

**George W. Broseman**  
Direct Dial: (610) 941-2459  
Direct Fax: (610) 684-2005  
Email: [gbroseman@kaplaw.com](mailto:gbroseman@kaplaw.com)  
[www.kaplaw.com](http://www.kaplaw.com)

May 10, 2017

**VIA EMAIL [LFENICLE@REAGERADLERPC.COM]**

Linus Fenicle, Esquire  
Reager & Adler  
2331 Market Street  
Camp Hill, PA 17011

**RE: Freedom Township, PA – Proposed Zoning Ordinance Text Amendment**

Dear Mr. Fenicle:

I am co-counsel with Bernard Yannetti, Esquire in connection with the above-captioned application for a zoning ordinance amendment to provide regulations for a Licensed Category 1 Horse Racing and Gaming Facility in Freedom Township. I am writing to you in your capacity as the Township Solicitor for Freedom Township to address two legal issues raised at the Township Planning Commission's May 3, 2017 meeting at which it discussed the proposed Zoning Ordinance text amendment ("**Text Amendment**").

In particular, one of the Planning Commission members asked whether the adoption of the proposed Text Amendment providing regulations for a Licensed Category 1 Horse Racing and Gaming Facility in the Mixed Use (MU) zoning district could be considered as spot zoning. Secondly, an audience member opposed to the Text Amendment suggested that the Supervisors would be asked to vote on whether the Township should ask the County to place a referendum on the ballot regarding horse racing in Freedom Township. For the reasons explained below, the proposed Text Amendment is not spot zoning, and the Township has no authority to approve such a referendum.

**A. Spot Zoning**

The Pennsylvania Supreme Court has defined "spot zoning" as: "a singling out of one lot or a small area for different treatment from that accorded to similar surrounding land indistinguishable from it in character, for the economic benefit of the owner of that lot or to his economic detriment." *Appeal of Mulac*, 418 Pa. 207, 210 A.2d 275 (1965); *Cleaver v. Board of Adjustment, Upper Darby Township Appeal*, 413 Pa. 583, 198 A.2d 538 (1964); *Glorioso*

*Appeal*, 413 Pa. 194, 196 A.2d 668 (1964); *Putney v. Abington Township*, 176 Pa.Super. 463, 108 A.2d 134 (1954). While the size of the land involved is a relevant factor in a spot zoning challenge, “the most important factor in an analysis of a spot zoning question is whether the rezoned land is being treated unjustifiably different from similar surrounding land.” *Schubach v. Silver*, 461 Pa. 366, 336 A.2d 328, 336 (1975).

As a general rule, a zoning text amendment that does not involve a zoning map change cannot be considered “spot zoning.” See, *Appeal of Kates*, 393 A.2d 499, 501 (1978); *Hines Nurseries, Inc. v. Plumstead Township Board of Supervisors*, 845 A.2d 918 (Pa. Cmwlth. 2004), *reversed on other grounds*, 580 Pa. 357, 861 A.2d 260 (2004). As the Commonwealth Court explained in *Appeal of Kates*:

The appellants first argue that the Ordinance permitting the expansion of nursing homes was designed for the benefit of four specific landowners and that it, therefore, constitutes unlawful spot zoning. We find no merit in this argument because the Ordinance does not Rezone any property but merely permits the expansion of existing buildings if they meet certain criteria set forth in the Ordinance. Spot zoning is defined as “ ‘ (a) singling out of . . . a small area (of land) for different treatment from that accorded to similar surrounding land . . . ” *Mulac Appeal*, 418 Pa. 207, 210, 210 A.2d 275, 277 (1965). Spot zoning is nevertheless a concept of land classification. The Ordinance in question here does nothing to alter the zoning classification of the land on which nursing homes are located and it does not, therefore, spot zone any property.

Therefore, since the proposed zoning amendment does nothing to alter the zoning classification of any land, it cannot, as a matter of law, constitute spot zoning.

Moreover, the law is also well-settled that in order to constitute “spot zoning” there must be an absence of justification for the different treatment of the land involved. *Lower Allen Citizens Action Group, Inc. v. Lower Allen Township Zoning Hearing Board*, 500 A.2d 1253 (Pa.Cmwlth. 1985); *Seeherman v. Wilkes-Barre City Zoning Hearing Board*, 400 A.2d 1334 (Pa. Cmwlth. 1979). As the Commonwealth Court explained in *Seeherman*:

The issue of “spot zoning” demands two separate inquiries: was differential treatment afforded this area and, if so, is the differential treatment justified? We must consider, among other factors, the area’s physical attributes, topography and size, the economic feasibility of a particular use, planning factors, and determine whether the rezoning is a part of a plan which will produce nondiscriminatory zoning when fully implemented. See

*Schubach v. Silver*, 461 Pa. 366, 336 A.2d 328 (1975); *Pollock v. Zoning Board of Adjustment*, *supra*. See also Ryan, Pennsylvania Zoning Law and Practice, s 3.4.11, p. 82 (1970).

