SUSTAINABLE FORESTRY INITIATIVE PENNSYLVANIA
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PENNSYLVANIA SUSTAINABLE FORESTRY INITIATIVE® IMPLEMENTATION COMMITTEE
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FACT SHEET: Pennsylvania's ACRE Law and a Summary of Attorney General Positions on Timber Harvesting

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What is the ACRE Law?

- On July 6, 2005, Act 38 also known as "ACRE" (Agriculture, Communities and Rural Environment) went into effect to ensure that ordinances adopted by local governments to regulate "normal agricultural operations" are not in violation of state law. A local ordinance cannot exceed, duplicate or conflict with state law. 3 Pa. C.S. §§ 312, 313.
- An "unauthorized local ordinance" is an ordinance enacted or enforced by a local government unit which does either of the following:
    - Prohibits or limits a normal agricultural operation unless the local government unit has authority under state law to adopt the ordinance and it is not prohibited or preempted under state law.
    - Restricts or limits the ownership structure of a normal agricultural operation.
- Under ACRE, "[a] local government unit shall not adopt or enforce an unauthorized local ordinance." 3 Pa.C.S. § 313(a). An "unauthorized local ordinance" is one that is "preempted under State law...." *Id.*, § 312(1)(ii). A local municipality cannot duplicate a state regulatory scheme nor can it "impede a comprehensive, statewide scheme of regulation." *Com., Office of Attorney Gen. ex rel. Corbett v. E. Brunswick Twp.*, 980 A.2d 720, 733 (Pa. Commw. Ct. 2009). When a municipality has ordinances that duplicate and/or impede upon state standards those state requirements override the local regulations.

Forestry in the Right to Farm Act (RTFA)

- The RTFA precludes a municipality from regulating normal agricultural operations as a nuisance and protects direct commercial sales of agricultural commodities. 3 P.S. § 953.
- Silviculture is a "Normal Agricultural Operation" and "[f]orestry and forestry products" are agricultural commodities as defined by the RTFA. 3 P.S. § 952. According to the RTFA, a Normal Agricultural Operation must not be less than ten contiguous acres in area; or less than ten contiguous acres in area but has an anticipated yearly gross income of at least $10,000.
- The RTFA's definition for "Normal Agricultural Operation" is also incorporated under ACRE. 3 Pa. C.S. § 312.

Forestry in the Agricultural Area Security Law (AASL)

- The 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." 3 P.S. § 903.

Forestry in the Municipalities Planning Code (MPC)

- The MPC's purpose clause forbids a municipality from taking actions that preclude access to the land for forestry purposes. 53 P.S. § I0105.
- The MPC explicitly addresses the considerable limitations on municipal authority to regulate forestry activities, including timber harvesting, as follows:
    - [z]oning ordinances may not unreasonably restrict forestry activities. To encourage maintenance and management of forested or wooded open space and promote the conduct of forestry as a sound and economically viable use of forested land throughout this Commonwealth, forestry activities, including but not limited to, timber harvesting, shall be a permitted use of right in all zoning districts in every municipality. 53 P.S. § I0603(f).
- Timber harvesting is the only agricultural practice that is a *use as of right* in all zoning districts.
- 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." ROBERTS. 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 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. § 1063(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")

How ACRE Can Help You

- An owner or operator of a normal agricultural operation (refer to above section on Forestry in the Right to Farm Act) may request that the Office of the Attorney General review a local ordinance that the owner or operator believes to be unauthorized.
- The Office of the Attorney General reviews the local ordinance after receiving the request from the owner or operator. If the Office believes that the ordinance violates ACRE, the Office and the local government work together to bring the ordinance into compliance with state law. If a resolution cannot be reached, the Office has the option of filing a lawsuit in the Commonwealth Court.
- After examining all relevant information, the Office of the Attorney General will advise the owner or operator whether or not the Office plans to file a lawsuit to challenge the ordinance.
- If the Attorney General decides not to file a lawsuit, the owner or operator still can file a lawsuit in Commonwealth Court to challenge the ordinance.
- Requests for review should be sent, in writing, to the following address:

  PA Office of Attorney General
  ATTN: ACRE
  15th Floor, Strawberry Square
  Harrisburg, PA 17120

  Or by email to: ACRE@attorneygeneral.gov

- There is no standard form or format for review requests. They can be as formal or informal as the requester prefers. It would be helpful to include a copy of the ordinance, a short explanation of the objection the farm owner or operator has to the ordinance, and any other materials that will aid the Attorney General's review.

