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Via E-Mail: [pmckenna@gawthrop.com](mailto:pmckenna@gawthrop.com)

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RE: Neighbors for Crebilly, LLC  
Conditional Use Application of Toll PA XVIII, L.P. for the Crebilly Farm

Dear Pat:

Based on the Board of Supervisors' incorporation of the record from the previous conditional use proceeding, please find attached the submission on behalf of Neighbors for Crebilly, LLC concerning the conditional use application of Toll PA XVIII, L.P.

Very truly yours,

LAMB MCERLANE PC

By:   
Mark P. Thompson

Enclosure

cc: (all via email)

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IN RE APPLICATION OF TOLL : WESTTOWN TOWNSHIP  
PA XVIII, L.P FOR CONDITIONAL : BOARD OF SUPERVISORS  
USE APPROVAL : CHESTER COUNTY,  
: PENNSYLVANIA

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**BRIEF OF NEIGHBORS FOR CREBILLY, LLC IN OPPOSITION TO  
CONDITIONAL USE APPLICATION OF TOLL PA XVIII, L.P.**

Neighbors for Crebilly, LLC, a party to the proceeding before the Board of Supervisors of Westtown Township, by and through its counsel, Mark P. Thompson of the firm of Lamb McErlane PC, hereby submits the instant Brief in opposition to the Conditional Use Application of Toll PA XVIII, L.P.

**I. Factual Background**

**A. The Parties**

On or about October of 2016, Applicant Toll PA XVIII, L.P., a Pennsylvania Limited Partnership, (the "Applicant") filed an application with the Township of Westtown, Chester County, Pennsylvania (the "Township") seeking conditional use approval pursuant to Section 170-900 of the Township Zoning Ordinance to permit a flexible development consisting of 319 single-family detached dwellings and townhomes, more or less.

Neighbors for Crebilly, LLC, is a duly incorporated Pennsylvania Limited Liability Corporation which consists of twenty-nine (29) property owners which adjoin the project development parcels. Neighbors for Crebilly, LLC was formed to advocate on the behalf of its member property owners. Neighbors for Crebilly, LLC was granted party status to the conditional use proceedings the Board of Supervisors at the March 29, 2017 conditional use hearing.

**B. The Property:**

The subject property in question consists of 11 parcels totaling approximately 322 acres and are located along Wilmington Pike in the Township, the same being bounded by West Pleasant Grove Road to the north, South New Street to the west and Street Road to the South. These parcels are more commonly referred to as Crebilly Farm. The parcels are owned by Crebilly Family Farm Associates, L.P., David Robinson, Laurie Robinson and David G. Robinson and more accurately are identified as Uninform Tax Parcel Numbers 67-4-30; 67-4-31; 64-4-32; 67-4-33; 67-4-33.1; 67-4-134; 67-4-29; 67-4-29.1; 67-4-29.2; 67-4-29.3 and 67-4-29.4. The parcels are located in the A/C-Agricultural/Cluster Residential and R-1 Residential Districts pursuant to the Township Zoning Ordinance and also located in the Westtown Township Agricultural Security Area and under Act 319 as an agricultural property.

The plan for Crebilly Farm submitted as part of the application is entitled "Conditional Use Subdivision Plan for Crebilly Farm Plan" prepared by ESE Consultants, Inc. and dated October 7, 2016 consisting of 45 plan sheets (the "Plan"). The Applicant submitted its application and Plan pursuant to Section 170-900 of the Township Zoning Ordinance, which permits a "flexible development."

As part of its application for a "flexible development," Section 170-1617 of the Zoning Ordinance, requires the Applicant to implement its Plan under the "Conservation Design Process". "This process is intended to show how the special features of the property relate to resource areas on adjacent lands, and how the development will properly relate to the features on the land that are most worthy of conservation." See, Zoning Ordinance § 170-1617(b). This process requires first that the applicant identify and prepare a map which accurately shows the locations of wetlands,

one-hundred year floodplains, slopes of 15% to 25% and slopes greater than 25%. These areas are defined as “primary conservation areas” per § 170-1617(c) of the Zoning Ordinance.

