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[Ferguson Township Board of Supervisors: Deny Toll Brothers development plan](#)

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Petition update

Nov. 16 Yeager Letter to Ferguson Supervisors



Smita Bharti

State College, PA

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November 16, 2015 Letter from Jordan B. Yeager, Esq. of Curtin & Heefner LLP, to Ferguson Township Supervisors

BY FACSIMILE (814-238-3454) and EMAIL (rmascolo@twp.ferguson.pa.us)

Mr. Dick Mascolo, Chairman
Ferguson Township Board of Supervisors
3147 Research Drive
State College, PA 16801

Re: Toll Brothers Planned Residential Development Application “The Cottages at State College”

Dear Mr. Mascolo:

This firm represents Kelli Hoover, a resident of Ferguson Township. We are writing in connection with the pending Final Planned Residential Development application of Toll Brothers, known as The Cottages at State College (the “Plan”). The Board of Supervisors should deny the application as presented. The Plan proposes storm water management facilities on a parcel located in the RA district, which use is not permitted pursuant to Section 301 of the Ferguson Township Zoning Ordinance. The Plan does not meet the requirements of Section 407 of the Ferguson Township Zoning Ordinance as it is inconsistent with the Comprehensive Plan and negatively impacts the Regional Drinking Water Supplies at the Harter and Thomas Well-fields. And, acceptance of the Plan would violate Ferguson Township Ordinance No. 981 because the area proposed for stormwater management is outside of the Centre Region Growth Boundary and Sewer Service Area.

The application presently before the Board of Supervisors must be reviewed in the context of both the

Pennsylvania Constitution and the Ferguson Township Home Rule Charter. Article I, Section 27 of the Pennsylvania Constitution provides that:

"The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."

Similarly, Section 1.05(A) of the Ferguson Township Home Rule Charter provides that

"All residents, natural communities and ecosystems in Ferguson Township possess a fundamental and inalienable right to sustainably access, use, consume, and preserve water drawn from natural water cycles that provide pure water necessary to sustain life within the Township."

All decisions made by the Board of Supervisors must be consistent with and in furtherance of the rights set forth above. The Plan, as presented, does not adequately protect the natural resources of the community, including the supply of groundwater recharge and should be denied.

A. Storm Water Management is not a permitted use in the RA District.

The Plan proposes improvements to parcels located in the R-4 (Multi-Family Residential) and RA (Rural Agricultural) zoning districts. The R-4 zoning district is incorporated into the PRD district and, as a result, the Board of Supervisors has the authority to, among other things, waive certain zoning requirements on those lots through the PRD process. See Ferguson Township Zoning Ordinance ("FTZO") §27-407(5) (establishing residential density in affected zoning districts, including the R-4 District). The RA zoning district is not a PRD district. The uses on the RA lot must, therefore, comply with the Zoning Ordinance unless a variance is approved by the Zoning Hearing Board.

Ferguson Township Planning and Zoning Director Maria Tranguch agreed with these observations at the March 2, 2015 meeting of the Board of Supervisors. In citing her memorandum of February 19, 2015, Ms. Tranguch noted that while the areas located in the R-4 zoning district may be rezoned to PRD, the parcel located within the RA district may not. (Board of Supervisors March 2, 2015 Meeting Minutes, p. 3.) She further observed that the stormwater management facilities proposed on the 5.5 acre lot in the RA zoning district "do not meet the intent or use regulations of the Rural Agricultural District." (Id., p. 4.) Ultimately she recommended disapproval of the Plan "due to the inconsistencies with best efforts to effectively plan and zone within the Township." (Id.)

Section 27-301(2) of the FTZO states that "[o]nly the uses listed below shall be permitted in the Rural Agricultural District." Table 301 lists the permitted uses for the lot, both primary and accessory. None of the listed uses include or allow a storm water management system as primary use. While such a system may typically be included as a utility or service to an existing use, a stormwater management facility by itself is a primary use. See FTZO §27-213(3)(B)(2)(b) (allowing naturalized stormwater basins as a conditional use in the Riparian Buffer Overlay District); FTZO §27-807(15) (identifying a stormwater retention basin as a Group 1 land use classification). Because this use is not permitted in the RA District, the applicant must first obtain a variance from the Zoning Hearing Board to allow this use.

The Board of Supervisors does not have the authority, through the PRD process, to waive or modify the zoning restrictions in the RA District. As such, the Board cannot approve the pending plan until the Zoning Hearing Board rules on a request for variance from the applicant. See *Residents Against Matrix v. Lower Makefield Tp.*, 845 A.2d 908 (Pa. Cmmw. 2004), where the Commonwealth Court ruled that a Board of

Supervisors could not approve a land development plan without the Zoning Hearing Board having first addressed zoning issues. The Court explained that under the Municipalities Planning Code “a zoning hearing board has exclusive jurisdiction to hear and render final adjudications in applications for variances, whereas a municipality's governing body has exclusive jurisdiction to hear and render final adjudications in applications for approval of subdivisions or land developments.” Id. at 911. This application must be denied due to its proposal of a use that is in violation of the Zoning Ordinance

B. The Plan is not consistent with the Comprehensive Plan and will negatively impact the Regional Drinking Water Supplies at the Harter and Thomas Well Fields.

