



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

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September 28, 2018

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[REDACTED]

Jennifer Mejia, Esq.
Mejia Law Group, LLC
1390 West Main Street
Ephrata, PA 17522

Re: ACRE Complaint – Clay Township- [REDACTED]

Dear Ms. Mejia and [REDACTED]

[REDACTED] as the operator of the [REDACTED], filed an Agricultural Communities and Rural Environment (“ACRE”), 3 Pa.C.S. § 311, *et seq.*, complaint wherein he contends that Clay Township’s (“Township”) ordinance, *Section 540, Forestry*, violates state law.

After the OAG notified the Township of the ACRE complaint Ms. Mejia, Township solicitor, informed the OAG “that the Township, complainant, [REDACTED] and property owner, [REDACTED] have successfully reached an agreement and a Zoning Permit was issued for Timber Harvesting on the subject property.” (August 8, 2018 email from Ms. Mejia to Mr. Willig). The OAG commends, and greatly appreciates, the Township’s willingness to work cooperatively with its citizens in this matter.

The Township is of the opinion that since the matter between it, [REDACTED], and [REDACTED] has been resolved, it did not “believe further Ordinance review by [the OAG] is required.” *Id.* The OAG respectfully submits that an ACRE review of municipal ordinances operates independent of any immediate disagreement between the farmer/owner/operator and a municipality. The OAG ACRE review continues regardless of whether the parties amicably resolve their differences. Here, the review of the Township’s Forestry Ordinance reveals several problems as explained below. The OAG sincerely hopes the cooperative spirit that guided discussions between the Township, [REDACTED] and [REDACTED] continues between the OAG and the Township in the instant matter.

Silviculture¹ is a “Normal Agricultural Operation” (“NAO”) and “[f]orestry and forestry products” are agricultural commodities as defined by the Right to Farm Act (“RTFA”). 3 P.S. §

¹ “Silviculture is the art and science of controlling the establishment, growth, composition, health, and quality of forests and woodlands to meet the diverse needs and values of landowners and society such as wildlife habitat, timber, water resources, restoration, and recreation on a sustainable basis.” <https://www.fs.fed.us/forestmanagement/vegetation-management/silviculture/index.shtml>

952. Timber harvesting is the only agricultural practice that is a *use as of right* in all zoning districts², and state law explicitly addresses the considerable limitations on municipal authority to regulate timber harvesting as follows:

[z]oning 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 of right in all zoning districts in every municipality.

Municipalities Planning Code (“MPC”), 53 P.S. §10603(f). This provision unmistakably identifies the intent of the General Assembly to encourage and promote timber harvesting throughout the Commonwealth. See Penn State University (“PSU”) College of Agricultural Sciences, *Dealing with Local Timber Harvesting Ordinances* (Exhibit A). I also include a Penn State publication that details timber harvesting practices and explains that many of the concerns justifying local regulation are addressed by state regulatory requirements; as a result, local regulation of forestry activities should be kept to a minimum, if used at all. See PSU College of Agricultural Sciences, *Timber Harvesting in Pennsylvania, Information for Citizens and Local Government Officials* (Exhibit B).

Moreover, the RTFA³ and other provisions of the MPC⁴ make perfectly clear the intent of the General Assembly to broadly encourage and promote all types of agriculture, including forestry. Indeed, the General Assembly’s Historical and Statutory Notes to ACRE declare 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 other agricultural products.” Both the black letter and the spirit of the law require townships to encourage and support, not hamper, timber harvesting. And it must be emphasized that the Township’s actions towards Mr. Sawyer and GSHPA is entirely consistent with the state-wide goal of encouraging and supporting timber harvesting. While the Township’s actions are laudable, its forestry ordinance places obstacles in the owner’s/operator’s way which unreasonably restrict forestry activities.

Section 540(A), *Forestry*, states that under certain circumstances⁵ a “[z]oning permit” must be secured before harvesting. The OAG presumes that Clay Township means a “harvesting” as

² Clay Township admirably recognizes this when it includes in its Forestry Ordinance “[f]orestry activities, including, but not limited to timber harvesting, shall be a permitted use in all Zoning Districts....” *Section 540, Forestry*.

³ “It 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 food and other agricultural products...It is the purpose of this act to reduce the loss to the Commonwealth of its agricultural resources by limiting the circumstances under which agricultural operations may be the subject matter of nuisance suits and ordinances.” 3 P.S. § 951, **Legislative policy**.