Important existing resources on the site, including, but not limited to, woodlands, tree lines, large specimen trees over 18 inches in trunk diameter, scenic views from inside the site, ridgelines and locations and descriptions of existing buildings and features with historical significance, if any, must be added to the plans as well. These features are labeled “secondary conservation areas” Zoning Ordinance § 170-1617C(1)(c). Section 170-1617C(2) of the Zoning Ordinance provides: “potential development areas shall not include any primary conservation areas . . . potential development areas also shall be delineated so as to minimize intrusion into secondary conservation areas.” Section 170-167C(2) further dictates that “land development activities and associated land disturbance shall not be permitted within more than 50% of the secondary conservation areas.”

The Plan proposes to utilize on-site sewage treatment facilities consistent with the Township’s Act 537 plan and also provides a traffic impact study, storm water feasibility report and historic resources inventory.

**C. The Proposed Use:**

The Applicant seeks conditional use approval for the construction of a planned residential development on the Property. The Plan provides for 317 new residential dwelling units and the retention of two pre-existing single-family detached dwelling units for a total of 319 units. Up to 37% of the 317 residential dwelling units are permitted to be townhomes. Additional improvements to the property include dedicated open space areas, parking and lighting improvements, a community clubhouse/gathering area and walking trails encompassing the entirety of the Property. Based on the topography of the Property, the Plan essentially proposes to

build the majority of the residential dwelling units between two fingers of streams located on the Property adding 50.4 acres of impervious coverage.

**D. Procedural History:**

On February 22, 2017, the Board opened the hearing on the Application and evidence was presented at hearings held on March 29, 2017, April 19, 2017, May 23, 2017, June 20, 2017, July 25, 2017, August 29, 2017, September 18, 2017, September 19, 2017 and November 27, 2017 (collectively the "Hearings"). In support of their Application, the Appellants presented the testimony of the experts Emily Stewart and Jeffrey Madden, both engineers for ESB; Paul Scott, geology expert; Fredric Eric Ebert, engineer and stormwater management expert; Robert Wise, historic preservation expert; and Nicole Kline, traffic engineer.

The Westtown Township Planning Commission, parties to the Application, presented the expert testimony of Kevin M. Matson, Westtown Township engineer; Stephen D. Dadio, P.E., a civil engineer; Albert Federico, P.E., a traffic engineer; William Malin, P.E., a stormwater management engineer; John D. Snook, a land planning expert; Michael C. Harris, a historian; and Sean Moir, a historical mapping expert. Thornbury Township presented the testimony of Frank Tavani, P.E., a traffic engineer. Neighbors of Crebilly presented the expert testimony of J. Michael Miller, a military historian and Michele C. Adams, P.E., a stormwater engineering expert.

**II. Argument**

Generally, a conditional use, such as the requested use in this instance, is a form of permitted use. *Pennridge Development Enterprises, Inc. v. Volovnik*, 624 A.2d 674 (Pa. Cmwlth. 1993). The fact that a use is permitted as a conditional use evidences a legislative decision that the particular type of use is not adverse to the public interest *per se*. *Vision Quest National Ltd. v. Board of Supervisors of Honeybrook Township*, 169 A.2d 915 (Pa. 1990). Initially, both the burden

and the duty fall upon the applicant to affirmatively prove they comply with “specific requirements” of the ordinance. A conditional use applicant must demonstrate that it is entitled to a conditional use by establishing compliance with the specific objective criteria for the use detailed in the zoning ordinance. *Bray v. Zoning Board of Adjustment*, 410 A.2d 909 (Pa. Cmwlth. 1980).

The burden then shifts to any objectors to establish that the proposed use is not, in fact, consistent with the promotion of health, safety and general welfare in the community. *Id.* The protestants must present sufficient evidence to establish that there is a high degree of probability that the use will cause substantial threat to the community. *In re: Appeal of the Cutler Group, Inc. from the Decision of the Board of Supervisors of East Vincent Township*, 880 A.2d 39 (Pa. Cmwlth. 2005). Such evidence must be more than a mere speculation of harm. *Szewczyk v. Zoning Board of Adjustment of the City of Pittsburgh*, 654 A.2d 218 (Pa. Cmwlth. 1995) (citing *Abbey v. Zoning Hearing Board of the Borough of East Stroudsburg*, 329 A.2d 912, 917 (Pa. Cmwlth. 1974)). The adverse impact upon the public interest must exceed that which might be expected in normal circumstances. *Brentwood Borough v. Cooper*, 431 A.2d 1177 (Pa. Cmwlth. 1981).

