Adams County Legal Journal

Vol. 53 February 3, 2012 No. 38, pp. 270-277

IN THIS ISSUE

BECKER ET AL VS. STRABAN TWP. ET AL

This opinion is continued from the last issue (January 27, 2012).



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ADAMS COUNTY LEGAL JOURNAL (USPS 542-600)

Designated for the Publication of Court and other Legal Notices. Published weekly by Adams County Bar Association, John W. Phillips, Esq., Editor and Business Manager.

Business Office - 117 BALTIMORE ST RM 305 GETTYSBURG PA 17325-2313. Telephone: (717) 334-1553

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NOTICE OF ACTION IN MORTGAGE FORECLOSURE

IN THE COURT OF COMMON PLEAS OF ADAMS COUNTY, PENNSYLVANIA

CIVIL ACTION-LAW

COURT OF COMMON PLEAS CIVIL DIVISION ADAMS COUNTY NO. 11-SU-1377

Wells Fargo Bank, N.A.

VS.

Kristen L. Kerchner and Justin K. Kerchner

NOTICE

TO: Kristen L. Kerchner and Justin K. Kerchner

You are hereby notified that on September 20, 2011, Plaintiff, Wells Fargo Bank, N.A., filed a Mortgage Foreclosure Complaint endorsed with a Notice to Defend, against you in the Court of Common Pleas of Adams County, Pennsylvania, docketed to No. 11-SU-1377. Wherein Plaintiff seeks to foreclose on the mortgage secured on your property located at 109 West York Street, Biglerville, PA 17307, whereupon your property would be sold by the Sheriff of Adams County.

You are hereby notified to plead to the above referenced Complaint on or before 20 days from the date of this publication or a Judgment will be entered against you.

NOTICE

If you wish to defend, you must enter a written appearance personally or by attorney and file your defenses or objections in writing with the court. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you without further notice for the relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS NOTICE TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE

TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

ADAMS COUNTY COURT ADMINISTRATOR

ADAMS COUNTY COURTHOUSE GETTYSBURG, PA 17325 (717) 334-6781, EXT. 213

LAWYER REFERRAL SERVICE MIDPENN LEGAL SERVICES 128 BRECKENRIDGE STREET GETTYSBURG, PA 17325 (717) 334-7624

2/3

NOTICE OF ACTION IN MORTGAGE FORECLOSURE

IN THE COURT OF COMMON PLEAS OF ADAMS COUNTY, PENNSYLVANIA

CIVIL ACTION—LAW NO. 10-S-1378

Bank of America, N.A., P.O. Box 50070, Dallas, TX 75285-0070, Plaintiff

vs

Justin P. Wendt and Kimberly A. Becker, 376 Maple Avenue, Hanover, PA 17731, Defendants

NOTICE OF SALE OF REAL PROPERTY

TO: Justin P. Wendt and Kimberly A. Becker, 376 Maple Avenue, Hanover, PA 17731, Defendants

Your house (real estate) at 376 Maple Avenue is scheduled to be sold at the Sheriff's Sale on March 13, 2012 at 10:00 a.m. in the Adams County Courthouse, 117 Baltimore Street, Room 104, Gettysburg, PA, to enforce the court judgment of \$171,365.27, obtained by Plaintiff above (the mortgagee) against you. If the sale is postponed, the property will be relisted for the Next Available Sale.

Property Description:

ALL that certain tract of land with the improvements thereon erected, situated, lying and being in Conewago Township, Adams County, Pennsylvania, known on the Plat or General Plan of a series of lots, streets, etc. of lands of Hanover Improvement Company as Lots Nos. 9 and 10, on the south side of

Maple Avenue in Block 13, adjoining Lot No. 8 on the west, a public alley on the south, Lincoln Street on the east and Maple Avenue on the north.

Parcel No. a(08)8-88

BEING the same premises which Willis H. Messersmith, married, by indenture dated 12/23/02 and recorded 12/31/02 in the Office of the Recorder of Deeds in and for the County of Adams in Deed Book 2929, Page 18, granted and conveyed unto Chad E. Thoman.

