



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

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December 12, 2019

Office of Attorney General
1251 Waterfront Place
Mezzanine Level
Pittsburgh, PA 15222
[REDACTED]

Board of Supervisors
Upper Saucon Township
5500 Camp Meeting Road
Canter Valley, PA 18034

Re: ACRE Request-Upper Saucon Township-Lehigh County- [REDACTED]

Dear Board of Supervisors,

Act 38 of 2005, the Agricultural Communities and Rural Environment (“ACRE”), law requires that the Office of Attorney General (“OAG”), upon request, review a local government ordinance for compliance with Act 38. The Act authorizes the Office, in its discretion, to file a lawsuit against the local government unit if, upon review, the Office believes that the ordinance unlawfully prohibits or limits a normal agricultural operation.

We write to inform the Board that we received a request from [REDACTED]. A copy of that request is attached for the Board’s review (*See Exhibit A*). If you can please respond to the ACRE request within thirty days I would greatly appreciate it.

[REDACTED] specifically raises two ordinance provisions in his October 31st letter that he contends violates ACRE: 1) § 517.B.1.c – Required Approval of a Forest Stewardship Plan. This ordinance reads that “applications for timber harvesting shall include written approval of a Forest Stewardship Plan by the PA (Department of Conservation and Natural Resources) DCNR, Bureau of Forestry.” and 2) § 517.D.1.J – No Timber Harvesting Buffer Zones. Upper Saucon lists required setbacks ranging from 25 to 100 feet. [REDACTED] is correct. These two ordinance provisions do violates ACRE.

Forest Stewardship Plan

[REDACTED] attaches to his ACRE Petition an April 3, 2019 letter from John Nissan, a professional forester with the DCNR Bureau of Forestry to Upper Saucon Township. Therein Mr. Nissan writes that the Forest Stewardship Plan process is “a voluntary program that should not be

made mandatory.” Mr. Nissan is right but I would go one step further. The Forest Stewardship Plan process is a voluntary¹ program that a local municipality *cannot* make mandatory.

Silviculture 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. § 952. Timber harvesting is the only agricultural practice that is a *use as of right* in all zoning districts, 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 clearly identifies the intent of the General Assembly to encourage and promote timber harvesting throughout the Commonwealth.

Moreover, the intent of the General Assembly to broadly encourage and promote all types of agriculture, including forestry, is made perfectly clear in the RTFA² and other provisions of the MPC.³ 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.” 3 Pa.C.S., § 311, *Historical and Statutory Notes*. Both the black letter and the spirit of the law require Townships to encourage and support, not hamper, timber harvesting.

Upper Saucon’s mandate that a Forest Stewardship Plan must be conducted and submitted to the Township violates ACRE. Upper Saucon cannot elevate that which a landowner is under

¹ “The Pennsylvania’s Forest Stewardship Program is a *voluntary* program to help forest landowners learn to improve and maintain the ecological health of their land. Private landowners who own between 5 and 1,000 acres of forestland can join the program.” <https://extension.psu.edu/pennsylvania-forest-stewardship-program-print> (emphasis added). “The Forest Stewardship Program does not tell you what you should do on your own land. Instead, it helps you accomplish...what you want to do, whether or not that includes timber harvesting.” *Forest Stewardship, Our Link to the Past-Our Legacy for the Future*, Pennsylvania State University (“PSU”) College of Agricultural Sciences, Number 1, 2008, p. 2. “Remember, a forest stewardship plan does not tell you what you must do on your land; it helps you do what you want to do....” *Id.*, p. 5. The Forest Stewardship Program is “designed specifically to meet the needs of private forest landowners...we hope you will join us in the stewardship....” *Id.*, p. 2;

² “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**.

