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via Regular Mail and E-mail
[REDACTED]

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

RE: ACRE – Request for Review
of [REDACTED] and [REDACTED]
East Marlborough Township, Chester County, Pennsylvania

Dear Senior Deputy Willig:

My Firm serves as Solicitor to East Marlborough Township ("Township"), Chester County, Pennsylvania. I write in response to your correspondence of November 4, 2020, with regard to an ACRE Request for Review ("ACRE Request"), submitted by Debra A. Shulski, Esquire, on behalf of [REDACTED] and the timber harvesting company [REDACTED] ("FSC") (collectively, "Complainants"), dated October 26, 2020.

By way of pertinent background, the ACRE Request stems from an October 2020 denial of a Zoning Permit Application of the Complainants for proposed timber harvesting activities at [REDACTED] East Marlborough Township property [REDACTED]. A zoning permit for the proposed timber harvesting activities was not issued as a result of clear noncompliance with a multitude of requirements contained in the Forestry and Timber Harvesting section (*i.e.*, § 1821) of the Township's Zoning Ordinance ("Ordinance").

By our count, Complainants have identified eight (8) Forestry and Timber Harvesting subsections which they allege to be "unreasonable and invalid and/or preempted by state regulations". Each of the eight (8) challenged subsections will be herein addressed in turn. At the outset and in sum, please note, the Township maintains that the entirety of its Forestry and Timber Harvesting Ordinance requirements (§ 1821.A. through § 1821.K.) represent reasonable, valid, and lawful municipal regulation of forestry and timber harvesting activities.

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The Forestry and Timber Harvesting Ordinance, last amended pursuant to Township Ordinance No.: 2019-05, is a product of careful planning, utilization of community dialogue and resources, as well as weigh-in from forestry and timber harvesting-based expertise. Specifically, in 2018, the Township Board of Supervisors instructed the Township Planning Commission to review and update the sections of the Zoning Ordinance applicable to environmental resources. As part of that deliberate and thorough process, one of the Township Supervisors, who had served as Goddard Chair of Forestry and Environmental Resource Conservation in Pennsylvania State University's ("PSU") School of Forest Resources, consulted a former colleague at PSU for input on the forestry and timber harvesting provisions of Ordinance. That professor referred the Township to and recommended consultation with the model timber harvesting ordinance drafted by The Brandywine Conservancy ("Conservancy"). In 2019, the Township was guided by the Conservancy's model ordinance in amending the provisions of the Zoning Ordinance that are the subject of this review by the Office of Attorney General ("OAG").

The Township is aware that, at the time the amendments were adopted, the OAG was in discussions with The Brandywine Conservancy over certain model ordinance provisions, specifically regarding the reasonableness of certain municipal-based regulations pursuant to the Right To Farm Act ("RTFA") and the Agriculture Communities and Rural Environment Act ("ACRE"). It is the Township's understanding that the final version of the Conservancy's model ordinance may incorporate subsequent revisions recommended by the OAG, not otherwise contained in the Township's Zoning Ordinance (at § 1821). Accordingly, while in large part similar (and identical in certain regards), the Township recognizes that its 2019 Zoning Ordinance amendments (based upon language in prior iterations of the Conservancy's model ordinance) may differ slightly from the Conservancy's final model ordinance. In large part, however, the ordinances are very similar, and the Township's Section 1821 may in fact satisfy the OAG's reasonableness and preemption-related assessments. A copy of the Conservancy's "Sample Forestry/Timber Harvest Provisions for Municipal Zoning Ordinances" is attached hereto and incorporated herein.

Challenge 1: Ordinance Section 1821.D. (Permit Required)

Complainants' allegations:

- Township requires a zoning permit application fee; and
- The zoning permit application review period is too lengthy and unreasonable.

Township's response:

Recognizing that a zoning permit application fee for proposed forestry and/or timber harvesting operations is not currently set forth by the Township's Fee Schedule, pursuant to a Board of Supervisors resolution, the Township did not charge Complainants any zoning permit application fee. The Township maintains that a reasonable zoning permit application fee may be

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required (if authorized by the Board of Supervisors) of forestry and timber harvesting applicants. Complainants offer no valid basis, nor legal citation, for their assertion that a permit application fee cannot otherwise be collected.

