

[REDACTED]

October 26, 2020

Sent via United Parcel Service, Overnight Delivery  
and electronic mail

Robert A. Willig, Senior Deputy Attorney General  
Litigation Section  
564 Forbes Avenue  
Pittsburgh, PA 15219

Re: [REDACTED]  
[REDACTED], East Marlborough Township  
Timber Harvesting Permit

Dear Mr. Willig:

Please be advised that this office represents [REDACTED], the owner of an approximately 20-acre parcel of land situate at [REDACTED] in East Marlborough Township ("Property"). [REDACTED] engaged [REDACTED] to conduct timbering activities on his Property. [REDACTED] has requested that Forestry Services be included as a joint complainant in this letter.

In conjunction with the proposed timbering activities, [REDACTED] submitted an application with East Marlborough Township ("Township") for a zoning permit to conduct timber harvesting activities by letter dated September 18, 2020 ("Application") since the Township does not have a prescribed form for this purpose. The Application included a copy of the Erosion & Sedimentation Plan ("E&S Plan") prepared by [REDACTED] in accordance with the requirements of the Chester County Conservation District ("CCCD"). [REDACTED] also advised the Township that review of the E&S Plan and regulations governing timber harvesting are under the exclusive control of the Pennsylvania Department of Environmental Protection which is administered by the CCCD.

In response to the Application, Township Zoning Officer [REDACTED], issued a letter dated September 25, 2020 (copy attached) advising that the Township has not made an assessment as to whether or not the Application constituted a complete submission and advised that the Application was required to comply with the applicable timber and harvesting permit requirements and procedures set forth in Section 1821.E of the Zoning Ordinance. [REDACTED] further noted that the Application was required, pursuant to Section 1821.D.2 of the Zoning Ordinance, to be submitted not less than forty-five days prior to commencement of the timber harvesting operation and, thereafter, the Township had thirty (30) days to issue the permit assuming the Application was complete and met all the Zoning Ordinance requirements. Based on this timing, [REDACTED]

concluded that no timber harvesting activities could commence on the Property before November 6, 2020.

Subsequently, by letter dated October 9, 2020 (copy attached), [REDACTED] denied the Zoning Permit ("Permit Denial") on the basis that the application was incomplete because certain information and documentation required under the East Marlborough Zoning Ordinance had not been provided and/or certain standards had not been met. Specifically [REDACTED] advised that the following is required:

1. Section 1821.D.1. - Requires an applicant to provide written agreement to comply with the regulations established in Zoning Ordinance Section 1821. No such agreement was provided by the Applicant.
2. Section 1821.E.1. - Requires an applicant to submit a Timber Harvesting Plan, signed by a Professional Forester. The Applicant has not submitted a Timber Harvesting Plan signed by the Applicant, the Property Owner or a Professional Forester. Additionally, the Applicant narrative and mapping are vague.
3. Section 1821.E.1.b. - Requires that feature maps are to be drawn to scale. The Applicant submitted only website-based documents, which do not appear to be drawn to scale, nor detailed in nature.
4. Section 1821.E.1.b.i., ii., iii., and iv. - Requires an existing features map, drawn to scale, containing a complete legend of all symbols used on the map. The Applicant has not provided a suitable existing features map. Rather, the purported Soil Map, Site Map, and Topographic Map are website-based documents, marked up in unintelligible fashion. The provided maps do not provide clear descriptions, locations or details as to the proposed Timber Harvesting activities. Additionally, Zoning Ordinance Section 1821.E.1.b.iv requires that the topographical survey of the site and immediate surrounding areas depicting topographic features be prepared by a registered surveyor or registered engineer, including a boundary line survey, among other unfulfilled express requirements.
5. Section 1821.E.1.c. - Requires a logging plan for the proposed Timber Harvesting Operation, which is to include items listed in Subsections i., ii., iii., iv., v.; and vi. The Applicant has not provided a Code-compliant logging plan.
6. Section 1821.E.1.d. - Allows an applicant to combine the requisite existing features plan with the requisite logging plan, provided all required information for each plan is clearly shown. Applicant can address several Application deficiencies in utilizing this provision's allowance.