In addition to the standard for the grant of a conditional use, if the record of proceedings of the local agency demonstrate the existence of substantial evidence, a reviewing court is bound by the local agency’s findings. *In re Nevling*, 907 A.2d 672 (Pa. Cmwlth. 2006). Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Valley View Civic Assoc.*, 462 A.2d at 640; *Herr*, 625 A.2d at 167.

- A. The Board Of Supervisors, As Trustee Of The Historic And Natural Resources Of The Commonwealth Must Deny The Conditional Use Application Of Toll Brothers As Required By The Environmental Rights Act Amendment To Article 1 Of The Pennsylvania Constitution.**

Article I, Section 27 of the Pennsylvania Constitution, commonly referred to as the Environmental Rights Amendment, ascribes a fundamental constitutional right:

“The people have the 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.”

Prior to the June 20, 2017 Supreme Court opinion in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017), a three part balancing test which was highly deferential to property developer as detailed in the case of *Payne v. Kassab*, 312 A.2d 86 (Pa. Commw. 1973), was employed to determine whether the use of the Commonwealth’s public natural resources violated Article I, Section 27. However, in 2013, the Supreme Court issued its decision in *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013), in which the Court rejected the three part test of *Payne*.

The Pennsylvania Supreme Court reaffirmed and extended *Robinson* decision in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017). First, the Supreme Court held that Article I, Section 27:

“[G]rants two separate rights to the people of this Commonwealth. The first right is contained in the first sentence, which is a prohibitory clause declaring the right of citizens to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment.” *Pennsylvania Environmental Defense Foundation*, 161 A.3d at 28, (quoting *Robinson Twp.*, 83 A.3d at 951). This clause places a limitation on the state's power to act contrary to this right, and while the subject of this right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional.

“The second right reserved by Section 27, set forth in its second sentence, is the common ownership by the people, including future generations, of Pennsylvania's public natural resources.” “The third clause of Section 27 establishes a public trust, pursuant to which the natural resources are the corpus of the trust, the Commonwealth is the trustee, and the people are the named beneficiaries. *Pennsylvania Environmental Defense Foundation*, 161 A.3d at 32, (quoting *Robinson Twp.*, 83 A.3d at 955-56).

The Township's fiduciary obligations are now heightened, because its duties to protect the natural and historic resources entrusted to its stewardship have been deemed constitutional. As a result, the Township, as trustee of the environmental and historical resources of the people is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary's conduct.

The explicit terms of the trust require the government to "conserve and maintain" the corpus of the trust." *Pennsylvania Environmental Defense Foundation*, 161 A.3d at 33. The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources, ***whether these harms might result from direct state action or from the actions of private parties.***" (emphasis added). *Id.* "As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality." *Id.*

In discharging these duties, the Township must assure it is fully informed regarding the impact of development on environmental and historic resources and clearly communicate this information to Residents and other beneficiaries of the trust. *Robinson Twp.*, 83 A.3d at 983. The Township must evaluate a development's impact on Article 1, § 27 rights on a case-by-case basis and apply a constitutional analysis. *Id.*

Importantly, the Supreme Court in *Pennsylvania Environmental Defense Foundation* also declared that: "no implementing legislation is needed to enunciate these broad purposes and establish these relationships . . . we re-affirm our prior pronouncements that the public trust provisions of Section 27 are self-executing". 161 A.3d at 934. Accordingly, Article I, Section 27 extends a right in the citizens of Pennsylvania to seek the enforcement of the Government's obligations. These rights are "fundamental," entitled to the same level of protection as all other



individual rights set forth in Article 1 of the Pennsylvania Constitution, including the rights to free speech, freedom of association, and freedom of religion. *Robinson Twp.*, 83 A.3d at 960, 976 (“the Pennsylvania Constitution now places citizens’ environmental rights on par with their political rights”).<sup>1</sup>

The Township should deny conditional use approval to the Application because it violates the rights of Residents and other property owners protected by Article 1, § 27 of the Pennsylvania Constitution and the due process clause.

The Township was presented with voluminous substantial evidence showing that: (1) the Property and neighboring properties are an unusually rich repository of environmental and historic resources, including being the site of an important battlefield of the American Revolution, and; (2) a showing of extensive damage to those resources on the Property, extending to neighboring properties that will adversely affect persons and property downstream of the watercourses existing on the Property.