The Pennsylvania Municipalities Planning Code ("PA MPC"), which establishes the framework for Pennsylvania zoning regulation, expressly authorizes the Township to charge administrative fees in an amount sufficient to offset costs borne by the Township in processing and administering applications. See § 617.3.(e). (53 P.S. § 10617.3.(e)). Such fees are required to be reasonable and commensurate with the costs of the services performed by the Township.

The Township disagrees with Complainants' allegation that the Township's review period, of *up to* 45 days (as contained in Section 1821.D.2.), is too lengthy and unreasonable. At the outset, Complainants cite no legal authority to substantiate their allegation. Furthermore, Section 1821.D.2.'s prescribed timing tracks the same 45-day review period as the Brandywine Conservancy Model Ordinance's Section B.1.a. A side-by-side review of the Ordinances reveal that their concepts are identical, and their language is nearly identical.

Specifically, the Township's Section 1821.D.2. states:

Applications for a Zoning Permit for Timber Harvesting shall be submitted to the Township for review of compliance with the standards for Timber Harvesting operations set forth herein not less than forty-five (45) days prior to commencement of the Timber Harvesting operation.

Whereas, the Brandywine Conservancy Model Ordinance's Section B.1.a similarly states:

Not less than forty-five (45) days prior to the commencement of a Timber Harvest, an application for zoning permit for Timber Harvest shall be submitted to the Township for approval by the Zoning Officer.

While the wording varies slightly between Ordinance provisions, the effect on timing does not whatsoever. Section 1821.D.2. was crafted directly from the accepted language of the Brandywine Conservancy Model Ordinance, and the Complainants' ACRE Request in this regard is without merit.

Challenge 2: Ordinance Section 1821.E. (Permit Application Procedure)

Complainants' allegation:

- The Township's permit application requirements are onerous, unreasonable, and deter timber harvesting activities.

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Township's response:

Again, Complainants cite no legal authority to substantiate their allegation. There are no specific allegations raised challenging the requiring of: an existing features map; a logging plan; a forest regeneration plan; a woodland reforestation plan; a forest best management practices plan; or a forest stewardship plan. Instead, Complainants (by way of sweeping generalities) suggest that such requirements have been found invalid.

As the case with Challenge 1 (*above*), the language of Ordinance Section 1821.E. closely tracks that of the Brandywine Conservancy Model Ordinance. A side-by-side comparison of the pertinent provisions of the Township's Ordinance with the Brandywine Conservancy Model Ordinance reveals the unmistakable similarities.

By way of demonstration, the comparable (and at times, identical) language is most succinctly summarized by comparing the following:

<u>Permit Application Content:</u>	<u>Township Ordinance §:</u>	<u>B.C. Model Ordinance §:</u>
existing features map	§ 1821.E.1.b.	§ C.1.b.
logging plan	§ 1821.E.1.c.	§ C.1.c.
forest regeneration plan	§ 1821.E.2.a.,b.	§ C.1.f.
forest BMP plan	§ 1821.E.3.	§ C.1.g.
forest stewardship plan	§ 1821.E.4.	§ C.1.h.

The Township would be interested in ascertaining and better understanding the Office of Attorney General's position regarding permit application procedures and content, as it is unaware of "other similar claims brought under ACRE", as imprecisely and loosely alleged by the Complainants.

Challenge 3: Ordinance Section 1821.F.
(Requirements Applicable to All Timber Harvesting Applicants)

Complainants' allegation:

- The Township's requirements applicable to all timber harvesting applicants are onerous, unreasonable, and preempted by state regulations.

Township's response:

Again, as with Challenges 1 and 2 (*above*) Complainants cite no legal authority to substantiate their allegation. Rather, Complainants merely suggest that such requirements (of

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Section 1821.F.) vaguely state that Ordinance requirements are unreasonable, onerous, and preempted.

Similar to Ordinance Sections 1821.D. and 1821.E. (as addressed immediately above), the language of Ordinance Section 1821.F. closely tracks that of the Brandywine Conservancy Model Ordinance. A side-by-side comparison of the pertinent provisions of the Township's Ordinance with the Brandywine Conservancy Model Ordinance reveals unambiguous similarities.