BEING KNOWN AS: 376 Maple Avenue, Hanover, PA 17331

PROPERTY ID NO.: 08-008-0088

TITLE TO SAID PREMISES IS VESTED IN Justin P. Wendt, single man, and Kimberly A. Becker, single woman, as joint tenants with right of survivorship by deed from Chad E. Thoman, single man, dated 4/26/2007 and recorded 5/4/2007 in Deed Book 4827, Page 240.

Udren Law Offices, P.C. Attorneys for Plaintiff 111 Woodcrest Road, Suite 200 Cherry Hill, NJ 08003 856-482-6900

2/3

INCORPORATION NOTICE

NOTICE IS HEREBY GIVEN that Articles of Incorporation were filed with the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania, on December 15, 2011.

The name of the corporation is SAMUELS DENTAL ARTS P.C.

The corporation has been incorporated under the Pennsylvania Business Corporation Law of 1988.

Robert E. Campbell, Esq. Campbell & White, P.C. 112 Baltimore Street Gettysburg, PA 17325 Attornevs

2/3

BECKER ET AL VS. STRABAN TWP. ET AL

Continued from last issue (1/27/2012)

The Court will now proceed with the other three appeals and collateral issues in this case. As previously stated, Appellant argues that the issuance of the enforcement notice in case 2010-S-381 violates or ignores the instruction of the *Haller Baking* and *Latrobe* cases. Appellant argues that the ZO/CEO concluded the motel use was not in use at the time zoning was enacted and that the ZO/CEO therefore concluded that the use of a motel was abandoned in violation of *Haller Baking*. In *Haller Baking*, the Pennsylvania Supreme Court held that a use does not need to be in actual operation on the date of the adoption of a zoning ordinance permitting continuation of existing uses so long as circumstances show the owner's intent to continue that use. *Haller Baking*, 145 A. at 79. Appellant also argues that because the enforcement notice did not mention the discontinuance of use provision, no presumption was ever raised of abandonment of the motel use.

Addressing Appellant's second argument first, this Court has already determined that the enforcement notice was sufficient to meet the MPC requirements of an enforcement notice. 53 P.S. § 10616.1. The enforcement notice cited the provision that the ZO/ SEO alleged Appellant was violating, Section 140-11B (1) of the Straban Township Code of Ordinances, for operating a motel in a zoning district where the use of a motel is not permitted. Appellant wants to require more of the zoning officer than the law specifies. The statute does not require the zoning officer to contemplate and articulate all possible positions the property owner might take in response to an alleged zoning violation. The statute does require the zoning officer to cite the specific violation. In the instant matter, the zoning officer more than complied with the requirements of the statute. In fact, all the zoning officer was required to do was to state "[t]he specific violation with a description of the requirements which have not been met, citing in each instance the applicable provisions of the ordinance." 53 P.S. § 10616.1(c)(3).

Returning to the enforcement notice, it appears the zoning officer could have satisfied the requirements of subsection (c)(3) if he had only stated "[t]he property is located in the MU-2 Zoning District. The use of motel is not permitted in that zoning district" and "[t]he use of the property as a motel is a violation of section 140-11(B)(1)

of the Straban Township Code of Ordinances." ⁶² However, the zoning officer elected to provide more information. ⁶³ Appellant argues that this section of the enforcement notice violates *Haller Baking* when the zoning officer concluded that because the use did not exist at the time of the adoption of the zoning ordinance, it was improper to conclude that it was therefore abandoned.

In theory, Appellant is correct that discontinued use standing alone does not lead to the conclusion that the use has been abandoned. However, the language of the enforcement notice does not violate *Haller Baking*.

The purpose of an enforcement notice is to alert the property owner of the specific violation being alleged by the municipality, not to set forth a legal analysis of the nuances of every theory that a

Statement of Violation and Applicable Ordinance Provisions:

The property is located in the MU-2 Zoning District. The use of motel is not permitted in that zoning district. In a letter dated February 5, 2008 from Straban Township's Zoning Officer, you were informed that the property may not be used as a motel, as the prior motel was effectively abandoned years ago. There is no Certificate of Non-Conformity on file.