First, the evidence presented to the Township overwhelmingly demonstrates that the Applicant does not meet the most basic constitutional requirement that the development protect environmental and historical trust resources. Unrefuted substantial evidence in the record supports

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<sup>1</sup> Although land use decisions also implicate the property rights of landowners promoting development, *Robinson Township* held that those rights do not automatically trump the Article 1 § 27 rights of the public and neighboring property owners. 83 A.3d at 953-54 (“to achieve recognition of the environmental rights enumerated in the first clause of Section 27 as ‘inviolable’ necessarily implies that economic development cannot take place at the expense of an unreasonable degradation of the environment.”). Moreover, unlike rights under Article 1 § 27, the due process property rights are not “fundamental.” *McSwain v. Commonwealth*, 520 A.2d 527, 530 (Pa. Commw. 1987), *appeal denied sub nom. Com. Farrell v. McSwain*, 538 A.2d 1058 (Pa. 1987) (“The appellant erroneously asserts that a fundamental right is involved here: his right to hold and use property. While someone deprived of property is entitled to due process, due process is not synonymous with a fundamental right. Rights which have been deemed to be fundamental, thus triggering strict scrutiny, include privacy and freedom of speech, but do not include the right to freely hold and dispose of one’s property.”).

a finding by the Board of Supervisors that the Crebilly Farm Property is in fact a “Battlefield of the American Revolution.”

In support of such a finding, the Township Planning Commission’s historian Michael C. Harris, testified that in his opinion the Crebilly property was a “Battlefield of the American Revolution” as follows:

Q. [Mr. Thompson] Could you explain what part viewsheds play in the 18<sup>th</sup> century warfare?

A. [Mr. Harris] Yes. So modern military still conducts things called staff fights [sic]

Court Reporter: I’m sorry called?

A. Staff, like staff, S-T-A-F-F, so and they will take their current officers or officer candidates out to study 18<sup>th</sup> and 19<sup>th</sup> century an combat, at try to apply it to modern military activities. One of the things they look at is the terrain analysis, and part of that is view shed. So you know, even though actual fighting might not happen on the particular property, if they crossed that over that property, and it was swampy, or it was wooded, or it was covered in fences, or it was hilly or had fallows through it, those are all the factors that are going to affect the effectiveness of the unit when it actually gets to its destination to engage in combat. So in terms of view shed or integrity or landscaping, that is the kind of what I was getting at. Does that answer your questions?

Q. Does a view shed –they didn’t have walkie-talkies or telephones back then, so does a view shed really define the area of the battlefield?

A. It can, yes. Especially in this – well, in any cases it doesn’t matter if there is walkie-talkies or not because what you can see coming or not coming is going to affect your decision process.

Q. So the view shed that Stevens had, would he have seen the Crebilly property and properties to the east all the way to [Rt.] 202?

A. I would have to go back and look at some maps. But he definitely had a view shed of the Crebilly property. I'm not sure about all the way to [Rt.] 202. That's debatable.

Q. So was his line of sight and that view shed critical to understanding the battle?

A. Yes.

Q. From a modern day point of view?

A. Yes.

Q. Now is it your opinion that the Crebilly property is a battlefield of the American Revolution or part of it?

A. I – what is your definition of a battlefield?

Q. Action taking place, people shooting at one another.

A. Yes, because I think there is American artillery fire going into the Crebilly property?

Q. So the answer to that question is yes?

A. Yes.

(Notes of Testimony 8/29/2017, pages 1297-1300).

Furthermore, the Township Planning Commission's battlefield mapping expert, Sean Moir, testified that in his opinion the Crebilly property was a "Battlefield of the American Revolution" as follows:

Q. [Mr. Thompson] The first, the second and third wood, as it relates to von Wurmb's description, those taken directly from the –

A. [Mr. Harris] Robertson map.

Q. Archibold Robertson map?

A. Yes, yes, yes.

Q. And those woods are used in describing the movement of the Hessian troops; is that

A. That is correct.

Q. Are there are any other woods that could, those woods could possibly be other than the ones that you have described or shown on this map?

A. Not in my opinion.

Q. So that given the fact that those woods are in the location they are in would necessarily have to account for the movements of the Hessians across the Crebilly property; Is that accurate?

A. Yes that's accurate, yes.

Q. So in your opinion, just to be clear, your opinion is that those troops were on the Crebilly property correct?

A. Yes.

Q. And that shots were fired at those troops, more likely than not, on the Crebilly property?

A. That is my opinion, yes.

Q. And that those troops may have fired shots based on von Wurmb's account.

A. Correct.

Q. Now, in your opinion, is that Crebilly property part of a battle of the American Revolution?

A. I would certainly say yes.

(Notes of Testimony 8/29/2017, pages 1345-1347).

