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May 31, 2019

Via Email and U.S. First Class Mail (pduffy@middletownbucks.org)

Mr. Patrick Duffy, P.E., Director of Building and Zoning
Township of Middletown
3 Municipal Way
Langhorne, PA 19047

**Re: Stone Farm – Preliminary Major Subdivision/Land Development Plan
Applicant – Metropolitan Development Group
Our File No. 10305-52925**

Dear Mr. Duffy:

We have completed our review of the Applicant’s Preliminary Plan for Stone Farm By-Right Plan, prepared by Gilmore & Associates, Inc., dated September 12, 2016, last revised April 18, 2019, containing 105 sheets (the “Plan”). The Plan provides for a residential connector street, labeled as Road “A”, for the purpose of linking the internal road system of the proposed Stone Farm development to the Summit Trace Development (the “Proposed Connecting Road”). This would then permit Summit Trace residents to access the proposed traffic signal at the top of the proposed Stone Farm development at Route 413. The intent of the Proposed Connecting Road is to connect Summit Trace Road through an area identified as “Open Space B” as identified in the Final Plans for the Summit Trace Development recorded December 8, 1977 (the “ST Recorded Plans”). To effectuate the Plan, the Applicant represents that it has entered into an agreement with the developer of the Summit Trace Development (which still owned the open space in the Summit Trace Development) to purchase all of the open space identified in the ST Recorded Plans. Our review, for the purposes of this correspondence, is limited to the Applicant’s rights and ability to connect the Proposed Connecting Road to the Summit Trace Development.

Based on our review of the above and research of the issues presented, the Plan and Proposed Connecting Road is deficient and contrary to Pennsylvania common law and the Middletown Township Zoning Ordinance and Subdivision and Land Development Ordinance (collectively, the “Township Ordinances”). It is very likely, therefore, that the residents of the Summit Trace Development would be able to successfully challenge the Plan and Proposed

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Connecting Road. We note that by correspondence dated October 30, 2018 from Zachary A. Siversten, Esquire, at least some of the residents of the Summit Trace Development have already objected to the proposed use of “Open Space B.” An analysis of the Plan pursuant to both the Township Ordinances and Pennsylvania common law is set forth in detail below under the corresponding headings.

A. Middletown Township Ordinances.

The Summit Trace Development was originally approved with the minimum amount of open space (thirty-five percent (35%)) required by the then applicable provisions of the Middletown Township Zoning Ordinance. These areas of open space are labelled on the ST Recorded Plans as Open Space A through F, with certain areas of open space, including Open Space B, also identified with an asterisk to denote Restricted Community Facility Areas (please note this is only a reference on the ST Recorded Plan and not a defined word in the Township Ordinances). Section 500-202 of the Middletown Township Zoning Ordinance defines “Open Space” as follows:

Open space is land which shall be kept open in perpetuity and shall be restricted from future development. Open space shall be permanent and inviolate. To qualify as open space, such land shall be used only for open space uses: recreation, amenity, buffer or resource protection. Open space shall not include land occupied by non-recreational buildings or structures, roads or road rights-of-way, easements, paving lots, land reserved for future parking lots, stormwater detention basins or retention basins, or the yards or lots of dwelling units.

Moreover, the Middletown Township Subdivision and Land Development Ordinance prohibits the further development or subdivision of Open Space once land has been designated as Open Space on approved development/sub-development plans. See Section 440-423(C) of the Township Ordinances (delineating that “[t]he plans shall contain the following statement for lands in [“Open Space”] Subsection C(1)[lawn], C(2)[natural area], or C(3) [recreation area][:] Open [S]pace land may not be separately sold, nor shall such land be further developed or subdivided.” (Emphasis added). Section 440-423(C)(3), recreation area, is defined as “[a]n area designated for a specific recreation use, including but not limited to tennis, swimming, shuffleboard, playfield and tot-lot” that shall be “maintained so as to avoid creating a hazard or nuisance and shall perpetuate the proposed use.”

Similarly, Section 440-520 delineates that “[a]dditional community facilities may be required to serve the proposed lots or dwellings in a subdivision or land development” and that “[w]here a proposed park, playground or other public facility is shown in the Comprehensive Plan or Community Facilities Plan and is located in whole or in part in a subdivision or land development, the dedication or reservation of such area may be required by the Board of Supervisors in those cases in which it deems such requirement to be reasonable. Section 440-424(H) provides that “the following may not be located in recreation areas: storm drainage facilities, sewage treatment or disposal facilities of any type, water storage tank[s], well pump house[s], and any similar use or other use which is not related to or associated with recreation.”

On the ST Recorded Plan, Open Space “B” was specifically reserved and designated as a Restricted Community Facility Area. Consequently, based upon the plain, unambiguous language of the ST Recorded Plans and the Middletown Township Ordinances, the separate sale and/or development of Open Space B, which is reserved in perpetuity as a Restricted Community Facility Area, is prohibited and uses that are not associated with recreation are prohibited. This differs from the areas of open space identified in the ST Recorded Plan, which are not denoted with an asterisk, and, as such, are not similarly restricted. This finding is also consistent with Pennsylvania common law, which, as discussed in detail below, provides that landowners have an easement by reference to land identified and restricted to a specific purpose in the deeds or recorded plot plans corresponding to their property.