Penn State University's Model Ordinance

In almost all cases, the Office of Attorney General has proposed that Townships consider enacting the "Pennsylvania Model Forestry Regulations" that were originally developed by the Penn State School of Forest Resources and

endorsed by the Pennsylvania State Association of Township Supervisors. The model is intended to address fairly the needs and concerns of local citizens as well as forest landowners and the forestry industry. It is also designed to be consistent with the so-called "Right to Practice Forestry" provision (53 P.S. § 10603(f)) of the Municipalities Planning Code. The model timber harvesting ordinance is available at:

https://extension.psu.edu/forest-management-and-timber-harvesting-in-pennsylvania

ACRE Acceptance Letters

If, upon review of a complaint, the Office of Attorney General believes that certain ordinances violate ACRE an Acceptance Letter is drafted which explains why the ordinances violate ACRE and what the municipality must do to remedy the situation. The Office of Attorney General has sent numerous letters to municipalities addressing shortcomings/flaws in their timber harvesting ordinances. These ACRE Acceptance Letters do not constitute official Office of Attorney General legal opinions under the Commonwealth Attorneys Act, 71 P.S. §732-204(a). Nor do they constitute legal advice. Acceptance Letters are fact-specific; the conclusions found therein depend on the individual circumstances of the ACRE complainant, the issues presented and the particular ordinances in dispute. The Acceptance Letters are offered only for informational purposes, to provide guidance to the agricultural community and local government. For more information, please contact the Office of Attorney General ACRE Office at acre@attorneygeneral.gov.

Summary of ACRE Acceptance Letter Positions on Timber Harvesting

This section summarizes most of the positions the Attorney General has published in ACRE Acceptance Letters on unauthorized ordinances related to timber harvesting (in no particular order). References for ACRE Acceptance Letter positions are included in brackets at the end of each bullet point. Several positions are reflected in multiple ACRE Acceptance Letters. ACRE Acceptance Letters can be downloaded from the Pennsylvania Office of Attorney General website: https://www.attorneygeneral.gov/resources/acre/acre-archive/

1. **Ordinance requires permit fees or escrow funds, such as $1,000-$3,227.03 or $50/acre, to review the permit application and/or to complete a "post harvesting inspection."** A Township may require permits and charge a fee to secure that permit. Permitting is required for numerous activities; charging a fee to process the application for the permit is accepted practice. However, the MPC unequivocally states that a Township "may prescribe reasonable fees with respect to the administration of a zoning ordinance ...." 53 P.S. § 10617.3(e). See *Golla v. Hopewell Township Board of Supervisors*, 452 A.2d 273 (Pa. Commw. Ct. 1982) (A municipality has authority under the MPC to impose a reasonable fee with respect to applications.). The OAG does not tell municipalities what a "reasonable" fee is. Previous OAG ordinance reviews held permit fees in the $100 range as reasonable under the MPC. "[T]his fee must be commensurate with the expense incurred by the [municipality] in connection with the issuance and supervision of the license or privilege." *Mastrangelo v. Buckley*, 433 Pa. 352, 385-86, 250 A.2d 447, 464 (1969) (footnote omitted) (emphasis added). While perhaps a bit on the high end, a $400 fee is consistent with other permit application fees for timber harvesting the OAG has seen in other municipalities across the Commonwealth. However, a permit fee: ...is distinguishable from a tax which is a revenue producing measure characterized by the production of a high proportion of income relative to the costs of collection and supervision. Thus, if a license fee collects more than an amount commensurate with the expense of administering the license, it would become a tax revenue and cease to be a valid license fee. *Talley v. Commonwealth*, 123 Pa.Cmwlth. 313, 553 A.2d 518, 519 (Pa.Cmwlth. 1989) (citations omitted). If [fees] are meant to cover the Township's costs in administering the permitting process, the fees are proper. If, on the other hand, the fees are meant to be a revenue generating mechanism they are improper. "'A municipality cannot impose a tax upon a business under the guise of exercising its police power, and, therefore, a license fee will be struck down if its amount is 'grossly disproportionate to the sum required to pay the cost of the due regulation of the business.'" *Costa v. City of Allentown*, 153 A.3d 1159, 1165 (Pa.Cmwlth. 2017)(citation omitted).
   The MPC also expressly prohibits Townships from charging a landowner "expenses for engineering...or other technical consultants...costs" in administering a zoning ordinance. 53 P.S. § 10617.3(e). The Township only has the authority to enforce zoning ordinances as provided for under the MPC. See 53 P.S. § 10616.1 & 10617.2. Requiring a significant deposit to cover the costs of engineering or technical consultants is not permitted under the MPC. The review and inspection, by necessity, would have to be done by an engineer or technical consultant with expertise in timber harvesting operations. The Township's attempt to escrow funds for reviewing a permit application for a permitted use by right is tantamount to converting the application into one for a conditional use, which it cannot do. The escrow fees violate ACRE and, if already collected, the Township must return the money. [East Nantmeal Township, Chester County, April 13, 2016; Lower Milford Township, Lehigh County, October 6, 2017; Pennsbury Township, Chester County, February 20, 2018; North Coventry