Finally, Neighbors for Crebilly's witness, Joseph M. Miller, military historian, and former Archivist for the United States Marine Corps., and expert in the modern interpretation of historical American battlefields and "Staff Rides" testified that based on the topography of the terrain on the Crebilly Farm property (Notes of Testimony 10/27/2017, pages 1560-1576). Moreover, Mr. Miller testified that the location of the battle for the "flank" of the Continental army on the Crebilly Farm and Sandy Hollow Park was the most important location on the entire Brandywine Battlefield and possibly the American Revolution. (Notes of Testimony 10/27/2017, pages 1566-1569). Based on the existence of a "defilade" or protective low area of terrain on the Crebilly Property directly

on the east side of New Street (See Exhibit NC-3), Mr. Miller testified that the Hessian Jaegers would have used this protective defilade on the Crebilly Farm Property to prepare for attacking the General Stephens' division massed on the hill located on the present day Sandy Hollow Park on the far right flank of General George Washington's troops. (Notes of Testimony 10/27/2017, pages 1569-1573). Like combat soldiers in the present day the Hessian Jaegers would have taken advantage of the terrain on the Crebilly Farm Property. To that effect, Mr. Miller testified that it would be impossible to interpret this important "flanking" maneuver if the proposed Toll development is approved and constructed. In essence the view that General George Washington would have seen would be destroyed forever. The protection of important cultural assets of the Commonwealth, and the United States of America moreover, are exactly the types of assets held in public trust that require the government to "conserve and maintain" the corpus of the trust. See *Pennsylvania Environmental Defense Foundation*, 161 A.3d at 33.

In addition the Applicant has not demonstrated a "reasonable effort to reduce the environmental incursion to a minimum," required by Article 1 § 27 as clearly outlined by the testimony of Michele C. Adams, P.E., which rises to the level of a violation of that Article under the *Pennsylvania Environmental Defense Foundation* case.

**B. The Applicant Has Failed To Present Evidence Which Demonstrates The Proposed Development Provides Adequate Stormwater Protections Required Under Section 170-2009 of The Township Zoning Ordinance.**

Section 170-2009(B)(6) of the Township Zoning Ordinance provides:

"In addition to demonstrating compliance with all standards applicable to the conditional use being requested, the site plan shall show the applicant's intentions with regard to the following . . . (e) [a]dequate handling of stormwater, in the form of a preliminary written analysis and conclusions as to anticipated methods, prepared by a registered professional engineer.

The evidence shows that the Applicant's proposed stormwater management plan for the Property fails to demonstrate adequate handling of stormwater pursuant to the Township Zoning Ordinance in several respects.

The Property contains multiple watercourses and streams, namely a tributary of Radley Run that crosses the lower southwest portion of the property. This tributary ultimately connects to the Lower Brandywine River. The Applicant's proposed development plan by its own estimation will add approximately 50.4 acres of impervious surfaces to the subject property. As a result, it is estimated that each acre of impervious surface constructed will contribute an additional three feet of additional stormwater runoff per year.

In the absence of proper stormwater management protocols this significant increase in stormwater runoff is expected to cause a massive downstream water flow increase and significant bank erosion and pollutant discharges on and into the water courses on the property. Consequently, these damages will further degrade the water quality of the watercourses which presently fall below acceptable Commonwealth quality standards. In order to address these stormwater management issues, the Applicant's Plan proposes ten (10) stormwater infiltration basins will be installed throughout the property to capture the increased stormwater flow. However, the plans provided by the Applicant are incomplete at best and what information is provided places in serious doubt whether the basins will be in fact able to perform the necessary infiltration. The data provided in support fails to address three of the proposed basins altogether. (Notes of Testimony 10/27/2017, page 1590).

Further, the percolation tests performed on several of the basins were performed at distances of ten feet or higher in elevation rather than at the bottom of the proposed basins. Based on the proposed placement of these basins, if one were to test from the bottom one would discover

the basins hit rock and would be infiltrated with water from the property's watercourses from below ground level. These factors severely impact the ability of the proposed basins to properly function in a manner necessary to handle the increased stormwater runoff of the development. Due to the fact that the Applicant has stated that stormwater volume control will be achieved through these infiltration basins, and that the proposed basins in question due to location cannot support proper infiltration, Applicant has failed to demonstrate under that is proposed plan provides for the adequate handling of stormwater pursuant to Section 170-2009.

