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July 24, 2020

VIA E-MAIL AND UPS

Board of Supervisors
Conewago Township
541 Oxford Ave.
Hanover, PA 17331

**RE: Klunk Farm Rezoning - Proposed Ordinance 2020-C
Failure to Provide Required Public Notice of Virtual Public Hearing
Our File No. 34679-0015**

Dear Board of Supervisors:

As you know, we represent Racehorse Road LLC ("Racehorse"), which is the owner of an approximately 85-acre tract of land identified as Adams County Tax Parcel No. 08K15-0004---000 (the "Property") in Conewago Township (the "Township"). The Township is considering the enactment of a zoning amendment – Ordinance 2020-C (the "Rezoning Amendment") – that would rezone the Property from the Township's Suburban Residential – R-1 zoning district to the Township's Agricultural – A zoning district. We have become aware that the location of the public hearing on the Rezoning Amendment scheduled for Monday July 27, 2020 has been moved from the "S.A.V.E.S. Building" to a virtual setting using the Zoom online application. The purpose of this letter is to object to the Township's failure to provide required public notice of the location of the virtual public hearing in accordance with the Pennsylvania Municipalities Planning Code, 53 P.S. § 10101, *et seq.* (the "MPC") and Conewago Township Zoning Ordinance (the "Zoning Ordinance"), as well as to outline other due process deficiencies we have identified with the proposed virtual public hearing.

Failure to Provide Required Public Notice

By way of background, the public hearing on the Rezoning Amendment was scheduled to be conducted in person on July 27, 2020 at 6:30 p.m. at the Southeastern Adams Volunteer Emergency Services Co. 29 building (the "S.A.V.E.S. Building"), 5865 Hanover Road., Hanover, PA 17331 (the "Rezoning Hearing"). By letters dated June 22, 2020 and July 9, 2020 (collectively, the "Solicitor's Letters"), the Township's Solicitor informed Racehorse and the

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owners of adjacent properties of the details for the Rezoning Hearing, including the location being the S.A.V.E.S. Building. Public notice of the Rezoning Hearing was published in the *Gettysburg Times* on June 29, 2020 and July 6, 2020 (collectively, "Public Notices") again identifying the S.A.V.E.S. Building as the location of the Rezoning Hearing. It is unknown whether the Property was posted with notice of the Rezoning Hearing. The Solicitor's Letters and Public Notices presumably were provided by the Township in an effort to comply with the strict public notice requirements of Section 609(b) of the MPC and Section 155-184.B of the Zoning Ordinance. Section 609(b) of the MPC states as follows:

(b)(1) Before voting on the enactment of an amendment, the governing body shall hold a public hearing thereon, pursuant to public notice¹, and pursuant to mailed notice and electronic notice to an owner of a tract or parcel of land located within a municipality or an owner of the mineral rights in a tract or parcel of land within the municipality who has made a timely request in accordance with section 109. In addition, if the proposed amendment involves a zoning map change, notice of said public hearing shall be conspicuously posted by the municipality at points deemed sufficient by the municipality along the tract to notify potentially interested citizens. The affected tract or area shall be posted at least one week prior to the date of the hearing.

(2)(i) In addition to the requirement that notice be posted under clause (1), where the proposed amendment involves a zoning map change, notice of the public hearing shall be mailed by the municipality at least thirty days prior to the date of the hearing by first class mail to the addresses to which real estate tax bills are sent for all real property located within the area being rezoned, as evidenced by tax records within the possession of the municipality. The notice shall include the location, date and time of the public hearing. A good faith effort and substantial compliance shall satisfy the requirements of this subsection.

(ii) This clause shall not apply when the rezoning constitutes a comprehensive rezoning.

53 P.S. §10609 [emphasis added].

Similarly, Section 155-184.B of the Zoning Ordinance states as follows:

¹ Section 107(a) of the MPC defines "Public notice" as "notice published once each week for two successive weeks in a newspaper of general circulation in the municipality. Such notice shall state the time and place of the hearing and the particular nature of the matter to be considered at the hearing. The first publication shall not be more than 30 days and the second publication shall not be less than seven days from the date of the hearing." 53 P.S. §107(a) [emphasis added].