Township, Chester County, June 08, 2018; Lower Saucon Township, Northampton County, February 15, 2019; East Earl Township, Lancaster County, November 05, 2019; Kidder Township, Carbon County, March 31, 2020; Pocono Township, Monroe County, April 07, 2020; Hellam Township, York County, August 15, 2020; East Rockhill Township, Bucks County, September 17, 2020; Industry Borough, Beaver County, January 15, 2021; Municipality of Monroeville, Allegheny County, March 17, 2021; Unity Township, Westmoreland County, March 1, 2021; Pine Township, Allegheny County, May 6, 2021]

2. **Ordinance mandates that tree harvesting is permitted as a special exception or conditional use.** The imposition of a special exemption process or conditional use for tree harvesting conflicts with and is preempted by the MPC, which provides that "timber harvesting, shall be a permitted use by right in all zoning districts in every municipality." 53 P.S. §10603(f). The MPC authorizes the imposition of a special exception in a zoning ordinance only in accordance with the provisions of the MPC. 53 P.S. §10603(c)(1). [Salisbury Township, Lehigh County, August 31, 2007; Municipality of Monroeville, Allegheny County, December 7, 2015]

3. **Ordinance stipulates that a timber harvesting permit is issued only after review/approval by the Municipal Engineer, Municipal Planning Commission, Code Enforcement Officer and/or the Council of the Municipality.** These review requirements for issuance of a permit effectively change a timber harvesting operation from a permitted use by right to a conditional use, which is expressly prohibited by the MPC and AASL. 53 P.S. §10603(f). A use permitted by right is a use that is not required to be "allowed or denied by the governing body after recommendations by the planning agency and hearing." 53 P.S. §10603(c)(1). This type of review is specifically and only for uses designated as conditional uses as provided under the MPC. "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. [Municipality of Monroeville, Allegheny County, December 7, 2015; East Nantmeal Township, Chester County, April 13, 2016; Pennsbury Township, Chester County, February 20, 2018]

4. **Ordinance requires a setback buffer area of 25-100 feet.** The ordinance constitutes an unreasonable restriction on forestry activities in violation of the MPC. A blanket setback buffer zone requirement is an unreasonable restriction 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 reason 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. [East Nantmeal Township, Chester County, November 9, 2015; Municipality of Monroeville, Allegheny County, December 7, 2015; East Nantmeal Township, Chester County, April 13, 2016; Lower Saucon Township, Northampton County, February 15, 2019; Upper Saucon Township, Lehigh County, December 12, 2019; Pine Township, Allegheny County, May 6, 2021; North Coventry Township, Chester County, May 12, 2021]

5. **Ordinance restricts the size, type and number of pieces of equipment to be used, including trucks on public streets or thoroughfares.** Placing restrictions on equipment to be used for the timber harvest can adversely impact the proposed best management practices to be used for the harvest, thus this requirement is an unreasonable restriction on timber harvesting in violation of the MPC. 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." ROBERTS. RYAN, 1 PENNSYLVANIA ZONING LAW AND PRACTICE § 3.3.14A (George T. Bisel Company, Inc. 2001). [Municipality of Monroeville, Allegheny County, December 7, 2015]

6. **Ordinance requires property owners maintain the site in "good condition" and that drainage courses, culverts, graded surfaces, and erosion and sedimentation devices be kept in "good condition" and "good repair," as well as requiring that "adequate provisions" be incorporated to prevent infiltration of sediment into streams.** Aside from the fact that these subsections use vague and ambiguous language to set a standard for a property owner to comply with [See also – Ordinance Issue 19 on page 8 of this fact sheet], these issues 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. In light of DEP's comprehensive regulatory scheme, we suggest that the Municipality amend the Ordinance to require only that the owner or operator of a timber harvesting operation provide the Municipality with copies of all documentation required by DEP to be kept on site during the earth disturbance activities. [Municipality of Monroeville, Allegheny County, December 7, 2015]

7. **Ordinance requires cross drain culverts, broad based dips, waterbars and other water-control structures as needed to allow surface water to traverse logging roads or trails, or landing areas and regulates with great specificity the spacing of culverts, broad based dips, and waterbars based on the slope of the road or trail.** These erosion concerns are already extensively addressed in mandatory E&S plans, resulting in a water control ordinance which either exceeds or duplicates existing state erosion and sedimentation standards. While the Township is within its authority to request copies of the E&S plans and permits, the requirements of the ordinance are addressed by a written E&S plan prepared in compliance with DEP's erosion and sediment control regulatory structure. *See* 25 Pa. Code § 102.4. The Township does not have the authority to duplicate or exceed the DEP's regulatory requirements. *See 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 Solid Waste Management Act and cannot impose more stringent requirements than the SWMA.). [Lower Saucon Township, Northampton County, February 15, 2019]