⁴ “It is the intent, purpose and scope of this act...to promote the preservation of this Commonwealth’s...prime agricultural land...to encourage the preservation of prime agricultural land....” 53 P.S. § 10105, **Purpose of act**. “Zoning ordinances shall encourage the continuity, development and viability of agricultural operations.” 53 P.S. § 10603(h). **Ordinance provisions**.

⁵ Section 540(A) reads that when an owner/operator is “harvesting or otherwise removing forty (40) or more trees with a trunk diameter of three (3) inches or more at a height of three (3) feet above the average ground level on any tract of land larger than two (2) acres...”

opposed to a “zoning” permit, *i.e.* that a “zoning permit” under the ordinance functions as a de facto timber harvesting permit. The OAG does not take issue with the general principle that a municipality may require a permit for timber harvesting operations. However, the specific conditions contained in the Township’s ordinance for the issuance of a “zoning permit” violate ACRE.

I. ENUMERATION (COUNTING) TREES/DIAMETER AT BREAST HEIGHT

Sections 540(A), 540(B), and 540(F) all require the harvester to determine whether he/she will harvest forty (40) or more trees.⁶ The ACRE statute provides that the OAG can use the Penn State University (“PSU”) College of Agricultural Sciences “for expert consultation regarding the nature of normal agricultural operations...” 3 Pa.C.S § 314(d). The OAG consulted with a PSU professor emeritus of forest resources who was the former director of the Center for Private Forests. He opines that an enumeration requirement⁷ as the Township now requires is unreasonably cost prohibitive to a timber harvesting operation. A timber harvesting contract describes the trees to be cut; a plot-based estimate, rather than a tree-by-tree enumeration, is sufficient to determine residual tree stand conditions. Plot-based estimates consider the residual basal area (*i.e.*, the cross-sectional area of trees expressed in square feet per acre), the average residual tree diameter, and the number of trees per acre, all determined by taking plots from the harvesting site. The PSU experts states that the use of point sampling, random plots, and estimation are statistically sound common practices used by professional foresters.⁸ With this information, a forester assesses the future sustainability of the tree stand consistent with the harvesting plan.

Section 540(A) also requires the harvester to count specific types of trees, *i.e.* those with a trunk diameter of three (3) inches or more at a height of three (3) feet or more above the ground. This practice of calculating a tree’s diameter at a certain height is commonly referred to as Diameter at Breast Height (“DBH”). Plot-based estimates routinely consider the average DBH of all the trees in a particular timber stand. Conversely, requiring that an owner/operator enumerate only trees of a specific DBH prior to harvesting is cost prohibitive and in the end counterproductive. The PSU College of Agricultural Sciences warns against using diameter limits in ordinances:

[d]iameter limit harvesting is a technique in which all trees above a certain specified diameter are removed. This technique, which results in taking only the largest, best trees of the most valuable species, can affect future health and value of the forest stand...mandating a diameter limit on timber harvesting operations can be detrimental. In Pennsylvania forest stands, the smaller trees are typically of the

⁶ The substance of Section 540(A) was cited above in footnote 5. Section 540(B) states that “[a] Forestry Management Plan shall be prepared and filed when harvesting forty (40) or more trees involving more than two (2) acres...” Section 540(F) reads “[w]hen harvesting or otherwise removing forty (40) or more trees on tracts larger than two (2) acres” the logger has to leave 30% of the forest canopy and of these trees a certain percentage have to be of the “highest value species...”

⁷ “Enumeration” is a type of forestry inventory. “Forestry inventory is an accounting of trees and their related characteristics of interest over a well-defined land area...forest inventories seek to *enumerate* the population of trees within a forest...For all but the smallest tracts of land, complete *enumeration* of individual[] [trees] is usually infeasible and survey sampling techniques are required.” <https://www.fs.fed.us/ne/durham/4104/papers/Gove18.pdf>, p. 2. (emphasis added)

⁸ See *e.g.* *Elementary Forest Sampling*, USDA Forest Service, <https://www.fs.fed.us/fmnc/ftp/measure/cruising/other/docs/AgHbk232.pdf>.

same age as the large trees. The difference in size is often the result of a difference in tree species, a genetically inferior tree, or the result of poor location. Diameter limiting harvesting will eventually shift the composition of the forest and may even degrade the quality of the forest by promoting inferior trees. This practice may also limit future options for forest management and slow the stand's ability to recover from disturbance through the elimination of seed trees for the species removed. As a result, requiring this method of harvest is unreasonable.