7. Section 1821.E.2. - Requires a Plan for Forest Regeneration. Applicant has not submitted a Plan for Forest Regeneration. It is assumed, given the nature of the Application, that the Timber Harvesting is not proposed as a Conversion to Agricultural Activity, as otherwise described within Zoning Ordinance Section 1821 and covered under PA Title 25, Chapter 102. The failure to provide a Plan for Forest Regeneration results in non-compliance with a multitude of Section 1821 requirements, including, Section 1821.E.2.a.i., ii., iii., iv., and v., as well as Section 1821.E.2.b.i. and ii.

8. Section 1821.F. - Sets forth requirements applicable to all Timber Harvesting applicants. Applicant has failed to comply with requirements of Section 1821.F. Until additional information, documentation, and Plans are provided (as outlined above, the Township cannot adequately assess compliance with Section 1821.F.

As the Attorney General's Office is well aware, the Right to Farm Act (RTFA) precludes a municipality from regulating normal agricultural operations (which includes forestry and forestry products). 3 P.S. § 953, 952. The Agriculture, Communities and Rural Environment Act ("ACRE"), 3 Pa. C.S. §301, *et. seq.* prohibits a municipality from adopting and/or enforcing local zoning regulations prohibited or preempted by state law. 3 Pa. C.S. §§312, 313. In addition, the Pennsylvania Municipalities Code ("MPC") explicitly limits a municipality's authority to regulate forestry activities including timber harvesting. 53 P.S. § 10603(f).

Pursuant to its authority under the Clean Streams Law, 35 P.S. §691.1 *et. seq.* the Pennsylvania Department of Environmental Protection ("DEP") regulates erosion and sediment control and post disturbance stormwater management involving timbering activities. 25 Pa. Code §102.2(a). All timber harvesting activities are required to have a written erosion and sedimentation plan to establish controls for activities near water sources. 25 Pa. Code §102.4(b). The regulations impose certain requirements with respect to erosion and sedimentation control, inspection reports and monitoring records which are to be maintained and available during all stages of the timbering project. An E&S Plan was prepared by [REDACTED] in conformance with all applicable requirements and is not required to be reviewed or approved by the Township.

In addition, stream crossings and other impacts to watercourses and wetlands associated with timber harvesting operations are regulated by DEP's Dam Safety and Waterway Management Regulations. 25 Pa. Code §105. The regulations do not preclude timber harvesting activities in water sensitive areas, but the amount of buffer zone that DEP will require near water sources depends on many variables, including soil type, slope, vegetative cover and stream character, etc.

We believe the reasons relied upon by the Township for the Permit Denial as contained in the East Marlborough Township Zoning Ordinance (Section 1821) are unreasonable and invalid and/or are preempted by state regulations including, without limitation, the following:

1. Section 1821.D. (Permit Required). This Section requires an applicant to provide written agreement to comply with the regulations contained in the Zoning Ordinance. In addition, although not a basis for the Permit Denial, this Section is invalid because

it required a permit fee. East Marlborough has no resolution and, therefore, the charging of a fee is invalid. This Section is also invalid because it provides that the Township has a forty-five (45) day review period. The PSU College of Agricultural Sciences, *Dealing with Local Timber Harvesting Ordinances*, p. 14 has determined that a forty-five (45) day period is too lengthy and unreasonable.

2. Section 1821.E (Permit Application Procedure). This Section requires the submission of a number of plans including: (a) an existing features map showing all the existing improvements and features on the property; existing watercourse, floodplains, riparian buffers; and topographical survey including all the site features, contours, steep slopes, etc.; (b) a logging plan including a soil erosion and sedimentation plan, design and maintenance of water control measures and design and maintenance of any proposed crossings of riparian buffer; (c) forest regeneration plan and woodland reforestation plan; (d) forest best management practices plan; and (e) forest stewardship plan. Such requirements are onerous, unreasonable and would deter timber harvesting due to the cost and time to comply. The Pennsylvania Attorney General's Office has found these same requirements to be invalid in its review of other similar claims brought under ACRE.
3. Section 1821.F (Requirements Applicable to all Timber Harvesting Applicants). This Section requires explanation of the erosion and sedimentation control Best Management Practices to be employed for timber harvesting on steep slopes, floodplains, riparian buffer, and wetlands. This Section also requires the demarcation of every tree selected to be harvested. This Section further prohibits diameter-limit cutting, selective cutting, clear cutting within prohibitive slopes and wetlands/riparian buffer, skidding across public roads, and limits the percentage of trees to be harvested over a four-year period. Such requirements are onerous and unreasonable and preempted by state regulations.

