

April 11, 2024

*Via Email Only*

Robert A. Willig, SDAG  
Office of the Attorney General  
1251 Waterfront Place  
Mezzanine Level  
Pittsburgh, PA 15222

Re: West Brandywine Township – [REDACTED] ACRE Complaint

Dear Mr. Willig:

This firm serves as Solicitor for West Brandywine Township. I write with respect to the February 12, 2024 ACRE inquiry filed by [REDACTED]. Please allow this correspondence to set forth the Township's response and position on what we interpret the issues raised by [REDACTED] to be, namely:

1. Is Township Code § 161-106(E)<sup>1</sup> requiring the [REDACTED] to submit a drainage permit application and grading permit application for their driveway an "unauthorized local ordinance" as defined by 3 Pa.C.S.A. § 312?

**Suggested Answer:** No. The driveway is an impervious area/surface that is not a "normal agricultural operation" as defined by 3 Pa.C.S.A. § 312 and 3 P.S. § 952 and therefore, Township Code § 161-106(E) is not an unauthorized local ordinance under Act 38 of 2005 ("ACRE").

<sup>1</sup> The Code of the Township of West Brandywine is available online at <https://ecode360.com/WE1756>.

To: Robert A. Willig, SDAG  
Re: West Brandywine Township - [REDACTED] ACRE Complaint  
Date: April 11, 2024  
Page 2

---

2. What is the Commonwealth's view on "agricultural stormwater management when it is in regard to maintaining, improving or constructing new impervious coverage such as driveways, barns, stable housing, etc." and how does the Commonwealth view "outdoor horse-riding arenas in regards to impervious coverage?"

**Suggested Answer:** This request falls outside the scope of ACRE, as ACRE allows an owner or operator of a normal agricultural operation to request the Office of Attorney General ("OAG") to review a claimed unauthorized local ordinance. 3 Pa.C.S.A. § 314(a). This request is not a request for review of a local ordinance, but a general request for legal advice.

To the extent this request raises the issue of whether Township Code § 161-106(E) is an unauthorized local ordinance as it pertains to the driveway (i.e., the new impervious coverage on the [REDACTED] property), see the Township's response to the first issue. In addition, the Township's Stormwater Management Ordinance is consistent with the Pennsylvania Department of Environmental Protection's ("DEP") Storm Water Management Act regulations and model ordinance. Since it is consistent with State regulation, it cannot be unauthorized.

3. Are Township Code § 200-15(B)(2)'s setback requirements for outdoor riding rings and public stable an "unauthorized local ordinance" as defined by 3 Pa.C.S.A. § 312?

**Suggested Answer:** No. While equine operations such as outdoor riding rings and public stables are normal agricultural operations, the Township is authorized to adopt Township Code § 200-15(B)(2) (setbacks for outdoor riding rings and public stables) by the Second Class Township Code, 53 P.S. § 66601, and Municipalities Planning Code, 53 P.S. § 10601, and is not prohibited or preempted from doing so. There is no state law that establishes setback requirements for outdoor riding rings or public stables that are inconsistent with the Township's regulations.

To: Robert A. Willig, SDAG  
Re: West Brandywine Township – [REDACTED] ACRE Complaint  
Date: April 11, 2024  
Page 3

---

## I. Background.

By way of background, the Township and most municipalities were directed and required by the Commonwealth in the early to mid-2010s to adopt new Stormwater Management Ordinances to comply with the Pennsylvania Storm Water Management Act and the Cleans Streams Law. The state regulatory agencies, working in conjunction with county governments, prepared the forms of stormwater management ordinances that each municipality was required to adopt. DEP was also directed to develop a model stormwater management ordinance, the most recent of which was published in 2022. Per the Pennsylvania Storm Water Management Act and the resulting Township Ordinance, which was adopted consistent with DEP's Model Ordinance in 2023, landowners must comply with certain planning and engineering requirements to assure that the rate, volume, direction and quality of stormwater resulting from new development is being addressed. *See generally* Township Code Chapter 161, Stormwater Management (adopted January 19, 2023).