See Exhibit A, PSU College of Agricultural Sciences, *Dealing with Local Timber Harvesting Ordinances*, p. 17.

II. FOREST MANAGEMENT PLAN/BEST MANAGEMENT PRACTICES

Sections 540(B) & (C), *Forestry*, mandate that a Forest Management Plan consistent “with the Timber Harvesting Guidelines of the Pennsylvania Forestry Association” be filed with the Township. The OAG acknowledges the Township may require an owner/operator to file a management plan developed by a professional forester. These plans normally include best management practices (“BMP”) designed to sustain and improve the health of the forest. However, the “Timber Harvesting Guidelines of the Pennsylvania Forestry Association” no longer exist and have been out of print for over twenty (20) years. The OAG recommends the Township change its ordinance to require compliance with the PSU College of Agricultural Sciences, *Best Management Practices for Pennsylvania Forests* (Exhibit C).

III. EROSION AND SEDIMENTATION CONTROL

Section 540(D), *Forestry*, requires the Erosion and Sedimentation (E&S”) Plan to “be submitted by the Applicant to the Lancaster County Conservation District for review, recommendation, and approval.” As explained below, the Township lacks the authority to compel such a submission.

Pursuant to the Clean Streams Law⁹ the Department of Environmental Protection (“DEP”) regulates erosion and sediment control. Its regulations require “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). Without question, timber harvesting is subject to the DEP’s E&S regulations. *Id.* § 102.4(b), 102.5(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 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

⁹ 35 P.S. §691.1 *et. seq.*

disturbance activity must obtain an E&S permit from DEP in addition to the E&S plan. *Id.* § 102.5(b).

The DEP's erosion and sediment control regulations do not require submission of an E&S plan to the Conservation District for review and approval; the Township itself cannot impose a requirement stricter than state law. 25 Pa. Code § 102.4(b)(8). 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). We also note that the Township may submit, at its own expense, an applicant's E&S Plan to the Conservation District to review compliance with the regulations; however, it may not impose that duty on the Applicant.

IV. CLEAR CUTTING

Section 540(E), *Forestry*, prohibits clear cutting "except on tracts of less than two (2) acres." Section 540(G) prohibits clear cutting on slopes in excess of 15% and within the one hundred (100) year floodway. Both sections run contrary to the principles of ACRE.

Often unfairly characterized as a destructive practice, clear cutting is a beneficial practice. The PSU silviculture expert advises that "clear-cutting," in which an entire stand (or most of it) is cut, is a recognized silvicultural tool leading to regeneration and establishment of even-aged forests; this type of forest is predominant across Pennsylvania. "Like large-scale natural disturbances, clear-cutting promotes the establishment and growth of intolerant and intermediate species, such as black cherry and oak," which require full sunlight to reproduce and grow well. See PSU College of Agricultural Sciences, *Timber Harvesting in Pennsylvania, Information for Citizens and Local Government Officials*, p. 5 (Exhibit B). For Pennsylvania's two major forest types, northern hardwood and oak/hickory, clear-cutting is the appropriate practice. *Id.* Moreover, the proportion of black cherry and oak in Pennsylvania risks reduction in the absence of clear-cutting or other even-aged management and harvesting techniques. *Id.*

A PSU publication further explains:

Clear-cutting refers to the forestry practice whereby all trees are removed with the purpose of reestablishing an even-aged stand. Restricting clear-cutting in forests is an unreasonable ordinance provision. Often, these provisions are developed and included based on a common misperception that this type of harvesting is ugly and detrimental to the forest ecosystems. This is not true, and in fact, shade-intolerant forest stands require clear-cutting to ensure proper regeneration. Additionally, this type of management practice is often beneficial with respect to the landowner's opportunities for the stand's future management. . . . There are a variety of acceptable silvicultural methods, and clear-cutting is one of them. It can be used to meet goals at a timber harvesting site and to ensure the proper regeneration. To restrict its use is unreasonable.

See Exhibit A, PSU College of Agricultural Sciences, *Dealing with Local Timber Harvesting Ordinances*, pp. 17-18. Plainly, the Township's prohibition on clear-cutting on tracts smaller than two acres is an unreasonable restriction on timber harvesting.

Another common misperception occurs when clear-cutting takes place on slopes; here the belief is that the hillside will significantly erode or even slide away entirely. The PSU expert advises that both an E&S plan and the timber harvesting plan address harvesting on steep slopes.