**C. The Applicant Is Not Entitled To Approval Of The Original Submitted Project Plans In Light Of The Fact That Subsequent Alterations To Said Plans Were Required To Be Incorporated.**

If legitimate, a single reason may support denial of a land development plan or in this case a conditional use plan. *Robal Associates, Inc. v. Bd. of Supervisors of Charlestown Twp.*, 999 A.2d 630 (Pa. Cmwlth. 2010). In *Robal*, the Commonwealth Court held that the rejection of a plan may stand if validly supported by even one of several objections. *Shelbourne Square*, 794 A. 2d at 950 (quoting *Herr v. Lancaster County Planning Comm'n*, 625 A.2d 164, 168-69 (Pa. Cmwlth. 1993)). See also *Delchester Developers, L.P. v. London Grove Twp. Bd. of Supervisors*, 161 A.3d 1106 (Pa. Cmwlth. 2017) (denial of plan where compliance Township technical standards were not met).

The Commonwealth Court in *Shelbourne Square* stated that while the governing body denied the plan based on numerous other technical defects that were correctable and did not warrant outright denial of the plan, the governing body's objection to the proposed highway access constituted a legitimate, substantive planning issue that justified denial. Some cases state that the unmet requirements must be objective in order to justify outright rejection of a plan. See *Michaels Dev. Co., Inc. v. Benzinger Twp. Bd. of Supervisors*, 413 A.2d 743 (Pa. Cmwlth.

1980) (PRD ordinance provisions requiring open space contained no standards regarding location of open space area). Similarly, some cases state that the unmet requirements must be substantive, not technical. Courts agree that many drawing requirements which can be corrected easily are technical in nature and do not support outright denial of an application.<sup>2</sup> However, as determined by appellate courts, substantive reasons are sufficient to support rejection: lot area (as opposed to lot dimensions);<sup>3</sup> stormwater requirements and grading requirements necessary for stormwater management calculations;<sup>4</sup> sewage or wastewater disposal requirements;<sup>5</sup> wetlands delineations;<sup>6</sup> highway access;<sup>7</sup> steep cross-section grades at the intersection with a public street;<sup>8</sup> and, erosion and sedimentation controls.<sup>9</sup> All of these issues are present in the application before the Board of Supervisors.

The case of *Schultheis v. Board of Supervisors of Upper Bern Township, Berks County*, 727 A.2d 145 (Pa.Cmwth.1999) is instructive on when the Board may deny a plan. In *Schultheis*, a developer submitted a sketch plan for a proposed residential subdivision. The township engineer reviewed the sketch plan and issued a review letter indicating the plan was deficient under the subdivision ordinance because of the lack of soil percolation and probe tests and wetlands delineation and erosion and sedimentation controls. The township's governing body denied the

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<sup>2</sup> *Shelbourne Square Assocs., L.P. v. Bd. of Supervisors, Twp. of Exeter, Berks County*, 794 A.2d 946 (Pa. Cmwth. 2002) (mislabeling of plans, failure to use proper wording/format for land survey).

<sup>3</sup> *Herr*

<sup>4</sup> *Highway Materials, Inc. v. Bd. of Supervisors of Whitmarsh Twp.*, 974 A.2d 539 (Pa. Cmwth. 2009) (water basin in residential district and concomitant need for fence or berm).

<sup>5</sup> *Highway Materials; Kohr v. L. Windsor Twp. Bd. of Supervisors*, 910 A.2d 152 (Pa. Cmwth. 2006); *Schultheis v. Bd. of Supervisors of U. Bern Tp., Berks County*, 727 A.2d 145 (Pa. Cmwth. 1999) (soil percolation and probe tests).

<sup>6</sup> *Schultheis*.

<sup>7</sup> *Shelborne Square*.

<sup>8</sup> *Kassouf. Twp. of Scott*, 584 Pa. 219, 883 A.2d 463 (2005).