B. Pennsylvania Case Law.

In Reed v. Reese, the Pennsylvania Supreme Court explained that “a sale of land and a conveyance by deed making reference to an unrecorded plan which plan includes streets or parks is sufficient to create an enforceable interest, or private right of use, mainly an easement, in the buyer and will normally create an irrevocable offer to dedicate such streets and parks.” 374 A.2d 665, 669 (Pa. 1976) (emphasis added). See also Cox’s Inc. v. Snodgrass, 92 A.2d 540, 541 (Pa. 1952) (explaining that “[i]t is well settled that the grantee of a lot, which is sold according to a plan of lots on which streets or alleys not previously opened or projected as a public street are plotted out by the grantor, acquires an easement over those streets and alleys as a private right of property arising out of the grant, of which he cannot be deprived without compensation[.]”) (emphasis added)).

In Potis v. Coon, the Pennsylvania Superior Court held that “[a]n easement by reference to a map or plate [sic] is not an express easement but, rather, an easement by implication.” 496 A.2d 1188, 1191-1192 (Pa. 1985) (citing McAndrews v. Spencer, 290 A.2d 258 (Pa. 1972); Rahn v. Hess, 106 A.2d 461 (Pa. 1954) (finding that a plot plan need not be recorded). The Pennsylvania Supreme Court has also drawn a distinction between recorded and unrecorded plot plans; namely, that a plot plan that is recorded operates as an offer to dedicate without regard to sale, while a plot plan that is not recorded, but which is referenced in a deed of sale, creates an irrevocable offer to dedicate, regardless of whether the plot plan itself is recorded. Reed, 374 A.2d at 669 (Pa. 1976) (explaining that “recordation was not necessary [because] . . . incorporation by reference makes the plot plan part of the deed”) (citing Vogel v. Hass, 322 A.2d 107, 109 (Pa. 1974)).

Furthermore, in Reed, the Pennsylvania Supreme Court held and clarified that a “use as a park may indeed be an easement.” 374 A.2d at 668. The Pennsylvania Supreme Court explained as follows:

Clearly an easement for a right of way limits the servient owner's use and possession to practically no use for himself, other than as a street or right of way. Likewise, the servient owner of land subject to a use as a park is practically also limited to use the area as a park. But, it still allows the servient owner possession and, at least one use, that is, as a park. Furthermore, any use the servient owner can devise that is not inconsistent with a use as a park by the dominant owner may also be engaged in.

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Id. The Pennsylvania Supreme Court also reiterated that “a reference in a recorded deed to an unrecorded plan is notice to all subsequent purchasers of the plan’s existence, puts the purchaser on inquiry, and thus, binds him to its contents.” Id. at 670. See generally Perrige v. Horning, 654 A.2d 1183, 1187 (Pa. Super 1995) (explaining that “[i]t is clear that a deed for land may incorporate by reference the conditions of a subdivision plan, and the plan condition then become enforceable in equity by the interested deed holder”).

In the matter before us, the ST Recorded Plans were recorded on December 8, 1977 and were also referenced in the deeds transferring the properties from the developer of Summit Trace to the purchasers of the same. By way of example, a true and correct copy of the Deed for Tax Parcel ID No. 22-066-109, a property within Summit Trace, is attached hereto as **Exhibit “A.”** Therefore, the area identified on the ST Recorded Plans as Open Space B, and denoted with an asterisk as a Restricted Community Facility Area, were properly dedicated by the recording of the Plan and reference to the open space in all the subsequent property deeds. As such, and as explained in Reed in Rahn, the residents/owners of the Summit Trace Development have an easement in Open Space B, the use of which is expressly reserved as a Restricted Community Facility Area.

If the Township were to approve an amended plan for the Summit Trace Development and grant waivers under the SALDO ordinance regarding the open space requirements, the Applicant would still be required to obtain consent from all the land owners in the Summit Trace Development for the Proposed Connecting Road through Open Space “B”. The Township has not been provided with any such acknowledgment or consent from any/all of the owners in Summit Trace. To the contrary and as noted above, the Township has received a notice from an attorney representing owners of land within Summit Trace objecting to the use of Open Space “B” for anything but its intended purpose.

Please feel free to contact us if you would like to discuss or if you should have any questions. Thank you for your attention to this matter.

Very truly yours,

CURTIN & HEEFNER LLP



James J. Esposito
Solicitor for Middletown Township

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cc: Middletown Township Planning Commission
Middletown Township Board of Supervisors
Stephanie Teoli Kuhls, Township Manager (*via e-mail only*)
Isaac Kessler, P.E., Township Engineer (*via e-mail only*)
Larry P. Young, P.E., Tri-State Engineers & Land Surveyors, Inc. (*via email only*)

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