

[REDACTED]

May 1, 2019

VIA E-MAIL: [REDACTED]
and FIRST CLASS MAIL
Robert A. Willig, Esquire
Commonwealth of Pennsylvania
Office of Attorney General
Mezzanine Level
1251 Waterfront Place
Pittsburgh, PA 15222

Re: [REDACTED]-Middle Smithfield Township-ACRE Complaint

Dear Attorney Willig:

As you know, this firm is the appointed Solicitor to Middle Smithfield Township ("MST"), Monroe County, Pennsylvania. This will serve to acknowledge MST's receipt of your correspondence, dated February 11, 2019, in regards to the above-referenced matter. The Township Board of Supervisors ("BOS") requested that I respond, on behalf of MST, to your correspondence. Thank you for your courtesy in allowing an extension in regards to the time for my response.

I will make several preliminary comments/observations.

First, the MST Ordinance of which [REDACTED] complains is a zoning ordinance enacted by the Township under the authority of the Pennsylvania Municipalities Code ("MPC"), and Pennsylvania Second Class Township Code. Under Secs. 603 and 604 of the MPC, a municipality is clearly authorized to enact zoning regulations that affect forestry activities.

Second, the only limitation on zoning ordinances in the MPC in regards to forestry is that the zoning ordinance may not unreasonably restrict forestry activities. See, Sec. 603(f). That subsection further provides that timber harvesting shall be a permitted use by right in all zoning districts in every municipality. In accordance with that requirement, the MST zoning ordinance permits, by right, forestry in every Zoning District in the Township.

Third, importantly, your correspondences does not refer to the 2003 Pennsylvania Commonwealth Court decision Chrin Brothers, Inc. v. Williams Township Zoning Hearing Board, 815 A.2d 1179 (2003), wherein the Court specifically upheld municipal zoning regulation of forestry activities. For example, in Chrin Brothers, the Court specifically upheld regulations that: (1) prohibited clear cutting on tracts of more than two acres; (2) required that on tracts larger than two acres, at least 30% of the forest canopy be preserved; and 3) prohibited clear cutting on slopes greater than 15%.

Fourth, the Commonwealth Court of Pennsylvania also found, in the case of Taylor v. Harmony Township Board of Commissioners, 851 A.2d 1020 (2004), that a municipality could adopt timber harvesting regulations, including prohibitions against harvesting in areas determined to be landslide-prone or flood-prone, under the Township's general police powers when the regulation sought to minimize floods, landslides, and dangerous storm water runoff, prevent damage to roads, drains, public utilities, water courses, prevent fire hazards, prevent reduction of property values, and enhance the natural beauty and environment within the Township. In that case, the person who challenged the Township ordinance also sought Pennsylvania Supreme Court review of the Commonwealth Court's decision, but was denied review. See, 581 Pa. 686 (Pa. 2004).

Fifth, setbacks are a typical feature in zoning ordinances. They are one of the mechanisms traditionally used to facilitate compatibility in neighboring uses. Setback requirements exist even for uses that are permitted by right, such as a single-family dwelling in a low density zoning district. I am not aware of a Court decision finding that a setback requirement is inherently inconsistent with a requirement that a use be permitted by right. In fact, any "reasonableness" analysis of a zoning regulation would seemingly require a balancing test of interests, and not a per se prohibition. If the state legislature wanted to prohibit all zoning regulation of forestry activities, the state legislature could have easily done so by different, or express language, in the MPC, but chose not to do so.

Sixth, MST is not hostile to agricultural uses in the Township. In no way has MST attempted to use zoning regulations to affirmatively single out and prevent forestry activities. There has not been a controversy in MST about the zoning regulation of timber

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harvesting. MST is surprised to receive an ACRE Complaint inquiry from the OAG regarding its zoning regulations on timber harvesting. MST has very good relations with its local residents, property owners and taxpayers. MST is not known for having an acrimonious relationship with such individuals. To my knowledge, [REDACTED], did not contact MST about any concerns that he may have had with the zoning ordinance, before submitting an ACRE Complaint to the OAG. We are not aware of [REDACTED], being an owner or operator of a normal agricultural operation in MST. MST questions whether [REDACTED] has standing under the ACRE Law to submit a request to the OAG for review of an MST ordinance, or to bring a private action in regards to MST's zoning ordinance. Nonetheless, in good faith, MST will engage in an interactive process with the OAG in regards to its concerns.

