



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

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January 15, 2021

Office of Attorney General
1251 Waterfront Place
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Pittsburgh, PA 15222

[REDACTED]

Industry Borough
ATTN: Board of Supervisors
1620 Midland Beaver Road
Industry, PA 15052

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

Re: ACRE Request for Review – Industry Borough, Beaver County

Dear Board of Supervisors and [REDACTED]

Act 38 of 2005, the Agricultural Communities and Rural Environment (“ACRE”) law, 3 Pa.C.S. §311, *et.seq.*, requires that the Office of Attorney General (“OAG”), upon request of an agricultural owner or operator, 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.

[REDACTED] filed an ACRE request for review challenging Industry Borough’s \$50.00 per acre fee that must be paid in order to secure a timber harvesting permit. Resolution No. 15-01 states “that the Timber Harvesting Permit Fees are hereby fixed pursuant to official Ordinance No. 07-02 at a rate of Fifty and 00/100 (\$50.00) Dollars per acre.”¹ A copy of the ACRE request as well as Resolution 15-01 is included for your review.

Silviculture² 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. The Municipalities Planning Code (“MPC”), 53 P.S. §§ 10101-11202, explicitly addresses the considerable limitations on municipal authority to regulate timber harvesting as it provides:

¹ Ordinance No. 07-02 is Industry Borough’s logging and tree harvesting ordinance.

² “Silviculture is defined as the art and science of controlling the establishment, growth, composition, health, and quality of forests and woodlands to meet the diverse needs and values of landowners and society on a sustainable basis.” USDA Forest Service, White Paper, F14-SO-WP-SILV-34, p.2.

[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.

53 P.S. § 10603(f)(emphasis added). This provision clearly indicates the intent of the General Assembly to encourage and promote timber harvesting throughout the Commonwealth as a use of right. Moreover, the intent of the General Assembly to generally encourage and promote all types of agriculture is made perfectly clear in the RTFA, 3 P.S. § 951, and other provisions of the MPC. 53 P.S. §§ 10105 & 10603(h). 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."

The MPC addresses the issue of permit fees. A Township may require permits and charge a fee to secure that permit. Permitting is required for numerous activities; charging a fee to process the application for the permit is accepted practice. However, the MPC unequivocally states that a Township "may prescribe reasonable fees with respect to the administration of a zoning ordinance..." 53 P.S. § 10617.3 (emphasis added). See *Golla v. Hopewell Township Board of Supervisors*, 452 A.2d 273 (Pa.Cmwlt. 1982)(A municipality has authority under the MPC to impose a reasonable fee with respect to applications.) "[T]his fee must be commensurate with the expense incurred by the [municipality] in connection with the issuance and supervision of the license or privilege." *Mastrangelo v. Buckley*, 250 A.2d 447, 464 (Pa. 1969). A permit fee:

...is distinguishable from a tax which is a revenue producing measure characterized by the production of a high proportion of income relative to the costs of collection and supervision. Thus, if a license fee collects more than an amount commensurate with the expense of administering the license, it would become a tax and cease to be a valid license fee.

Talley v. Commonwealth, 553 A.2d 518, 519 (Pa.Cmwlt. 1989)(citations omitted). "A municipality cannot impose a tax upon a business under the guise of exercising its police power, and, therefore, a license fee will be struck down if its amount is 'grossly disproportionate to the sum required to pay the cost of the due regulation of the business.'" *Costa v. City of Allentown*, 153 A.3d 1159, 1165 (Pa.Cmwlt. 2017)(citation omitted).

██████████ purchased timber in Industry Borough covering 160 acres. Industry informed ██████████ that it had to pay a \$8,000 (160 acres x \$50.00) fee to secure the necessary timber harvesting permit. The OAG respectfully submits that under no interpretation of the law can this amount be considered "reasonable." The OAG respectfully submits that this exorbitant amount cannot be considered anything other than "grossly disproportionate" to Industry Borough's costs in administering its timber harvesting ordinance. As you know, Brighton Township borders Industry to the north. When one looks at Brighton's "Logging Application Checklist" one sees that there is no application fee for timber harvests of less than 3 acres, a \$100.00 fee for harvests of 3-25 acres, \$200.00 for harvests of 25-50 acres, and \$300.00 for

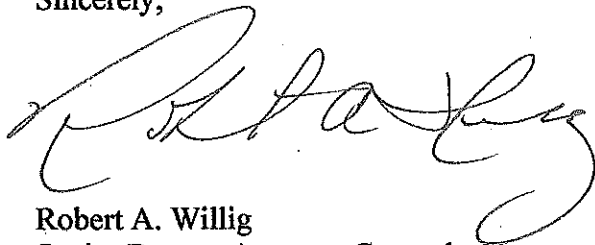
harvests of over 50 acres.³ Raccoon Township is right across the Ohio River from Industry. Raccoon's timber harvesting permit application fee is \$250.00. **Raccoon Township Ordinances**, Chapter 168, Timber Harvesting, §168-8.G, *Application*. Potter Township is also right across the Ohio River from Industry. On Potter's "Timber Harvesting Application" one sees the fee for a permit is \$250.00. Brighton, Raccoon, and Potter Townships' fees are consistent with those the OAG has seen for timber harvesting permits across the Commonwealth. The OAG is unaware of any timber harvesting permit fees that can potentially run into the thousands of dollars.

"Stumpage refers to the value of standing trees in a woodlot or 'on the stump.' Trees are valued by buyers 'on the stump' after deducting costs associated with cutting, transporting the felled tree to the log landing, hauling the logs to the mill, and other costs." Penn State Extension, *Value Standing Timber*, June 18, 2020, p. 32. <https://extension.psu.edu/valuing-standing-timber>. \$50.00 is a considerable percentage of the average stumpage for an acre of timber thereby making harvesting that timber less economically attractive to both landowners and forestry companies. Industry Borough's fee dissuades forestry companies from doing business in the Borough and makes it more likely that landowners will be deprived of taking advantage of a commercially valuable resource found on their own property.

Industry Borough's \$50.00 per acre fee runs contrary to the black letter of the law. The fee also runs afoul of the MPC's, RTFA's, and ACRE's clear intent that agriculture, which includes timber harvesting, be promoted throughout the Commonwealth. The OAG recommends that Industry Borough not charge [REDACTED] \$8,000.00. The OAG further recommends that Industry repeal Resolution 15-01 and impose a flat or sliding scale timber harvesting permit application fee(s) consistent with that of Brighton, Raccoon, and Potter Townships.

If you can please respond within thirty days of receipt of this letter informing me how Industry Borough wishes to proceed in this matter, I would greatly appreciate it.

Sincerely,



Robert A. Willig
Senior Deputy Attorney General

³ By way of comparison, it would cost \$2,550.00 to secure a permit to harvest 51 acres in Industry Borough.