8. **Ordinance provides that a person that is convicted of a violation of the Ordinance and fails to pay the fine will be imprisoned for at least ninety days.** The Municipality does not have authority to impose a term of imprisonment for violation of Ordinance provisions. The MPC sets forth the scope of a municipality's enforcement authority. A municipality's only authority for a defendant that does not pay a fine is to "enforce the judgment pursuant to the applicable rules of civil procedure." 53 P,S. § 10617.2(a). [Municipality of Monroeville, Allegheny County, December 7, 2015; Kidder Township, Carbon County, March 31, 2020; Hellam Township, York County, August 15, 2020]

9. **Ordinance includes provisions allowing, requiring, or disallowing certain forestry practices (e.g. clearcutting, cutting large diameter trees) throughout a municipality.** 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. Certain sites require specific silvicultural methods to ensure proper regeneration of species and forest stands. The overarching management goals vary depending on the site specific conditions of a particular forest. 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. Clearcutting is a recognized silvicultural tool leading to the regeneration and establishment of even-aged forests, which are predominant across the State. Clearcutting is appropriate for Pennsylvania's two major forest types, northern hardwood and oak hickory and without clearcutting or other even-aged management and harvesting techniques, the proportion of black cherry and oak in Pennsylvania will be reduced in the future." The landowner and logger must be given the flexibility to choose the best silvicultural method in light of the specific circumstances present at the time of the harvest instead of being forced into a silvicultural straightjacket which can reduce the commercial bottom line and harm the environment. 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. [Municipality of Monroeville, Allegheny County, December 7, 2015; East Nantmeal Township, Chester County, April 13, 2016; Clay Township, Lancaster County, September 28, 2018; East Brandywine Township, Chester County, December 12, 2018; Lower Saucon Township, Northampton County, February 15, 2019; Kidder Township, Carbon County, March 31, 2020; North Coventry Township, Chester County, May 12, 2021]

10. **Ordinance prohibits harvesting on landslide prone soils or slopes exceeding 25%.** This automatic 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. 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. Conversely, naturally fallen trees pull up roots in what foresters call a "root ball" and are more likely to destabilize the soils than harvesting. Thus, the older, dead, sick or infected trees left on a stand to fall pose a greater risk of landslide than a timber harvest used to remove those trees. 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 timber harvesting/forest management and E&S plans. We propose that the Municipality amend the Ordinance to state that: "An applicant proposing to engage in timber harvesting on landslide prone soils must provide a forestry plan prepared by a professional forester that describes the best management practices to be employed to ensure stabilization of the soils and demonstrates compliance with the Penn State College of Agricultural Sciences publication entitled *Best Management Practices for Pennsylvania Forests* (2001)." [Municipality of Monroeville, Allegheny County, December 7, 2015; North Coventry Township, Chester County, June 08, 2018; East Brandywine Township, Chester County, December 21, 2018; Lower Saucon Township, Northampton County, February 15, 2019; Pine Township, Allegheny County, May 6, 2021]

11. **Ordinance imposes a 25-150 ft buffer around wetlands and water sources or precludes harvesting within a floodway, 100 year floodplain, zone one riparian buffer or wetland.** 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). 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." However, "[p]ermits are not required to cut timber and other vegetation, including cutting in wetlands." (Id.). Due to the varying conditions in a particular forest the BMPs necessary to protect environmental resources will also vary. For this reason, the blanket wetland/water source buffer zone contained in the Ordinance is excessive, unreasonable, arbitrary, and contrary to BMPs. The Township's blanket prohibition on harvesting within floodways and wetlands directly conflicts with 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. A blanket setback buffer zone requirement is unreasonable and contrary to sustainable forestry practices because it precludes all timber harvesting in the zone and there may be trees that should be removed to maintain the long term health of the forest [See also – Ordinance Issue 4 on page 4 of this fact sheet]. Moreover, there may be safety or other reason 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. Therefore the Township's blanket prohibition is an unreasonable restriction on timber harvesting. [Municipality of Monroeville, Allegheny County, December 7, 2015; East Nantmeal Township, Chester County, April 13, 2016; North Coventry Township, Chester County, June 08, 2018; Clay Township, Lancaster County, September 28, 2018; Eldred Township, Monroe County, November 29, 2018; Middle Smithfield Township, Monroe County, February 11, 2019; Lower Saucon Township, Northampton County, February 15, 2019; Upper Saucon Township, Lehigh County, December 12, 2019; Kidder Township, Carbon County, March 31, 2020; Pocono Township, Monroe County, April 07, 2020; Middle Smithfield Township, Monroe County, April 17, 2020; Hellam Township, York County, August 15, 2020; North Coventry Township, Chester County, May 12, 2021; Municipality of Murrysville, Westmoreland County, December 21, 2021]

