



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

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Re: ACRE Request for Review – North Coventry Township, Chester County

Dear [REDACTED] and [REDACTED],

[REDACTED] initiated this matter when he filed two (2) ACRE requests for review in March 2017.

INITIAL ACRE COMPLAINTS

The first complaint addressed general timber harvesting concerns, while the second dealt with road posting and bonding; together they identified a total of thirty-six (36) issues. Many of these claims were duplicative and/or not claims at all but rather observations, opinions, or hypotheticals. In an August 17, 2017, letter [REDACTED] attorney at the time [REDACTED] clarified matters by identifying the seven (7) primary areas where he alleged that North Coventry Township’s ordinances violated ACRE: 1) North Coventry’s requirement that it approve an already Department of Environmental Protection (“DEP”) approved Erosion & Sedimentation (“E&S”) Plan; 2) a “professional forester” had to develop a Timber Harvesting Plan (“THP”) that would be filed with the Township; 3) the requirement that a timber harvester have liability insurance and the onerous amount of permit fees; 4) the mandate that the timber harvesting plan show all of the natural features and topography of the harvest site in addition to identifying the size and species of the trees to be harvested and those to remain; 5) North Coventry requiring the permit applicant to designate the time periods to reestablish the forest canopy and having the Township designated professional forester approve this timeline; 6) the prohibition of removing specimen vegetation unless the applicant could show that the specimen trees posed a hazardous condition or that not harvesting those trees constituted a financial hardship; and 7) the prohibition of harvesting within riparian buffers and on slopes of 25% grade or more.

Through his attorney, [REDACTED] proposed in this August 17, 2017 letter that North Coventry’s timber harvest ordinance be repealed in its entirety and replaced with a one sentence ordinance that reads “[n]otwithstanding any contrary or conflicting provisions of this chapter, the

standards applicable to timber harvesting normal agricultural operations with respect to natural resource protection and with respect to environmental impacts shall be governed exclusively and as applicable by the landowner's Forest Management Plan prepared by a consulting forester and the DEP Erosion & Sedimentation Plan and the best practices manuals and technical guides incorporated within those regulatory schemes thereunder, as the same may be amended or updated from time to time." In a March 28, 2018, email Attorney ██████████ sent to the OAG an explanation of ██████████'s road posting and bonding claims.

After careful review, the OAG determined that North Coventry's ordinance had several problems. In a June 8, 2018 letter to North Coventry, the OAG identified these issues and offered solutions: 1) the Township could not require local County Conservation District ("CCD") preapproval of an already DEP approved E&S Plan to secure a timber harvesting permit. North Coventry had to delete that requirement from the ordinance; 2) North Coventry had to delete its definition of "professional forester" and replace it with the definition the OAG offered; 3) North Coventry had to change the five (5) feet contour lines on the topography maps to twenty (20) feet and it had to abandon the cut/residual tally method and replace it with a plot based estimate; 4) the timeline for canopy reestablishment had to be deleted; 5) the specimen vegetation portion of the ordinance had to be deleted; 6) the riparian buffers and 25% steep slope prohibitions had to be deleted. The OAG instructed North Coventry how to amend these provisions; 7) the Township had no authority to impose insurance requirements and that section had to be deleted. Additionally, the permit fees were unreasonable and had to be reduced and the escrow requirement eliminated; and 8) it was possible that the motor vehicle weight limitations may constitute an "as applied" ACRE violation which could be remedied by North Coventry including "Local Deliveries Exempt" signs on weight limited roads.

The OAG offered North Coventry two options. It could amend the ordinance piecemeal or it could repeal the timber harvesting ordinance *in toto* and enact the Pennsylvania State University's ("PSU") model timber harvesting ordinance. The OAG declined to advance ██████████'s one sentence ordinance proposal.

By letter dated June 28, 2018, North Coventry, through its solicitor ██████████ accepted the OAG's first option, by agreeing to delete and amend the problematic portions of the ordinance. The sole exception was the road posting/bonding requirements; there, the Township believed its ordinance complied with state law requirements. North Coventry agreed in this letter that it would not require ██████████ to submit to the offending portions of the ordinance. It also agreed that ██████████ could proceed with his harvest the very next month under the provisions of the "new" proposed ordinance that included the OAG's required deletions/amendments. Finally, North Coventry consented to reduce by half the permit application fee, consistent with the OAG's requirements. ██████████ declined the offer. He informed the OAG via a July 23, 2018 email that while North Coventry "conceded to all but 2 of the 13 points in [the OAG's letter]...these terms are not acceptable to me..."