The letter of February 5, 2008 also detailed the reasons for the determination. "Having researched the Property, going back many years, when zoning was implemented in Straban Township on August 24, 1992, the use as a motel at that site was not permitted in the R-R District, and no certificate of nonconformity was issued. That would lead me to conclude that the motel use did not exist at that time. When the present Zoning Ordinance was adopted on December 6, 2006, the use as a motel did not exist since the property was in disrepair and not in operation. I would call your attention to Zoning Ordinance 140-26 A. "Continuation. Any nonconforming use existing on the effective date of this chapter or created by an amendment to this chapter may be continued although such use does not conform to the provisions of this chapter. Change in ownership or possession of this use or property shall not prevent the continuance of the nonconforming use" (underlining added for emphasis). The facts are that there was no use of the property as a motel at the adoption of the ordinance."

A site visit was done on October 1, 2009 and the doors of several units were knocked on. The resident of Unit 5 answered the door and stated that she was renting that unit. Although no name was given, several vehicles were photographed parked in front of this unit in the past.

The use of the property as a motel is a violation of \$140-11(B)(1) of the Straban Township Code of Ordinances.

Bd. Exhibit #1 of 12/08/09, the "Enforcement Notice."

⁶² See Bd. Exhibit #1 of 12/8/09, the "Enforcement Notice."

⁶³ The relevant section of the enforcement notice is restated here:

property owner might advance. Proof is to be presented at a subsequent hearing. Here, the zoning officer was not required to provide an abandonment analysis in the notice. The zoning officer simply added information to support the finding of a violation for operating a motel where the use is prohibited. By reciting the text of the earlier letter, the zoning officer was reminding Appellant that he was already aware of the Township's position that the use had been abandoned.

The next issue is whether the Board committed an error of law or abuse of discretion in regard to the hearings on the Enforcement Notice action and the Certificate of Non-Conformity action. Appellant argues that the two actions are separate proceedings and were never consolidated. The Township argues that the actions were consolidated at the zoning hearing level. Appellant argues that if the cases were not consolidated, the Board's use of Mr. Shultz's testimony from the denial of Certificate of Non-Conformity action to meet the Township's burden on the abandonment issue in the enforcement action was improper. The Township argues that even if the two actions were not consolidated, the Township met its burden to prove a violation and Appellant failed to prove any defenses to the violation.

A review of the transcripts from the hearings of November 23, 2009 and December 8, 2009 indicates that Appellant, the Township and the Zoning Hearing Board were in agreement that there were two separate actions on appeal before the Board. There is no indication in the transcripts that the actions were consolidated. In fact, in several instances, the parties or the Board acknowledged on the record there were two separate actions.

The first mention of consolidation came in the Zoning Hearing Board decision regarding the Enforcement Notice where the Board stated, "The zoning hearing application in effect consolidated two cases into one application. This decision, when considered with annexed decision, deals with both cases consolidated by Appellant." While it is true that Appellant used one application to appeal both decisions of the zoning officer, he consistently insisted that there were two separate actions. Because the actions were separate, it was an error for the Board to use the testimony of Mr. Shultz to find that the Township met its burden of proof regarding abandonment in the enforcement

⁶⁴ Zoning Hearing Board decision of February 9, 2010, regarding the Enforcement Notice

decision unless that testimony was incorporated into the other hearing. However, this error was not fatal to the Board's final decision.

The Board's decision to deny the appeal of the enforcement notice was appropriate because the Township met its burden of proving that Appellant was operating a motel in a zoning district where operation of a motel is not permitted, in violation of section 140-11(B)(1) of the Straban Township Code of Ordinances.

At the December 8, 2009 hearing, Mr. Coleman, the ZO/CEO, testified that he spoke with a tenant of Unit #5 of the subject property, and that he received two messages from a person who stated he was living in Unit #6. At this hearing, it was established that the subject property is located in the MU-2 zoning district, a zoning district where the use of a motel is not allowed. Section 140-11(B) (1). It was also established that no certificate of nonconformity had ever been issued for the subject property. At the same hearing on the enforcement notice, Appellant testified that he was operating a motel. Appellant chose not to present any other evidence to defend against the violation. Appellant did not give any evidence in the enforcement action hearing regarding a continuing, valid, preexisting nonconforming use status of the subject property. Because the Township met its burden to prove the violation listed in the enforcement notice, and because Appellant did not present a viable defense, the Board's decision to deny Appellant's appeal was correct and is affirmed by this Court.

