



COMMONWEALTH OF PENNSYLVANIA
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April 13, 2016

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Via Email and First Class Mail

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**RE: ACRE Review Request
East Nantmeal Township, Chester County**

Dear Mr. Oeste:

This letter is in follow up to our letter dated November 9, 2015, in which we explained that we were preparing a letter detailing the legal problems with East Nantmeal Township's zoning ordinance provisions regulating timber harvesting and suggesting how they may be resolved through enactment of ordinance amendments. Although we are prepared to bring legal action against the Township pursuant to Section 315 of ACRE to invalidate or enjoin the enforcement of the Ordinance provisions, we provide this letter in an effort to start negotiations to resolve this matter by agreement on ordinance amendments.

I. STATE LAWS PROTECTING/REGULATING TIMBER HARVESTING/FORESTRY

We begin our legal analysis with an overview of the State laws that regulate and/or protect timber harvesting and forestry operations.

The Municipalities Planning Code (MPC) explicitly addresses the limit on municipal authority to regulate forestry activities, including timber harvesting, as it provides:

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

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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.

53 P.S. § 10603(f). Clearly, this provision indicates the intent of the General Assembly to encourage the preservation of forested land and provide protections to permit the owners of forested land to maintain and manage those woodlands through timber harvesting as of right regardless of the particular zoning district. See Penn State College of Agricultural Sciences, *Dealing with Local Timber Harvesting Ordinances* (2004) (Exhibit A).

Moreover, a municipality's zoning power under the MPC is limited to planning for uses and not regulating the details of an operation. In re Thompson, 896 A.2d 659 (Pa. Cmwlth. 2006) (explaining that "[z]oning only regulates the *use* of land and not the particulars of development and construction."). "Zoning is a regulation of uses, not a means of regulating the manner in which business is conducted." ROBERT S. RYAN, 1 PENNSYLVANIA ZONING LAW AND PRACTICE § 3.3.14A (George T. Bisel Company, Inc. 2001). It is also well-settled that a municipality's "power to . . . regulate does not extend to an arbitrary, unnecessary, or unreasonable intermeddling with the private ownership of property." Eller v. Bd. of Adjustment, 198 A.2d 863, 865-66 (Pa. 1964); Van Sciver v. Zoning Bd. of Adjustment, 152 A.2d 717, 724 (Pa. 1959) (same); Schmalz v. Buckingham Twp. Zoning Bd., 132 A.2d 233, 235 (Pa. 1957) (same).

The Right to Farm Act (RTFA) precludes a municipality from regulating normal agricultural operations as a nuisance and protects direct commercial sales of agricultural commodities. 3 P.S. § 953. The definition of agricultural commodities includes "forestry and forestry products." 3 P.S. § 952. The Agricultural Area Security Law (AASL) precludes a municipality from enacting ordinances which would unreasonably restrict farm structures or farm practices within the area. 3 P.S. § 911. The AASL defines normal farming operations to include silvicultural activities and crops to include "[t]imber, wood and other wood products derived from trees." Id. § 903. The MPC also provides that no public health or safety issues shall require a municipality to adopt a zoning ordinance that violates or exceeds the provisions of the AASL or RTFA. 53 P.S. § 10603(h); Commonwealth v. Richmond Township, 975 A.2d 607, 616 n.13 (Pa. Cmwlth. 2009) (explaining that through section 10603(h) of the MPC, the "legislature implicitly has determined that an agricultural operation complying with these acts does not constitute an operation that has a direct adverse effect on public health and safety").

Finally, pursuant to its authority under the Clean Streams Law, 35 P.S. § 691.1, *et seq.*, the Department of Environmental Protection (DEP) regulates erosion and sediment control and "requires persons proposing or conducting earth disturbance activities to develop, implement and maintain [best management practices] to minimize the potential for accelerated erosion and sedimentation and to manage post construction stormwater." 25 Pa. Code § 102.2(a). Timber harvesting is subject to the DEP's Erosion and Sediment Control (E&S) regulations. Id. § 102.4(b), .5(b), (d). DEP defines "timber harvesting activities" as "[e]arth disturbance activities including the construction of skid trails, logging roads, landing areas and other similar logging or silvicultural practices." Id. § 102.1.

A timber harvest operation that disturbs more than 5,000 square feet must develop and implement a written erosion and sediment (E&S) plan. *Id.* § 102.4(b)(2)(i). An E&S plan is “[a] site specific plan consisting of both drawings and a narrative that identifies BMPs to minimize accelerated erosion and sedimentation before, during and after earth disturbance activities.” *Id.* § 102.1. DEP requires that an E&S plan must be “prepared by a person trained and experienced in E&S control methods and techniques applicable to the size and scope of the project being designed.” *Id.* § 102.4(b)(3). The E&S plan must identify and plan for the “types, depth, slope, locations and limitations of the soils.” *Id.* § 102.4(b)(5)(ii). A timber harvesting operation that involves 25 acres or more of earth disturbance activity must obtain an E&S permit from DEP in addition to the E&S plan. *Id.* § 102.5(b); see DEP, *Timber Harvest Operations Field Guide for Waterways, Wetlands and Erosion Control* (2009) (Exhibit B).

In addition, activities associated with timber harvesting operations are also regulated by the DEP’s Dam Safety and Waterway Management regulatory scheme (“Waterway Management regulations”). 25 Pa. Code § 105. These regulations govern the crossing of streams, construction culverts, fords, and bridges, and other impacts to water courses and wetlands during timber harvesting operations. *Id.* § 105.2 - .3. There are three levels of permitting for timber harvesting under the DEP’s regulatory program: permit waiver, general permit, or a water obstruction and encroachment permit. *Id.* § 105.11 - .13; .441. A permit is not required to cut timber or other vegetation, including cutting in wetlands. Exhibit B provides a detailed discussion of permit requirements and best management practices for timber harvesting operations involving waterways or wetlands. (Exhibit B at 8-10.)

Against this background, we turn to the legal problems with the Ordinance and to a suggested compromise that would correct those problems. The starting point is the ACRE law, which prohibits a municipality from adopting or enforcing a local ordinance prohibited or preempted by State law. 3 Pa. C.S. §§ 312, 313. The State laws implicated under our ACRE analysis are set forth above.

II. LEGAL PROBLEMS WITH ZONING ORDINANCE

A. Definitions

We have identified legal problems with some definitions in the Ordinance and provide an explanation of those problems and suggested revisions.

The definition for “High Value Species” attempts to delineate the size and species of trees that should be considered “high value” species. However, our experts advise that the types of trees considered a high value species can change from year to year as the market changes. Moreover, we are advised that what is of value to a woodland owner may go beyond economics. The identification of high value trees and the silvicultural practices appropriate for the particular forest stand are more properly in the purview of the land owner and forester. This definition should be deleted from the ordinance.

