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Via Email Only

David A. Willig, Esquire
Senior Deputy Attorney General
Office of the Attorney General
1251 Waterfront Place
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Pittsburgh, PA 195222

RE: ACRE Request for Review- West Rockhill Township, Bucks County

Dear Attorney Willig:

Please be advised that this firm serves as the Solicitor for West Rockhill Township ("Township"). I have been provided a copy of your letter to the West Rockhill Township Board of Supervisors dated December 29, 2020 in which you outline a request to review the West 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 West Rockhill Township's response to the complaint presented by [REDACTED] as well as the general assertion that the Township's Ordinance is not permitted under ACRE.

I. [REDACTED] Standing and location of the subject Property

Your December 29, 2020 letter provided the Township with a copy of [REDACTED] November 6, 2020 email to your Office and the Pennsylvania Sustainable Forestry Initiative Implementation Committee Fact Sheet ("Fact Sheet"). Neither your letter nor [REDACTED] email indicate the address of the property he desires to harvest, the parcel number of the property, or the name(s) of the owner(s) of the property. Your letter provides an address for [REDACTED] that is not within West Rockhill Township. [REDACTED] simply indicates that he is a forester with [REDACTED] and is being denied a timber harvesting permit in West Rockhill Township. Without information to identify the property and the landowners, the Township is unable to ascertain whether [REDACTED] has Standing to request review of the West Rockhill Township Ordinance regarding forestry. As Township records are maintained

according to property addresses, not Applicant's name, the Township is unable to confirm or deny the specific statements in [REDACTED] complaint.

II. Professional Review and Escrow

[REDACTED] has indicated that the Township is "requiring escrow funds of \$1,500.00." From our reading of [REDACTED] email, it appears that he has not paid the requested Escrow to the Township.

First, West Rockhill Township's zoning ordinance requires adherence to a number of technical provisions for forestry use, several of which mirror the provisions of the model ordinance prepared by Penn State referenced by your office ("Model Ordinance"). West Rockhill Township's zoning ordinance and the zoning ordinances of municipalities across Pennsylvania contain technical provisions for particular uses which require a heightened level of training in order to administer. The forestry use in West Rockhill Township is no different in that proper administration of the requirements requires an expert review.

West Rockhill Township's non-professional staff does not have the technical expertise to evaluate the requirements of all provisions of its zoning ordinance nor the technical provisions of the Model Ordinance, many of which are a part of the West Rockhill Ordinance. The Municipalities Planning Code (53 P.S. §10101, *et seq.*, "MPC") requires West Rockhill Township to administer its zoning ordinance in accordance with its literal terms. To require non-professional staff to review the considerable technical plans is to invite misapplication of the zoning ordinance provisions designed to ensure safe, environmentally friendly forestry operations which have minimal impact on the community.

Second, this Office strongly disagrees with the position of the OAG as stated in the Fact Sheet that the MPC prohibits the Township from requesting escrow fees for timber harvesting applications. Specifically, the Fact Sheet states that "[t]he MPC expressly prohibits Townships from charging a landowner 'expenses for engineering...or other technical consultants... costs' in administering a zoning ordinance. 53 P.S. §10617.3(e)"; "[r]equiring a significant deposit to cover the costs of engineering or technical consultants is not permitted under the MPC"; and "[t]he Township's attempt to escrow funds for reviewing a permit application for a permitted use by right is tantamount to converting the application into one for a conditional use, which it cannot do."

It is our position that the referenced Section of the MPC, Section 10617.3(e), cannot be applied to ACRE to prohibit the Township from requiring an Escrow for professional review of a forestry application. Any reference to Section 10617.3(e) of the MPC is misplaced as said Section applies specifically to Hearings, not ordinance administration. We do not agree with the position that any and all Escrows for Professional Service Fees for activities covered under ACRE are violative of ACRE and are therefore, not permitted.

Finally, it is the position of the Township that refundable Escrows allow the Township to keep the fees reasonable. As discussed below, West Rockhill Township's permit fee is only \$250.00, which is extremely reasonable.

III. Permit Fee

██████████ request for review states that he paid the Township a \$250.00 permit fee. Although it is not clear from ██████████ email whether he is alleging that the \$250.00 permit fee is excessive, we will address this issue under the assumption that he is so alleging. West Rockhill's permit fee is commensurate with the expenses incurred by the Township to issue and supervise permits in the Township. The \$250.00 fee is certainly reasonable to cover the Township's costs in administering the permitting process, and in fact may not cover said cost in full.

