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October 7, 2021

**VIA E-MAIL [MANAGER@ALLENTOWNSHIP.ORG]
AND U.S. MAIL**

Allen Township Board of Supervisors
c/o Ilene Eckhart
Township Manager
Allen Township
4714 Indian Trail Road
Northampton, PA 18067

RE: Allen Township Zoning Ordinance and Subdivision and Land Development Ordinance Amendments - Mixed Use Village Use in R-1 Zoning District

Dear Supervisors:

On behalf of the Trustees (“**Trustees**”) of the Trust for Willow Brook Farm (“**Farm**”), thank you for the recent opportunity to review with the Board and Township Planning Commission the draft amendments (“**Proposed Amendments**”) to the Allen Township Zoning Ordinance (“**Zoning Ordinance**”) and Allen Township Subdivision and Land Development Ordinance (“**SALDO**”). The joint meeting was very productive. Revised drafts of the Proposed Amendments will follow shortly under separate cover.

Last week we received the September 22, 2021 letter from the Lehigh Valley Planning Commission (“**LVPC**”) reviewing the Proposed Amendments. Quite frankly, we were astonished by the content of the review letter. I say “astonished” because in reviewing prior requests to change the zoning of the Farm the LVPC recommended the exact same type of development that would be constructed under the Proposed Amendments (see attached 2/28/14 LVPC Review Letter). Now the LVPC opposes the Proposed Amendments. In doing so the LVPC ignores the history of the Trustees’ efforts to obtain a change of the zoning of the Farm, the Trustees’ Challenge to the Validity of the present R-I Zoning of Farm (“**Challenge**”), and demonstrates its lack of understanding of the law of spot zoning in Pennsylvania. This letter is to respond.

The Willow Brook Farm Property

We agree with the LVPC that the Proposed Amendments focus solely on the more than 265 acres of land owned by the Trust for Willow Brook Farm. However, that is the only aspect of the LVPC letter that we agree with. The LVPC has ignored the fact that the Farm is the remnant of a more than 1200 acre farm owned by C. Thomas Fuller (“**Fuller Farm**”). As you are aware, in 1998, more than 630 acres of the Fuller Farm was taken by the Airport Authority through *de facto* condemnation. A portion of the condemned land was incorporated into the Lehigh Valley International Airport, while other portions were sold by the Authority to private developers. Specifically, East of the Willow Brook Property, FedEx has developed a 1,166,369 s.f. distribution facility with plans to expand to more than 2,000,000 s.f. and to the South of the Willow Brook Property, The Rockefeller Group has developed a more than 1,000,000 s.f. industrial facility. Because of the industrial development to the South and East and high density residential developments to the North and West the Farm became an island of R-1 Zoned land surrounded by higher intensity uses which made the R-1 development of the Farm economically impossible. It was for that reason that we filed a Challenge.

The Challenge and the Proposed Amendments

As you know, the present versions of the Proposed Amendments were drafted as a result of multiple discussions over more than a year between Supervisors, Staff, Township Solicitor and the Trustees’ team of lawyers, engineers and land planners. Those discussions examined the existing zoning of the Farm, concluded that the Farm should be zoned for a mix of uses as a transition between the residential development located to the north and west of the Farm and the industrial zoning located to the south and east of the Farm, and led to the drafting of the Proposed Amendments. The Proposed Amendments were thoroughly reviewed at the joint meeting of the Supervisors and Planning Commission on September 20, 2021, where we collectively agreed that after certain changes are made the Proposed Amendments are to be advertised for a Public Hearing.

Before I move on to why the LVPC’s recitation of the law of Spot Zoning is wrong I would like you to recall that in 2014, when the Trustees requested that the Township rezone the Farm to Industrial to allow it to be developed consistent with the adjacent large-scale warehouses, the LVPC opposed that zoning change and opined that:

Given the proximity of residential areas to the site and the natural features of the site, we believe that changing it to Industrial/Commercial would create incompatible land uses at municipal borders and have the potential to negatively impact the residential areas, the school and the creek corridor.

The LVPC also stated that the Farm was better suited to be developed for mixed use:

The Township should consider changing the area to the neighborhood commercial designation **or creating a new mixed-use category that would incorporate some residential uses, some lower intensity commercial uses and open space around the creek. The goal would be to provide a buffer between the existing residential areas highlighted above and the proposed Rockefeller industrial development while also preserving the creek corridor.**

This is precisely what the Proposed Amendments are designed to achieve.

Spot Zoning

The LVPC spends the majority of its letter opining on the law of spot zoning. Unfortunately, the LVPC quotes an economic development committee rather than the Pennsylvania Supreme Court and then wholly ignores the last twenty-five years of case law. In other words, the LVPC got it all wrong.

The most important Pennsylvania Supreme Court case on spot zoning is *In re: Realen Valley Forge Greenes Associates*, 576 Pa. 115, 838 A.2d 718 (2003), which was not mentioned in the LVPC letter. In *Realen*, the Supreme Court examined the authority underlying a municipality's right to enact zoning laws and the countervailing property owner's interests that must be balanced to pass Constitutional muster. In *Realen*, as with the Farm, all of the properties surrounding a large tract of land (125 acres) had, over time, been rezoned and developed while the Valley Forge Golf Course continued to be zoned for agriculture. In *Realen*, after the Township refused the owner's numerous requests for rezoning, the property owner challenged the agricultural zoning claiming that the township's actions amounted to unconstitutional spot zoning and thus confiscation of their property. The Supreme Court agreed.