These preliminary/general observations having been made, I know turn to the four specific criticisms the OAG had of the MST Zoning Ordinance.

1. Requirement that the property owner submit a E&S Plan to the CCD and get CCD's approval

MST is willing to revise the requirement for a property owner to submit an E&S Plan to the Conservation District, and obtain District approval, for timber harvest over one acre. State regulations require Conservation District submission and approval only for harvest involving 25 acres or more of earth disturbance. As an aside, state regulations still require a property owner to create an E&S Plan, through of a qualified individual, if there will be 5,000 sq. ft. of earth disturbance. Further, in such cases, the conservation district can still inspect the plan and determine whether it is in compliance with state law.

In place of the current requirement, I expect that MST will require the property owner/applicant to submit any E&S/stormwater management plans required by federal or state law, and proof any required permits.

Next, as you are aware, while MST may not require a property owner to submit an E&S Plan to the Conservation District when state law does not require it, the Township may submit, at its own expense, an applicant's E&S Plan to the Conservation District to review compliance with the regulations. Further, Conservation District

review of the plan may be desirable. Conservation Districts are the recognized experts in this area, and delegated by DEP to review E&S Plans generally in the state to ensure compliance with Commonwealth regulations. Further, while MST may not be able to require an applicant to pay a fee directly to a third party for a review, MST is authorized to charge fees to offset the cost of its zoning administration expenses.

The time it takes for a township official, or third party, to review and evaluate an E&S Plan, obviously, represents a cost to MST, and one that can be funded through the charge of a fee. Thus, MST expects that it will raise the fee for Timber Harvest's Zoning Application/Permits to pay the cost of permit application review.

Lastly, MST cannot simply ignore situations where a property owner's E&S Plan is clearly inadequate under state law. That would be a disservice to both the state and local residents. The purposes of ACRE do not include allowing a property owner to escape otherwise applicable land use regulations. That would be an unreasonable construction of laws.

2. Twenty-five (25') foot setback requirement to streams

MST does not necessarily agree with your analysis concerning the validity of a 25' setback to a water body or stream for timbering operation. There are good, and valid, zoning reasons for having the setback. The Taylor case, referenced above, would also support that MST has the legal authority to require a setback under its police powers. Further, MST finds it difficult to understand how the state believes the need for timbering operations, and earth disturbance, within 25' of a water body, or even in it, outweighs the possible E&S harm in connection with the water body. However, this is not something MST is going to fight about. MST is amenable to deleting the setback requirement.

3. Canopy minimum requirement

Under the Chrin Brothers, Inc. v. Williams Township Zoning Hearing Board, referenced above, there appears to be clear legal authority that the MST's minimum canopy requirement is within its zoning powers, and thus an authorized local ordinance. If the OAG does not agree, MST would respectfully requests that the OAG provide the legal authority/analysis as to why the Chrin Brothers case would

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not constitute the appropriate legal authority for MST's zoning provision.

4. Setbacks for tops and slash

The MST's setback is only 25' for tops and slash. A setback requirement between properties for different uses would seem to be a power customarily with a Township's zoning authority under the MPC. Further, the required setback would seem to be a minimal burden to the property owner. It is difficult to see how the setback requirement is an unreasonable zoning restriction of forestry. Your February 11, 2019, correspondence encloses an example letter on this topic involving an ordinance that required a property owner to remove tops and slash from the entire property. I understand why a requirement of 100% removal is unreasonable. But that is not the situation here. MST respectfully disagrees with the OAG's analysis. If there is some more legal authority/analysis that you have on the topic, please send it. Otherwise, MST is not inclined to change the requirement

In summary, MST respectfully submits that its zoning ordinance does not unreasonably restrict forestry activities in Township. In attempt to accommodate some of the concerns of the OAG, MST would be willing to address some of the OAG's concerns. This is not a subject that has really been a controversy in the Township. On the other hand, there are some OAG criticisms of the MST zoning ordinance with which MST does not agree. If the OAG has more legal authority/analysis in those areas where there is disagreement, MST respectfully requests it be sent.

If you need anything further, please do not hesitate to contact me.

Sincerely,

[REDACTED]

cc: Michele Clewell, Township Secretary (for distribution to BOS)
(via e-mail: [REDACTED])