The definition for "Professional Consulting Forester" provides as follows:

A forester who has obtained a Certified Foresters® certification from the Society of Certified Foresters (SAF), or who is a full member of the Association of Consulting Foresters (ACF). In the alternative, the Board of Supervisors may approve an individual, not meeting the above qualifications, as a Professional Consulting Forester, if such individual petitions the Board, prior to any request for a timber harvesting permit, and submits his or her educational and professional qualifications, samples of previous timber harvesting plans authored, and references from Pennsylvania municipalities. The minimum requirements for consideration as a Professional Consulting Forester are: (1) the individual must have a Bachelor of Science degree in Forestry from a college accredited by the Society of American Foresters; (2) the individual must demonstrate that his or her principle business activity is forestry consulting; (3) the individual must demonstrate that he or she does not have an economic interest in a timber purchasing or procurement entity; and (4) the individual must demonstrate that he or she has prepared a minimum of five (5) timber harvesting plans within the Commonwealth of Pennsylvania.

Ordinance § 201.

Pennsylvania does not have a license or registration requirement for foresters. The requirements of this definition are overly broad and unduly burdensome; therefore are unreasonable. The requirement for an individual to petition the Board of Supervisors for approval is tantamount to requiring conditional use approval. Our forestry experts have advised that a forester can hold a degree in various related forestry studies and have demonstrated experience working in the field of forestry to be qualified to write a timber harvesting plan. This definition can be amended to require as follows:

"Professional Forester" is a forester meeting one of the following requirements:

- (a) Two years of technical forestry experience and an associate's degree in forest technology, forestry, forest management, forest ecosystem management, urban forestry, forest science, agroforestry, or a related forestry or natural sciences degree; or
- (b) A bachelor's degree in forest technology, forestry, forest management, forest ecosystem management, urban forestry, forest science, agroforestry, or a related forestry or natural sciences degree; or
- (c) A master's degree in forest technology, forestry, forest management, forest ecosystem management, urban forestry, forest science, agroforestry, or a related forestry or natural sciences degree.

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The Ordinance defines "Selective Cutting" as "[t]he felling of certain, but not all, trees in an area for the purpose of: removing dead, diseased, damaged, mature or marketable timber; improving the quality of a tree stand or species; or meeting personal domestic needs." This is not an accurate definition. The term "selective cutting" has a distinct meaning in the field of forestry. (Exhibit C at 5.) "Selective cutting" is a euphemism for what is called "high-grading" or "diameter limit cutting." This practice involves taking only the best or biggest trees in a timber harvest. Our experts have advised that this practice is not recognized as a sustainable practice and has no basis in scientific forestry because it leads to a progressive deterioration of the forest variety and quality. Conversely, "selection cutting" is a regeneration technique in which trees are removed singly or in small groups designed to create or perpetuate uneven aged forests. In any event, the term "selective cutting" is not used in the Section 1327 timber harvesting provisions and should simply be deleted from the Ordinance.

The definition for "Skid Road (haul road)" combines two distinct terms. A "skid road" is used to drag trees on the ground from the stump to the landing. A "haul road" leads from the landing to the public road. The Ordinance should be amended to separate these terms into two separate definitions.

The term "Specimen Vegetation" is used in Section 1327(C)(2)(c) to require that a site plan include identification of specimen vegetation. As discussed below under Section II.(D)(5), our PSU expert advised that requiring identification of specimen vegetation is both time and cost prohibitive to a timber harvesting operation. To the extent the Township seeks to preclude harvesting of "specimen vegetation," our experts advised that this would encourage the harvesting of trees prior to them reaching the qualifications in this definition, impact the economic value of a timber harvest, and interfere with prescribed silvicultural practices for forest management and regeneration. There are many site specific factors, as discussed below, which are considered in planning a timber harvest to achieve sustainability and regeneration goals.

As set forth below, we request that this term be deleted from Section 1327(C)(2)(c) site plan requirements for a timber harvesting operation. However, we acknowledge that this term is also used under Article XV — Natural Resource Protection to regulate land development and disturbance activities within East Nantmeal Township. For this reason, we agree that this term can remain in the Ordinance subject to the amendments suggested below for provisions under Article XV.

The definition for "Timber Harvesting Operation" states as follows:

The felling and removal of four (4) trees, or greater than six (6) inches DBH, per acre to be converted to any forest product or for sale to others. The felling and/or removal of diseased or dead trees, or invasive trees or other invasive herbaceous species, or the felling and removal of trees for personal firewood use, or the removal of trees from an orchard, Christmas tree farm or tree nursery, or the clearing of trees in an area in accordance with an approved subdivision or land development plan or building permit or the shall not constitute timber harvesting provided that such activity shall not occur more than once in a three (3) year

period. Forestry, as defined in Article II, herein, shall be considered a timber harvesting operation, and shall require a timber harvesting permit.

This definition is overly broad and unreasonable because it encompasses many activities that are not considered timber harvesting in the field of forestry. Our PSU expert has opined that a minimum threshold of four trees of greater than six inches in diameter per acre is so low that it would qualify almost any cutting operation as a timber harvest. Also, the removal of dead, diseased, or invasive trees, shrubs or vines is related to forest management and is not considered a timber harvest. The removal of trees for personal firewood use or removal on orchards, Christmas tree farms or tree nurseries is also not timber harvesting. The same is true for activities related to maintaining or restoring forest stand conditions by removing competitive vegetation, such as a thinning or removal of invasive species. The owner of forested land should not be required to obtain a permit to engage in forest management activities.

We suggest that the Township amend the definition for timber harvesting operation to state: "Timber harvesting operation means that part of forestry involving cutting down trees and removing logs from the forest for the primary purpose of sale or commercial processing into wood products." This revision balances the Township's objective to require a permit for commercial timber harvesting operations with the rights of the woodland owner to engage in personal use and routine forest management activities without a permit. This is also consistent with the MPC requirement for zoning ordinances to "encourage the 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 the Commonwealth." 53 P.S. § 10603(f).

B. Timber Harvesting Permit and Permit Application Requirements

At the outset, we want to make it clear that we do not have an issue with the general principle that the Township requires a permit for timber harvesting operations. However, the Ordinance permit requirements for timber harvesting operations are overly restrictive and unreasonable, thus beyond the Township's authority under the MPC, violate the AASL, and conflict with the DEP's comprehensive Erosion and Sediment Control and Dam Safety and Waterway Management regulatory schemes. The "[c]omprehensive state regulations already cover many aspects of a timber harvesting operation[, thus in most cases,] a permit should only serve to verify that state laws are being followed." (Exhibit A at 14.)