Attorney ██████████ had at least one ACRE case with the OAG several years prior to the North Coventry matter. In that case, the OAG ACRE lawyer suggested both sides submit proposed ordinances, which the OAG would utilize in drafting a legally sufficient ordinance. Both parties did so, and the OAG used those proposals as a resource to draft the new ordinance, resolving the case. In an attempt to move this North Coventry matter forward, Attorney ██████████ suggested the same course of action. The undersigned attorney agreed and the OAG sent a letter in October 2018 to Attorneys ██████████ and ██████████ requesting proposed ordinances.

In a November 13, 2018 letter [REDACTED] submitted the same one sentence ordinance he had offered over a year earlier. His position had not changed. Attorney [REDACTED] informed the OAG via a November 19, 2018 letter that after receiving the OAG's request for proposed ordinances North Coventry provided its proposed draft ordinance to Attorney [REDACTED] so the parties could resolve their differences and present a joint proposed ordinance to the OAG. [REDACTED] noted in his letter that [REDACTED] declined North Coventry's offer, stating that he would not "settle" outside of the OAG/ACRE process. According to Attorney [REDACTED] [REDACTED] offered his one sentence ordinance and "assert[ed] that the Township should not regulate timber harvesting." As a result, North Coventry attached to its letter its own proposed ordinance to the OAG without any input from [REDACTED].

SUBSEQUENT ACRE COMPLAINT

In October 2019, [REDACTED]'s current counsel, [REDACTED], filed a new ACRE request, which purports to present "a distinct legal challenge [to] non-uniform requirements that are arbitrary, unreasonable and discriminatory [with] no basis...to justify the disparate treatment." Here, [REDACTED] asserts that while North Coventry identifies certain types of agricultural activities, including forestry, as "non-invasive agriculture" ("NIA"), timber harvesting is the only NIA actually subject to regulation. According to [REDACTED], this violates the "uniformity" requirement of the Municipalities Planning Code ("MPC"), 53 P.S. § 10605. In addition, [REDACTED] restates his claims that the timber harvesting ordinance violates ACRE, contending that his previously proposed ordinance must be enacted and North Coventry must install "local deliveries exempt" signs on all weight restricted roads in order to cure the ACRE violation.

Having thoroughly reviewed the most recent ACRE complaint, and building upon the previous Acceptance Letter, the OAG finds as follows:

I. TIMBER HARVESTING ORDINANCE

North Coventry indicated willingness to delete and/or amend the problematic portions of the ordinance identified in the OAG's June 8, 2018 letter; the sole exception was its road posting/bonding requirements. The OAG has carefully reviewed the draft ordinance provisions attached to North Coventry's November 19, 2018 letter and finds those proposals acceptable. However, included in these proposed ordinances is a section which states: "[a]ll other provisions of the North Coventry Zoning Ordinance have not been amended or otherwise revised and the provisions of this Ordinance are hereby reaffirmed and shall remain in full force and effect." Section 13.A, *Miscellaneous*. As part of the ACRE process, the OAG reviewed the entirety of North Coventry's ordinance and concludes that the remainder of the ordinance also contains problematic provisions. North Coventry cannot determine that the rest of its ordinance shall be "reaffirmed and shall remain in full force and effect."

The OAG has a public ACRE website at <https://www.attorneygeneral.gov/resources/acre/>. It contains a list of the ACRE cases that have come into this Office along with the corresponding Acceptance Letters. In addition to this North Coventry case, there are several timber harvesting cases with links to the Acceptance Letters.