12. **Ordinance requires that a Forest Management Plan consistent with the "Timber Harvesting Guidelines of the Pennsylvania Forestry Association" be filed with the Township.** The OAG acknowledges the Township may require an owner/operator to file a management plan developed by a professional forester. However, the "Timber Harvesting Guidelines of the Pennsylvania Forestry Association" no longer exist and have been out of print for over twenty (20) years. The OAG recommends the township change its ordinance to require compliance with the

PSU College of Agricultural Sciences, *Best Management Practices for Pennsylvania Forests*. [Clay Township, Lancaster County, September 28, 2018]

13. **Ordinance requires Forest Management Plan be approved by County Conservation District.** The County Conservation District has no authority to review and approve forest management plans; thus this requirement can never be met by an applicant. For this reason, the requirement is an unreasonable restriction on forestry activities in violation of the MPC and AASL. [Salem Township, Luzerne County, December 14, 2015; Municipality of Murrysville, Westmoreland County, December 21, 2021]

14. **Ordinance requires Erosion & Sedimentation Control Plan (E&S Plan) be submitted to and approved by the 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 and the Conservation District has no role in DEP's approving of such plans, thus the Township cannot impose this requirement because it is stricter than State law. 25 Pa. Code § 102.4(b)(8). 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. What the Township cannot do is require the landowner to get approval from the Conservation District prior to harvesting. Additionally, the Township cannot simply transfer the cost of the Conservation District review into its fee for processing timber harvesting permit applications. The MPC expressly prohibits Townships from charging a landowner "expenses for engineering…or other technical consultants…costs" in administering a zoning ordinance. 53 P.S. § 10617.3(e) [See also – Ordinance Issue 1 on page 3 of this fact sheet]. Having the experts at the local Conservation District review the E&S Plan falls within the ambit of engineering and technical consultation. The Township can, perhaps, increase the timber harvesting permit fee by *some* amount to help defray *some* of the costs of Conservation District review, but the Township cannot increase the permit fee for the entire Conservation District review cost. That would violate the MPC. The Pennsylvania Sustainable Forestry Initiative ("PaSFI") and the Pennsylvania Forest Products Association ("PFPA") wrote a letter to the DEP in 2020 asking that agency to clarify for the CCDs what they could and could not do with respect to E&S Plans. The DEP responded and that letter is available at: https://sfiofpa.org/pdf.php?id=104. This letter thoroughly and succinctly summarizes the DEP's position on CCD reviews of E&S Plans, which mirrors the OAG view. [East Nantmeal Township, Chester County, April 13, 2016; North Coventry Township, Chester County, June 08, 2018; Clay Township, Lancaster County, September 28, 2018; Eldred Township, Monroe County, November 29, 2018; East Brandywine Township, Chester County, December 21, 2018; Middle Smithfield Township, Monroe County, February 11, 2019; East Earl Township, Lancaster County, November 05, 2019; Kidder Township, Carbon County, March 31, 2020; Pocono Township, Monroe County, April 07, 2020; Middle Smithfield Township, Monroe County, April 17, 2020; East Rockhill Township, Bucks County, September 17, 2020; Unity Township, Westmoreland County, March 1, 2021; Canton Township, Washington County, May 07, 2021; Municipality of Murrysville, Westmoreland County, December 21, 2021]

15. **Ordinance defines "High Value Species."** 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. [See also – Ordinance Issue 19 on page 8 of this fact sheet] [East Nantmeal Township, Chester County, April 13, 2016; Clay Township, Lancaster County, September 28, 2018; North Coventry Township, Chester County, May 12, 2021]

16. **Ordinance requires that a 30% forest canopy be preserved and that at least 30-50% of the trees remaining following the harvest must be "High Value Species" or "Highest Value Species."** Not only is such a canopy requirement in violation of ACRE, it too, can be unwise from a silvicultural standpoint. 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 forestland. 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 forest land. The overarching management goals will vary

depending on the site specific conditions at a particular forest. For these reasons, an ordinance attempting to place uniform standards on forestry activities when conditions will vary depend on the particular forests is unreasonable. 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." 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. Decisions on proper silvicultural prescriptions for a timber harvest should be determined by the forester and landowner. [See also – Ordinance Issue 9 on page 5 of this fact sheet; Ordinance Issue 15 on page 7 of this fact sheet; Ordinance Issue 19 on page 8 of this fact sheet] [East Nantmeal Township, Chester County, April 13, 2016; Clay Township, Lancaster County, September 28, 2018; Middle Smithfield Township, Monroe County, February 11, 2019; Pine Township, Allegheny County, May 6, 2021; North Coventry Township, Chester County, May 12, 2021]