<sup>9</sup> *Schultheis*.



plan based on the deficiencies cited in the review letter. After the denial, the developer submitted additional information in an attempt to cure the deficiencies. On the developer's appeal, the trial court held the grounds for denial were relatively minor; accordingly, it remanded the matter in order to provide the developer an opportunity to correct the deficiencies. Court reversed, holding the deficiencies were substantive and, therefore, justified outright denial of the plan. The Court stated the degree of deviation from the relevant ordinance requirements was not critical where it was clear the plan did, in fact, deviate from the requirements. The Court further stated *neither case law nor the ordinance required the governing body to grant conditional approval or permit the developer to revise his plan; rather, the governing body was only obligated to review the plan as submitted. Schultheis, 727 A.2d at 149* (emphasis added). In this case, there are numerous instances where the plan, *as submitted*, does not comply with ordinance requirements. The Board should not permit wholesale amendments to the plan or allow the Applicant to essentially re-design the entire plan in order to comply with requirements in the Township Ordinances. Most notably in this case, Neighbors for Crebilly's stormwater expert, Michele C. Adams, P.E., testified and presented a report entered as Exhibit NC-5, that in her opinion, the requirements related to the conditional use for stormwater have not been met (Notes of Testimony 10/27/2017, page 1590). Taking into consideration the fact that the proposed development will add 50.4 acres of impervious coverage to the property, Ms. Adams testified that no data has been presented for proposed basins 4, 9, and 10 showing their functionality. Proposed basins 6 and 8 show high percolation tests and the bottom of proposed basin 7 is lower than the nearest test that shows it would hit rock making it non-compliant with state requirements for feasibility (Notes of Testimony 10/27/2017, page 1598-1601). Because the basins are not shown to perform their function for volume reduction or water quality improvement or even peak rate control they are not shown to

provide for adequate capacity for the amount of runoff they have been designed to control (Notes of Testimony 10/27/2017, page 1620-1622). Adding to the issue of the noncompliance of the proposed basins serving the development, the loading ratio or how much impervious area compared to area of the stormwater infiltration system is well beyond sound engineering. Ms. Adams testified that a 5-to-1 loading ratio would be an adequate design to handle the proposed impervious. Specifically Ms. Adams testified that Basin 2 has a ratio of 120-to-1 and proposed basins 1 and 4-10 also have extremely high loading ratios, which are not permitted by the Pennsylvania Department of Environmental Protection and would cause the potential for erosion and stormwater pollution downstream (Notes of Testimony 10/27/2017, page 1631-1633). Ms. Adams testified further that the Applicant's engineer failed to apply the correct "curve number" in generating its stormwater calculations for volume (Exhibit NC-5, p.9) pursuant to §144-309.D.(3) of the Township Code and utilized an "average curve number" where such use is not permitted, both instances of which will cause an underestimation of runoff generated by the development which could potentially cause health, safety and welfare issues for downstream properties (Notes of Testimony 10/27/2017, page 1634-1635).

**D. The Board of Supervisors Erred in Not Allowing Neighbors for Crebilly to Present the Testimony of Dr. Samuel Watson, Professor of Military History at the United States Military Academy at West Point**

In this case the record is incomplete because Neighbors for Crebilly was denied an opportunity to be heard fully in presenting the testimony of Dr. Samuel Watson, Professor of Military History at the United States Military Academy at West Point testifying on the importance of the Battle of the Brandywine, specifically the importance of the flanking engagement of Stephen's Division with the Hessians and his opinion on whether a portion of the battlefield located

on the Crebilly Farm Property should be preserved. See *Morris v. South Coventry Tp. Bd. of Supervisors*, 898 A.2d 1213 (Pa. Cmwlth. 2006). No party would be prejudice based on Dr. Watson testifying remotely from his office at West Point as he would been able to be seen by video feed and heard by the parties to the application as well as the Board of Supervisors who would be able to ask questions in real time.

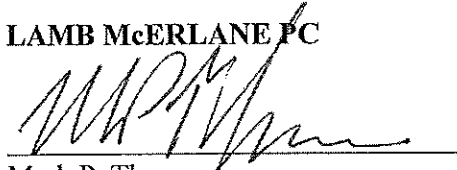
**III. CONCLUSION**

There is substantial evidence in the record that the Applicant has failed to meet its burden of proof and has failed to satisfy the standards and conditions required for conditional use in the Township Zoning Ordinance sufficient to uphold a denial of the application. Therefore, Neighbors for Crebilly, LLC requests that the Board of Supervisors of Westtown Township deny the application of Toll PA XVIII, L.P. for conditional use approval.

Respectfully submitted,

**LAMB McERLANE PC**

By:



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