

BEFORE THE PA OFFICE OF ATTORNEY GENERAL

[REDACTED] COMPLAINT

Municipality Of Murrysville Zoning Ordinance

Re: Acre Request, Murrysville, Westmoreland County

Supplement to Murrysville Response to [REDACTED]
Complaint to Provisions of Murrysville Zoning Ordinance

Findings of Fact

Murrysville Zoning Ordinance does view timbering a matter of right in all Zoning Districts.

- **Forestry, minor** being one acre or less is designated as a **P Permitted Use designation** in all Zoning Districts. They are handled by handled by the Code Enforcement Officer alone upon application for a forestry use, subject to the four (4) criteria set forth under Zoning Ordinance Section 220-31 (N) (1) through (4). None of the criteria listed are particularly burdensome and have a reasonable relationship to the general health welfare and safety of the community
- **Forestry, major** is more than one acre, and carries a **CU Conditional Use Designation** in all Zoning Districts. As a matter of Zoning Law under the Pennsylvania Zoning Law under the (MPC) Pennsylvania Municipalities Planning Code, and/or an abundance of or appellate Court Authority, A Conditional Use is also deem a permitted right, in equal standing to that of a P Permitted Use, and the applicable four standard for review under (N (1) – (4), but for the reviewing authority is the governing body, instead of the Code Officer pursuant to review by the Administration alone.

Review of Applications

A Code Officer only has no authority administratively to impose reasonable conditions, only to approve or deny a forestry minor application for small timber areas ... since they are deemed to not pose "extraordinary" burdens. If they do, the applicant's recourse for a denial is the Zoning Hearing Board for relief.

The Murrysville Council as the governing body has authority to address and mitigate an extraordinary burden with reasonable conditions on a forestry major application which are more likely to be involved on larger timbering activity

Timber Rights Conferred under MPC

An Agricultural Use has a "protected" status under a general prohibition of zoning regulations of such uses and even has limited protections from nuisance lawsuit.

A Timber Use, however, has no such protection under the MPC as an, agricultural use. To the contrary, while the MPC contemplates that they are to be permitted in ever Zoning District, it is also clear they are subject to "**reasonable regulations**". This extends to each Zoning District and apply to what is deemed reasonably necessary for a timber activity

contemplated for a proposed tract on review so that it takes into consideration the variety on consideration(s) presented by the said activity and tract.

53 P.S. Section 10603 Zoning Ordinance Provisions. –

.....

(f) Zoning 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 by right* in all zoning districts in every municipality. (Emphasis added)

Variety of Considerations

These local consideration can range from wetlands to landslide prone area as was upheld by the Commonwealth Court in **Taylor v Harmony Township Board of Commissioners**, 851 A.2d 1020 (2004), and to prevent soil erosion as was upheld in **Chrin Brothers, Inc. v William Township Zoning Hearing Board** 815 A.2d 1179 (2003).

The Commonwealth Court in Chrin raises up therein Section 105 of the MPC, and also Section 604 of the MPC in support of reasonable restrictions for the variety of consideration that the local government is charged to conserve, preserve and protect for the general health welfare and safety of the community, citing the following authority:

“Preservation or protection,” when used in connection with natural and historic resources, shall include means to conserve and safeguard these resources from wasteful or destructive use but shall not be interpreted to authorize the unreasonable restriction of forestry, mining or other lawful uses of natural resources.

53 P.S. § 10107(a) (emphasis added). In addition, Section 105 of the MPC provides, in relevant part, that:

§ 105. Purpose of act

*1185 ... wherever the provisions of this act promote, encourage, require or authorize governing bodies to protect, preserve or conserve open land, consisting of natural resources, forests and woodlands, any actions taken to protect, preserve or conserve such land shall not be for the purposes of precluding access for forestry.

53 P.S. § 10105 (emphasis added). Additionally, Sections 604 and 605 of the MPC provide, in relevant part, that:

§ 604. Zoning purposes

The provisions of zoning ordinances shall be designed:

(1) To promote, protect and facilitate any or all of the following: the public health, safety, morals, and the general welfare ... as well as preservation of the natural, scenic and historic values in the environment and preservation of forests, wetlands, aquifers and floodplains.

§ 605. Classifications

Addendum to Murrysville Response

53 P.S. Section 10603 Zoning Ordinance Provisions

(a) Zoning ordinances should reflect the policy goals of the statement of community development objectives required in section 606, 1 and give consideration to the character of the municipality, the needs of the citizens and the suitabilities and special nature of particular parts of the municipality.