17. **Ordinance requires the identification of "specimen vegetation" but defines the term loosely.** Based on the Ordinance's definition, "specimen vegetation" is whatever the Township deems it to be. Having such a vague and ambiguous definition of "specimen tree" places an unreasonable restriction on timber harvesting in violation of the MPC [See also – Ordinance Issue 19 on page 8 of this fact sheet]. Such a vague standard raises the possibility of arbitrary and/or discriminatory enforcement of the ordinance. Township ordinances cannot be vague and ambiguous. "A local government unit has no authority to adopt an ordinance that is arbitrary, vague or unreasonable or inviting of discriminatory enforcement. *Exton Quarries, Inc. v. Zoning Board of Adjustment*, 425 Pa. 43, 228 A.2d 169 (1967). A vague ordinance is one that proscribes activity in terms so ambiguous that reasonable persons may differ as to what is actually prohibited. Scurfield Coal, Inc. v. Commonwealth, 136 Pa. Cmwlth. 1, 582 A.2d 694 (1990)." *Com., Office of Atty. Gen. ex rel. Corbett v. Richmond Twp.*, 2 A.3d 678, 681 (Pa. Commw. Ct. 2010). Moreover, experts advise that requiring identification of specimen vegetation is time consuming and cost prohibitive to a timber harvesting operation; precluding the harvesting of "specimen vegetation" impacts the economic value of a timber harvest; and interferes with prescribed silvicultural practices for forest management and regeneration. It must be remembered that "[z]oning ordinances may not unreasonably restrict forestry activities." And to that end, the legislature has made "timber harvesting…a permitted use of right in all zoning districts in every municipality. 53 P.S. §10603(f). [Pennnsbury Township, Chester County, February 20, 2018; North Coventry Township, Chester County, June 08, 2018; East Brandywine Township, Chester County, December 21, 2018]

18. **Ordinance defines "Professional Consulting Forester" or requires approval of forester from the Board of Supervisors.** 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 to harvest timber – this is unlawful for timber harvesting is a use as of right in all zoning districts under the MPC. [East Nantmeal Township, Chester County, April 13, 2016; North Coventry Township, Chester County, June 08, 2018; Kidder Township, Carbon County, March 31, 2020]

19. **Ordinance uses 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. 20 15) (citation omitted). Requirements that the forest canopy "be preserved in good condition" and that the remaining trees "be well distributed through the area" constitute vague and ambiguous standards for a property owner to comply with and a zoning officer to enforce. [East Nantmeal Township, Chester County, April 13, 2016; Clay Township, Lancaster County, September 28, 2018]

20. **Ordinance requires timber harvesting operator provide proof of workmen's compensation and/or liability insurance.** 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. Hiring a person to do a job before one even has

permission to do the job places the "cart before the horse." Requiring the landowner to provide proof of insurance prior to the issuance of a permit places and unnecessary obstacle in the landowner's way that results in an unreasonable restriction on forestry activities. 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. The OAG is not aware of any authority to support the Township's requirement for proof of liability insurance; rather the opposite is true. The township has no authority to impose personal liability. It has only the authority to enforce zoning ordinance provisions as provided by the MPC. 53 P.S. §§ 10616.1; 10617.2. 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. [East Nantmeal Township, Chester County, April 13, 2016; North Coventry Township, Chester County, June 08, 2018; Lower Saucon Township, Northampton County, February 15, 2019; East Earl Township, Lancaster County, November 05, 2019; Kidder Township, Carbon County, March 31, 2020; Pine Township, Allegheny County, May 6, 2021]

21. Ordinance requires identifying the total number of trees within the harvest operation, or specific types of trees, or mapping of all tree locations within one meter of accuracy. This enumeration requirement to tally both the cut and residual trees represents an unreasonable, cost-prohibitive exercise for 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. Additionally, requiring that an owner/operator enumerate only trees of a specific DBH prior to harvesting is cost prohibitive and counterproductive. Likewise, ordinances that require all tree locations to be numerically identified and marked on a map within one meter of accuracy are similar to ordinances mandating unreasonable, overly restrictive, and overly specific identification of trees on the harvest site. [See also – Ordinance Issue 26 on page 10 of this fact sheet] [East Nantmeal Township, Chester County, April 13, 2016; North Coventry Township, Chester County, June 08, 2018; Clay Township, Lancaster County, September 28, 2018; Pine Township, Allegheny County, May 6, 2021]