The OAG has identified the following problems with the remainder of the ordinance. Instead of including a lengthy analysis of those problems in this letter, the OAG directs North

Coventry's attention to the following Acceptance Letters where the same problems have been extensively addressed:

- 1) *Prohibition on Clear Cutting*: East Nantmeal Township, April 2016, Letter, pp. 12-13; East Brandywine Township, 2016, p. 4; and Clay Township, 2018, pp. 5-6;
- 2) *Prohibition on Harvesting in Floodway/100 Year Floodplain/Zone-One Riparian Buffer/ Wetland*: East Nantmeal, April 2016 Letter, pp. 14, 15-16, 18; Lower Saucon Township, 2019, pp. 3-4; Eldred Township, 2018, pp. 3-4; and Upper Saucon Township, 2019, pp. 2-3;
- 3) *Percentages of Canopy & High Value Species Remaining After Harvest*; East Nantmeal, April 2016 Letter, pp. 3, 16-17; and Clay, pp. 6-8;
- 4) *Uniform Buffer from Property Lines*; East Nantmeal, November 2015 Letter; East Nantmeal, April 2016 Letter, p. 18; Monroeville Borough, 2015, p. 11; Lower Saucon, pp. 3-4; and
- 5) *Reforestation Requirements*; East Nantmeal, April 2016 Letter, p. 10; East Brandywine Township, 2016, p. 7; Lower Saucon, p. 8; Pennsbury Township, 2017, pp. 4-5; Upper Saucon, pp. 1-3

As detailed in the prior Acceptance Letters, such provisions violate ACRE; as a result, North Coventry must delete these provisions from its ordinance.

II. UNIFORMITY

With regard to the claimed violation of the MPC's uniformity claim, the OAG has determined that timber harvesting is not the only form of NIA that North Coventry regulates via ordinance. Accordingly, [REDACTED] uniformity argument fails.

Included in the definition of NIA is "[t]he raising of animals and poultry not to exceed a combined total of 1,000 pounds per acre...." Part II, General Legislation, Chapter 370, Zoning, Article II, **Definitions of Terms**, § 370-9, *Definitions, Agriculture, Nonintensive*. Chickens qualify as "poultry;" through an ordinance, North Coventry extensively regulates the keeping of chickens to ensure the number of chickens does not exceed the 1,000 pounds per acre standard. The purpose of the North Coventry chicken ordinance is to limit "the adverse effects of [keeping chickens] on surrounding properties. Such adverse effects can include noise, odors, unsanitary conditions, attraction of predators, chickens running at large, unsightly conditions, and similar adverse conditions." Part II, General Legislation, Chapter 112, Animals, Article III, **Chickens**, § 112-17A, *Purpose and general regulations*. To that end, the ordinance regulates lot size, the number of chickens allowed, and setback distances from property lines for structures, manure, and feed. *Id.*, § 112-17.1. It contains exacting standards for how chicken structures like pens, runs, and coops must be built. *Id.*, § 112-8. The ordinance also regulates noise, odors, waste and manure storage and removal, as well as how to dispose of dead chickens and on-site slaughtering. *Id.*, § 112-19. Finally, residents keeping chickens are subject to penalties for violating the ordinance. *Id.*, § 112-20.

The NIA definition also includes "[t]he cultivation of the soil and the raising and harvesting of products of the soil including nurseries, horticulture, commercial greenhouses...." Part II, General Legislation, Chapter 370, Zoning, Article II, **Definitions of Terms**, § 370-9, *Definitions*,

Agriculture, Nonintensive. “High tunnels” are ubiquitous in Pennsylvania; these structures are regularly used in the cultivation of the soil and at nurseries, horticultural sites, and commercial greenhouses and as such, fall within the NIA’s definition. North Coventry regulates high tunnels. Its ordinance notes that state stormwater management laws and regulations apply to high tunnels unless these temporary agriculture buildings satisfy certain standards. Part II, General Legislation, Chapter 194; Stormwater Management, Article I, General Provisions, §194.106.C.5(a), *Exceptions, simplified approach for small projects and modified requirements for agricultural structures.* See also *Id.*, §194.106.E (Agricultural buildings must comply with state laws and regulations except in certain circumstances).

In addition to poultry being included in the definition of NIA, the Township also includes “[t]he raising of animals” in general “not to exceed a combined total of 1,000 pounds per acre....” Part II, General Legislation, Chapter 370, Zoning, Article II, **Definitions of Terms**, § 370-9, *Definitions, Agriculture, Nonintensive.* If a person is engaging in the NIA of “raising animals” North Coventry has required setback distances for barns or other agricultural buildings from lot boundaries and dwellings; the Township mandates the lots must be graded so as to keep animal wastes on that lot to prevent those wastes from seeping onto other properties as well as to keep that waste away from water bodies; and animal pastures must be fenced. Part II, General Legislation, Chapter 370, Zoning, Article X, Supplemental Use Regulations, §370-40.A, *Agriculture, General requirements.*

As the forgoing examples amply demonstrate, any assertion that timber is the only NIA North Coventry regulates through its ordinances is mistaken. The uniformity argument fails on that ground alone.