By way of demonstration, the comparable (and at times, identical) language is most succinctly summarized by comparing the following:

<u>Applicant Requirement Content:</u>	<u>Township Ordinance §:</u>	<u>B.C. Model Ordinance §:</u>
steep slopes	§ 1821.F.2.	§ D.2
floodplains	§ 1821.F.3.	§ D.3
boundary demarcation	§ 1821.F.4	§ D.4
minimum acceptable standards	§ 1821.F.6	§ D.6

The Township would be interested in ascertaining and better understanding the Office of Attorney General's position regarding applicable timber harvesting requirements, as it is unaware of all alleged preemption by state regulations, as vaguely alleged by the Complainants.

Challenge 4: Ordinance Section 1821.G. (Permit Application Review & Approval)

Complainants' allegation:

- Township is without authority to require escrow funds for reimbursement of professional review fees in connection with a zoning permit.

Township's response:

It appears that Complainants challenge only Section 1821.G.3., as opposed to the entirety of Section 1821.G. The Township maintains that while a zoning permit application fee for proposed forestry and/or timber harvesting activities is permissible (in accordance with any Township fee schedule established by Board of Supervisors resolution), a separate (and additional) escrowing of funds for reimbursement of professional review fees in connection with said zoning permit application may not be permissible, pursuant to the PA MPC, specifically Section 617.3.(e). (53 P.S. § 10617.3(e)).

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If the Office of Attorney General finds Section 1821.G.3. to be overreaching, the Township may be willing to altogether eliminate Section 1821.G.3., while retaining the remainder of Section 1821.G. (*i.e.*, subsections G.1., G.2., G.4., and G.5.), which entails valid permit application review and approval procedures and requirements.

Challenge 5: Ordinance Section 1821.H. (Revocation or Suspension of Permit)

Complainants' allegation:

- Township is without authority to revoke a permit preempted by other state regulations.

Township's response:

The Township is permitted to revoke or suspend a zoning permit it has that authority to issue and is responsible for issuing, as it pertains to forestry and/or timber harvesting activities. The Township disagrees with Complainants' assertion that Section 1821.H. is invalid and/or preempted by state regulation. It is well within a municipality's police powers to enforce its ordinances, including zoning permits issued thereunder. Just as Complainants availed themselves of the Township's timber harvesting zoning permit application process, the Township has the duties, rights, powers, and authority to enforce its ordinances, including the revocation and/or suspension of said permits issued pursuant thereto.

However, if the Office of Attorney General finds Section 1821.H. to be problematic, only in the sense that it interprets enforcement of "any other applicable law" of a Forestry or Timber Harvesting operation to be overreaching, the Township may be willing to consider striking only the "or any other applicable law" language of Section 1821.H.3. The Township maintains that the remainder of Section 1821.H. constitutes a reasonable, valid, and lawful subsection of the Ordinance.

Challenge 6: Ordinance Section 1821.I. (Road Bonding)

Complainants' allegation:

- Impermissibly allows the Township to require a bond to be posted to guaranty damage to roadways.

Township's response:

Complainants contend that there exists no authority to support Section 1821.I.'s road bonding requirement. However, pursuant to 67 Pennsylvania Code, Chapter 189, entitled "Hauling in excess of posted weight limit", individuals may be required to furnish a bond, should timber harvesting or other activities require hauling in excess of posted weight limits, for the protection of the public health, safety, and welfare, including Township infrastructure. The precise criteria for road bonding requirements, where applicable, is set forth in 67 Pa.C.S. § 189.

The provision in question merely holds timber harvesters accountable for the repair of any damage to Township roads caused by traffic associated with a forestry and/or timber harvesting operation, as it would other individuals/entities conducting other, authorized activities. The Township believes itself to be well within its authority to establish, administer, and enforce the road bonding requirement under these circumstances, given the very nature of the activities, as prescribed by the state legislature.

Challenge 7: Ordinance Section 1821.J. (Inspections/Remedies)

Complainants' allegation:

- Impermissibly allows the Township to enforce violations of the erosion and sedimentation plan.