22. Ordinance requires reforestation of the site. 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, according to Penn State College of Agricultural Sciences publication, *Timber Harvesting in Pennsylvania, Information for Citizens and Local Government Officials* (2004) "most of Pennsylvania's forests will regenerate naturally from seeds or sprouts." It is "unreasonable, both economically and ecologically, to require a forestry operation to artificially regenerate the site." [East Nantmeal Township, Chester County, April 13, 2016; Pennsbury Township, Chester County, February 20, 2018; North Coventry Township, Chester County, June 08, 2018; East Brandywine Township, Chester County, December 21, 2018; Lower Saucon Township, Northampton County, February 15, 2019; Pine Township, Allegheny County, May 6, 2021; North Coventry Township, Chester County, May 12, 2021]

23. Ordinance requires plan that includes topographic map with 5-10 foot contour intervals. The five/ten foot interval 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/ten foot intervals would be very costly and require a site specific surveying. While a map with five/ten feet intervals may be a reasonable requirement for a residential development, such a short interval is not necessary for a timber harvest even including road planning on a harvest. Forcing a landowner or logger to expend additional resources of time and money for a site specific survey instead of allowing the owner/logger to rely upon already existent 20 foot maps constitutes an unreasonable restriction on timber harvesting. This requirement is overbroad, unreasonable, and unnecessary for a timber harvest. [East Nantmeal Township, Chester County, April 13, 2016; North Coventry Township, Chester County, June 08, 2018; Lower Saucon Township, Northampton County, February 15, 2019]

24. Ordinance requires the Township Engineer to approve the appropriateness and standards for all stream 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 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. [East Nantmeal Township, Chester County, April 13, 2016]

25. **Ordinance requires that all remaining tops and slash be removed from the site, or does not permit tops and slash to be left within a certain distance of various man-made and natural features such as streets, streams, trails driveways and drainage ditches, or limits the height of slash piles.** In this case, the OAG consulted with a PSU School of Agriculture professor emeritus of forestry. This expert opines that tops/slash is an important component to timber harvest site productivity that should be left on site for several reasons. First, tops/slash contributes important elements back into the site. Secondly, tops/slash contributes immensely to organic material cycling which serves to release the micronutrients. If tops/slash are removed or collected in a concentrated area, the micronutrients do not come back into the nutrient cycle quickly or effectively. The tops/slash also help build the O-horizon. Tops/Slash has been shown to help facilitate forest regeneration by deterring deer browsing on actual trees. Much of the microorganism community depends on the habitat created by the tops/slash following harvesting. Another concern with the mandated removal of tops/slash is the impact on the site increases the amount of disturbance from the machinery used to gather and move the tops/slash. Doing this likely contributes to additional tree stem damage, soil compaction, organic matter disturbance, and the loss of habitat described above. While the cost of removing tops/slash is site and circumstance specific, in all cases, it presents the logistical challenge of how to gather it up, move it efficiently to a concentration point, and then chip it for removal from the site. Under any scenario, complete removal is expensive and could require specialized machinery. Tops and slash are good for the environment – not bad. For all these reasons, the township's requirement that tops/slash be removed or concentrated in various areas within the harvest site is a violation of state law as such a mandate constitutes an unreasonable restriction on forestry activities. [East Brandywine Township, Chester County, December 21, 2018; Lower Saucon Township, Northampton County, February 15, 2019; Hellam Township, York County, August 15, 2020; Pine Township, Allegheny County, May 6, 2021]

26. **Ordinance requires a detailed site map/plot plan with permit application.** Timber harvesting is subject to the DEP's E&S regulations. *Id.*, §§ 102.4(b) & 102.5(b) &(d). A timber harvest operation that disturbed more than 5,000 square feet must develop and implement a written 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. As a result, the site map/plot plan information required by the Township's Ordinance is already included in the E&S plan prepared under 25 Pa.Code § 102.4(b)(2)(i). By preparing the state mandated E&S plan, the landowner has essentially complied with the Township's Ordinance. Regardless, state law preempts this ordinance requirement. The ordinance duplicates requirements found in the DEP regulations pertaining to erosion and sediment control and therefore is invalid. [See also – Ordinance Issue 23 on page 9 of this fact sheet] [Eldred Township, Monroe County, November 29, 2018; East Brandywine Township, Chester County, December 21, 2018; Pennsbury Township, Chester County, February 20, 2018; East Earl Township, Lancaster County, November 05, 2019; Pine Township, Allegheny County, May 6, 2021]