1. Section 1327(A)(2) Approval of E & S Plan

Section 1327(A)(2) requires an E&S plan along with a "letter of approval of such plan from the Chester County Conservation District." The DEP's erosion and sediment control regulations do not require an E&S plan to be submitted for review and approval to the Conservation District, thus the Township cannot impose this requirement because it is stricter than State law. 25 Pa. Code § 102.4(b)(8). The DEP requires that the written E&S plan, inspection reports and monitoring records be available "at the project site during all stages of the

earth disturbance activities.” Id. § 102.4(b)(8). This Section should be amended to remove this approval requirement.

The Township can require an applicant to provide a copy of the written E&S Plan. We also note that the Township may, at its own expense, submit an applicant’s E&S Plan to the Conservation District for review to check compliance with the regulations.

2. Section 1327(A)(3) Proof of Insurance Requirements

This section requires that a timber harvesting operator must provide proof of “state workmen’s compensation” and liability insurance coverage. There are several problems with this requirement. First, in the typical timber harvest a landowner first obtains a municipal permit before the timber goes out for bid to timber harvesters, thus this information would not be available at the time of submitting the application. Second, the township’s authority to request proof of insurance for worker’s compensation is limited to the issuance of building permits, not timber harvesting permits. 77 P.S. § 462.2. We are not aware of any authority to support the Township’s requirement for proof of liability insurance. Finally, the Worker’s Compensation Act provides for certain employer/employee exemptions from providing worker’s compensation coverage. 77 P.S. §§ 22; 462.7; 484. We suggest that the Township either delete this section or amend this Section to state: “The identity of the timber harvesting operator shall be provided to the Township upon the award of the bid for the timber harvest covered by the approved timber harvesting permit and proof of any insurance required under State law or proof of exemption therefrom for the timber harvester shall also be provided at the same time.”

3. Section 1327(A)(4) Escrow for Reviewing Fees

Section 1327(A)(4) requires payment of a non-refundable permit fee. This fee requirement is within the Township’s authority so long as the fee is established as part of a permit fee schedule, so that the amount is ascertainable by the landowner prior to application. However, the requirement to escrow funds for review of the application is beyond the Township’s authority under the MPC. Section 10617.3 precludes a municipality from charging costs or expenses for “engineering, architectural or other technical consultants” in administering the zoning ordinance. 53 P.S. § 10617.3. Moreover, the Township’s attempt to escrow funds for reviewing a permit application for a permitted use by right is tantamount to converting the application to a conditional use proceeding, which it cannot do. The Township should amend this section to delete the following language: “and escrow funds, based upon a reasonable estimate by the Township, for the review of the application.”

4. Section 1327(A)(5) Imposition of Liability

Under Section 1327(A)(5), the Township requires a landowner and a timber harvesting operator to attest to their joint and several liability for “compliance with all timber harvesting requirements.” The Township has no authority to impose liability, but rather only has authority to enforce zoning ordinance provisions as provided for under the MPC. Enforcement for purported violations of zoning ordinance provisions requires the Township to initiate

enforcement proceedings, which includes providing an enforcement notice and other due process requirements. 53 P.S. §§ 10616.1; 10617.2. This subsection must be deleted in its entirety because it is beyond municipal authority.

C. Review of Timber Harvesting Permit Application

1. Section 1327(B)(1) Payment for Reviewing and Consulting Costs

The Township seeks to impose financial responsibility on an applicant for "all reasonable expenses for inspection, review, legal and other consulting costs and expenses incurred by the Township in processing the timber harvesting application." For all of the reasons stated above regarding Section 1327(A)(4), this Section also goes beyond municipal authority. The Township cannot charge these fees and expenses to review the timber harvesting application. 53 P.S. § 10617.3. In fact, the Township could not charge these fees and costs for a zoning hearing board proceeding much less for a use that is permitted by right. Section 1327(B)(1) must be deleted in its entirety.

2. Section 1327(B)(5) Imposition of Unknown Conditions

Section 1327(B)(5) states that within 55 days of submission of a timber harvesting application, the Code Enforcement Officer "shall indicate to the applicant approval or denial of the submitted plan or approval subject to reasonable conditions." As discussed above, the MPC provides that timber harvesting is a use that must be permitted as of right in all zoning districts in a municipality. 53 P.S. § 10603(f). "In zoning terminology, the term 'permitted use' refers only to those uses allowed absolutely and unconditionally." Neighbors of Keiners Lane v. Township of Robinson, 550 A.2d 863, 865 (Pa. Cmwlth 1988). When a "use is permitted under the zoning ordinance there is no basis for the imposition of restrictions on the use greater than those specified in the ordinance itself." Id. (citing ROBERT S. RYAN, 2 PENNSYLVANIA ZONING LAW AND PRACTICE § 9.4.18 (George T. Bisel Company, Inc. 2001)). Moreover, a zoning officer or code enforcement officer only has authority to "administer the zoning ordinance in accordance to its literal terms" and has no authority to impose conditions not set forth in the ordinance itself. 53 P.S. § 10614. A special exception and conditional use are the types of uses that allow a governing body to impose other conditions as part of an approval. Thus, a permitted use must comply with requirements set forth in an ordinance, but the zoning officer has no authority to determine "reasonable conditions" outside the terms of the ordinance in approving a permit for a timber harvesting operation. (Exhibit A at 15-16.)

The last phrase of this Section: "or approval subject to reasonable conditions" should be deleted.

D. Timber Harvesting Plan

1. Section 1327(C)(1)(c) Identification of Timber Harvesting Operator

This section requires a timber harvesting plan to include the name, address, and telephone number for the timber harvesting operator. However, in the typical timber harvest a landowner first obtains a municipal permit before the timber goes out for bid to timber harvesters, thus this information would not be available at the time of submitting the timber harvesting plan. This problem can be remedied by revising this section to provide that the identity and contact information for the timber harvesting operator shall be provided to the township upon award of the bid for the timber harvest covered by the approved timber harvesting permit.

2. Section 1327(C)(1)(e) Commencement and Completion Dates

The commencement and completion dates for the timber harvest will not be known until the timber is sold to the timber harvester. Additionally, there are many factors that are considered in establishing commencement dates. These factors include: best season to harvest at the site, market conditions that may result in postponing the harvest, and weather conditions. Our PSU expert has advised us that it is common for a sale contract to allow a year or more to start or complete a timber harvesting operation.

As a result, we suggest that this Section be amended to add language at the end of the sentence stating: "if known when plan is submitted with the application, otherwise applicant shall inform Township of dates for commencement and completion upon the award of the bid for the timber harvest."

3. 1327(C)(1)(f) Identification of Tree Totals

This Section requires the following to be contained in a timber harvesting plan:

The total number of trees on the area subject to the timber harvesting operation, the total number of trees to be harvested and the total number of trees to remain. The trees to be harvested shall be described in terms of size, in DBH, and species.

Our PSU expert has advised us that this enumeration requirement to tally both the cut and residual trees is unreasonable because it would be cost prohibitive to the timber harvesting operation. A timber harvesting contract will describe the trees to be cut. 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

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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.