³ “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**.

no obligation to do in the first place to a mandatory requirement that a landowner must do in order to harvest timber. It also appears that Upper Saucon has a fundamental misunderstanding of the purpose of a Forest Stewardship Plan. The Plan is not designed for a local municipality to use as it sees fit, but rather, the Plan is a tool for landowners to accomplish what he/she wants to do with the land even if it does not involve timber harvesting. There is no legal authority for Upper Saucon to require the Plan. Indeed, such a requirement is inconsistent with the law cited above stating in clear terms that timber harvesting is to be encouraged not hindered.

Buffer Zones

Section 517.D.1.J mandates no-cut buffer zones of between twenty-five (25) and one hundred (100) feet. These no-cut buffers apply along adjoining streets, scenic roads, adjoining properties, riparian areas, waterbodies, and designated trails

That portion of § 517.D.1.J dealing with water bodies and riparian areas conflicts with the state regulatory programs protecting “[a]ll surface waters, lakes, ponds, streams and wetlands in Pennsylvania.” See Pennsylvania Department of Environmental Protection (“DEP”), *Timber Harvest Operations Field Guide for Waterways, Wetlands, and Erosion Control*, July 2009, p. 4. The DEP’s Erosion and Sediment Control and Waterway Management regulatory schemes⁴ implement best management practices for timber harvesting near streams, ponds, wetlands, floodplains, and other waters of the Commonwealth. The regulations do not preclude timber harvesting activities in these water-sensitive areas; instead, the amount of buffer zone required near a water source depends on many variables, including soil type, slope, vegetative cover, and stream character. *Id.*, p. 21; see e.g. 25 Pa.Code § 102.14. All timber harvesting activities are required to have a written E&S Plan to establish controls for activities near water sources. 25 Pa. Code § 102.4(b). Certain activities associated with timber harvest operations may require a permit under the Waterway Management regulations, 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.” *Timber Harvest Operations Field Guide for Waterways, Wetlands, and Erosion Control*, July 2009, p. 8. However, “[p]ermits are not required to cut timber and other vegetation, including cutting in wetlands.”⁵ *Id.*

The best management practices manual for the Waterway Management regulations requires adequate buffer zones “where roads, skid trails, or log landings will be located near streams or wetlands.” *Id.*, p. 19.⁶ The width of the buffer zone depends on the slope between the forestry activity and the stream/wetland. *Id.* As explained in the manual:

⁴ 25 Pa.Code Chapters 102 and 105.

⁵ The Federal Clean Water Act exempts silvicultural activities within wetland areas from permit and regulatory requirements when managed under best management practices. 33 U.S.C. § 1344(f)(10)(A).

⁶ The DEP’s *Timber Harvest Operations Field Guide for Waterways, Wetlands, and Erosion Control*, July 2009, and BMP Manual are one and the same. “This Timber Harvesting Operations Field Guide for Waterways, Wetlands and Erosion Control was developed as a quick reference guide and contains the most commonly used best management practices (“BMPs”) for silviculture activities.” *Timber Harvest Operations Field Guide for Waterways, Wetlands, and Erosion Control*, July 2009, page immediately following the front cover and immediately before page i, Table of Contents.

Buffer zones are land areas adjacent to both flowing and nonflowing water bodies where specific management strategies should be applied. Buffer zones protect wetlands, streams, lakes and ponds by helping to:

- protect water quality by filtering sediments and other pollutants from surface runoff;
- maintain proper water temperatures and degree of shading for both aquatic plant and animal life; and
- help retain sources of food and cover for wildlife species that use forested wetlands.

Id., p. 20.

Although trees may be harvested within buffer zones around water sources, the DEP's best management practices requires retention of 50% of the tree canopy so that there is no increase in water and ground surface temperature. *Id.* Moreover, the season, soil type, soil moisture, and type of equipment used has to be taken into account when harvesting. *Id.*, pp. 24-25. The "[c]areful implementation of BMPs will protect and enhance important wetland functions while allowing for cost-effective timber harvesting." *Id.*, p. 25. The DEP requires certain best management practices when felling trees near wetlands or other water sources, which includes buffer zone requirements. *Id.*, pp. 21, 27-28.

