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July 16, 2019

VIA REGULAR UNITED STATES MAIL
AND VIA ELECTRONIC MAIL

Robert A. Willig, Sr. Deputy Attorney General
Office of Attorney General
1251 Waterfront Place
Mezzanine Level
Pittsburgh, PA 15222
[REDACTED]

Re: Fairview Township Timber Ordinance/ACRE Review

Dear Attorney Willig:

I write in response to your letter, dated June 19, 2019, to outline why the Fairview Township Timber Ordinance, Fairview Township Code of Ordinances, Section 44, does not violate ACRE.

Regarding the application for a timber harvesting permit, the requirement of a permit, and payment of a reasonable fee, is permissible under ACRE. The written harvesting plan is also permissible. Although more restrictive language has been considered unreasonable by your office in the past, your guidance page indicates it is permissible to require a foresting plan consistent with approved forestry practices. Road bonds, road maintenance agreements, and the like are also permissible under ACRE. These requirements do not unreasonably restrict timber operations.

We concede that amendments are necessary to remove such requirements as the Erosion and Sediment Control Plan to the county conservation district; and the requirement of proof of workers' compensation insurance and liability insurance. However, we assert the remaining application requirements are permissible under ACRE.

Regarding the other issues raised by the complainant:

Subsection B, Applicability, stating the ordinance applies to all timber harvesting when the total area is one-half acre or more; requiring a permit; and providing that the Ordinance does not apply to cutting of small trees (less than six inches in diameter) or cutting of ten percent or less of larger trees, and indicating the Ordinance does apply to other timber operations. This subsection indicates the operations to which the timber harvesting ordinance applies and does not apply. It does not itself impose any restrictions or limitations on timber operations and is permissible.

Subsection E-6, which restricts clear-cutting on areas greater than one-half acre and on slopes greater than twenty-five percent. Consistent with the OAG Fact Sheet, this provision should be amended to require a forestry plan prepared by a

professional forester that addresses the best management practices to be employed to ensure stabilization of soils and demonstrates compliance with the Penn State College of Agricultural Sciences publication entitled "Best Management Practices for Pennsylvania Forests (2001)".

Subsection E-8, which requires thirty percent of the forest cover (canopy) to be kept in a harvest area of greater than two acres: amendment will be necessary.

Subsection F, which places liability on landowner and operator for damage caused to Township roads by timber operations which is greater than the damage caused by normal traffic. Specifically, the complainant complains of a bond which the Township is requiring for damages, in the amount of \$4,886.00. The Pennsylvania State University Extension website indicates road bonding and/or road maintenance provisions are permissible. The provision at issue does not unreasonably restrict timber harvesting operations and is permissible.

Thank you for your professional courtesy and consideration. If you have any questions, please feel free to contact my office.

Very truly yours,

Donald G. Karpowich,
Attorney-at-Law, P.C.

A handwritten signature in black ink, appearing to read "Erika L. Mills". The signature is fluid and cursive, with a long horizontal stroke at the end.

Erika L. Mills, Esquire

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JOHN G. DEAN
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July 17, 2019

Via Facsimile [REDACTED] and First Class Mail

Robert A. Willig, Senior Deputy Attorney General
Office of Attorney General
1251 Waterfront Place
Mezzanine Level
Pittsburgh, PA 15222

Re: Rice Township/ACRE Review Request

Dear Mr. Willig:

Please be advised that our firm represents Rice Township (the "Township"). In that regard, this shall serve as the Township's response to your June 19, 2019 correspondence regarding the complaint filed by [REDACTED] alleging, inter alia, that provisions of the Township's Zoning Ordinance (the "Ordinance") regarding timber harvesting violate Act 38 of 2005 ("ACRE").

As you know, ACRE prohibits local municipalities from adopting and enforcing "unauthorized local ordinance[s]." See 3 Pa.C.S. § 313(a). An "unauthorized local ordinance" is defined as "[a]n ordinance enacted or enforced by a local government unit" which prohibits or limits a "normal agricultural operation" unless (1) the local government unit has expressed or implied authority under state law to adopt the ordinance and (2) is not prohibited or preempted under state law from adopting the ordinance. See 3 Pa.C.S. §§ 312(1)(i)-(ii).

