

[REDACTED]
[REDACTED]
ATTORNEY AT LAW

May 19, 2022

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

Re: ACRE Request for Review - Reilly Township-Schuylkill County

Dear Senior Deputy Willig:

In my capacity as solicitor to the Board of Supervisors of Reilly Township ("Township") here in Schuylkill County, the Township confirms it has received your letter dated May 3, 2022 regarding the ACRE review request submitted by [REDACTED] of [REDACTED] and is pleased to provide this response.

In drafting the Reilly Township Forestry/Timbering Ordinance [# 2-2022 enacted March 23, 2022], pains were taken to review the Attorney General's materials in the ACRE Resource Center at <https://www.attorneygeneral.gov/resources/acre/> and reviewed the relevant Acceptance Letters and case law as it existed at the time of drafting. Counsel crafted the ordinance provisions to take into account these resources in a good faith attempt to comply with the guidance provided in the Resource Center. We believed then—and continue to believe—that the Township's Ordinance is consistent with the law and the guidance provided by your office. Parenthetically, we note that the Pennsylvania Sustainable Forestry Initiative's so-called "Fact Sheet", which purports to be a summary of the OAG's guidance and "acceptance letters" is not a reliable guide to the actual guidance. In some cases, it distorts or misstates the applicable decisional bases for the letters or extracts overbroad conclusions from them. Our positions are based on the *actual text* of the guidance and acceptance letters to the extent applicable, not a summary intended for laypersons.

We therefore offer the following point-by-point response to each of the issues raised by [REDACTED].

ISSUE: "Qualified Professional Forester - (definition page 5; requirement for management plan, page 6). These requirements appear to violate point 18 in the ACRE Fact Sheet."

TOWNSHIP RESPONSE: The Township believes these requirements to be consistent with the law. The Attorney General's prior Acceptance Letters acknowledge that the law permits municipalities to require management plans prepared by a professional forester. In its review of the Clay Township timber ordinance, the Attorney General stated: *"The OAG acknowledges the Township may require an owner/operator to file a management plan developed by a professional forester. These plans normally include best management practices ('BMP') designed to sustain and improve the health of the forest."* See, <https://www.attorneygeneral.gov/wp-content/uploads/2018/06/20181001100416.pdf> Point 18 in the ACRE "Fact Sheet" is not to the contrary. Indeed, the definition of "qualified professional forester" used in Article III of the Reilly Township ordinance was approved by the Attorney General in its ACRE review of the East Nantmeal Township timber ordinance. See, <https://www.attorneygeneral.gov/wp-content/uploads/2018/04/2015-East-Nantmeal-Timber.pdf> (p. 4). Point 18 of the ACRE "Fact Sheet" deals with unreasonable ordinance definitions of "professional consulting forester" or requirements for governing body approval of the forester upon petition. Reilly Township's ordinance does not impose any such requirements.

ISSUE: "Management Plan requirements - page 6, paragraph (4) (A) (i) - this appears to require a greater level of detail than allowable as enumerated in points 21 and 26 of the ACRE fact sheet."

TOWNSHIP RESPONSE: The Township believes the requirement in Article IV (4)(A)(i) for a plot-based estimate of the residual tree stand conditions is consistent with the law. These provisions were drafted specifically with reference to prior Attorney General review and Acceptance Letters.

The requirement in subsection (4)(A)(i) for a plot-based estimate of the residual tree stand conditions was expressly approved in the April 13, 2016 Attorney General ACRE review of the East Nantmeal Township timber ordinance. See, <https://www.attorneygeneral.gov/wp-content/uploads/2018/04/2015-East-Nantmeal-Timber.pdf>

content/uploads/2018/04/2015-East-Nantmeal-Timber.pdf, pp. 9-10. (“This Section can be amended to replace it to require that a plot-based estimate of the residual tree stand conditions be included in the timber plan.”). The forestry rationale for the OAG approval of such a condition was thoroughly reviewed in the April 13, 2016 OAG letter:

The residual tree stand conditions can be determined using a plot-based estimate rather than the enumeration. This involves estimating the residual basal area (i.e., the cross-sectional area of trees expressed in square feet per acre), the average residual tree diameter, and the number of trees per acre. This information is determined by taking plots from the site. The use of point sampling, random plots, and estimation are common practices used by professional foresters that are statistically sound. By taking the pre-harvest stand description of basal area with the number of trees per acre by species from the plots, then it is possible to estimate the average stand diameter. By reviewing the pre-harvest and post-harvest numbers, a forester determines the existing forest conditions and what those conditions will be following the harvest. With this information, a forester can assess the future sustainability for the tree stand considering the harvesting plan.