██████████ relies on 53 P.S. §10605, *Classifications*, of the MPC as support for his uniformity claim; however, he cites only to a portion of that section. While §10605 does read in part “[w]here zoning districts are created, all provisions shall be uniform for each class of uses or structures, within each district....” the language which immediately follows states: “**except** that additional classifications may be made within any district....” (emphasis added) The MPC’s uniformity requirement is not absolute; under the exception additional classifications may be made within any district “[f]or the regulation, restriction or prohibition of uses and structures at, along, or near...natural...bodies of water...places of relatively steep slope or grade...[and in] flood plain areas, agricultural areas.” *Id.*, § 10605(2)(ii), (iii), and (vii). By their very nature, timber harvests intersect with the additional classifications; often, a harvest impacts bodies of water (e.g. streams, rivers, lakes), involves cutting down trees on hillsides of varying grades, and/or occur in a flood plain. Far from supporting ██████████’s position, §10605 expressly allows for North Coventry’s regulation of timber harvesting.

The Courts agree. A landowner in Williams Township, Northampton County challenged that municipality’s timber harvesting ordinances. The Commonwealth Court rejected the challenge based in part on §10605’s exception language when it held “the restrictions placed on forestry by the Ordinance are consistent with Section 605 of the MPC, which allows restrictions in areas of ‘relatively steep slope or grade, or other areas of hazardous geological or topographical features’ and in ‘flood plain areas.’” Thus we fail to see how the trial court erred in affirming the

¹ “High tunnels are simple structures used to extend the growing season for horticultural crops such as vegetables, small fruits, and cut flowers. While they resemble greenhouses, the structures are much more economical and less labor-intensive to construct. They consist of simple frames usually covered by a double poly layer. The sides roll up to vent excess heat. Most high tunnels are not heated nor do they require electricity to operate.” <https://www.ag.ndsu.edu/high-tunnel>.

decision of the ZHB” denying the landowner’s challenge to the ordinances. *Chrin Brothers, Inc. v. Williams Township Zoning Hearing Board*, 815 A.2d 1179, 1186 (Pa.Cmwlt. 2003).

Historically, the OAG has analyzed timber harvesting ACRE cases consistent with the *Chrin Brothers* holding; we have never taken the position that municipalities are entirely without authority to regulate timber or to enact appropriate timber harvesting ordinances. When addressing a problematic timber ordinance, we first remind municipalities that the MPC allows timber harvesting as a use as of right in all zoning districts, 53 P.S. §10603(f), and follow up with a detailed explanation why the ordinance violates ACRE and how the municipality can fix the offending portions of the ordinance to bring it into compliance with state law. Typically, the OAG offers the municipality two options: amend the ordinance piecemeal as outlined in the Acceptance Letter or repeal it entirely and enact the PSU Model Timber Harvesting Ordinance. In fact, the OAG does not simply leave municipalities to fend for themselves when fixing their ordinances. This Office actively engages with the municipality and assists in drafting legally sufficient ordinances. To simply declare that a municipality cannot enact a meaningful timber harvesting ordinance would be inconsistent with everything the OAG has done in the past and continues to do to this day with great success.²

██████████ is correct on the basic legal principle: ordinances cannot be discriminatory or arbitrary thereby resulting in disparate treatment. North Coventry’s timber ordinances do not rise to this standard. As explained above and in the June 2018 Acceptance Letter, the ordinances contain problematic provisions. None of those problems are that they are discriminatory, or arbitrary, or result in disparate treatment. The facts do not support the underlying premise, that timber harvesting is the only NIA subject to regulation, upon which the uniformity claim is built. North Coventry regulates other forms of NIA through its ordinances. There is no discrimination.