In addition, although not raised as a basis for the Permit Denial, there are a number of other requirements contained in the Zoning Ordinance governing timber harvesting activities which are invalid including:

- A. Section 1821.G (Permit Application Review and approval; Inspection, Permit Fees). This Section requires an applicant to post a deposit with the Township to cover the costs of the plan reviews and inspections by the Township Engineer. The Township cannot require escrow funds for reimbursement of professional review fees in connection with a zoning permit and/or zoning process and is precluded from doing so under the MPC. 53 P.S. §10617.3(e).
- B. Section 1821.H (Revocation or Suspension of Permit). This Section allows the Township to revoke or suspend a permit. The Township has no authority to revoke a permit for items preempted by other state regulations.

- C. Section 1821.I (Road Bonding). This Section allows the Township to require that a bond be posted to guarantee any damage to roadways. There is no authority to support this requirement.
- D. Section 1821.J (Inspections/Remedies). This Section allows the Township to enforce any violations of the erosion and sedimentation plan. Such requirement is invalid in that it is preempted by state regulations.
- E. Section 1821.C. (Definitions). Certain definitions are unreasonable and invalid and should be deleted. Also, "Timber Harvesting" used extensively through the Zoning Ordinance is undefined. A full copy of Section 1821 is attached.

Pursuant to ACRE, the details and requirements of the provisions of the East Marlborough Ordinance discussed above may not be applied or enforced in connection with the proposed timbering activities. The Pennsylvania Attorney General's office in its review of other matters similar to this has recognized that a municipality does not have authority to establish its own regulatory scheme for timber harvesting that duplicates, exceeds or conflicts with the DEP's Erosion and Sediment Control and Dam Safety and Waterway Management regulatory schemes, MPC, RTFA or ACRE.

[REDACTED] respectfully requests that the Office of the Attorney General formally review the applicable provisions of the East Marlborough Township Zoning Ordinance (copies of relevant Sections are attached) and confirm that the subject provisions of the East Marlborough Township Zoning Ordinance (coupled with the Township Zoning Officer's review letter) constitute an unauthorized local ordinance which unlawfully restricts timbering and harvesting activities on the subject Property, which is a normal agricultural operations under Pennsylvania law.

Please advise of any additional information you may require in connection with the foregoing request.

Very truly yours,

[REDACTED]

[REDACTED]

[REDACTED]  
Enclosures

cc: East Marlborough Township Attn: Zoning Officer and Township Manager (w/enclosures via e-mail)

[REDACTED] (w/enclosures via e-mail)

[REDACTED] (w/enclosures via e-mail)

[REDACTED] (w/enclosures via e-mail)

# East Marlborough Township

Chester County, Pennsylvania

September 25, 2020

[REDACTED] <sup>ic.</sup>  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

RE: [REDACTED]  
[REDACTED]  
**Proposed Timber Harvesting Activities**

Dear [REDACTED]

East Marlborough Township is in receipt of your correspondence and accompanying materials, dated September 18, 2020, regarding proposed timber harvesting activities at the above-referenced property. The Township received your correspondence and accompanying materials on Tuesday, September 22, 2020. Please note, the Township has not yet made an assessment as to whether your written submission constitutes a complete application and request for the requisite zoning permit, in accordance with the Township's Zoning Ordinance of 2019, namely Section 1821, entitled, "Forestry and Timber Harvesting". Specifically, and despite additional oversight and permitting of the Pennsylvania Department of Environmental Protection and the Chester County Conservation District, your written submission must nonetheless also comply with the applicable permit application procedures and requirements of Zoning Ordinance Section 1821.E.

Additionally, I note your stated desire to commence timber harvesting at the subject property during the week of September 21, 2020 (*i.e.*, this week), along with your written request for the requisite zoning permit to conduct timber harvesting. However, please note, in accordance with Township Zoning Ordinance Section 1821.D.2., your application must be submitted to and subsequently reviewed by the Township for compliance with the standards for timber harvesting operations set forth in the Township Zoning Ordinance "not less than forty-five (45) days prior to commencement of the timber harvesting operation." Thereafter, "[w]ithin thirty (30) days of submission to the Township, a timber harvesting permit shall be issued" so long as you have met all of the Zoning Ordinance's requirements. Accordingly, any proposed timber harvesting activities at the property should not be scheduled to commence before Friday, November 6, 2020. Assuming the submission of a completed timber harvesting application (as received on September 22, 2020) and compliance with all Zoning Ordinance requirements (as

[REDACTED]  
[REDACTED]  
[REDACTED]  
September 25, 2020

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contained within Section 1821), the Township shall issue the requisite timber harvesting zoning permit on or before Thursday, October 22, 2020.

