

MARY C. EBERLE
JOHN B. RICE
DIANNE C. MAGEE *
DALE EDWARD CAYA
DAVID P. CARO ♦
DANIEL J. PACT ♦ †
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JOEL STEINMAN
MATTHEW E. HOOVER
COLBY S. GRIM
MICHAEL K. MARTIN
MITCHELL H. BAYLARIAN
IAN W. PELTZMAN
WILLIAM D. OETINGER

* ALSO ADMITTED IN NEW JERSEY
◊ ALSO ADMITTED IN NEW YORK
† MASTERS IN TAXATION
♦ ALSO A CERTIFIED PUBLIC ACCOUNTANT

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J. LAWRENCE GRIM, JR., OF COUNSEL
JOHN FREDERIC GRIM, OF COUNSEL

104 S. SIXTH STREET
P.O. BOX 215
PERKASIE, PA. 18944-0215
(215) 257-6811
FAX (215) 257-5374
(215) 536-1200
FAX (215) 538-9588
(215) 348-2199
FAX (215) 348-2520

November 16, 2020

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

RE: ACRE Request for Review, East Rockhill Township

Dear Attorney Willig:

Please be advised that this firm serves as the Solicitor for East Rockhill Township ("Township"). I have been provided a copy of your letter to the East Rockhill Township Board of Supervisors dated September 17, 2020 in which you outline a request to review the East Rockhill Township Ordinance as it pertains to its forestry use under Act 38 of 2005 ("ACRE"). The Township believes that the existing provisions of its zoning ordinance are consistent with ACRE and with the Township's authority under the Municipalities Planning Code. Please allow this letter to serve as East Rockhill Township's response to the complaint presented by the property owner in this matter.

Erosion and Sediment Control Plan Submission

In his request for review submitted to the Office of the Attorney General, [REDACTED] alleges he was required to have an erosion and sediment plan reviewed and approved by the Bucks County Conservation District. While East Rockhill Township has no reason to doubt [REDACTED] was required to obtain an erosion and sediment plan, this plan was not a requirement imposed by East Rockhill Township. I have attached as "**Exhibit A**" the East Rockhill Township Zoning Ordinance section pertaining to forestry use which contains no provision requiring the submission of an erosion and sedimentation control plan to the Township. I have also attached as "**Exhibit B**" the review letter of the East Rockhill Township Engineer dated August 21, 2019 sent to [REDACTED] which contains no requirement to *obtain* an erosion and sedimentation control plan. The Township Engineer's review letter simply states that

Unauthorized Local Ordinances

East Rockhill Township also notes state law does not expressly prohibit the use of an escrow to provide for professional review of Normal Agricultural Operations, as the term is defined under the Agricultural Code (3 Pa.C.S. §101, *et seq.*). The Agricultural Code requires that municipalities “shall not adopt nor enforce an unauthorized local ordinance.” (3 Pa.C.S. §313(a)). Within the definitions section of the Agricultural Code, an “Unauthorized Local Ordinance” is defined as:

- (1) Prohibits or limits a normal agricultural operation unless the local government unit:
 - (i) has expressed or implied authority under State law to adopt the ordinance; and
 - (ii) is not prohibited or preempted under State law from adopting the ordinance.

The Agricultural Code goes on to explain that “Notwithstanding the provisions of this section, nothing in this chapter shall be construed to diminish, expand or otherwise affect the legislative or regulatory authority of local government units under State law...” (3 Pa..C.S. §313(c)). Consistent with the literal terms of §313(c), Courts have interpreted the Agricultural Code so as to not limit the existing authorities of municipalities to legislate with respect to agricultural uses. The language of Section 313(c) merely confirms that municipalities retain their authority to regulate, as otherwise provided by law. “[T]he legislature's use of the phrase ‘or otherwise affect’ means that the authority of local governments to legislate under State law was not expanded, diminished or otherwise changed by Act 38.” *Com., Office of Atty. Gen., ex rel. Corbett v. Packer Twp.*, No. 432 M.D. 2009, at *2 (Pa. Cmwlth., Jan. 6, 2010) citing to *Com., Office of Atty. Gen. ex rel. Corbett v. E. Brunswick Twp.*, 956 A.2d 1100 (Pa. Cmwlth. 2008).