In considering a PRD plan, the Board of Supervisors must take into account the intent of the PRD District, as set forth in the Zoning Ordinance. Among other considerations, the intent of the PRD ordinance is to “provide a character of development which is compatible with surrounding land uses.” FTZO §27-407(1)(E) and (F). Upon approval of a PRD application, the Board of Supervisors must provide findings of fact establishing that the plan is in the public interest, concluding, among other things that the plan is “consistent with the Centre Region Comprehensive Plan” (FTZO §27-407(2)(B)(6)(b)(1)); and how the proposed plan has a beneficial relationship “to the larger neighborhood in which it is proposed to be established (FTZO §27-407(2)(B)(6)(b)(5)). A PRD plan may be rejected if the Board determines that the plan “[a]dversely affects existing uses on adjacent lands which are different from the proposed uses in the PRD.” (FTZO §27-407(5)(C)).

The Future Land Use Map of the 2013 Comprehensive Plan designates the 5.5 acre parcel located in the RA District as agricultural. Approval of the current Plan would be contrary to the Comprehensive Plan by removing this parcel from agricultural use. See October 21, 2015 Centre Regional Planning Agency review letter (“[t]he 5.5 acres, which would be used primarily for stormwater facilities, will no longer be viable for agricultural use, which is contrary to Land Use Goals 7 and 8 in the 2013 Centre Region Comprehensive Plan that identify protection of agricultural areas to maintain their future agricultural use.”) The character of the proposed plan is most certainly not consistent with the surrounding agricultural land uses.

As the Board is aware, the Plan is proposed on properties located within the Zone 2 Wellhead Protection Area for the Thomas-Harter Wellfields, which provide a substantial amount of the drinking water for Ferguson Township and surrounding municipalities. The Township has not adequately considered the impact of this project on the quality of groundwater recharge to the wellheads. Numerous communications have been provided to the Board of Supervisors expressing concern with the potential impact.

- “The significant grading, landscape alteration, increase in impervious surfaces, and channeling of stormwater involved with this project does increase the risk of sinkhole formation and therefore does increase the potential to degrade ground water quality.” October 31, 2014 letter from Aqualith Technologies, LLC.
- “There are two (2) areas identified on Sheet 3 of the Preliminary PRD as potentially containing possible karst features. Karst aquifers are exceptionally vulnerable to contamination when the natural filtration capability of soil is bypassed due to thin soils, sinkholes or subsurface open fractures and voids. Contaminants can enter the karst system and travel long distances over a relatively short period of time. This is of special concern to the SCBWA as The Cottages at State College are located with the zone of influence for their wellheads. The use of decentralized management facilities throughout the development is highly recommended in order to replicate natural hydrologic loading rates (i.e. groundwater recharge) over the entire site rather than recharge at centralized management facilities. This will allow for faster repairs of smaller individual BMPs in the event of failure as opposed to the larger BMPs which may require more time and pose a more significant risk of groundwater contamination.” January 7, 2014 letter from Gwin, Dobson & Foreman, Inc.

• “The development threatens the drinking water supply for 75,000 residents in the Centre Region.” Sierra Club Moshannon Group Public Statement, dated May 14, 2015

In response to concerns raised at the March 2, 2015 Board of Supervisor’s meeting, Township engineer Ron Seybert acknowledged that he is not a hydrogeologist. In order to ensure that the Township’s natural resources are protected and that the surrounding land uses (i.e., groundwater recharge and filtration) are not adversely affected, the Township needs to obtain, at the Applicant’s expense, independent studies from a hydrogeologist to determine the impact of the project and adequacy of stormwater management techniques that have been proposed. See Robinson Township, et al. v. Commonwealth, et al., 83 A.3d 901, 952, 623 Pa. 564, 647 (2013) (all levels of government must “consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features.”) If the Board of Supervisors approves the Plan as proposed without taking this step, it will have effectively violated the Ferguson Township residents’ constitutional right to protection of natural resources.

C. The applicant has not complied with the requirements for expansion of the Centre Region Growth Boundary and Sewer Service Area.

On December 17, 2013, the Township passed Ordinance Number 981, which adopted the Centre Region Growth Boundary and Sewer Service Area Implementation Agreement (the “Agreement”). The Agreement sets forth procedures for the expansion of the Regional Growth Boundary (“RGB”) and Sewer Service Area (“SSA”). The 5.5 acre lot currently proposed to provide stormwater management facilities for the Plan is located outside of the RGB/SSA. Because this lot will support a project that is unquestionably a Development of Regional Impact, as set forth in the Agreement, it must be included in the RGB/SSA. This would require an expansion of that area in conformity with the requirements of the Agreement. The Centre Regional Planning Agency stated as much in its review letter dated October 21, 2015.

As noted in the CRPA review letter, the RGB/SSA may be expanded in this case without action by the General Forum of the Centre Region Council of Governments. Nevertheless, the Board of Supervisors should conduct public hearings to determine if expansion of the RGB/SSA would be appropriate in this instance, as the Agreement allows only a limited amount of expansion within five years of execution of the Agreement.

* * * *

For the reasons set forth above, we request that the Board of Supervisors deny the application for final Planned Residential Development approval pending the applicant’s resolution of the issues raised above. Pursuant to the Municipalities Planning Code, should the Board approve the application, our client reserves the right to appeal any such decision.

Very truly yours,

Jordan B. Yeager, Esquire
for CURTIN & HEEFNER LLP

cc: Ms. Kelli Hoover
Mr. Drew Clemson (via email: dclemson@twp.ferguson.pa.us)
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