Thus, the requirement has been approved by the OAG previously; it reflects “common practice by professional foresters”; and does not unreasonably restrict forestry uses.

Although it appears that [REDACTED] only objects to this single provision of subsection (4)(A)(i) relating to the OAG-approved requirement for plot-based estimate of the residual tree stand conditions, we want to make it clear that the other provisions of subsection (4)(A) have also been drafted to comply with the OAG guidance.

The regeneration or reforestation plan requirements in subsection (4)(A)(ii) *expressly allow natural reforestation as a permissible option* to avoid the problem found in the East Nantmeal ordinance. See, <https://www.attorneygeneral.gov/wp-content/uploads/2018/04/2015-East-Nantmeal-Timber.pdf>

Subsections (4)(A) (iii) to (vi) are part of the Penn State Extension Pennsylvania Model Forestry Regulations. The Attorney General review letters under the ACRE law frequently recommend that a municipality adopt the Pennsylvania Model Forestry Regulations to avoid conflicts with ACRE.

To make the requirements even less burdensome, the ordinance specifically provides that: "To the extent that any of the information required in this Article is set forth in an erosion and sedimentation plan, the submission of the erosion and sedimentation plan to the Township satisfies the requirement to provide such information."

The "start and completion date" requirements in subsection (4)(A)(vii) is language adopted from the AG review of the Lower Saucon Township ordinance (see, https://www.attorneygeneral.gov/wp-content/uploads/2017/02/Lower_saucon_acceptance.pdf, p. 7) and review of the East Nantmeal Township ordinance (see, <https://www.attorneygeneral.gov/wp-content/uploads/2018/04/2015-East-Nantmeal-Timber.pdf>)

The map requirements of (4)(B)(i)-(v) are part of the Penn State Extension Pennsylvania Model Forestry Regulations, as recommended by the Attorney General's office. The Penn State Extension Pennsylvania Model Forestry Regulations provide for site plan mapping with 20 foot contour intervals because that is the standard contour interval used in most USGS mapping. The Attorney General ACRE reviews have objected to requirements for five or ten foot contour intervals because they would require site-specific topographic surveys. Thus, the Reilly Township Ordinance provides for contour intervals smaller than 20 feet *only if they are available on USGS topographic mapping of the site*: "with all topographic features represented with contour lines with no less than twenty (20) foot contour intervals. If smaller contour intervals are represented on available United States Geologic Survey topographic mapping (including USGS digital products) for the site, such smaller contour intervals shall be used[.]"

ISSUE: "Tops and Slash requirements - Page 8, paragraphs 2, 3, and 9. These appear to violate point 25 in the ACRE Fact Sheet."

TOWNSHIP RESPONSE: The Township believes these requirements to be consistent with the law.

The language in Article V, sections 1 through 6, is set forth in the Penn State Extension Pennsylvania Model Forestry Regulations (Penn State Extension EE0249 Timber Harvesting, Sections 6 and 7, p. 14) and is therefore permissible under prior Attorney General guidance. Section 9 provides: "All tops and slash shall be lopped to a maximum height of 6 feet above the surface of the ground." This is not an unreasonable requirement.

It appears in other timbering ordinances and (to our knowledge) has not been determined to be unreasonable, and [REDACTED] offers no basis upon which to conclude it is unreasonable. Overall, it does not unreasonably restrict forestry operations. Nor does [REDACTED] offer any alternative height which is believes to be reasonable, or why any other height would be more reasonable than six feet.

ISSUE: "Permit Bond - Page 10, paragraph 7. This is the most damaging provision of the ordinance, in which it requires a \$5,000 escrow up to 25 acres, with an additional \$2,000 for every ten acres or portion of ten acres above 25. This violates the ACRE fact sheet's point 1 and creates an insurmountable economic barrier to timber harvesting in the township."

TOWNSHIP RESPONSE: The Township believes its requirements to be consistent with the law. The Ordinance does not require a permit "escrow." Instead, it provides for a bond, irrevocable letter of credit, or a certified check in the amount provided by the Ordinance, the purpose of which is to "guarantee faithful performance of the Commercial Forestry permit and compliance with th[e] Ordinance." It is not an escrow for permit review. The amount is placed in an interest bearing account with the interest to be credited to the depositor. The bond must be released within thirty (30) days after final determination that the permit and Ordinance requirements have been satisfied. To our knowledge, neither the Attorney General nor any Pennsylvania court has determined that a requirement for a performance guarantee, with the funds returned to the permit holder upon compliance with permit and ordinance requirements, is impermissible. We are not aware of any basis to assert that state law either prohibits or preempts such requirement. Moreover, [REDACTED] provides absolutely no support for its bald assertion that the requirement constitutes an "insurmountable economic barrier." It provides no financial or economic information whatsoever to justify this claim.