(1) Public hearing. Before hearing and enacting Chapter 155, Zoning, and/or Zoning Map amendments, the Board of Supervisors shall conduct a public hearing to inform the general public of the nature of the amendment and to obtain public comment. Such public hearing shall be conducted after public notice (as defined herein and listed below) has been given.

(2) Public notice. Before conducting a public hearing, the Board of Supervisors shall provide public notice as follows:

(a) Notice shall be published once each week for two successive weeks in a newspaper of general circulation in the municipality. Such notice shall state the time and place of the hearing and the particular nature of the matter to be considered at the hearing. The first publication shall not be more than 30 days and the second publication shall not be less than seven days from the date of the hearing. Publication of the proposed amendment shall include either the full text thereof or the title and brief summary, prepared by the Municipal Solicitor and setting forth all the provisions in reasonable detail. If the full text is not included:

[1] A copy of the full text shall be supplied to a newspaper of general circulation in the municipality at the time the public notice is published; and

[2] An attested copy of the proposed ordinance shall be filed in the County Law Library, or other county office designated by the County Commissioners, who may impose a fee no greater than that necessary to cover the actual costs of storing said ordinances.

(b) For Zoning Map amendments, public notice shall also include the posting of a sign at conspicuous locations along the perimeter of the subject property deemed sufficient by the Township to notify potentially interested citizens. This sign(s) shall be posted at least one week prior to the hearing and will exhibit the nature, date, time, and location of the hearing. In addition, notice of the public hearing shall be sent by first class mail by the municipality at least 30 days prior to the date of the public hearing by first-class mail to the addressees to which real estate tax bills are sent for all real property located within the area to be rezoned, as evidenced by the tax records within possession of the Township. Such notice shall include the location, date and time of the public hearing. The first-class mail notice requirement shall not apply when the rezoning constitutes a comprehensive rezoning.

Section 155-184.B of the Conewago Township Zoning Ordinance [emphasis added].

The Notices all stated that the Rezoning Hearing would be held at the "S.A.V.E.S. Building."

On July 20, 2020 – only seven days before the scheduled Rezoning Hearing – and after the Notices were issued and published (and possibly posted on the Property), the Board voted to conduct the Rezoning Hearing virtually. As a result, the location of the Rezoning Hearing – as advertised to the public in the Notices – is incorrect. The Township has changed the location of the Rezoning Hearing without providing the statutorily required public notice pursuant to Section 609(b) of the MPC and Section 155-184.B of the Zoning Ordinance.

It appears as though the Township is relying on recent legislation in its decision to change the location of the Rezoning Hearing without providing the statutorily required public notice.² Senate Bill 841, codified as 35 Pa. C.S. §5741 (“Section 5741”), was enacted earlier this year due to the COVID-19 pandemic. Section 5741(a) permits governing bodies to “conduct hearings, meetings, proceedings or other business through the use of an authorized telecommunications device” (i.e. virtually). Racehorse does not dispute that the Township can conduct a hearing on the Rezoning Amendment virtually, but it must do so pursuant to the statutorily required public notice. Section 5741 does not excuse the Township from compliance with Section 609(b) of the MPC and Section 155-184.B of the Zoning Ordinance with respect to the required public notice for the Rezoning Hearing.

The plain language of Section 5741 is clear. Section 5741 differentiates between “hearings” and “meetings.” For example, Section 5741(a) states as follows:

Authorization. An agency, department, authority, commission, board, council, governing body or other entity of a political subdivision included in a declaration of disaster emergency as specified under Section 7501(d) (relating to general authority of political subdivisions) may conduct hearings, meetings, proceedings or other business through the use of an authorized telecommunications device until the expiration or termination of the COVID-19 disaster emergency.

35 Pa. C.S. §5741(a) [emphasis added].

In Section 5741(b) (establishing quorum requirements) and Section 5741(f) (requiring municipalities to provide for public participation), the General Assembly again used all three terms – “hearings,” “meetings” and “proceedings.” The same is not true for other parts of Section 5741 – notably the parts dealing with required notice to the public.