(b) Zoning ordinances, except to the extent that those regulations of mineral extraction by local ordinances and enactments have heretofore been superseded and preempted by the act of May 31, 1945 (P.L. 1198, No. 418), known as the "Surface Mining Conservation and Reclamation Act," 2 the act of December 19, 1984 (P.L. 1093, No. 219), known as the "Noncoal Surface Mining Conservation and Reclamation Act," 3 and the act of December 19, 1984 (P.L. 1140, No. 223), known as the "Oil and Gas Act," 4 and to the extent that the subsidence impacts of coal extraction are regulated by the act of April 27, 1966 (1st Sp.Sess., P.L. 31, No. 1), known as "The Bituminous Mine Subsidence and Land Conservation Act," 5 and that regulation of activities related to commercial agricultural production would exceed the requirements imposed under the act of May 20, 1993 (P.L. 12, No. 6), known as the "Nutrient Management Act," 6 regardless of whether any agricultural operation within the area to be affected by the ordinance would be a concentrated animal operation as defined by the "Nutrient Management Act," the act of June 30, 1981 (P.L. 128, No. 43), known as the "Agricultural Area Security Law," 7 or the act of June 10, 1982 (P.L. 454, No. 133), entitled "An act protecting agricultural operations from nuisance suits and ordinances under certain circumstances," 8 or that regulation of other activities are preempted by other Federal or State laws may permit, prohibit, regulate, restrict and determine:

- (1) Uses of land, watercourses and other bodies of water.
 - (2) Size, height, bulk, location, erection, construction, repair, maintenance, alteration, razing, removal and use of structures.
 - (3) Areas and dimensions of land and bodies of water to be occupied by uses and structures, as well as areas, courts, yards, and other open spaces and distances to be left unoccupied by uses and structures.
 - (4) Density of population and intensity of use.
 - (5) Protection and preservation of natural and historic resources and prime agricultural land and activities.
- (c) Zoning ordinances may contain:
- (1) provisions for special exceptions and variances administered by the zoning hearing board, which provisions shall be in accordance with this act;

(2) provisions for conditional uses to be allowed or denied by the governing body after recommendations by the planning agency and hearing, pursuant to express standards and criteria set forth in the zoning ordinance. Notice of hearings on conditional uses shall be provided in accordance with section 908(1), 9 and notice of the decision shall be provided in accordance with section 908(10). In allowing a conditional use, the governing body may attach such reasonable conditions and safeguards, other than those related to off-site transportation or road improvements, in addition to those expressed in the ordinance, as it may deem necessary to implement the purposes of this act and the zoning ordinance;

(2.1) Deleted by 2000, June 23, P.L. 495, No. 68, § 15 , effective in 60 days.

(2.2) provisions for regulating transferable development rights, on a voluntary basis, including provisions for the protection of persons acquiring the same, in accordance with express standards and criteria set forth in the ordinance and section 619.1; [FN10]

(3) provisions for the administration and enforcement of such ordinances;

(4) such other provisions as may be necessary to implement the purposes of this act;

(5) provisions to encourage innovation and to promote flexibility, economy and ingenuity in development, including subdivisions and land developments as defined in this act;

(6) provisions authorizing increases in the permissible density of population or intensity of a particular use based upon expressed standards and criteria set forth in the zoning ordinance; and

(7) provisions to promote and preserve prime agricultural land, environmentally sensitive areas and areas of historic significance.

(d) Zoning ordinances may include provisions regulating the siting, density and design of residential, commercial, industrial and other developments in order to assure the availability of reliable, safe and adequate water supplies to support the intended land uses within the capacity of available water resources.

(e) Zoning ordinances may not unduly restrict the display of religious symbols on property being used for religious purposes.

(f) Zoning 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 by right in all zoning districts in every municipality.

(g) (1) Zoning ordinances shall protect prime agricultural land and may promote the establishment of agricultural security areas.

(2) Zoning ordinances shall provide for protection of natural and historic features and resources.

(h) Zoning ordinances shall encourage the continuity, development and viability of agricultural operations. Zoning ordinances may not restrict agricultural operations or changes to or expansions of agricultural operations in geographic areas where agriculture has traditionally been present unless the agricultural operation will have a direct adverse effect on the public health and safety. Nothing in this subsection shall require a municipality to adopt a zoning ordinance that violates or exceeds the provisions of the act of May 20, 1993 (P.L. 12, No. 6), known as the "Nutrient Management Act," the act of June 30, 1981 (P.L. 128, No. 43), known as the "Agricultural Area Security Law," or the act of June 10, 1982 (P.L. 454, No. 133), entitled "An act protecting agricultural operations from nuisance suits and ordinances under certain circumstances."