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.

4. Section 1327(C)(1)(h) Woodlands Management Plan

Section 1327(C)(1)(h) requires a Woodlands Management Plan to address the long term goals of the forested land. The Township requires the plan to include information related to "woodland reforestation" and that the landowner "shall be responsible for ensuring that all land subject to a timber harvesting operation shall be reforested or maintained in a forested state." We note that a timber harvesting plan is distinct from a woodland management plan. Our PSU expert has advised that in Pennsylvania, forest management plans are developed to achieve desired forest regeneration and not "reforestation." According to our expert, "reforestation" suggests planting and other types of artificial regeneration treatments to a forest. However, "most of Pennsylvania's forests will regenerate naturally from seeds or sprouts." Penn State College of Agricultural Sciences, *Timber Harvesting in Pennsylvania, Information for Citizens and Local Government Officials* at 5 (2004) (Exhibit C); see also (Exhibit A at 18). There are situations for which trees may need to be planted to reforest, which include "reforesting former strip mines, old fields, conifer plantations, and areas where insects or diseases have killed all the seed-producing trees." (Exhibit C at 5). However, these situations would not be involved an application for a timber harvesting permit. It is "unreasonable, both economically and ecologically, to require a forestry operation to artificially regenerate the site." (Exhibit A at 18.)

With this said, we suggest that the Township amend this provision to replace the word "reforestation" from subsection (a) with "regeneration." Also, the phrase "reforested or maintained in a forested state" should be deleted and replaced with "included in a plan to achieve desired regeneration of the forested land."

5. Section 1327(C)(2)(c) Natural Features on Site Plan

According to our PSU expert, the requirement in this Section that a site plan must identify all specimen vegetation is cost and time prohibitive and would require that the landowner or forester have access to neighboring properties. This requirement would necessarily encompass measuring and describing conditions on acres of land and also require the ability to depict all the identified specimen vegetation on the map. We suggest that the Township delete "specimen vegetation" from this subsection because it is an unreasonable requirement because it would deter timber harvesting due to the cost and time to comply.

6. Section 1327(C)(2)(d) Topography Contour Intervals

This Section requires that the site plan depict "[t]opography with contour intervals of not more than five (5) feet which may be from published USGS maps." Our expert explained that the five foot interval requirement for the topographic map is an extraordinary requirement and

cost prohibitive. The intervals on most topographic maps in Pennsylvania are 20 feet. The requirement to create a map with five foot intervals would be very costly and require a site specific surveying. This requirement is overbroad, unreasonable, and unnecessary for a timber harvest. This subsection can be amended to provide "topography with contour intervals typically used for timber harvest mapping."

7. Section 1327(C)(4) Erosion and Sediment Control Plan

Section 1327(C)(4) requires the submission of an Erosion and Sediment Control Plan and compliance with the DEP's permit requirements under the Dam Safety and Waterway Management regulations. The Township is within its authority to request copies of these plans and permits. However, the requirements under subsections (b)-(d) are already fully addressed through a written E&S plan prepared in compliance with DEP's erosion and sediment control regulatory scheme. 25 Pa. Code § 102.4. An E&S plan is "[a] site specific plan consisting of both drawings and a narrative that identifies BMPs to minimize accelerated erosion and sedimentation before, during and after earth disturbance activities." *Id.* § 102.1. The E&S plan for a timber harvest must include identification and mapping of all landings, skid roads, haul roads, and water source crossings, as well as identifying all erosion control BMP measures and structures. See DEP Erosion and Sediment Control Plan for a Timber Harvesting Operation form 3930-FM-WM0155 (Exhibit D). The plan requires identification of a "sequence of BMP installation and removal in relation to the scheduling of earth disturbance activities, prior to, during and after earth disturbance activities that ensure the proper functioning of all BMPs." 25 Pa. Code § 102.4(b)(5)(vii). The plan also must establish a "maintenance program which provides for the operation and maintenance of BMPs and the inspection of BMPs on a weekly basis and after each stormwater event, including the repair or replacement of BMPs to ensure effective and efficient operation. The maintenance program must provide for completion of a written report documenting each inspection and all BMPs repair, or replacement and maintenance activities." *Id.* § 102.4(b)(5)(x). The DEP requires that the written E&S plan, inspection reports and monitoring records be available "at the project site during all stages of the earth disturbance activities." *Id.* § 102.4(b)(8). The Township does not have authority to duplicate the DEP's regulatory requirements. Commonwealth v. East Brunswick Township, 980 A.2d 720, 733 (Pa. Cmwlth. 2009) (explaining that a township cannot duplicate the regulatory regime established by the SWMA and cannot impose more stringent requirements than the SWMA."). Therefore, the Township should delete subsections (b)-(d) because that information will be included in the written E&S plan. (Exhibit A at 16-17.)

Subsection 13237(C)(4)(e) requires the applicant to submit the E&S plan to the conservation district for review and approval. As explained above with respect to Section 1327(A)(2), the DEP's erosion and sediment control regulations do not require an E&S plan to be submitted for review and approval to the Conservation District, thus the Township cannot impose this requirement because it is stricter than State law. 25 Pa. Code § 102.4(b)(8). This subsection should be deleted.

8. Section 1327(C)(5) Other Information Required by Township

This Section states that “[t]he timber harvesting plan shall include other information as may be required by the Township to determine compliance with this Article.” For all the reasons discussed above regarding Section 1327(B)(5), the Township does not have authority to require information outside the terms of the ordinance because timber harvesting is a permitted use. Thus, Section 1327(C)(5) should be deleted in its entirety.

E. Timber Harvesting Operational Requirements

As each forest stand is different, so too will each timber harvest be different. As a result, an ordinance that includes provisions requiring or precluding certain forestry practices uniformly throughout a municipality fails to account for the unique circumstances and ecological requirements of a particular site. Restrictions on the type of forestry practices a landowner may engage in for a timber harvest can be an obstacle to the best silvicultural methods suitable for the stand at that time, thus would constitute an unreasonable restriction in violation of the MPC. (Exhibit A at 17; Exhibit C at 9.) To be sure, the MPC was amended to allow for forestry activities as a permitted use by right in all zoning districts with the “intent to make it easier to carry out all forestry activities by limiting the scope of zoning and other regulations.” (Exhibit C at 9.) East Nantmeal Township’s operational requirements impose unreasonable obstacles to a landowner’s ability to plan for and utilize silvicultural practices which may be the best prescription for the particular forested land.

1. Section 1327(D)(1) Imposition of Liability

This Section provides that the “operator and landowner shall be jointly and severally responsible for the restoration of any property, public or private, that may be damaged as a result of the timber harvesting operation.” As discussed above regarding Section 1327(A)(5), the Township has no authority to impose personal liability for damage to personal or public property. This subsection must be deleted in its entirety because it is beyond municipal authority.