It must be noted, again, that there was a significant amount of procedural confusion during the Board hearings. This confusion led to frustration between the parties and the Board. While the Township wanted Appellant to proceed first on the issue of nonconforming use and the denial of the Certificate of Non-Conformity, Appellant insisted that the Township should go first on the Enforcement Notice action because it was issued first in time. The Township wanted to proceed with the nonconforming use action because the resolution of whether the subject property was a valid preexisting nonconforming use would resolve any issue as to whether Appellant had a valid nonconformity defense to the violation of section 140-11(B)(1). Because this Court has concluded that the preexisting nonconforming use of the subject property was abandoned years prior to Appellant's purchase of the subject property, it logically follows that

any use of the subject property as a motel by Appellant, now or in the future, would be in violation of 140-11(B)(1).

The 2008 Appeals The 2008 Appeal of the "Enforcement Notice" letter

The Court will now address the appeal filed to docket 2008-S-675. Appellant appeals the April 15, 2008 decision⁶⁵ of the Zoning Hearing Board finding that the February 5, 2008 letter to Appellant was not intended to be an enforcement notice, and that this letter was not the basis for any enforcement action against Appellant. Appellant raises two issues on appeal.

Appellant first argues that the Board failed to explicitly reverse the statements of the Zoning Officer that the nonconforming, preexisting use was abandoned years ago. Appellant also argues that the Board failed to explicitly reverse the ZO/CEO's statement that he would rule against any application of the owner to register the property as a nonconforming use. Appellant argues that ZO/CEO's statements were substantive decisions. Appellant further argues that 53 P.S. § 10909.1 requires the Board to have considered and ruled on the ZO/CEO's determinations.

In relevant part, 53 P.S. § 10909.1 states:

(a) The zoning hearing board shall have exclusive jurisdiction to hear and render final adjudications in the following matters:

. . .

(3) Appeals from the determination of the zoning officer, including, but not limited to, the granting or denial of any permit, or failure to act on the application therefore, the issuance of any cease and desist order or the registration or refusal to register any nonconforming use, structure or lot.

53 P.S. § 10909.1(a)(3).

- A. The letter dated February 8, 2008, [sic] was not intended by the Zoning Officer to be an enforcement notice.
- B. The letter did include language that viewed in a literal sense suggested enforcement.
- C. The letter does note [sic] meet the requirements for an enforcement notice. The Board's Order: "The letter dated February 8, 2008, [sic] is determined not to be a basis for any enforcement action against Applicant for the reasons state above."

⁶⁵ The Board made three conclusions:

The MPC defines "Determination" as "final action by an officer, body or agency charged with the administration of any land use ordinance or applications thereunder" 53 P.S. §10107(b). "With no application pending, there could be no failure or refusal by the zoning officer" *Greene Landfill, Inc. v. Greene Twp. Zoning Hearing Bd.*, 407 A.2d 903, 905 (Pa. Commw. Ct. 1979).

The Board concluded that the ZO/CEO's letter was not intended by him to be an enforcement notice. This Court sees no reason to disturb the findings of the Board in this case. The Board did recognize that the language used in the February 5, 2008 letter suggested enforcement, and noted that it understood Appellant's concerns regarding the letter and possible enforcement action. The Board further recognized in its April 15, 2008 decision that the February 5, 2008 letter was part of an ongoing attempt by the Township to resolve the issues with Appellant amicably. Because the ZO/CEO's statements were not determinations, the Board did not violate 53 P.S. § 10909.1 when it chose not to specifically address the ZO/CEO's statements. The ZO/CEO's statement in the February 5, 2008 letter that "if an application to register the motel use at the Property as a preexisting nonconforming use were attempted, [he] would have to deny that registration" was not a substantive decision; nor was it a refusal to register a nonconforming use, as Appellant had not yet applied for a certificate of nonconforming use from the Township.

Finally, Appellant argues that the Board erred by failing to return the \$500 filing fee to him. The MPC provides:

Any filing fee paid by a party to appeal an enforcement notice to the zoning hearing board shall be returned to the appealing party by the municipality if the zoning hearing board or any court in a subsequent appeal rules in the appealing party's favor.