IV. Unauthorized Local Ordinance

West Rockhill Township further notes that 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 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. West Rockhill Township's ordinance bears a strong resemblance to the ordinance in *Chrin Bros.*

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, West Rockhill Township's forestry ordinance operates within the confines of the MPC and is, therefore, a valid exercise of municipal zoning power.

V. Erosion and Sediment Control Plan Submission

In his request for review, [REDACTED] alleges that the Township required the Erosion and Sediment Control Plan ("E&S Plan") to be submitted to the County Conservation District ("CCD"), and that he paid Bucks County \$500.00 to review his E&S Plan. As [REDACTED] indicated that he paid Bucks County, not West Rockhill Township, \$500.00 to review his E&S Plan (which may have been required by State regulation), the Township is not able return [REDACTED] \$500.00 even if it determined that it was necessary to do so.

As you are undoubtedly aware, State regulations require a property owner to create a written E&S Plan if there will be 5,000 square feet of earth disturbance. State regulations further require the written E&S Plan to be submitted to and approved by the Conservation District for harvesting involving 25 acres or more of earth disturbance.

Pennsylvania DEP has delegated its E&S review in Bucks County to the Bucks County Conservation District. West Rockhill Township, rather than imposing additional requirements on the applicant, is simply trying to ensure that the State regulations concerning erosion and sediment control are being met.

As the Township was not provided with the property address or parcel ID associated with the requested permit in this case, we are unable to review [REDACTED] Permit Application to ascertain the amount of earth disturbance proposed, and are therefore unable to determine whether [REDACTED] was required by State regulations to prepare a written E&S Plan and whether he was required to submit said E&S Plan to the CCD for review and approval.

Neither ACRE nor the regulations under ACRE address this issue specifically, and it is our opinion that your Office's position that the Township can require a Forestry Management Plan, can require the Applicant to provide a copy of an E&S Plan prepared per State regulation, and can (at its own cost) submit said E&S Plan to the CCD for review, but cannot require the submission and approval of the E&S Plan to the CCD as a prerequisite for permit approval, is not supported by law.

VI. Workmen's Compensation and Liability Insurance

[REDACTED] email complains that he was required to provide "proof of workmens comp [sp] and liability insurance." The West Rockhill Ordinance does request "[p]roof of current general liability and/or worker's compensation insurance."

We do not believe that requiring proof of general liability insurance and/or worker's compensation insurance prohibits or limits normal agricultural operation as set forth in ACRE. The necessity for compliance with State Worker's Compensation Insurance seems to be obvious, and not overly burdensome to provide.

VII. Map/Plot Plan Submission

It is our position that the Site Map requirements contained in the West Rockhill Township Ordinance are not overly burdensome and are in compliance with ACRE. After review of the Model Ordinance, which requires the preparation and submission of a "Logging Plan," and

the West Rockhill Ordinance which requires the preparation of a Forestry Plan and Site Map, it appears that the requirements of each are substantially similar.

Although the Fact Sheet appears to argue that your Office is of the position that the required E&S Plan is sufficient, the Model Ordinance requires a Logging Plan and Map with many of the same requirements set forth in the West Rockhill Ordinance. In fact, all of the West Rockhill requirements for a Forestry Plan (A7.2.d.i-v.) are required in the Model Ordinance under "Contents of the logging plan." Further, many of the requirements in the West Rockhill Ordinance for the Forestry Plan are included in the Model Ordinance.

VIII. Road Bonding

Although the Township is unable to determine which property [REDACTED] is referring to in his email as we were not provided an address or parcel ID, and because [REDACTED] is not a Township resident, to the best of our recollection, the Township has never required road bonding for forestry operations.

As the Township is permitted to require road bonding to cover damage to roads, and because no bonding was requested of [REDACTED], it does not appear that this is an issue.

IX. Conclusion

West Rockhill Township respectfully submits that its forestry zoning ordinance does not unreasonably restrict forestry activities in the Township and is not violative of ACRE. 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, West Rockhill Township will consider amendments to its zoning ordinance with respect to the Forestry Use. In the event West Rockhill elects to amend its zoning ordinance, it will be guided by the Model Ordinance.

Sincerely,

GRIM, BIEHN & THATCHER

By [REDACTED]

cc: [REDACTED] (il)

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]