2. Section 1327(D)(2) Prohibition on Clear Cutting

Section 1327(D)(2) prohibits the silvicultural method of clear cutting. Our PSU expert has advised us that clear-cutting, in which an entire stand (or most of it) is cut, is a recognized silvicultural tool that leads to regeneration and establishment of even-aged forests, which are predominant across the State. “Like large-scale natural disturbances, clear-cutting promotes the establishment and growth of intolerant and intermediate species, such as black cherry and oak,” which require full sunlight to reproduce and grow well. (Exhibit C at 5.) “Clear-cutting is appropriate for Pennsylvania’s two major forest types, northern hardwood and oak/hickory.” (*Id.*) “Without clear-cutting or other even-aged management and harvesting techniques, the proportion of black cherry and oak in Pennsylvania will be reduced in the future.” (*Id.*)

Moreover, a PSU publication has explained that:

Clear-cutting refers to the forestry practice whereby all trees are removed with the purpose of reestablishing an even-aged stand. Restricting clear-cutting in forests is an unreasonable ordinance provision. Often, these provisions are developed and included based on a common misperception that this type of harvesting is ugly and detrimental to the forest ecosystems. This is not true, and in fact, shade-intolerant forest stands require clear-cutting to ensure proper regeneration. Additionally, this type of management practice is often beneficial with respect to the landowner's opportunities for the stand's future management. . . . There are a variety of acceptable silvicultural methods, and clear-cutting is one of them. It can be used to meet goals at a timber harvesting site and to ensure the proper regeneration. To restrict its use is unreasonable.

(Exhibit A at 17-18.)

For these reasons, the Township's prohibition on clear-cutting is an unreasonable restriction on timber harvesting. The Township can amend this provision to provide that "Any proposed clear-cutting must be set forth in the Timber Harvesting Plan along with an explanation of the site conditions and the reasons and goals for employing the clear-cutting method."

3. Section 1327(D)(3) Prohibition on Timbering on Slopes

Section 1327(D)(3) prohibits timber harvesting on slopes exceeding 25% or greater. This blanket restriction in the Ordinance is an unreasonable restriction on forestry activities in violation of the MPC because it conflicts with best management practices (BMPs) recognized in the field of forestry.

Our PSU expert has advised that both an E&S plan and the timber harvesting plan would address harvesting on steep slopes. The BMPs for runoff or soil degradation are required to be in an E&S plan. Those BMPs include precluding use of operating equipment and haul and skid roads on steep slopes. Timber harvesting on steep slopes typically involves using cables to remove logs from the felling site. Our expert explained that removing timber following BMPs does little to change water infiltration or to destabilize soils. This is because tree roots, even from harvested trees, continue to hold the soil in place. However, fallen trees pull up their roots in what foresters call a root ball and are more likely to destabilize the soils from water infiltration.

As explained in a PSU publication, "[c]ertain sites require specific silvicultural methods to ensure proper regeneration of species and forest stands. Timber harvesting operations should be given flexibility to determine what method or methods will best allow for future forest stands." (Exhibit A at 17.)

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The Township can amend this provision to require that "Any timber harvesting proposed on slopes of 25% or greater must provide an explanation of the Erosion and Sediment Control best management practices to be employed on the slopes, the reasons for harvesting on the slopes, and method for retrieving the logs that are felled on the slopes."¹

4. Section 1327(D)(4) Prohibition on Harvesting in Riparian Buffer/Wetland/Flood Areas

Section 1327(D)(4) precludes timber harvesting "within a floodway, 100 year floodplain, zone one riparian buffer, or wetland." However, pursuant to several State laws, "[a]ll surface waters, lakes, ponds, streams and wetlands in Pennsylvania are protected" through State regulatory programs. (Exhibit B at 4.) The DEP's Erosion and Sediment Control and Waterway Management regulatory schemes both regulate best management practices for timber harvesting near streams, ponds, wetlands, floodplains, and other waters of the Commonwealth. 25 Pa. Code §§ 102; 105. These regulations do not preclude timber harvesting activities in these water-sensitive areas. Instead, the amount of buffer zone that DEP requires near water sources depends on many variables, including soil type, slope, vegetative cover, and stream character. All timber harvesting activities are required to have a written E&S Plan to establish controls for activities near water sources. 25 Pa. Code § 102.4(b); (Exhibit B at 1). Certain activities associated with timber harvest operations may require a permit under the Waterway Management regulations, such as the "deposition of solid fill, gravel, soil, slate and other such material in wetlands, streams and floodways for construction of temporary and permanent roads." (Exhibit B at 8.) However, "[p]ermits are not required to cut timber and other vegetation, including cutting in wetlands."² (Id.)

The best management practices manual for the Waterway Management regulations requires adequate buffer zones "where roads, skid trails, or log landings will be located near streams or wetlands." (Id. at 19.) "The width of the buffer zone depends on the slope between the forestry activity and the stream/wetland." (Id.)

As explained in the manual:

Buffer zones are land areas adjacent to both flowing and nonflowing water bodies where specific management strategies should be applied. Buffer zones protect wetlands, streams, lakes and ponds by helping to:

- protect water quality by filtering sediments and other pollutants from surface runoff;

¹ We note that under Ordinance Section 903(B)(3) the Township does not list timber harvesting as a permitted use on "prohibitive slopes." The Township should amend this Section to include a subsection 6 stating: "timber harvesting in conformance with the provisions of Section 1327." The Township must allow timber harvesting in every zoning district as of right. 53 P. S. § 10603(f).

² The Federal Clean Water Act exempts silvicultural activities within wetland areas from permit and regulatory requirements when managed under best management practices. 33 U.S.C. § 1344(f)(10)(A).

- maintain proper water temperatures and degree of shading for both aquatic plant and animal life; and
- help retain sources of food and cover for wildlife species that use forested wetlands.

(Id. at 20.)

Although trees may be harvested within buffer zones around water sources, the DEP's best management practices requires retention of 50% of the tree canopy "to prevent an increase in water and ground surface temperature." (Id.) "Harvesting should be done with regard to season, soil type, soil moisture, and type of equipment used." (Id. at 24-25.) The "[c]areful implementation of BMPs will protect and enhance important wetland functions while allowing for cost-effective timber harvesting." (Id. at 25.) The DEP requires certain best management practices when felling trees near wetlands or other water sources, which includes buffer zone requirements. (Id. at 21, 27-28.)