53 P.S. § 10616.1(e).

When the Zoning Hearing Board entered its April 15, 2008 decision, it concluded, in part, that the language in the February 5, 2008 letter, when viewed literally, suggested that the letter was an enforcement notice. It appears to this Court that Appellant's appeal of the letter was necessary in order for Appellant to obtain a determination regarding whether the letter was or was not an enforcement notice. Because of the admitted ambiguity in the letter, it was entirely

reasonable for Appellant to believe that the letter was an enforcement notice, requiring his appeal. Appellant incurred the \$500 filing fee to ascertain whether the letter was or was not an enforcement notice. Consistent with the statutory provision, this cost should not be borne by Appellant as the successful party. Accordingly, the \$500 filing fee should be returned to Appellant by the Township.

The 2008 Appeal of the Enforcement Notice regarding the sign

Finally, the Court will address the appeal filed to docket 2008-S-1274. Appellant appeals the August 8, 2008 decision of the Zoning Hearing Board denying his appeal of the Zoning Enforcement Notice which was issued on April 8, 2008 regarding a sign on the subject property. Appellant, during his ownership of the property, attached a rectangular sign to a metal pole located near the front of the property. The sign pole had been standing since at least 1979. Appellant argues that the sign structure (basically the pole) is a valid preexisting nonconforming structure. The Board found that Appellant erected a sign only when he attached the advertising face of the sign to the sign post. The Board also found that Appellant did not obtain the required permit to erect a sign, and that failure to acquire the permit was a clear violation of the Zoning Ordinance. Appellant essentially argues that the "sign" is the sign structure – including the pole, and that because the sign structure is a valid preexisting nonconforming structure, it was not a violation of the zoning ordinance to put a sign face on the pole.

Section 140-53 of the Township's zoning ordinance establishes general regulations for all signs. The zoning ordinance defines a "sign" as:

Any permanent or temporary structure, or part thereof, or any device attached, painted or represented directly or indirectly on a structure or other surface that shall display or include any letter, word, insignia, flag or representation used as, or which is in the nature of, an advertisement, announcement, visual communication or direction, or is designed to attract the eye or bring the subject to the attention of the public.

Straban Township Zoning Ordinance §140-53.

In other words, a sign is that part of the structure which attempts to display a message. The supporting pole standing alone is not a sign because the pole does not convey a message. Section 140-58 of the zoning ordinance states the permit requirement: "All permanent signs over six square feet in area shall require a permit" The zoning ordinance on nonconforming structures, Section 140-24, does not contain an abandonment provision. Instead, Section 140-24A states that "continuation" means, "any nonconforming structure existing on the effective date of this chapter or created by an amendment to this chapter may continue, although such structure does not conform to the dimensional requirements of this chapter." Straban Township Zoning Ordinance §140-24A.

Whether or not the sign qualifies as a valid preexisting nonconforming structure, a permit is required for a permanent sign over six square feet in area. Appellant does not dispute that his sign was over six square feet in area. Appellant did not acquire a permit as required by Section 140-58. Because Appellant did not acquire a permit for his sign, and because a sign permit is required to display such a sign, Appellant violated Section 140-58 of the zoning ordinance, as the Board concluded. In light of this Court's decision herein that the motel use of the subject property was abandoned years prior to the purchase of the subject property by Appellant, and that any valid preexisting, nonconforming use was therefore abandoned, it is clear that any preexisting, nonconforming use of the sign structure in question would have been abandoned as well. If Appellant wishes to erect a sign on the subject property in the future, he must follow the zoning ordinance provisions regarding signs and sign permits. The Board did not abuse its discretion or commit an error of law when it found that, per the Township's ordinance, Appellant must have a sign permit to erect a permanent sign over six square feet in area.

For the foregoing reasons, the attached Order is entered.

ORDER OF COURT

AND NOW, this 18th day of August 2011, IT IS ORDERED THAT:

- 1) Appellant's four appeals, docketed as 2008-S-675, 2008-S-1275, 2010-S-381 and 2010-S-382, are consolidated for disposition by this Court.
- 2) The four decisions of the Zoning Hearing Board of Straban Township are affirmed.
- 3) The Township shall return to Appellant the \$500 filing fee Appellant paid for his appeal to the Board of the February 5, 2008 letter from the Zoning Officer in 2008-S-675.