(i) Zoning ordinances shall provide for the reasonable development of minerals in each municipality.

(j) Zoning ordinances adopted by municipalities shall be generally consistent with the municipal or multimunicipal comprehensive plan or, where none exists, with the municipal statement of community development objectives and the county comprehensive plan. If a municipality amends its zoning ordinance in a manner not generally consistent with its comprehensive plan, it shall concurrently amend its comprehensive plan in accordance with Article III.

(k) A municipality may amend its comprehensive plan at any time, provided that the comprehensive plan remains generally consistent with the county comprehensive plan and compatible with the comprehensive plans of abutting municipalities.

(l) Zoning ordinances shall permit no-impact home-based businesses in all residential zones of the municipality as a use permitted by right, except that such permission shall not supersede any deed restriction, covenant or agreement restricting the use of land nor any master deed, bylaw or other document applicable to a common interest ownership community.

Willig, Robert A.

From: [REDACTED]
Sent: Thursday, November 25, 2021 11:17 AM
To: Robert A. Willig
Cc: [REDACTED]
Subject: Municipality of Murrysville Zoning Ordinance, [REDACTED] Complaint to OAG.10.9.2021
Attachments: Timber Zoning [REDACTED] Complaint to OAG.10.9.2021.pdf

Dear Senior Attorney Willig;

I am following up on my prior email concerning the Complaint filed by [REDACTED] objection to timber provisions of the Murrysville Zoning Ordinance. I am including as an attachment my earlier preliminary response and extension request while on vacation in Florida to pursue further research. I will supplement it further with additional support by the extension date previously requested of November 29, 2021.

I did pursue further research at the Westmorland County Law Library on [REDACTED] objection under the State laws at play here. While traditional Agricultural uses benefit from clear, zoning "prohibitions", however, as to timbering, the State law makes reference to the term "reasonable" restrictions, in conjunction with an opportunity to invoke Departmental review of a local Zoning Ordinance as to "unreasonable" restrictions. The Municipality does appreciate and respect the mandated review process by the Office of the Attorney General as contemplated under State law.

- In my research I was looking for any lower or appellate court case law declaration on a narrow legal issue. Specifically, is there a case on an actual or constructive prohibition on "local governing body" review of a local timbering application under a Zoning "Conditional Use" review process.
- In my research I did not find any such legal authority which is the reason for my inquiry today. It is possibly there is some case law and that I may have missed it on my research effort. Therefore, I would appreciate knowing of such appellate court case to more fully prepare Murrysville's response.

In Murrysville's Zoning Ordinance, the same supporting information standard found at Zoning Ordinance sub Sections 220 (N) (1-4) applies on a proposed timber activity that is to be submitted to the governing body for approval on a larger scale timber activity, as that submitted to Administration for a small scale timber activity which is handled at the administrative level. The latter review and permit issuance would be by the "Administration's Code Officer" who handles all simple applications on a daily basis without necessity of any review or approval requirement from the "governing body".

The Pa. Municipalities Planning Code (MPC) Conditional Use review process applies to activities deemed as matter of law to be a permitted use as a matter of right, subject only to review that the application meets the designated threshold "supporting information" provisions contained in the Zoning Ordinance. When a timber activity is identified as conditional use, it is presumed as a matter of law to include all customary and ordinary associated burdens of said timber activity. When a proposed conditional use poses extraordinary burden, a Municipality is obligated to address same with reasonable condition(s) to mitigate the extraordinary burden, instead of denial of the said proposed use. Further, the MPC contains express time deadlines on conditional use reviews and decision to protect an applicant is not unduly delayed in an exercise of it permitted use right coming before the governing body.

Under either of Murrysville's local review and approval process, the same supporting information guideline standard applies whether deemed a small or large scale timbering activity. The extent of information to be provided on a small tract would customarily be less than that provided on a large tract timber activity given the scope of increased activity and impact on a larger tract based upon its physical characteristics, soils, topography, wetlands (year round or intermittent wet weather streams) on the said tract, as well as possible impact on adjoining developed or undeveloped

lands. However, it is important to note that the Murrysville Zoning Ordinance timber activity provision does not recite any extraneous "Supplemental Regulations" pertaining to either a small or a large tract activity.