The E&S plan requires BMPs for runoff or soil degradation. Those BMPs include precluding use of operating equipment and haul and skid roads on steep slopes. Timber harvesting on steep slopes typically involves using cables to remove logs from the felling site. The expert explains that removing timber in accordance with established BMPs does little to change water infiltration or to destabilize soils. Tree roots, even from harvested trees in a clear cut, continue to hold the soil in place. In contrast, naturally fallen trees, that is, trees that fall due to storms, high winds, lightning strikes and the like, pull up their roots in what foresters call a "root ball" and are more likely to destabilize the soils from water infiltration.

As explained in a PSU publication, "[c]ertain sites require specific silvicultural methods to ensure proper regeneration of species and forest stands. Timber harvesting operations should be given flexibility to determine what method or methods will best allow for future forest stands." See Exhibit A, PSU College of Agricultural Sciences, *Dealing with Local Timber Harvesting Ordinances*, p. 17. Without doubt, prohibiting clear cutting on slopes results in an unreasonable restriction on forestry activities in conflict with recognized forestry BMPs and in violation of the MPC.¹⁰

Clay Township prohibits clear cutting within 100 year floodplains; however, pursuant to several State laws, "[a]ll surface waters, lakes, ponds, streams and wetlands in Pennsylvania are protected" through State regulatory programs. See Exhibit B, PSU College of Agricultural Sciences, *Timber Harvesting in Pennsylvania, Information for Citizens and Local Government Officials*, p.4. The DEP's Erosion and Sediment Control and Waterway Management regulatory schemes regulate BMPs for timber harvesting near streams, ponds, wetlands, floodplains, and other waters of the Commonwealth. See 25 Pa. Code §§ 102; 105. These regulations do not preclude timber harvesting activities in these water-sensitive areas. Instead, the amount of buffer zone that DEP requires near water sensitive areas depends on many variables, including soil type, slope, vegetative cover, and the particular characteristics and circumstances of that water sensitive area. See Department of Environmental Protection ("DEP"), *Timber Harvest Operations Field Guide for Waterways, Wetlands, and Erosion Control*, pp.19-21 (Attached as Exhibit D). All timber harvesting activities must have a written E&S Plan to establish controls for activities near water sources. 25 Pa. Code § 102.4(b); See Exhibit B, PSU College of Agricultural Sciences, *Timber Harvesting in Pennsylvania, Information for Citizens and Local Government Officials*, p.1. Certain activities associated with timber harvest operations may require a permit under the Waterway Management regulations, 25 Pa. Code §§ 102; 105, such as the "deposition of solid fill, gravel, soil, slate and other such material in wetlands, streams and floodways for construction of temporary and permanent roads." See Exhibit D, DEP, *Timber Harvest Operations Field Guide for Waterways, Wetlands, and Erosion Control*, p.8.

Due to the varying conditions in a particular forest, the BMPs necessary to protect environmental resources will also vary. For this reason, the Township's blanket prohibition on harvesting in 100 year floodways directly conflicts with the DEP's Erosion and Sediment Control and Waterway Management regulatory schemes, which allow timber harvesting activities near water sources using required BMPs tailored to the unique site conditions of a specific property.

V. AMOUNT AND TYPES OF TREES TO BE HARVESTED

Section 540(F), *Forestry*, limits the harvest of trees based on the type, as well as the number, of trees. When removing forty (40) or more trees on tracts larger than two (2) acres, the

¹⁰ 53 P.S. §10603(f).

harvester must leave at least 30% of well distributed forest cover (i.e. canopy). Furthermore, the harvester must guarantee that at least 30% of this residual stand is of the highest value species. As explained above, the enumeration/counting requirement (i.e. 40 trees) is invalid. The remaining provisions of Subsection F are also an unreasonable restriction on timber harvesting activities.

The PSU expert explains 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. Without question, proper timber harvesting maintains the health and sustainability of forested land. A professional forester develops the plan for a timber harvesting operation; this plan contains an assessment of the overall health of the forest and identifies the best management practices necessary to sustain and improve the health of the forest. These BMPs include: identifying which trees to remove, how much canopy to retain, the unique needs of environmentally sensitive areas, and overall management goals to sustain that forested land. The overarching management goals vary depending on the site specific conditions of a particular forest. See PSU of Agricultural Sciences, *Best Management Practices for Pennsylvania Forests* (2001) (Exhibit C). For these reasons, an ordinance attempting to place uniform standards on forestry activities is unreasonable. The properly prepared forest management, timber harvesting, and E&S plans establish the necessary BMPs for a particular forest.