In its opinion, the Supreme Court explained that spot zoning occurs when one lot or an area is singled out for different treatment from that accorded to similar surrounding land for the economic benefit or detriment of the owner of the singled out lot, **unless the municipality demonstrates that such disparate treatment is justified by good planning principles.** The Supreme Court held that Upper Merion's rationale for the disparate treatment, that the golf course was surrounded by roads, did not justify the disparate treatment.

The *Realen* Court stated "the issue here is not whether any zoning district designation could be appropriately applied to the [Realen] lands but whether the AG District designation can be so justified. Based on this principle it then held that the fact that the golf course was surrounded by roads was not a rational justification for its disparate treatment. In other words, there is nothing inherently improper about singling out an individual parcel or a tract of land for disparate treatment, but the chosen zoning must be justified by good planning principles, such

as the unique characteristics of the property or its surroundings. The LVPC's analysis completely misstates the law of spot zoning by failing to mention this important concept that if good planning justifies the disparate treatment of the spot zoned property, the zoning is still a valid exercise of the police power.

The Commonwealth Court applied the *Realen* analysis in its decision in *Telvil Corp. v. Zoning Hearing Bd. of East Pikeland Twp.*, 2009 WL 9104914 (Pa. Cmwlth. 2009). In *Telvil*, the owner of an approximate 90.9 acre tract of land challenged East Pikeland Township's Agricultural Preservation District and Agricultural Override District which purported to protect prime agricultural soils and thus substantially limited the property owner's ability to develop its property. The landowner contended that the Agricultural Override District was arbitrarily drawn and thus amounted to unlawful spot zoning. The Commonwealth Court analyzed the facts and concluded that although the subject property was being treated differently than surrounding properties, (*Id.* at p.6.) the disparate treatment was justified by the unique circumstances of the subject property and its surroundings. *Id.* at pp. 6-7. The Court concluded that the zoning, although disparate, was not spot zoning because it was as the result of a sound planning decision to create a needed and appropriate transition between "divergent districts on each side." *Id.*

The Trustees' challenge to the validity of the zoning of the Farm has resulted in the conclusion that the current zoning of the Farm is inappropriate for multiple reason and that the Zoning Ordinance must be modified to rectify the situation. As suggested in 2014 by the LVPC the appropriate zoning for the Farm is mixed-use, and that is what the Proposed Amendments will permit. But in its letter the LVPC states that the Proposed Amendments will also result in the Farm being spot-zoned. We disagree. Based on the principles set forth in *Realen* and *Telvil* the proposed mixed-use zoning for the Property will not result in spot zoning because there are very sound planning reasons for the mixed-use zoning.

The Farm is a distinct property that is located adjacent to properties that are zoned differently; it is a large property that contains more than 265 acres; it is bisected by a municipal boundary and the Catasauqua Creek, and it is presently improved with an expansive equestrian facility and golf course. Because of all of these attributes sound planning requires a cure to the inappropriate R-1 zoning and that cure is the Proposed Amendments that will allow the Farm to be developed as a transition between the intense industrial development to the south and east and the high density residential development to the north and west.

Specifically, the Proposed Amendments authorize a new use in the R-1 District that will allow the retention and enhancement of the unique features of the Farm by, *inter alia*, (1) adaptively reusing a number of the existing structures on the Farm to create a mixed use village, (2) preserving the equestrian and golf facilities and incorporating them as active and passive recreation throughout a mixed-use community, (3) utilizing and enhancing the creek corridor to provide pedestrian connections within the community and between the new community and surrounding areas. The Proposed Amendments likewise specifically address the Farm's

unique surroundings by creating a necessary and appropriate transition between the intense industrial development to the east and south and the residential developments to the north and west. The Proposed Amendments are the implementation of sound planning. Moreover, the Proposed Amendments provide a mix of residential dwelling types to address regional needs for a diverse community, provide a walkable community diminishing reliance on automobile use within the community, provide integration and interconnection between the Farm and the adjacent residential communities and existing recreations spaces.

The Proposed Amendments may create disparate treatment for the Farm, but, in accordance with Pennsylvania Law as discussed in *Telvil*, this disparate treatment is wholly justified by the characteristics of the Farm and its surroundings. Moreover, the Proposed Amendments create “a new mixed-use category that would incorporate some residential uses, some lower intensity commercial uses and open space around the creek. [and] provide a buffer between the existing residential areas and the proposed Rockefeller industrial development while also preserving the creek corridor.” Precisely what the LVPC previously recommended.

Finally, the requested change in the zoning of the Willow Brook Farm would not constitute spot zoning because the change is not being made for the economic benefit or detriment to the property owner. Rather it is being made to correct the current invalid zoning.

Sincerely,

Marc B. Kaplin



cc (via electronic transmission):

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