Conditional Use Public Hearing. - I understand that [REDACTED] was informed that his application on the proposed timbering action, with any supporting information, could be considered by the Murrysville Council, typically on the next month at its public meeting. Conditional use public hearings are typically set at the start of the Council meeting, information received acknowledged, as well as public comment, and then acted upon by the governing body under the business portion of the same Agenda, absent some compelling reason for not doing so by the governing body.

This is the customary practice on all Murrysville Conditional Use applications, based upon an actual submission with applicant's supporting information. I would note that timber activity Conditional Use applications coming before the governing body are rare. I do not recall one within the last 10 + years during my tenure as Murrysville Solicitor. Therefore, I expect the [REDACTED] objection is founded upon the timber foresters' attempt to circumvent all lawful local review of timbering impacts within Murrysville and other communities. The objection is further unique for it appears to pertain to a parcel of land that was previously owned by, a former now deceased Murrysville Council Member, who bequeathed said vacant parcel of land to an adjoining beloved municipality of his youth that is not a named party in this Complaint.

- It is my sense that [REDACTED] is raising a personal objection on behalf of the timber industry as to the necessity of submitting any supporting document to Murrysville, even as to information that he may already have, in hand, regardless of whether it is a larger or small scale timbering activity.
- While such a position may have vitality on a farming agricultural use, it is not well found on a timbering activity when the State law objective on timber activity is to curtail "unreasonable" restrictions, not a prohibition of (i) a local review thereof or (ii) a reasonable restriction based upon local review of required supporting information and the record established at the public hearing.

I tried to reach out to you by phone on Wednesday to inquire about any appellate court authority on an outright prohibition on the use of a Conditional Use review process on either a small or large scale timber activity. Unfortunately, I was unable to navigate the message instruction to locate your phone extension. Given this is the Thanksgiving Day weekend, I suspect many folks are taking advantage of an early start on an extended holiday break.

Sincerely;

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

Law Offices of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
October 9, 2021

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

Re: Municipality of Murrysville
Zoning Ordinance
[REDACTED] Complaint

Dear Attorney Willig;

I am the Solicitor for the Municipality of Murrysville. I received from Murrysville's [REDACTED] your correspondence dated September 27, 2021, and [REDACTED] Complaint filed with the Office of Attorney General for a review of Murrysville's Zoning Ordinance.

Your letter correctly notes the Murrysville Ordinance does authorize "major" forestry activity in all residential zoning districts. Murrysville issues a permit for doing so pursuant to the governing body's "conditional use" approval. Under the Pennsylvania Municipalities Planning Code (MPC), a "conditional use" is an activity (use) permitted as a matter of right upon applicant's simply presenting its proposed use at a public meeting and the activity meets the elementary threshold requirements contained in the local ordinance.

When a "major" forestry activity classification is designed as a conditional use, the law implicitly deems all customary and ordinary burdens associated with a major forest activity CANNOT be a basis for rejection of an applicant's conditional use approval under the MPC and controlling appellate court cases thereunder.

Pennsylvania zoning law only recognizes extraordinary burdens as the basis to deny a conditional use application. Furthermore, even where there are extraordinary burdens, the law favors an applicant's proposed use by further requiring the local municipality to consider all reasonable conditions to help mitigate an extraordinary burden instead of denying the conditional use. The reason for such requirements on review of all conditional uses, including a major forestry activity, is because in the eyes of MPC and appellate court case law, they are deemed a permitted use as a matter of right.

To my knowledge, I am not aware of an appellate court decision that deems a Conditional Use review process by a governing body as a per se violation for consideration of a major timbering activity.

I am currently out of the Office for the month of October, 2021. [REDACTED]

[REDACTED] Your letter requests a response to the [REDACTED] Complaint within 30 days. I would like to pursue my legal research noted above on the above referenced Conditional Use review process prior to responding to [REDACTED] Complaint with the major forestry activity provision of the Murrysville Zoning Ordinance.

Therefore, I respectfully request leave to submit the Municipality's formal response to the [REDACTED] Complaint on or before November 29, 2021. This will give me an opportunity to research appellate court cases noted under Purdon's Statutes and/or Roberts, Zoning Law and Practice.

This request is not being submitted for purposes of delaying consideration of the [REDACTED] Complaint. I look forward to a discussion of Murrysville Zoning Ordinance Section 220-31 (N) (1-4) upon completion of my research and submission of the Municipality's response to the [REDACTED] Complaint. I did a preliminary review of decisions on the OAG web site and do have a sense of the OAG responsibility in dealing with such complaints.

Sincerely;

[REDACTED]