Nor is the attempt to regulate the NIA of forestry arbitrary. The only time an ordinance is arbitrary is “where it is shown that [the ordinance] results in disparate treatment of **similar landowners** without a reasonable basis for such disparate treatment.” *C&M Developers, Inc. v. Bedminster Township Hearing Board*, 820 A.2d 143, 151 (Pa. 2002)(emphasis added). See also *Reimer v. Board of Supervisors of Upper Mount Bethel Township*, 615 A.2d 938, 944, n.6 (Pa.Cmwlt. 1992)(emphasis added)(“The purpose of the uniformity requirement... was to ensure potentially hostile landowners that all property which was **similarly situated** would be treated alike.”) Timber harvesting is not the same as or even similar to the “[t]he cultivation of soil and the raising of and harvesting of products of the soil,” or nurseries, horticulture, or commercial greenhouses, or “[t]he raising of animals and poultry not to exceed a combined total of 1,000 pounds per acre....” Part II, General Legislation, Chapter 370, Zoning, Article II, **Definitions of Terms**, § 370-9, *Definitions, Agriculture, Nonintensive*. Different types of agricultural activities are, quite simply, different. Just because various types of farming fall under the larger rubric of “agriculture” does not mean that they all must be treated exactly the same. A farm with hundreds of animals is different from a soybean farm, which is different from an apiary, which is itself different from a winery, and all of which are different from timber harvesting. Diverse forms of agriculture each present their own unique set of concerns and challenges that must be addressed to

² The OAG established the practice of working with municipalities in the 2015-2016 East Nantmeal Township case. It did the same with the 2015 Salem Township and Borough of Monroeville timber harvesting ACRE cases. The OAG exerted considerable effort and worked tirelessly with Township officials in all three cases when assisting them in drafting a legally sufficient timber harvesting ordinance.

protect the environment and the community at large. Agriculture is a vast area encompassing many different types of activities. One only needs to look at the definitions of "agricultural commodity" and "normal agricultural operation" found in the Right to Farm Act, 3 P.S. §952, Definitions, to know that this is true.

██████████ contends that North Coventry does not have a reasonable basis to regulate timber harvesting. The *Chrin Brothers* Court certainly disagrees. If it is true that municipalities have no reasonable basis to regulate timber, the *Chrin* Court would not have sided with the municipality in its effort to do exactly that. The OAG disagrees that there is no reasonable basis upon which a municipality may regulate timber. This Office has repeatedly and consistently concluded that municipalities may have timber harvesting ordinances so long as those ordinances do not violate ACRE.³ PSU certainly agrees that municipalities may have, and in fact should have, timber harvesting ordinances. The School issued its own model ordinance. The environmental and societal impacts of timber harvesting are considerable and obvious. If a harvest is done incorrectly, the environmental consequences at the harvest site, as well as surrounding areas, can be devastating in both the short and long term. The adverse consequences for the community at large in which the timber is harvested is equally as damaging.

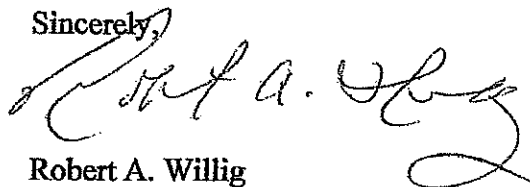
III. ROAD POSTING AND BONDING

It is unclear whether road posting and bonding matters fall within ACRE. To the extent that they may, the entirety of ██████████'s road issue is that North Coventry must post "Local Deliveries Exempt" signs on already existing weight-restricted road signs. ██████████ informed the OAG in a December 2019 letter that "if [the OAG] believe[s] signage must specifically state 'local deliveries exempt' on all [of North Coventry's] restricted weight roadways, it will comply." The OAG requests North Coventry to take this action, so that this issue is resolved.

CONCLUSION

To finally resolve this matter, North Coventry must amend its timber harvesting ordinance. As the OAG has said for years in all timber harvesting ACRE cases, North Coventry can do this one of two ways: a piecemeal approach or by repealing the ordinance entirely and enacting the PSU Model Ordinance. The OAG recommends adoption of the PSU Model Ordinance. We have identified numerous problems with the ordinance and it would be less confusing and more efficient if North Coventry enacted the PSU Model Ordinance. I would welcome a proposed ordinance from North Coventry using the PSU Model Ordinance as a template. Once North Coventry enacts a legally sufficient ordinance and adds the "Local Deliveries Exempt" signs, this matter will be closed.

Sincerely,



Robert A. Willig
Senior Deputy Attorney General

³ See e.g. East Brandywine Township; Lower Saucon Township; Pennsbury Township; Eldred Township; and Clay Township to name just a few.