As with all other Township zoning permit applications, your timber harvesting application will be reviewed in due course by appropriate Township personnel and professional consultants. Given your apparent sense of urgency, your correspondence seeks authorization within a seven (7) day timeframe, and makes note of a possible and threatened claim against the Township with the Pennsylvania Attorney General under the ACRE Law. However, the Township is unable and unwilling to make any such confirmation and authorization without first reviewing the timber harvesting application materials, which were received just three (3) days ago. The Township will not unduly delay its review, nor its zoning permit issuance, if ultimately deemed warranted.

I thank you for your understanding and anticipated cooperation. I trust that you will not commence timber harvesting activities at the subject property as initially suggested (*i.e.*, this week), as you are not authorized to do so, and that you will instead await the Township's issuance of the requisite timber harvesting zoning permit to commence any such activities.

Sincerely,

East Marlborough Township

[REDACTED]  
Township Zoning Officer

cc:

[REDACTED]  
[REDACTED]  
[REDACTED]

# East Marlborough Township

Chester County, Pennsylvania

October 9, 2020

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

RE: Proposed Timber Harvesting

[REDACTED]  
[REDACTED]  
[REDACTED]

Dear [REDACTED],

I am in review of your September 22, 2020 submission to East Marlborough Township, which seeks a required Zoning Permit for proposed timber harvesting at the above-referenced property. Based upon your submission and my review of the same, I find your application submission to be incomplete, and respectfully request your submission of supplemental information and documentation, in accordance with East Marlborough Township Zoning Ordinance requirements, summarized as follows:

### Documents Reviewed:

1. Application Letter (with attachment) for proposed timber harvesting activities from [REDACTED] dated September 18, 2020; and
2. Chester County Conservation District Timber Harvest Application for District Services; and
3. Post-submission correspondence between Applicant and Township.

### General Comments:

Pursuant to Zoning Ordinance Section 1821.D.1.:

[i]t shall be unlawful for any person to engage in Timber Harvesting on any Lot in the Township without first securing a Zoning Permit from the Township. Any person proposing to engage in Timber Harvesting on any Lot in the Township shall apply for a permit by written application...Such permit shall require the Applicant's agreement to comply with the regulations established in this Section. Failure of the Applicant to abide by such regulations shall be a violation of the provisions of this Ordinance.



Pursuant to Zoning Ordinance Section 1821.D.2.:

[a]pplications 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. Within thirty (30) days of submission to the Township, a Timber Harvesting permit shall be issued if the applicant has met all of the requirements.

While Section 1821 of the East Marlborough Township Zoning Ordinance is readily available and accessible via the Township's website, a PDF version of Section 1821 is provided for your convenient reference.

**Comments Regarding Application Insufficiency:**

1. Section 1821.D.1. – Requires an applicant to provide written agreement to comply with the regulations established in Zoning Ordinance Section 1821. No such agreement was provided by the Applicant.

2. Section 1821.E.1. – Requires an applicant to submit a Timber Harvesting Plan, signed by a Professional Forester. The Applicant has not submitted a Timber Harvesting Plan signed by the Applicant, the Property Owner or a Professional Forester. Additionally, the Applicant narrative and mapping are vague.

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described within Zoning Ordinance Section 1821 and covered under PA Title 25, Chapter 102. The failure to provide a Plan for Forest Regeneration results in non-compliance with a multitude of Section 1821 requirements, including, Section 1821.E.2.a.i., ii., iii., iv., and v., as well as Section 1821.E.2.b.i. and ii.

8. Section 1821.F. – Sets forth requirements applicable to all Timber Harvesting applicants. Applicant has failed to comply with requirements of Section 1821.F. Until additional information, documentation, and Plans are provided (as outlined above), the Township cannot adequately assess compliance with Section 1821.F.

At this time, given the above-identified Application deficiencies, the Township cannot issue the requested timber harvesting zoning permit. Until required, supplemental information and documentation is provided to the Township for further review, the timber harvesting zoning permit request is hereby denied. Please contact me directly with further comments and/or questions that you may have in this regard.

Sincerely,

[Redacted signature block]

cc: [Redacted list of recipients]