Township's response:

Complainants mischaracterize the nature of Ordinance Section 1821.J. The Section allows the Township to enforce various Ordinance provisions, including Township-issued permitting (in addition to the "runoff and erosion control plan"). The Township disagrees with Complainants' assertion that Section 1821.J. is invalid and/or preempted by state regulation. It is within a municipality's police powers to enforce its ordinances, including zoning permits issued thereunder. Just as Complainants availed themselves of the Township's timber harvesting zoning permit application process, the Township has the duties, rights, powers, and authority to enforce its ordinances, including permits issued pursuant thereto.

Section 1821.J. merely states the Township's inherent, general rights to enforce its ordinances, determine compliance with issued permits and submitted plans, declare violations, and seek appropriate remedies, including available enforcement procedures. The Township has statutory authorization pursuant to the PA MPC, PA Stormwater Management Act, and PA Clean Streams Law.

Challenge 8: Ordinance Section 1821.C. (Definitions)

Complainants' allegations:

- Certain definitions are unreasonable and invalid, necessitating deletion; and
- The term "Timber Harvesting" is undefined.

Township's response:

Complainants have not specifically identified any of the "certain definitions" which they allege to be unreasonable and/or invalid. All definitions of the Ordinance constitute reasonable, valid, and lawful terminology. Such a sweeping and vague allegation should be altogether disregarded.

Additionally, the term "Timber Harvesting" is most definitely defined in Article II of the Ordinance. In addition, the Ordinance's definition of "Timber Harvesting" is virtually identical to the definition of the same term in the Conservancy's Model Ordinance. Specifically, Article II of the Ordinance provides that: "[u]nless otherwise expressly stated, the following words and phrases shall be construed throughout this Ordinance to have the meaning therein indicated." Article II goes on to appropriately define "Timber Harvesting" as:

The cutting or removal of more than ten (10) trees of twelve (12) inches or greater DBH from any area of Woodland, whether accomplished in a single operation or in more than one operation over three (3) or fewer years or a Conversion to Agricultural Activity. The following activities shall not be considered Timber Harvesting for the purposes of this Ordinance:

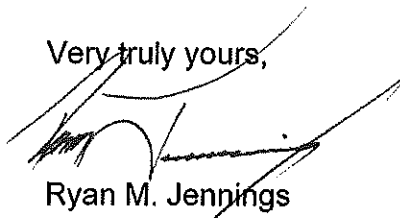
1. *The removal of trees that are dead, are nearly dead due to natural aging or the existence of disease, rot or other damage, represent an imminent threat to public health or safety, or are Invasive Vegetation;*
2. *The removal of trees pursuant to a Township approved subdivision or land development plan or landscape plan; provided that any other regulations applicable to such activities expressly set forth in this Ordinance shall apply;*
3. *The cutting or removal of trees as part of a Christmas Tree farm or Nursery operation;*
4. *Improvement Cutting or Intermediate Treatment of a Forest or Woodland Stand. To confirm either of these forest management practices, the Zoning Officer may require the Landowner to submit an analysis that documents improvements to the existing Woodland Stand (i.e., increasing stem diameter, improving stem quality, improving species composition) by removing poorly formed trees or trees of low commercial value.*

In sum (and based upon the above), East Marlborough Township is unclear as to how, as Complainants assert, its Ordinance exceeds or conflicts with the Pennsylvania Department of Environmental Protection's ("PA DEP") Erosion and Sediment Control and Dam Safety & Waterway Management regulations, in addition to the PA MPC, RTFA or ACRE. The Township finds the vast majority of Complainants' allegations to be baseless, whereby further Forestry and Timber Harvesting Ordinance-related amendments are unwarranted.

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I thank you in advance for your assistance with and attention to this matter. The Township looks forward to hearing from you on behalf of the Office of Attorney General at your convenience. In the meantime, should you have any questions or require additional information, please do not hesitate to contact me directly.

Very truly yours,



Ryan M. Jennings

RMJ:akf

all via e-mail only

cc: Debra A. Shulski, Esquire
East Marlborough Township Board of Supervisors

[REDACTED]