Here, the Township has implied authority under the laws of this Commonwealth to adopt and enforce the Ordinance. See 53 P.S. § 66506. Pursuant to the Second Class Township Code, "[t]he board of supervisors may make and adopt any ordinances, bylaws, rules and regulations not inconsistent with or restrained by the Constitution and laws of this Commonwealth necessary for the proper management, care and control of the township and its finances and the maintenance of peace, good government, health and welfare of the township and its citizens, trade, commerce and manufacturers." Id. [REDACTED]

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complaint fails to demonstrate how the Township's Ordinance, as it relates to registration requirements for foresters and clear cutting, is inconsistent with ACRE or any other laws of the Commonwealth. To the contrary, enactment and enforcement of the timber harvesting provisions of the Ordinance are properly within the Township's police power for the safety and care of its citizens. See Taylor v. Harmony Twp. Bd. of Comm'rs, 851 A.2d 1020, 1024-1025 (Pa. Commw. 2004).

To be sure, Section 902.14 of the Ordinance, entitled "Forestry Activities," neither prohibits nor limits timber harvesting. See § 902.14 of the Ordinance. On the contrary, § 902.14 of the Ordinance is specifically intended to promote, encourage and facilitate safe and effective timber harvesting by requiring Forestry Management Plans to be prepared by qualified foresters and forest technicians, and by regulating clear cutting. Id. See also Office of Atty. Gen. ex rel. Corbett v. Packer Twp., No. 432 M.D. 2009, 2010 Pa. Commw. Unpub. LEXIS 176, at *4 (Pa. Commw. Dec. 8, 2009) (stating that "the language of Section 313(c) [of ACRE] merely confirms that municipalities retain their authority to regulate, as otherwise provided by law").

Finally, ACRE does not preempt local municipalities from legislating in the field of timber harvesting. See 3 Pa.C.S. §§ 312-313. As a general matter, the state is not presumed to preempt a field merely by legislating in it. Kightlinger v. Bradford Twp. Zoning Hearing Bd., 872 A.2d 234, 238 (Pa. Commw. 2005) (citation omitted). Rather, the General Assembly must clearly express its intent to preempt a field in which it has legislated. Id.

"The test for preemption in this Commonwealth is well established." See Burkholder v. Zoning Hearing Bd., 902 A.2d 1006, 1012 (Pa. Commw. 2006). "Either the statute must state on its face that local legislation is forbidden or indicate 'an intention on the part of the legislature that it should not be supplemented by municipal bodies.'" Id. (quoting Western Pennsylvania Restaurant Ass'n v. Pittsburgh, 366 Pa. 374, 77 A.2d 616, 620 (1951)). "The consequence of a determination of preemption is severe." Burkholder, 902 A.2d at 1012. "If the General Assembly preempts a field, the state retains all regulatory and legislative power for itself and no local

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legislation is permitted." Id. Accord Council of Middletown Twp. v. Benham, 514 Pa. 176, 523 A.2d 311 (1987).

In this Commonwealth, state statutes address preemption by "(1) expressly specify[ing] that municipalities may enact ordinances not inconsistent with the state law that promote the state law's purpose; (2) expressly forbid[ding] municipal legislation; or (3) be[ing] silent on the issue of preemption while regulating an industry or occupation." Synagro-WWT, Inc. v. Rush Twp., 299 F. Supp. 2d 410, 415-16 (M.D. Pa. 2003) (citing Mars Emergency Med. Servs., Inc. v. Township of Adams, 559 Pa. 309, 740 A.2d 193, 195 (1999)). "Recognizing the clarity with which the General Assembly must express an intent to preempt and the significance of such a determination, our Supreme Court found an intent to totally preempt local regulation in only three areas: alcoholic beverages, anthracite strip mining, and banking." Burkholder, 902 A.2d at 1012 (citation and internal quotation marks omitted). "Accordingly, absent a clear statement of legislative intent to preempt, state legislation will not generally preempt local legislation on the same issue." Id. (citation omitted).

Here, as previously stated, although ACRE limits the circumstances in which local municipalities can legislate timber harvesting, ACRE specifically contemplates the enactment of legislation by a local municipality if it "has expressed or implied authority under State law to adopt the ordinance" and "is not prohibited or preempted under State law from adopting the ordinance." 3 Pa.C.S. § 312(1)(i)-(ii). Absent any provisions in ACRE to the contrary, the Township submits that its timber harvesting provisions do not violate ACRE.

Respectfully,


John G. Dean

JGD/ap