Again, due to the varying conditions in a particular forest the BMPs necessary to protect environmental resources will also vary. For this reason, the Township's blanket prohibition on harvesting with floodways and wetlands directly conflicts with the DEP's Erosion and Sediment Control and Waterway Management regulatory schemes, which allow timber harvesting activities near water sources using required best management practices that depend upon the unique site conditions of a specific property. Therefore, the Township's prohibition is an unreasonable restriction on timber harvesting. We suggest that the Township can amend this provision to provide that "A Timber Harvesting Plan proposing to engage in timber harvesting activities near a floodway, 100 year floodplain, zone one riparian buffer, wetland, or other water sources shall include a description of the best management practices required for the activity under both an Erosion and Sediment Control Plan and pursuant to the Dam Safety and Waterway Management regulations and best practices manual for timber harvesting operations."

5. Section 1327(D)(5) Regulation of Stream Crossings

Section 1327(D)(5) imposes the following requirements:

Stream crossings shall be avoided, however where deemed necessary by the Township Engineer, crossings shall be made at right angles across suitable culverts or bridges. Hauling, skidding or placing fill or obstructions in watercourses is prohibited except for approved crossings.

The Township does not have authority to impose these requirements on a timber harvesting operation because all aspects of crossing streams, wetlands, hauling, skidding, fill or other obstructions in water courses are regulated under the DEP's Erosion and Sediment Control and Waterway Management regulatory schemes. 25 Pa. Code §§ 102; 105. In addition, the U.S. Army Corps of Engineers also regulates any crossings that may impact wetlands. The Waterway Management regulations "require permits for all types of crossings, including culverts, bridges,

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and fords, that drain more than 100 acres or require wetland fills.” (Exhibit C at 7.) “Permit applications must be accompanied by an erosion and sediment control plan approved by the local County Conservation District.” (*Id.*)

“All crossings of wetlands by logging access roads and skid trails require permits under both state and federal law.” (*Id.*) Wetlands are regulated jointly by the U.S. Army Corps of Engineers and the DEP. (*Id.*) “Although tree harvesting is allowed in wetland areas in most cases, Chapter 105 prohibits the ‘encroachment’ (for example, a road crossing) of any wetland without a permit from the DEP.” (*Id.*) Even if a stream crossing does not require a general permit from DEP, it still requires federal authorization from U.S. Army Corps of Engineers. (Exhibit B at 5.)

The Township does not have authority to delegate decision-making to its Township Engineer regarding the appropriateness or standards for stream crossings or any other obstruction to a water course in a timber harvesting operation. The requirements for obstructions in streams, wetlands, and floodways are comprehensively regulated by the DEP and, in some cases, in conjunction with the U.S. Army Corps of Engineers.

The Township can amend this provision to provide that “A Timber Harvesting Plan proposing any crossing of streams or wetlands or otherwise obstructing or encroaching any water course during the harvesting operations must identify any and all required permits, plans, and approvals required by the Department of Environmental Protection, Chester County Conservation District, and the U.S. Army Corps of Engineers. Copies of any and all approved permits, plans, and approvals shall be provided to the Township upon receiving such approval.”

6. Section 1327(D)(7) Restrictions on Silvicultural Methods

Under Section 1327(D)(7), the Township seeks to regulate the silvicultural methods for a timber harvest by requiring that a 30% forest canopy be preserved and that at least 50% of the trees remaining following the harvest must be comprised of high value species. This section also provides that if the requirement to retain high value species cannot be met prior to the harvest, then no high value species trees may be removed during the harvest. These provisions are an unreasonable restriction on timber harvesting activities for the following reasons.

Our PSU expert explained that timber harvesting is a well-recognized forest management practice that, when properly planned, results in renewing and improving the vigor, diversity, and beauty of a forest. It is well-accepted that timber harvesting is utilized to maintain the health and sustainability of forested land.

The plan for a timber harvesting operation is developed by a professional forester and requires the assessment of the overall health of the forest and identification of the best management practices to be implemented to sustain and improve the health of the forest. This includes, for example, identifying which trees to remove, how much canopy to retain, addressing environmentally sensitive areas, and the overall management goals to sustain that forested land. The management goals will vary depending on the site specific conditions at a particular forest.

See Penn State College of Agricultural Sciences, *Best Management Practices for Pennsylvania Forests* (2001) (Exhibit E). For these reasons, an ordinance attempting to place uniform standards on forestry activities when conditions will vary depending on the particular forest is unreasonable. The BMPs necessary for a particular forest will be set forth in properly prepared forest management, timber harvesting, and E&S plans.

Moreover, “[c]ertain sites require specific silvicultural methods to ensure proper regeneration of species and forest stands. Timber harvesting operations should be given flexibility to determine what method or methods will best allow for future stands. Additionally, landowners have a right to manage their woodlot for future outcomes.” (Exhibit A at 17.) Our PSU expert has advised that the requirements under this Section necessarily exclude clearcutting and restrict the use of shelterwood and seed tree silvicultural methods, which would call for removal of more trees than allowed under this provision. As previously stated, there are species and site conditions of a forest that a full canopy removal would be the best prescription for the forest health and regeneration goals. The decision on proper silvicultural prescriptions for a timber harvest should be determined by the forester and landowner.

Furthermore, this provision contains terms and requirements that are vague and ambiguous. It is well-settled that “[a] local government unit has no authority to adopt an ordinance that is arbitrary, vague or unreasonable or inviting of discriminatory enforcement.” Richmond Township, 2 A.3d at 681; Exton Quarries, Inc. v. Zoning Bd. of Adjustment, 228 A.2d 169, 178 (Pa. 1967). “A vague ordinance is one that prescribes activity in terms so ambiguous that reasonable persons may differ as to what is actually prohibited.” Id. “A zoning ordinance is ambiguous if the pertinent provision is susceptible to more than one reasonable interpretation or when the language is vague, uncertain, or indefinite.” Kohl v. New Sewickley Twp., 108 A.3d 961, 968 (Pa. Cmwlth. 2015) (citation omitted).

The requirement that the forest canopy “be preserved in good condition” and that the remaining trees “be well distributed throughout the area” constitute vague and ambiguous standards for a property owner to comply with and a zoning officer to enforce. It also begs the question of whether the zoning officer is qualified to make these evaluations and determinations on the conditions of a forest canopy and proper tree distribution. The requirement to retain “high value species” trees is also problematic. Our PSU expert advises that what is considered a “high value tree” can change over time with market changes. It is beyond municipal authority to impose these variable requirements on a landowner.

We propose that the Township amend Section 1327(D)(7) to state that: “A Timber Harvesting Plan shall describe the silvicultural methods and best management practices to be employed to for the timber harvest and demonstrate compliance with the Penn State College of Agricultural Sciences publication entitled *Best Management Practices for Pennsylvania Forests*.” This Penn State publication is recognized in the industry as representative of the best approach for managing forest stands. (Exhibit E). It was developed by the Forest Issues Working Group which is comprised of a “diverse group of professional natural resource managers, forest landowners, scientists, and environmental organizations.” (Exhibit E at 2-4).