Upon information and belief, [REDACTED] purchased the property that is the subject of their ACRE Complaint in February/March 2023. In January 2024, [REDACTED] constructed a driveway on the property. The driveway was installed without a grading permit, drainage permit or stormwater management plan. As far back as April 2023, [REDACTED] submitted an incomplete permit application for the driveway. As recently as January 14, 2024, [REDACTED] represented to the Township that they were putting together all the required permit applications/plans for the driveway. However, no application was submitted. [REDACTED] ACRE Complaint was submitted thereafter to the OAG on February 12, 2024. To this day, there is no grading permit, drainage permit or stormwater management plan for the driveway.

## II. Analysis.

### Issue 1 – Driveway Drainage/Grading Permit Applications

[REDACTED] driveway is an impervious area/surface that is not a "normal agricultural operation" as defined by 3 Pa.C.S.A. § 312 and 3 P.S. § 952 and therefore, Township Code § 161-106(E) is not an "unauthorized local ordinance" under ACRE. There are no reported appellate or other court decisions or prior OAG ACRE decisions that have directly addressed this issue.

To: Robert A. Willig, SDAG  
 Re: West Brandywine Township – [REDACTED] ACRE Complaint  
 Date: April 11, 2024  
 Page 4

The Township’s definitions of “agricultural activity” and “impervious surface” are consistent with DEP’s definitions of “agricultural activity” and “impervious surface (area)” in its 2022 Model Stormwater Management Ordinance.<sup>2</sup> DEP’s 2022 Model Stormwater Management Ordinance excludes construction of new impervious driveways from its definition of “agricultural activity.” Township Code § 1-20 also excludes construction of new buildings or impervious area from the definition of “agricultural activity.” Township Code § 1-20 further defines “impervious surface” to include driveways that prevent or resist infiltration of water.

DEP Model Ordinance Article II – Definitions	Township Code § 1-20 – Definitions
<p>Agricultural Activity – Activities associated with agriculture such as agricultural cultivation, agricultural operation, and animal heavy use areas. This includes the work of producing crops including tillage, land clearing, plowing, disking, harrowing, planting, harvesting crops or pasturing and raising of livestock and installation of conservation measures. Construction of new buildings or impervious area is not considered an agricultural activity. 4</p>	<p>Agricultural Activity – Activities associated with agriculture such as agricultural cultivation, agricultural operation, and animal heavy use areas. This includes the work of producing crops including tillage, plowing, disking, harrowing, planting or harvesting crops; or pasturing and raising of livestock; and installation of conservation measures. Construction of new buildings or impervious area is not considered an “agricultural activity.”</p>
<p>Impervious Surface (Impervious Area) – A surface that prevents the infiltration of water into the ground. Impervious surfaces (or areas) shall include, but not be limited to: roofs; additional indoor living spaces, patios, garages, storage sheds and similar structures; and any new streets or sidewalks. Decks, parking areas, and driveway areas are not counted as impervious areas if they do not prevent infiltration.</p>	<p>Impervious Surface – A surface that has been compacted or covered with a layer of material so that it prevents or is resistant to infiltration of water, including, but not limited to, structures such as roofs, buildings, storage sheds; other solid, paved or concrete areas such as streets, driveways, sidewalks, parking lots, patios, tennis or other paved courts; or athletic playfields comprised of synthetic turf materials. For the purposes of determining compliance with Chapter 161, compacted soils or stone surfaces used for vehicle parking and movement shall be considered impervious. Surfaces that were designed to allow infiltration (i.e., areas of porous pavement), will be considered on a case-by-case basis by the Municipal Engineer, based on appropriate documentation and condition of the material, etc.</p>

<sup>2</sup> DEP’s 2022 Model Stormwater Management Ordinance can be found at [greenport.pa.gov/eLibrary/GetDocument?docId=13879&DocName=10\\_2022\\_MODEL\\_STORMWATER\\_MANAGEMENT\\_ORDINANCE.PDF](https://greenport.pa.gov/eLibrary/GetDocument?docId=13879&DocName=10_2022_MODEL_STORMWATER_MANAGEMENT_ORDINANCE.PDF)

