Water Resources Planning regulations. 27 Pa.C.S. §§ 3118, 3131, 3133-34; 25 Pa.Code § 110, *et.seq.* These regulations establish the framework for permissible water withdrawal and use activities, along with registration, monitoring, record-keeping, and reporting requirements. 25 Pa.Code § 110.201(3). Consumptive water use over 100,000 gallons is regulated by the Delaware River Basin Commission and its water planning regulations.”

3. Return to [REDACTED] the \$1,172.73. Change the language of **Ordinance 268**, Section 9 to mirror that of 53 P.S. § 10617.3 of the MPC.

I look forward to the Township’s response in the hope that we can resolve this matter amicably.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. A. Willig', with a large, sweeping flourish at the end.

Robert A. Willig
Senior Deputy Attorney General