7. Section 1327(D)(8) Marking of Trees to be Harvested

The Township requires that trees to be harvested be marked in two locations with the "higher of the two marks shall be provided around the entire circumference of the tree." Our experts advise that, in the field of forestry, trees to be harvested are never marked with a full circumference around the tree. This requirement is difficult, costly, and labor-intensive. The standard is to paint two slash marks; one at eye level and the other on the stump to remain. The Township may amend this provision to require simply two painted slash markers on trees to be harvested.

8. Section 1327(D)(10) Regulation of Roads and Skid Trails

This section provides that: "[e]xcept when approved by the Township engineer, all access roads, haul roads and skid trails shall be cut only horizontally across slopes." As discussed above in reference to Sections 1327(C)(4) and (D)(5), DEP's Erosions and Sediment Control regulations govern the planning for all access systems under a timber harvesting E&S Plan. (Exhibit D.) The DEP's Waterway Management regulations govern any access roads near water sources. The Township does not have authority to regulate the design and construction of these roads or trails. Moreover, our PSU expert has advised that the roads or trails would not be contoured as required in this provision because the road would not drain properly. The Township should delete this provision.

9. Section 1327(D)(12) Restriction on Skidding Trees

Section 1327(D)(12) states that "Trees or logs shall not be skidded or transported within fifty (50) feet of wetlands or watercourses, except at approved crossings." The DEP regulates the use of access systems in wetlands and near water sources in accordance with required BMPs and obtaining any applicable permits or plans. (Exhibit B at 8, 24-29; Exhibit D.) The DEP does require certain buffer strips along streambanks, which is included in an E&S plan. The buffer distances vary depending on slope of land and proximity to the stream. Thus, a blanket setback without allowing for consideration of site specific factors is unreasonable. This provision should be deleted.

10. Section 1327(D)(13) Buffer Zone Along Streets and Property Lines

We addressed the legal problems with the 75 foot buffer requirement under this Section of the Ordinance in our November 9, 2015, letter. This provision should be amended as set forth in that letter.

11. Section 1327(D)(14) Restricting Cutting of Large Diameter Trees

This provision precludes cutting any tree "which is the largest of its species in the state or exceeds forty eight (48) inches DBH." Generally, trees that are over 36 inches DBH are not harvested because they are too large to process. However, as explained, there are many factors that are considered in planning a timber harvest for a particular stand. There may be

circumstances that necessitate the cutting down of a large diameter tree. This provision does not account for site specific factors. Thus, the provision should either be deleted or amended to include a phrase at the end stating: "unless there are factors that require that the tree be cut down."

12. Section 1327(D)(16) Requiring Removal of Tops/Slash from Water Sources

Section 1327(D)(16) states that "No tops or slash shall be left in any buffer area, stormwater swale, floodway, floodplain, zone-one riparian buffer or wetland." Again, this requirement fails to account for site specific conditions and BMPs for wetlands and floodplains. Our experts advise that leaving tops in floodplains and other locations can be important habitat and regeneration protections. (Exhibit B; Exhibit E.) Also, the removal of tops in a floodplain or wetland may cause more surface damage than leaving them there. For these reasons, the Township's requirement for removal of tops and slash without regard to the site conditions is unreasonable. These issues are addressed under the DEP's regulatory schemes for E&S Plans and Waterway Management.

13. Section 1327(D)(18) Processing of Wood on Site

This provision precludes the processing of wood products on the property without zoning approval. Our experts have advised that typically some logs at the site are made into firewood for the landowner's personal use. We suggest that Township add a sentence to this Section providing that: "The processing of firewood for the landowner's personal use is permitted."

14. Section 1327(D)(22) Retiring Access Systems Following Harvesting

Section 1327(D)(22) requires the following:

When the harvest is completed, all access roads, skid and haul trails and landing areas must be graded to original contours and be seeded and mulched to establish a stable groundcover. The final grading and establishment of groundcover shall be consistent with the timber harvesting plan or with a separately approved subdivision or land development plan. In addition, all necessary measures, as directed by the Township Engineer, to prevent erosion and sedimentation shall be undertaken.

As with the other provisions, the retirement of haul roads, skid roads, landings, and other access systems are regulated by the DEP's Erosion and Sediment Control and Waterway Management regulatory schemes. 25 Pa. Code §§ 102; 105. The required E&S plan must contain BMPs for post-harvest retirement of access systems. (Exhibit D § 9; Exhibit B at 23.) Some of the BMPs include smoothing and shaping all road and landing surfaces; removing culverts and replacing them with waterbars, broad-based dips, or ditches; removing temporary stream crossings in accordance with DEP permit requirements; and seeding and mulching critical areas where there exists a significant potential for erosion and sediment to be deposited in a

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stream or off the property. (Exhibit 23-24.) There is no requirement to grade access systems to "original contours." In fact, our PSU expert advised that this requirement is impossible to accomplish when these access systems are cut into a slope because, in that case, the soil has been pushed down the slope to build the road and to return to contour would require pushing the soil back up the slope. Also, the regrading of roads is not typically the most feasible or environmentally sensitive course of action for retirement. Again, the Township is going beyond its authority and imposing unreasonable requirements to address issues that are already governed by the DEP's regulatory programs.

Moreover, a timber harvest is not land development, thus the Township cannot impose a requirement to obtain an approved subdivision or land development plan. The Township also does not have authority to delegate to the Township Engineer the power to regulate and impose requirements for erosion and sedimentation control for timber harvesting operations. These issues are already thoroughly regulated by the DEP's regulatory programs.

We propose that the Township amend Section 1327(D)(22) to state only that: "Proof of the plans to retire all access systems, including access roads, haul and skid trails, and landing areas shall be provided to the Township through the Timber Harvesting Plan and/or Erosion and Sediment Control Plan and shall be in conformance with the Department of Environmental Protection's best management practices under its regulatory programs."

F. Article XV — Natural Resource Protection

Under Article XV, the Township establishes natural resource protection standards for land disturbance and development activities. There are several provisions that impose restrictions on timber harvesting operations in such areas as wetland buffers, riparian buffers, woodlands, hedgerows, and specimen vegetation. The reasons why these restrictions and requirements are unreasonable are fully covered in the discussion above on various subsections of Section 1327. Accordingly, we suggest the following amendments be made to Article XV:

- Section 1501: add subsection F stating that "Requirements for timber harvesting operations are set forth under Section 1327 and this Article XV does not apply to timber harvesting operations"
- Section 1502(D)(1)(a): delete "harvested for timber"
- Section 1502(D)(1)(c): delete entire subsection
- Section 1502(E)(2)(a)(1): delete "timber harvesting"
- Section 1502(E)(2)(b)(1): delete "harvested for timber"
- Section 1502(E)(2)(e): delete entire subsection

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The implementation of these amendments will permit the Township to continue to regulate natural resource protection standards for other land disturbance and development activities under Article XV, but place requirements for timber harvesting operations solely under Section 1327.