In this case, providing regulations for a Licensed Category 1 Horse Racing and Gaming Facility within the Mixed Use (MU) District is justified. Under the Horse Racing Reform Act and the Gaming Control Act, it is within the exclusive jurisdiction of the Harness Racing Commission and the Gaming Commission whether or not a Licensed Category 1 Horse Racing and Gaming Facility will be permitted to be located on the property. If the Township wants to have any zoning control over the area, bulk and dimensional aspects of the Licensed Category 1 Horse Racing and Gaming Facility, it is incumbent upon the Township to adopt those regulatory controls. Indeed, if the Township does not adopt such regulations, it will have no regulations in place to regulate the area, bulk or dimensional aspects of the proposed facility. Therefore, there is ample justification for the Township to provide regulations that would apply only to the Property in the event that the Harness Racing Commission and the Gaming Commission grant the required licenses for a Licensed Category 1 Horse Racing and Gaming Facility on the Property. Based on the ample justification for the different treatment of the Property from a zoning standpoint, as a matter of law, it would not constitute spot zoning.

It is also noted that the Mixed Use District (MU) also contains text with specific regulations for golf communities, which can only be on tracts of at least 500 acres with access limited to arterial roads. These factors limit where golf communities can be located. The Township approved a very large golf course community in the Mixed Use District (MU) pursuant to those regulations. Those provisions, which have existed for several years, have not been regarded as spot zoning.

**B. The Township has no Power to Approve a Referendum**

The other legal issue that arose involves the question of whether the Township can put to a referendum vote the issue of whether the proposed Licensed Category 1 Horse Racing and Gaming Facility should be permitted. Section 66549 of the Second Class Township Code, 53 P.S. §66549, provides as follows:

- (a) In addition to the powers and duties imposed upon the township supervisors by this act or any other provision of law, the township supervisors shall have the power and duty to secure the health, safety and welfare of persons and property by adopting an ordinance prohibiting the conducting of live horse race meets by a licensed corporation at a racetrack located *within the area of fifty air miles from the center of an existing, currently licensed racetrack*, notwithstanding the provisions of the act of December 17, 1981 (P.L. 435, No. 135), known as the "Race Horse Industry Reform Act," provided that a majority of electors of the township

approve a referendum pursuant to subsection (b) prohibiting the conducting of such horse race meets within the township.

(b) The township supervisors may, or upon the petition of a number of electors of the township equal to at least twenty-five percent of the highest number of votes for a public office of the township at the last preceding municipal election shall, adopt a resolution directing the county board of elections to place a referendum question on the ballot for the primary or general election, with respect to the conducting of live horse race meets by licensed corporations within the township. The question shall be in the following form:

Shall live horse race meets conducted by licensed corporations be prohibited within the area of fifty air miles from the center of an *existing, currently licensed racetrack*?

(c) *The definitions provided for in the "Race Horse Industry Reform Act" shall apply to this section.* (emphasis supplied)

The Race Horse Industry Reform Act ("Act") defines a "racetrack" as: "[t]he physical facility where a *licensed racing entity* conducts thoroughbred or standardbred horse race meetings respectively with pari-mutuel wagering."

The Act defines a "licensed racing entity" as "[a]ny person *that has obtained a license* to conduct live thoroughbred or harness horse race meetings respectively with pari-mutuel wagering *from the commission*."

The Act defines the "Commission" as the State Horse Racing Commission.

The closest racetrack where a licensed racing entity conducts thoroughbred or standardbred horse race meetings with pari-mutuel wagering is located in Grantville, Pennsylvania, which is approximately 57 air miles from the proposed Mason Dixon Downs location in Freedom Township. Therefore, the extremely limited referendum procedure authorized by Section 66549 of the Second Class Township Code *does not allow* the Board of Supervisors of Freedom Township to adopt a resolution directing the County board of elections to place a referendum question on the ballot with respect to the conducting of live horse race meets at Mason Dixon Downs.

Linus Fenicle, Esquire  
May 10, 2017  
Page 5

---

Since these issues are likely to come up at the Board of Supervisors' meeting next week, we wanted you to have this information prior to that meeting.

Sincerely,



George W. Broseman

GWB:sl

cc: Bernard Yannetti, Esquire  
LeVan Real Estate Partnership, LP