To: Robert A. Willig, SDAG  
Re: West Brandywine Township - [REDACTED] ACRE Complaint  
Date: April 11, 2024  
Page 5

---

Broadening “agricultural activity” or “normal agricultural operation” to include impervious driveway surfaces would frustrate the purpose of the Storm Water Management Act to preserve to the maximum extent practicable natural stormwater runoff regimes, *inter alia*. See 32 P.S. § 680.3. Even if the driveway is considered a normal agricultural operation, the Township has the authority to (and is required to) implement ordinances and regulations to regulate development within the Township by the Pennsylvania Storm Water Management Act, 32 P.S. § 680.11(b), Second Class Township Code, 53 P.S. § 66601, and the Municipalities Planning Code, 53 P.S. 10601. Township Code § 161-106(E) falls within this category of authorized (and required) ordinances and regulations and is not prohibited or preempted under state law. Here, the Township’s exclusion of the driveway from the definition of “agricultural activity” is consistent with DEP’s exclusion of the driveway from the definition of “agricultural activity.”

Accordingly, Township Code § 161-106(E) is not an unauthorized local ordinance under ACRE.

### **Issue 2 – Request for Guidance on Stormwater Management and Impervious Coverage**

[REDACTED] request for the Commonwealth’s view on “agricultural stormwater management when it is in regard to maintaining, improving or constructing new impervious coverage such as driveways, barns, stable housing, etc.” and how the Commonwealth views “outdoor horse-riding arenas in regards to impervious coverage” falls outside the scope of ACRE. ACRE allows an owner or operator of a normal agricultural operation to request the OAG to review specific aspects of claimed unauthorized local ordinances. 3 Pa.C.S.A. § 314(a). Here, [REDACTED] request for “guidance and clarification” on stormwater management and impervious coverage does not identify a local ordinance believed to be an unauthorized local ordinance and is therefore not a legally recognized ACRE claim.

To the extent this request raises the issue of whether Township Code § 161-106(E) is an unauthorized local ordinance as it pertains to the driveway (i.e., the new impervious coverage on the Shoemakers’ property), see the Township’s response to Issue 1.

### **Issue 3 – Setbacks for Outdoor Riding Rings and Public Stables**

Finally, [REDACTED] have a “potential issue” with the Township’s requirements for setbacks from property lines for outdoor riding rings and public stables. However, the Township is authorized by the Second Class Township Code, 53 P.S. § 66601, and Municipalities Planning Code, 53 P.S. § 10601, to establish setbacks.

To: Robert A. Willig, SDAG  
Re: West Brandywine Township - [REDACTED] ACRE Complaint  
Date: April 11, 2024  
Page 6

While Pennsylvania state law sometimes preempts local regulation of setbacks for agricultural properties, a review of available prior OAG decisions dating back to 2006 as well as caselaw and statutes regarding setbacks for agricultural properties appear to limit this preemption to manure setbacks/setbacks for Concentrated Animal Operations and Concentrated Animal Feeding Operations ("CAOs" and "CAFOs") under the Nutrient Management Act. *See* 3 Pa.C.S.A. §§ 506, 519; 25 Pa. Code §§ 83.202, 83.205; *Berner v. Montour Twp. Zoning Hearing Bd.*, 217 A.2d 238 (Pa. 2019). It does not appear that this preemption has ever been applied to a public stable. The Township's setback in Township Code § 200-15(B)(2) does not apply to manure setbacks or CAOs and CAFOs.

Furthermore, [REDACTED] always have the right to seek a variance. [REDACTED] potential issues with the setbacks appear to solely be based on the unique or irregular physical circumstances or conditions of their property and not because the Township is attempting to override a state regulation governing setbacks of outdoor riding rings or public stables, of which there are none. A request for a variance from the setback requirements is a more appropriate avenue for addressing the need for zoning relief.

The Township respectfully requests that the interpretation/relief requested in [REDACTED] [REDACTED] ACRE Complaint be denied.

Very truly yours,  
[REDACTED]

Cc: [REDACTED]  
West Brandywine Township Board of Supervisors  
[REDACTED]