Moreover, “[c]ertain sites require specific silvicultural methods to ensure proper regeneration of species and forest stands. Timber harvesting operations should be given flexibility to determine what method or methods will best allow for future stands. Additionally, landowners have a right to manage their woodlot for future outcomes.” See Exhibit A, PSU College of Agricultural Sciences, *Dealing with Local Timber Harvesting Ordinances*, p. 17. The PSU expert advises that requirements like those found in § 540(F), which necessarily exclude clearcutting and also restrict the use of shelterwood and seed tree silvicultural¹¹ methods, operate to prevent the removal of the appropriate number of trees for a specific site. As previously stated, there are forests for which a full canopy removal presents the best method for that forest’s health and regeneration goals. Decisions on proper silvicultural prescriptions for a timber harvest should be determined by the forester and landowner.

Section 540(F) also contains impermissibly vague terms and requirements. It is well-settled that “[a] local government unit has no authority to adopt an ordinance that is arbitrary, vague or unreasonable or inviting of discriminatory enforcement. *Exton Quarries, Inc. v. Zoning Board of Adjustment*, 425 Pa. 43, 228 A.2d 169 (1967). A vague ordinance is one that proscribes activity in terms so ambiguous that reasonable persons may differ as to what is actually prohibited. *Scurfield Coal, Inc. v. Commonwealth*, 136 Pa.Cmwlth. 1, 582 A.2d 694 (1990).” *Com., Office of Atty. Gen. ex rel. Corbett v. Richmond Twp.*, 2 A.3d 678, 681 (Pa. Cmwlth. 2010). Ambiguous zoning ordinances contain provisions subject to multiple interpretations or language that is uncertain or indefinite. *Kohl v. New Sewickley Twp.*, 108 A.3d 961, 968 (Pa. Cmwlth. 2015) (citation omitted).

The requirement that the forest canopy “be well distributed” is a vague and ambiguous standard making it impossible for a property owner to comply or for a zoning officer to enforce. It also begs the question of whether a zoning officer is qualified to evaluate the conditions of a forest canopy and determine the proper tree distribution. Obligating the owner to retain only the

¹¹ “The shelterwood method leaves a large number of trees standing long enough to establish and protect ‘advanced regeneration’ sites until the seedlings and saplings are well established.” “The seed tree method leaves a few of the best trees standing to become the parent trees of the new forest.” See Exhibit C, PSU of Agricultural Sciences, *Best Management Practices for Pennsylvania Forests*. P. 13.

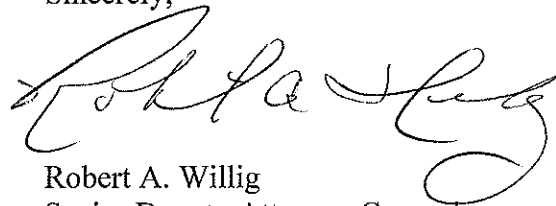
“highest value species” trees is also problematic. The PSU expert advises that trees designated as “high value” evolves over time as the market changes. It is beyond municipal authority to impose these variable requirements on a landowner. 53 P.S. §10603(f).

VI. CONCLUSION

The OAG appreciates the Township’s willingness to work with [REDACTED] and the [REDACTED] to permit the timber harvest, as well as its recognition that timbering is a use as of right in all zoning districts. We acknowledge that the current Forestry Ordinance in its brevity does not intend to overly regulate timber operations. Unfortunately, while the Ordinance is brief it violates ACRE in the several respects explained above. The OAG strongly recommends that Clay Township enact the “Pennsylvania Model Forestry Regulations” developed by the PSU School of Forestry Resources. See Pennsylvania Model Forestry Regulations (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.*, p. 1. This model ordinance also addresses the needs and concerns of local governments as it is “designed to be consistent with the so-called ‘Right to Practice Forestry’ provision (53 P.S. § 10603(f)) of the Municipalities Planning Code.” *Id.*

Please review this letter and attached resources and let me know whether the Township will resolve the ACRE case by enacting the model ordinance. The OAG respectfully submits this is the best solution. Thank you for your consideration and I look forward to working with you to hopefully resolve this matter without resorting to litigation.

Sincerely,



Robert A. Willig
Senior Deputy Attorney General