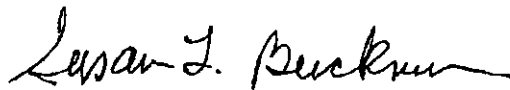
III. CONCLUSION

As evident from the discussion above, local ordinances that attempt to regulate the how, when, and where of activities already subject to State comprehensive regulatory schemes "have not fared well under preemption challenges." Commonwealth v. East Brunswick Township, 980 A.2d 720, 730 (Pa. Cmwlth. 2009); Commonwealth v. Richmond Township, 2 A.3d 678, 684-88 (Pa. Cmwlth. 2010). East Nantmeal Township 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 AASL.

In lieu of enacting the amendments we set forth above, we propose that the Township may consider enacting the "Pennsylvania Model Forestry Regulations" that was developed by the Penn State School of Forest Resources. Penn State School of Forest Resources, Pennsylvania Model Forestry Regulations (2000) (Exhibit F). "The model is intended to address fairly the needs and concerns of local citizens as well as forest landowners and the forestry industry." Id. at 1. "It is also designed to be consistent with the so-called 'Right to Practice Forestry' provision (P.S. § 10603(f)) of the Municipalities Planning Code." Id.

Please review the enclosed information with the Board of Supervisors and let me know whether the Township will commit to resolving the legal problems with its ordinance in the manner discussed above. As stated above, we plan to file a lawsuit against East Nantmeal Township unless it notifies us that it will take the necessary steps to resolve this review with our Office. We appreciate the Township's attention to this matter.

Sincerely,



SUSAN L. BUCKNUM
Senior Deputy Attorney General

SLB/kmag
cc: Jim Moore (w/o encl.)

EXHIBIT A



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

KATHLEEN G. KANE
ATTORNEY GENERAL

November 9, 2015

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15th Floor, Strawberry Square
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sbucknum@attorneygeneral.gov

Via Email and First Class Mail

Thomas F. Oeste, Esquire
Parke, Barnes, Spangler, Oeste & Wood, P.C.
126 West Miner Street
West Chester, PA 19382

RE: ACRE Review Request
East Nantmeal Township, Chester County

Dear Mr. Oeste,

As you know, the Office of the Attorney General received a request from Jim Moore to review the timber harvesting provisions in the East Nantmeal Township zoning ordinance pursuant to Section 314 of Act 38 of 2005 (ACRE). As we indicated in previous correspondence, it appears from our review that certain provisions of the Ordinance unlawfully prohibit or limit a normal agricultural operation in violation of Act 38. We are in the process of drafting a letter that will detail the legal problems and suggest how they may be resolved through enactment of ordinance amendments. However, this process is taking longer than expected due to the sheer number of problems we identified and the need to consult with our Penn State forestry expert on the issues.

We have been made aware that an operator of a proposed timber harvesting operation in the Township has submitted a variance request regarding the 75 foot buffer area required under Section 1327(D)(13) of the Ordinance. It is our understanding that a hearing on the variance request is scheduled for November 16, 2015. We are writing to make the Township aware that we are challenging this 75 foot buffer area requirement as it constitutes an unreasonable restriction on forestry activities in violation of the Municipalities Planning Code (MPC). 53 P.S. § 10603(f).

The MPC is explicit on the subject of protecting timber harvesting activities, as it provides that: "Zoning ordinances may not unreasonably restrict forestry activities." Id. Timber harvesting is included in the term "forestry activities." Id. §§ 10107, 10603(f). The MPC precludes a municipality from unreasonably restricting timber harvesting in order to "encourage maintenance and management of forested" land "and promote the conduct of forestry as a sound and economically viable use of forested land." Id. § 10603(f). The legislature's goal to promote sound maintenance of forested lands is evident from the MPC also requiring a municipality to permit timber harvesting in all zoning districts as a use by right. Id.

Our Penn State expert has advised us that the 75 foot buffer requirement is contrary to Best Management Practices (BMPs) and sound forest management accepted in the field of forestry. A forest plan for a timber harvesting operation is developed by professional forester and requires the assessment of the overall health of the forest and identification of the best management practices to be implemented to sustain and improve the health of the forest. This includes, for example, identifying which trees to remove, how much canopy to retain, addressing environmentally sensitive areas, and the overall management goals to sustain that forested land. The management goals will vary depending on the site specific conditions at a particular forest. In addition, the Department of Environmental Protection (DEP) requires a person engaging in timber harvesting activities to have either a written erosion and sediment (E&S) control plan or an approved E&S permit depending on the size of the timber harvesting operation. 25 Pa. Code § 102.4(b), .5(b). An E&S plan or permit requires planning for the site specific characteristics of the earth disturbance activity and the implementation of BMPs. Thus, a blanket setback buffer zone requirement is unreasonable because it precludes timber harvesting in the buffer zone in which there may be trees that should be removed to maintain the long term health of the forest, thus it is contrary to sustainable forestry practices. Moreover, there may be safety or other reasons which require the harvesting of trees in the buffer zone, including the prevention of accelerated erosion and sediment control. The buffer setback also results in a direct economic impact by reducing the amount of property from which an owner can harvest trees in contravention of the MPC.

We will be providing a more detailed letter to you in the near future outlining all of the problems with East Nantmeal's timber harvesting ordinance provisions. We will also be providing you with suggestions on how to resolve those problems through ordinance amendments. However, with respect to the buffer zone, our suggested amendment is delete Section 1327(D)(13) and replace it with a provision that requires the owner/operator of the timber harvesting operation to provide a forest plan prepared by a professional forester that sets forth the applicable BMPs to be implemented for the timber harvest, including the plan to address harvesting in the area along the perimeter of the property. The owner/operator may also be required to provide proof of any required DEP plans or permits.

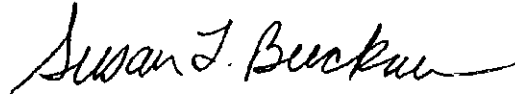
As you are aware, we are prepared to bring legal action against the Township pursuant to Section 315 of ACRE to invalidate or enjoin the enforcement of the Ordinance provisions. Our challenge to the 75 foot buffer requirement is that it imposes an unreasonable restriction on timber harvesting in violation of the MPC. A decision by the Zoning Hearing Board in the

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upcoming variance proceedings does not bind this Office and has no impact on the ACRE proceedings. We request that you inform the solicitor for the Zoning Hearing Board about our position on the buffer requirement in the hopes that it will prevent unnecessary time and expense in continued proceedings while also allowing our Office to negotiate with the Township on ordinance amendments to resolve this ACRE action.

Please contact me at your earliest convenience to discuss the process we use to approve proposed ordinance amendments prior to the Township enacting them.

Sincerely,



SUSAN L. BUCKNUM
Senior Deputy Attorney General

SLB/kmag
cc: Jim Moore