ESTATE NOTICES

NOTICE IS HEREBY GIVEN that in the estates of the decedents set forth below the Register of Wills has granted letters, testamentary or of administration, to the persons named. All persons having claims or demands against said estates are requested to make known the same, and all persons indebted to said estates are requested to make payment without delay to the executors or administrators or their attorneys named below.

FIRST PUBLICATION

ESTATE OF BURNELL H. GRIM a/k/a BURNELL HOKE GRIM. DEC'D

Late of Conewago Township, Adams County, Pennsylvania

Co-Executors: William S. Grim and Joseph M. Grim, c/o James T. Yingst, Esq., Guthrie, Nonemaker, Yingst & Hart, LLP, 40 York Street, Hanover, PA 17331

Attorney: James T. Yingst, Esq., Guthrie, Nonemaker, Yingst & Hart, LLP, 40 York Street, Hanover, PA 17331

ESTATE OF DORA E. HARTLAUB, DEC'D

Late of Mt. Pleasant Township, Adams County, Pennsylvania

Executor: David W. Hartlaub, 575 Storms Store Road, Gettysburg, PA 17325

Attorney: Teeter, Teeter & Teeter, 108 W. Middle St., Gettysburg, PA 17325

ESTATE OF BRENDA M. MENGES, DEC'D

Late of Hamilton Township, Adams County, Pennsylvania

Executors: Theron J. Menges, 340 Forest Drive, New Oxford, PA 17350; Lisa M. Kessel, 421 Abbottstown Street, Apt. #6, East Berlin, PA 17316

Attorney: Elinor Albright Rebert, Esq., 515 Carlisle Street, Hanover, PA 17331

ESTATE OF MARY E. MILLER a/k/a MARY ELLEN MILLER, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executor: Robert Lee Miller, c/o Keith R. Nonemaker, Esq., Guthrie, Nonemaker, Yingst & Hart, LLP, 40 York Street. Hanover. PA 17331

Attorney: Keith R. Nonemaker, Esq., Guthrie, Nonemaker, Yingst & Hart, LLP, 40 York Street, Hanover, PA 17331 ESTATE OF KEVIN M. WAREHIME a/k/a KEVIN MICHAEL WAREHIME. DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executrix: Mary K. Warehime, c/o Matthew L. Guthrie, Esq., Guthrie, Nonemaker, Yingst & Hart, LLP, 40 York Street, Hanover, PA 17331

Attorney: Matthew L. Guthrie, Esq., Guthrie, Nonemaker, Yingst & Hart, LLP, 40 York Street, Hanover, PA 17331

SECOND PUBLICATION

ESTATE OF DAVID D. HOOD, DEC'D

Late of the Borough of York Springs, Adams County, Pennsylvania

Executor: Brady G. Hood, 28 Valley Road, Shrewsbury, PA 17361

ESTATE OF DOROTHY E. SCHROEDER, DEC'D

Late of Butler Township, Adams County, Pennsylvania

Executrix: Karen A. Decker, 874 Elderwood Avenue, Tipp City, OH 45371

Attorney: Bernard A. Yannetti, Jr., Esq., Hartman & Yannetti, 126 Baltimore Street, Gettysburg, PA 17325

THIRD PUBLICATION

ESTATE OF MARION C. SLAYBAUGH, DEC'D

Late of Butler Township, Adams County, Pennsylvania

Executor: Glenn A. Slaybaugh, 960 Yellow Hill Road, Biglerville, PA 17307

ESTATE OF WALTER J. SMITH, DEC'D

Late of Reading Township, Adams County, Pennsylvania

Executor: Susan M. Wessel, c/o Sharon E. Myers, Esq., CGA Law Firm, PC, 135 North George Street, York, PA 17401

Attorney: Sharon E. Myers, Esq., CGA Law Firm, PC, 135 North George Street, York, PA 17401

ESTATE OF GLORIA A. ZIEGLER, DEC'D Late of Straban Township, Adams County. Pennsylvania

Executor: Elizabeth A. Wiles, 5 Cannon Lane, Gettysburg, PA 17325

Attorney: Teeter, Teeter & Teeter, 108 W. Middle St., Gettysburg, PA 17325