State law, as it existed at the time of the enactment of the Chapter 3 of the Agricultural Code (“ACRE”) in 2005 allowed forestry ordinances with similar, but even more technically demanding, ordinances which would explicitly required professional review. In *Chrin Bros. v. Williams Twp. Zoning Hearing Bd.* the Commonwealth Court reviewed the authority of a municipality to enact an ordinance regulating a forestry use against §603(f) of the MPC which restricts the enactment of zoning ordinances which “unreasonably restrict forestry activities.” 815 A.2d 1179 (Pa. Cmwlth. 2003); 53 P.S. 10603(f). The Commonwealth Court reviewed an ordinance which required:

1. A Forestry Management Plan shall be prepared and followed for any forestry involving more than 2 acres. This Plan shall be prepared by a professional forester.
2. The Forestry Management Plan shall be consistent with the Timber Harvesting Guidelines of the PA. Forestry Association.

3. Clearcutting shall be prohibited except on tracts of less than 2 acres. This provision shall not apply to State Game Lands where clearcutting is done to benefit the natural habitat.
4. On tracts larger than 2 acres, at least 30 percent of the forest cover (canopy) shall be kept and the residual trees shall be well distributed. At least 30 percent of these residual trees shall be composed of a higher value species *as determined by a professional forester.*
5. An Erosion and Sedimentation Control Plan shall be submitted to the County Conservation District for any review and recommendation.
6. Reforestation shall be required except for areas proposed for buildings, streets and utilities on an approved plan.
7. Clear cutting is prohibited on areas with slopes greater than 25 percent or within the 100-year floodway.

Chrin Bros., at 1181, emphasis added.

The Commonwealth Court upheld the municipal ordinance relying heavily on testimony of the Township Engineer who had reviewed the project. The Commonwealth Court held that:

...§603(f) merely codifies many years of case law setting forth the general principle that zoning ordinances may not unreasonably restrict the manner in which a landowner chooses to use his land. However, an ordinance may regulate the use of land as long as the regulation is not unduly restrictive, i.e., the regulation must have the requisite substantial relationship to the public welfare in order to be valid.

Chrin Bros., at 1185.

The Commonwealth Court relied heavily on the testimony of the township engineer who had reviewed the project in finding that the municipal regulations bore the requisite relationship to public welfare and were not arbitrary or unreasonable. East Rockhill Township's ordinance bears a strong resemblance to the ordinance in *Chrin Bros.* with the exception that East Rockhill Township's ordinance is less onerous and contains fewer technical provisions.

Chrin Bros. represents the state of the municipal authority to regulate forestry uses by ordinance in 2003, two years before the ACRE Law was enacted. As explicitly stated in §313(c), "Notwithstanding the provisions of this section, nothing in this chapter shall be construed to diminish, expand or otherwise affect the legislative or regulatory authority of local government units under State law..." (3 Pa.C.S. §313(c)). Against the standard *Chrin Bros.* set for municipal regulation of forestry uses by ordinance, East Rockhill Township's forestry ordinance operates within the confines of the MPC and is, therefore, a valid exercise of municipal zoning power.

Scope of Project and Professional Review

East Rockhill Township also wishes to address the use of the escrow funds in [REDACTED] particular case. First, [REDACTED] escrowed funds were used to obtain a technical review and to ensure completion of the project *in its entirety*. The Township Engineer reviewed not only the technical provisions of the forestry use under the zoning ordinance, but also aspects of the project unrelated to any agriculture use such as proper installation of temporary driveway, eventual removal of the temporary driveway, and securing the reseeded of the disturbed land. It has been [REDACTED] refusal to remove the temporary driveway that has caused the substantial residue of his escrow to not be returned. Upon his removal of the temporary driveway, the Township will return a large portion of the escrow. As it stands, however, the Township has an unauthorized entrance to its right-of-way which does not properly protect the road from runoff and which it has requested removal pursuant to the temporary permit. The use of escrowed funds for the technical review of the forestry use were minimal and were necessary to ensure the provisions of the zoning ordinance were properly applied. However, [REDACTED] has obstinately refused to address the Township's request to remove the temporary driveway and has, therefore, not been returned the remaining portion of his escrowed funds.

Conclusion

Despite the Township's defense of its ordinance, it always seeks to regulate uses within its boundaries in accordance with experts' advice and recommendations. As such, East Rockhill Township will consider amendments to its zoning ordinance with respect to the Forestry Use. In the event East Rockhill elects to amend its zoning ordinance, it will be guided by the model ordinance prepared by Penn State and provided to the Township by the Attorney General's Office.

Very truly yours,

GRIM, BIEHN & THATCHER

By: _____ /s/ [REDACTED]

[REDACTED]
Cc: [REDACTED]
[REDACTED]
[REDACTED]