² The Township posted notice of the changed location on its website – www.conewagotwp.us – on Wednesday July 22, 2020. It is our understanding that was a new website for the Township that began operating that same date. Prior to that date, the Township's website was www.conewagotwp.org. The Township made the decision to provide notice of the changed location of the Rezoning Hearing on a brand new website that the public likely is not yet aware of being the new website. Even as recently as July 23, 2020, a Google search for “Conewago Township, Adams County” still brought up as the first result a link to the old and non-functioning website. A Google search on July 24, 2020 found neither the old website nor the new website appearing as a result. Racehorse believes this has caused confusion for the public and has limited the dissemination of the news that the Township has changed the location of the Rezoning Hearing less than a week before the hearing.

Section 5741(c) sets forth the advance notice that is required for "meetings" without mentioning the term "hearings" or "proceedings." Section 5741(c) states as follows:

Advance notice. To the extent practicable, an agency, department, authority, commission, board, council, governing body or other entity of a political subdivision shall post advance notice of each meeting conducted under subsection (a) on the entity's publicly accessible Internet website, if any, in an advertisement in a newspaper of general circulation, or both. Public notice shall include the date, time, technology to be used and public participation information as provided under subsection (f).

35 Pa. C.S. §5741(c) [emphasis added].

Similarly, Section 5741(e) - dealing with the notice required for a municipality to take action on certain land use approvals (not including a zoning amendment proposed by the municipality) again regulates only "meetings" and not "hearings". Section 5741(e) states as follows:

Unrelated issue. An agency, department, authority, commission, board, council, governing body or other entity of a political subdivision shall not consider any application, plat, plan, submission, appeal or curative amendment unrelated to the Governor's declaration of disaster emergency related to COVID-19 during a meeting unless notice to the public and interested parties has been provided at least five days prior to the meeting via a post on the entity's publicly accessible Internet website, if any, in a newspaper of general circulation, or both.

35 Pa. C.S. §5741(e) [emphasis added].

The plain language chosen by the General Assembly demonstrates its intent to treat "meetings" differently than "hearings." The General Assembly – thru Section 5741 – has altered temporarily the notice required for "meetings" but has left unaltered the public notice requirements for "hearings." The policy behind that legislative decision is simple – the public notice requirements for hearings always have been more robust than any notice requirements for meetings. Thus, Section 5741 does not excuse the Township from complying with Section 609(b) of the MPC and Section 155-184.B of the Zoning Ordinance. In order for the Township to conduct the Rezoning Hearing in a new location (even a virtual location), it must first provide the public notice required by Section 609(b) of the MPC and Section 155-184.B of the Zoning Ordinance. The Township has not done so.

Proceeding with the Rezoning Hearing virtually on July 27, 2020 without the required public notice is prohibited and will lead to a procedural challenge should the Rezoning Amendment be enacted subsequent to a hearing held on that date.

Other Due Process Concerns

Racehorse has additional concerns with the procedures the Township intends to employ for any virtual Rezoning Hearing (whenever it is held). The Township's posting on its new website of the information about the virtual Rezoning Hearing requires all comments in writing and exhibits to be submitted to the Township Solicitor at least four (4) hours before the hearing. This suggests that Racehorse and members of the public will not be able to provide comments or exhibits during the hearing. Section 5741(f) permits the Township to accept comments in writing prior to the hearing, but it does not in any way permit the municipality to restrict the timing or manner in which comments are submitted.

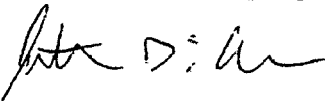
It also is unclear whether Racehorse or any member of the public will be permitted to ask questions of the Board of Supervisors or ask questions to witnesses as part of the hearing. Property owners affected by a proposed rezoning and members of the public normally would be permitted to ask questions during an in-person public hearing. Any attempt to abridge this ability to ask questions of the Board of Supervisors or witnesses would violate the procedural and substantive due process rights of Racehorse and members of the public.

Finally, it is unclear whether the Township intends to have a stenographer present to transcribe the hearing. Given the nature of the proceeding and the high likelihood of litigation resulting from any ultimate decision to adopt the Rezoning Amendment, it is critical that all of the hearings be transcribed by a stenographer so as to create a proper record of the proceedings.

Please do not hesitate to contact us with any questions.

Sincerely,

McNEES WALLACE & NURICK LLC

By 
Jonathan D. Andrews

- c: Mr. Ben Myers (via e-mail only)
- James M. Strong, Esq. (via e-mail only)
- Helen L. Gemmill, Esq. (via e-mail only)
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