As this regulatory scheme demonstrates, the best management practices for a particular forest is entirely dependent upon the unique conditions of that forest. For this reason, the Upper Saucon's blanket prohibition on harvesting within a certain distance of any water body conflicts with the DEP's Erosion and Sediment Control and Waterway Management regulations; those regulations recognize the unique nature of each forest by allowing timber harvesting activities near water sources using required best management practices tailored to the particular site conditions of a specific property.

The ACRE statute provides for the OAG to utilize the PSU School of Agriculture as experts in agricultural operations issues. 3 Pa.C.S. § 314(d). The OAG consulted with a PSU School of Agriculture professor emeritus of forestry. The Penn State expert advised that any blanket, automatic buffer requirement is contrary to BMPs and sound forest management accepted in the field of forestry. A professional forester develops a forest plan for a timber harvesting operation and in so doing, assesses the overall health of the forest and identifies the best management practices to implement to sustain and improve the health of the forest. This includes, for example, identifying which trees to remove, how much canopy to retain, addressing environmentally sensitive areas, and the overall management goals to sustain that forested land. These management goals will vary depending on the site specific conditions at a particular forest. In addition, the DEP requires a person engaging in timber harvesting activities to have either a written E&S control plan or an approved E&S permit depending on the size of the timber harvesting operation. 25 Pa. Code §§ 102.4(b), 102.5(b). An E&S plan or permit requires planning for the site specific characteristics of the earth disturbance activity and the implementation of BMPs. Thus, Upper Saucon's blanket setback buffer zone requirements are unreasonable and contrary to sustainable forestry practices because it precludes all timber harvesting in the zone and there may be trees that should be removed to maintain the long term health of the forest. Moreover, there may be safety or other

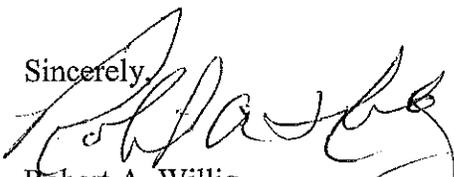
reasons which require the harvesting of trees in the buffer zone, including the prevention of accelerated erosion and sediment control. The buffer setback also results in a direct economic impact by reducing the amount of property from which an owner can harvest trees in contravention of the MPC.

The OAG has an ACRE website resource center. Go to the OAG's public website located at <https://www.attorneygeneral.gov/>. Click on the "Resources" tab. Under the "General Resources" heading one will see a link to the "ACRE-Agriculture, Communities and Rural Environment" resource center. Click on that link. The website includes all of the "Acceptance Letters" the OAG has sent to municipalities since the inception of the ACRE program in 2005. "Accepted" cases are those in which the OAG determines there are legal problems with the local ordinances. An "Acceptance Letter" is a letter brief notifying the municipality why its ordinance violates state law, as well as the specific steps the municipality must take to come into compliance with state law.

When one looks at the website, one can see that there are numerous timber harvesting cases that the OAG has reviewed. These timber harvesting acceptance letters are a wealth of information for townships and citizens alike showing how the OAG had dealt with timber cases in the past. I encourage you to browse through those letters.

The OAG respectfully submits that a prudent course of action would be for it and Upper Saucon Township to work together to amend the ordinances so that they comply with state law. In the past, the OAG and many municipalities have agreed to enact the Pennsylvania State University Model Timber Harvesting Ordinance with much success. I have attached the Penn State Extension's *Forest Management and Timber Harvesting in Pennsylvania – Information for Citizens and Local Government Officials* publication for your review (See Exhibit B). It provides a wealth of information including the PSU Model Ordinance on pages 12-15.

I thank you for your consideration in this matter. Please do not hesitate to contact me with any information, concerns, or guidance that you may have.

Sincerely,

Robert A. Willig
Senior Deputy Attorney General

cc [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]