ISSUE: "OIC Ordering Work Suspension - Page 9, Line 19 - this provision grants exceptionally broad authority to the township official to halt timber harvesting operations based on a vague interpretation of conditions. See ACRE Fact Sheet point 19."

TOWNSHIP RESPONSE: The Township believes these requirements to be consistent with the law. It is within a municipality's police powers to enforce its ordinances, including zoning permits issued thereunder. Just as [REDACTED] is availing itself of the Township's timber harvesting

permit application process, the Township has the duty, right, power, and authority to enforce its ordinances, including permits issued pursuant thereto. The Ordinance provides for a suspension *only* upon a "finding that corrective action has not been taken by the date specified in a notice of violation; the operation is proceeding without a Management Plan; or the operation is causing immediate harm to the environment." It does not authorize suspension upon a "vague interpretation of conditions." The Township is not forced to stand idly by while a timber operator egregiously violates the Ordinance by refusing to take corrective action notwithstanding a deadline in a notice of violation, or by timbering without even satisfying the basic requirement of a Management Plan, or by causing immediate environmental harm. Once such harm occurs, it can be extremely expensive and difficult or impossible to remediate. Establishing a guardrail against such harm does not render the Ordinance "unreasonable", nor does state law prohibit or preempt the Township from enforcing its permits by preventing ongoing violations.

ISSUE: "Review prior to issuance of permit - Page 10, paragraph 5 – "OIC shall review and determine whether to issue a permit ... " This provision violates point 3 in the ACRE fact sheet because it essentially treats the permit application as a conditional use."

TOWNSHIP RESPONSE: The Township believes its permit requirements to be consistent with the law. In its ACRE review of a Clay Township timber ordinance, the AG stated: "The OAG does not take issue with the general principle that a municipality may require a permit for timber harvesting operations." See, <https://www.attorneygeneral.gov/wp-content/uploads/2018/06/20181001100416.pdf> . The question is whether such a permit requirement is consistent with the MPC requirement that timber harvesting be a use permitted by right in all zoning districts. 53 P.S. §10603(f). The Attorney General has reviewed timber harvesting permit requirements in a Lower Saucon Township and other ordinances and did *not* find the requirement of a permit *per se* as violative of ACRE. Municipalities issue permits all the time for uses that are permitted as of right *after a staff review to determine that the applicant meets the applicable requirements that are explicitly set forth in the Ordinance.* Indeed, under the Pa. Municipalities Planning Code, municipalities may impose use conditions within its zoning ordinance *even for uses permitted as of right.* Common examples are zoning permits and building permits that require compliance with certain standards set forth in the ordinance.

Contrary to [REDACTED] assertion, such requirements for a permit does not "treat the permit application as a conditional use." It is erroneous to believe that municipalities must—or even customarily—unconditionally and ministerially issue permits for uses permitted as of right. To the contrary, it is incumbent upon a zoning officer to assure that a permit application complies with the ordinance. While such uses are not subject to the jurisdiction of a zoning hearing board, and neither a zoning officer nor the zoning hearing board may impose conditions on such uses that are not explicitly set forth in the zoning ordinance, the ordinance itself may set forth classifications and conditions for uses permitted by right. In contrast, "conditional uses" allow a municipality's governing body to impose conditions that are not found in the ordinance itself.

The Reilly Township Ordinance provides that the "permit shall be established on the basis of and incorporate the Management Plan." It merely provides for a determination that the applicant has met permit requirements expressly set forth in the Ordinance that are reasonable and that in many cases have been previously approved by the Attorney General. This is *unlike* the objectionable situation in which an issuing authority has discretion to withhold a permit or to impose conditions outside of the Ordinance itself. [REDACTED] appears to claim that the municipality must issue a permit even if it completely fails to show that it meets reasonable Ordinance standards (e.g., it fails to submit a management plan; the management plan was not prepared by a forester; the plan fails to make any provision for design, construction, maintenance, and retirement of the access system, including haul roads, skid roads, etc.; the applicant fails to include a map showing where the timbering is to take place). [REDACTED] claim is misguided, misinterprets the Municipalities Planning Code, and misapplies the ACRE law.

For all these reasons, Reilly Township believes that its Timbering Ordinance is valid, does not unreasonably restrict forestry activities, and is neither prohibited nor preempted by state law. The Township respectfully requests the OAG to reject and dismiss [REDACTED]'s objections.

Very truly yours,

[REDACTED]

Cc: [REDACTED]
Board of Supervisors of Reilly Township
[REDACTED]