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Via Email

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Re: Public Hearing on Wegmans Distribution Center – REZ2019-00037, Air Park Associates, L.P.

Dear Members of the Board of Supervisors of Hanover County:

I represent various citizens who reside in neighborhoods surrounding the property where the referenced Wegmans Distribution Center is proposed to be located (Wegmans Facility).

I have been advised that yesterday, April 1, 2020, the Board of Supervisors voted 4-3 to schedule the required public hearing on the referenced Wegmans Distribution Center project for April 22, 2020. My clients strongly object to the public hearing being conducted on that date or any other date during the continuation of the mandatory “stay at home” Executive Order No. 55 issued by Governor Northam on March 30, 2020, which is in full force and in effect until June 10, 2020. My clients make this request for the following reason.

As you are no doubt aware, the Attorney General of Virginia, Mark Herring, on March 20, 2020 issued an advisory opinion on how public bodies may continue to conduct business during the State of Emergency initially declared by Governor Northam on March 12, 2020 to help Virginia better respond to the threat posed by the COVID-19 virus. The Attorney General’s opinion makes several rulings that are relevant to this Board’s determination to hold a public hearing on the Wegmans project.

The Virginia Freedom of Information Act (VFOIA) declares that it “shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operation of government.” Va. Code § 2.2-3700 (B). The VFOIA creates a strong presumption that meetings of public bodies are open to the public and conducted in person.

As the Attorney General has noted, the VFOIA expressly addresses how public bodies may conduct meetings in times of emergencies. A public body may meet by electronic communication means without a quorum of the public body physically present at one location so long as (i) the Governor has declared a state of emergency in accordance with Va. Code § 44-146.17, (ii) the nature of the declared emergency makes it impractical or unsafe to assemble a quorum in a single location; and (iii) ***“the purpose of the meeting is to address the emergency.”*** Va. Code § 2.2-3708.2(A)(3) (emphasis supplied). An electronic meeting of the Board to conduct a public hearing on the Wegmans project clearly does not fall within the scope of the limited exception to conduct meetings and public hearings at a single location on the referenced zoning request under the VFOIA. Simply put such a hearing is not for the purpose of addressing the State of Emergency declared by the Governor as required.¹ Proceeding with a public hearing on a zoning matter over

¹ County Ordinance 20-06, proposed by the County Administrator on March 25, 2020 pursuant to Va. Code § 15.2-1413 purports to authorize the Board to conduct a public hearing on the Wegman matter by electronic means. Section B (2) establishing emergency procedures to ensure the continuity of county government states, however, that public hearing items may be postponed until after the local emergency related to COVID-19 has been declared to be no longer in effect unless to do so would be inconsistent with other statutory requirements. There is no statutory requirement that mandates this zoning application receive a public hearing before June 10th the date the Governor’s Executive Order is to expire. Moreover, as the Attorney General’s Opinion notes, “it is important to emphasize the limits of the authority conferred by Va. Code § 15.2-1413. Any ordinances enacted pursuant to that statute “particularly those authorizing departures from otherwise-governing state law – must be carefully limited in scope to allowing the locality to assure continuity in its government” during the emergency.

which much controversy exists, when the public is prohibited by the Governor from being physically present to petition its local government does not fall within the purpose of the statute to assure the continuity of the County's government operations. The zoning application has nothing to do with the declared emergency and the hearing should be postponed until after the emergency is revoked.

As you well know, Va. Code § 15.2-2204 (A) requires notice of a public hearing on this matter to specify "...the time and place of hearing at which persons affected may appear and present their views..." The statute embodies the fundamental due process right of citizens to be afforded by their local government "a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971). And, this due process right includes "an effective opportunity to defend [or advocate] by confronting any adverse witnesses and by presenting ... arguments and evidence orally." *Blinder, Robinson & Co. v. State Corporation Commission*, 227 Va. 24, 28, 313 S.E. 2d 652, 654 (1984). Anything less than providing the opportunity to address the Board in person on this public issue and to be present while others are speaking deprives the County's citizens of their due process rights to have a meaningful opportunity to be heard, especially on a matter that is unrelated to the State of Emergency that has caused these statutory and constitutional rights to be compromised.

The Wegmans project is a matter of intense public interest in the County. It is a complex and controversial project as evidenced by the hundreds of citizens that created a standing room only hearing at the Planning Commission on February 20th. It is not appropriate to force citizens the Hobson's choice between conforming with the Governor's executive order to "stay at home" or lose their First Amendment rights to petition their local government and to redress their grievances.

With all due respect, I urge the Board to cancel the April public hearing on this matter and postpone any public hearing and subsequent decision until such time as the State of Emergency has passed and a proper public hearing can be conducted.

Respectfully submitted,


Brian L. Buniva

CC: Dennis Walter, County Attorney
Andrew M. Condlin, Esq.