



COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF ATTORNEY GENERAL

JOSH SHAPIRO  
ATTORNEY GENERAL

October 6, 2017

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564 Forbes Ave.  
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137 Locust Street  
P.O. Box 510  
Oxford, PA 19363-0510

Board of Supervisors – Lower Milford Township  
C/O Alene Shafinsky  
7607 Chestnut Hill Church Road  
Coopersburg, PA 18036

*Re: ACRE Review Request*  
*Lower Milford Township-Lehigh County - [REDACTED]*

Dear Mr. Canan and Ms. Shafinsky,

[REDACTED] challenges Lower Milford Township's requirement that he pay a fee of \$100.00 and deposit \$4,500.00 in escrow before he starts harvesting timber. The \$100.00 fee does not violate the Agriculture, Communities and Rural Environment (ACRE) Act, 3 Pa.C.S. § 311 *et.seq.*; however, the escrow requirement does. This letter addresses a single, discrete issue raised in [REDACTED] ACRE complaint: the challenge to the fee and escrow requirements, which are causing [REDACTED] immediate harm. This letter does not address the other concerns with Lower Milford's timber harvesting ordinances expressed by [REDACTED] in his ACRE complaint. Those larger questions remain and the Office of the Attorney General (OAG) will contact the Township when it completes that broader ACRE review.

The Lower Milford Ordinance in question is found at Article XII, *Supplemental Regulations*, § 1200.A.33.b, Timber Harvest. It reads: “[a]ny timber harvesting operation shall be undertaken in accordance with a Timber Harvesting Plan approved by the Township. All Timber Harvesting Plans shall be submitted to the Township for review for compliance with the standards for timber harvesting operations set forth herein.” The applicable costs for this review are listed in the 2017 *Fee Schedule and Submission Criteria*, Timber Harvest, pp. 14-15, which states “[t]he following fees shall be charged in connection with Timber Harvest activities... [a]n application fee of \$100... [a] review escrow of \$2,000 shall be deposited and includes one (1) post harvesting inspection. Fees will be charged at \$112/hr for a Plan Reviewer and \$42.50/hr for clerical... an

escrow of \$2,500 security for removal of all temporary erosion and sedimentation controls and general site restoration....”

The \$100.00 application fee is consistent with ACRE requirements. 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. 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*, 69 Pa.Cmwlth. 377, 452 A.2d 273 (1982)(A municipality has authority under the MPC to impose a reasonable fee with respect to applications.)

The \$4,500.00 escrow total, however, violates ACRE as requiring such escrow payments goes beyond Lower Milford’s authority under the MPC. 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 \$2,000.00 to review the application and to complete a “post harvesting inspection.” This review and inspection, by necessity, would have to be done by an engineer or technical consultant with expertise in timber harvesting operations. The Township admits as much when it notes in its fee schedule that it charges \$112.00 per hour for the “Plan Reviewer’s” time. When compared to the Municipal Engineering Service Fees on page 15 of the 2017 Fee Schedule, the Township charges \$112.00 per hour for a “Professional Engineer.” As a result, by implication, the “Plan Reviewer” is a “Professional Engineer.”

Timber harvesting is “a permitted use by right in all zoning districts in every municipality.” 53 P.S. § 10603(f). Lower Milford’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 \$2,000.00 review escrow and no longer charge those seeking to harvest timber that amount.

Additionally, Lower Milford cannot force a landowner to pay the \$2,500.00 security escrow. The 2017 *Fee Schedule and Submission Criteria, Timber Harvest*, p. 15, states that this amount is necessary to guarantee that “all temporary erosion and sedimentation controls” are removed and the “general site restoration in accordance with the approved E & S Plan” is completed. The Township only has the authority to enforce zoning ordinances as provided for under the MPC. *See* 53 P.S. §§ 10616.1; 10617.2. Enforcement for purported violations of zoning ordinance provisions requires the Township to initiate enforcement proceedings which includes providing notice and other due process protections.

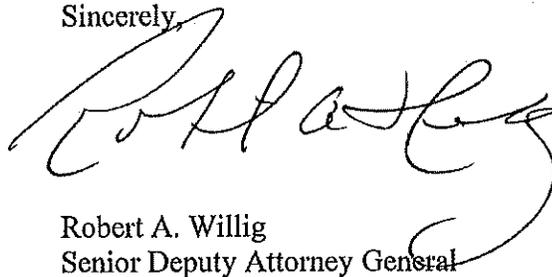
The OAG has received an expert opinion from a professor emeritus specializing in silviculture issues at the Pennsylvania State University School of Agriculture. The expert opines that the Erosion and Sediment (“E&S”) plan is a Department of Environmental Protection (“DEP”) requirement which has to be submitted for any earth disturbance activity. *See* 25 Pa.Code § 102 *et seq.* The plan covers all aspects of the E&S activities associated with harvesting timber (*i.e.* planning, sediment and water control, and retirement). If a harvester fails to create a plan and follow the law, there are regulatory consequences. Those consequences are enforced by either DEP or the local Conservation District. If the Township has a problem with a harvest not being “closed” down correctly, it has recourse through the enforcement of its own ordinances under the MPC as well as contacting the DEP or the local Conservation District with a request to take regulatory action. As a result, Lower Milford’s imposition of yet another requirement, the \$2,500.00

“security escrow,” exceeds its authority under both the MPC and the Commonwealth’s E&S regulatory scheme.

Promoting agriculture is an acknowledged state policy and these escrow fees hinder rather than encourage silviculture. The Right to Farm Act states that “[i]t 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...agricultural products [and] [i]t is the purpose of this act to reduce [loss of] agricultural resources by limiting the circumstances under which agricultural operations may be the subject matter of...ordinances.” 3 P.S. § 951. The General Assembly’s Historical and Statutory Notes to ACRE affirm that 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 agricultural products.” As noted above, the MPC permits timber harvesting in all zoning districts which is consistent with the Legislature’s overarching policy of enhancing and supporting agriculture throughout the Commonwealth. In short, Lower Milford’s escrow fees are not only contrary to the law but also contrary to the stated policy of encouraging agriculture.

The escrow fees violate ACRE. To be in compliance with the law, Lower Milford must delete those fees from its *Fee Schedule and Submission Criteria* and cease requiring those harvesting timber to pay the \$4,500.00. To be clear, this letter addresses only the issue raised in [REDACTED] ACRE complaint relating to the fees. The OAG continues to review the Township’s timber ordinances as a whole to determine whether they comply with state law. The OAG will advise the Township when it has completed that review. In the meantime, the OAG welcomes Lower Milford’s thoughts on this letter and any input it may have on the OAG’s further review.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert A. Willig", written over a large, stylized flourish that extends downwards and to the right.

Robert A. Willig  
Senior Deputy Attorney General