27. **Ordinance requires that the site plan must include the duration of forestry operation (number of days) in order to secure a permit.** The commencement and completion dates for the timber harvest will not be known until the timber is sold to the timber harvester. Additionally, numerous factors are considered when establishing commencement dates, including best season to harvest at the site, market conditions that may result in postponing the harvest, and weather conditions. Placing a hard and fast time limit on the harvesting operation can place both the landowner and the township in difficult situations. Pushing a landowner to harvest when the market is low costs him/her thousands of dollars in lost revenue. Forcing a harvest when weather conditions are poor, or forcing a harvest in the wrong season, can result in needless ecological consequences to the harvested land as well as to the surrounding area. Imposing a rigid time period for the harvest work is an unreasonable restriction of forestry activities under the MPC and not only serves to potentially harm the landowner but to potentially have an adverse effect on the Township as well. [Lower Saucon Township, Northampton County, February 15, 2019]

28. **Ordinance prohibits logging on Sundays and holidays.** The Township cannot simply forbid agricultural activity for entire days under what the OAG presumes is some type of nuisance rationale. The OAG presumes that the Township wants to maintain quiet on those days when many of its residents are at home. Yet by doing so the Township implicates the strict limitations on nuisance actions found in the Right to Farm Act ("RTFA"). 3 P.S.

§§ 951, 954. Limiting logging to certain hours is permissible if those limitations are reasonable. But forbidding timber harvesting for entire days because such logging may be a "nuisance" to some is impermissible. [Pocono Township, Monroe County, April 07, 2020]

29. **Ordinance recognizes or prefers "Selective Cutting."** 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" should simply be deleted from the ordinance. [See also – Ordinance Issue 9 on page 5 of this fact sheet] [East Nantmeal Township, Chester County, April 13, 2016; Lower Saucon Township, Northampton County, February 15, 2019; Kidder Township, Carbon County, March 31, 2020]

30. **Ordinance requires that a road be bonded prior to issuing a timber harvesting permit.** It is unclear whether road posting and bonding matters fall within ACRE. The OAG has dealt informally with road posting/bonding issues meaning the OAG has resolved matters with various townships prior to the filing of an ACRE request for review. Townships can require road bonding to cover damage to roads but there are constraints and a specific process that municipalities must follow in order to impose such bonding. The Township should review PennDOT LTAP, Technical Information Sheet #158, *Posting and Bonding Procedures for Municipal Roadways*; and PennDOT LTAP, Technical Information Sheet #195, *How to Post and Bond a Municipal Road, An Overview of Publication 221: Posting and Bonding Procedures for Municipal Highways*. Therein the Township will find a summary of what must be done in order to post and bond as well as citations to applicable law. If the township follows the guidance contained therein, as well as the requirements of the statutes and regulations referenced in those documents, then it is in compliance with state law. [Hellam Township, York County, August 15, 2020; North Coventry Township, Chester County, May 12, 2021; Canton Township, Washington County, May 07, 2021]

31. **Ordinance requires a Forest Stewardship Plan approved by the PA DCNR Bureau of Forestry.** The township's mandate that a Forest Stewardship Plan must be conducted and submitted to the Township violates ACRE. The Forest Stewardship Plan process is a voluntary program that a local municipality cannot make mandatory. "The Pennsylvania's Forest Stewardship Program is a voluntary program to help forest landowners learn to improve and maintain the ecological health of their land. Private landowners who own between 5 and 1,000 acres of forestland can join the program." https:/extension.psu.edu/pennsylvania-forest-stewardship-program-print. "The Forest Stewardship Program does not tell you what you should do on your own land. Instead, it helps you accomplish…what you want to do, whether or not that includes timber harvesting." *Forest Stewardship, Our Link to the Past-Our Legacy for the Future*, Pennsylvania State University ("PSU") College of Agricultural Sciences, Number 1, 2008, p. 2. "Remember, a forest stewardship plan does not tell you what you must do on your land; it helps you do what you want to do…" Id., p. 5. The forest Stewardship Program is "designed specifically to meet the needs of private forest landowners…we hope you will join us in the stewardship…" Id., p. 2. The township cannot elevate that which a landowner is under no obligation to do in the first place to a mandatory requirement that a landowner must do in order to harvest timber. It also appears that the township has a fundamental misunderstanding of the purpose of a Forest Stewardship Plan. The Plan is not designed for a local municipality to use as it sees fit, but rather, the Plan is a tool for landowners to accomplish what he/she wants to do with the land even if it does not involve timber harvesting. There is no legal authority for Upper Saucon to require the plan. Indeed, such a requirement is inconsistent with the law stating in clear terms that timber harvesting is to be encouraged not hindered. [Upper Saucon Township, Lehigh County, December 12, 2019]