

**KAPLIN STEWART MELOFF REITER & STEIN, P.C.**

By: Gregg I. Adelman, Esquire  
Attorney I.D. No. 84137  
Union Meeting Corporate Center  
910 Harvest Drive  
P.O. Box 3037  
Blue Bell, PA 19422  
(610) 941-2552

Attorneys for Applicant  
Toll PA XVIII, L.P.

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IN RE: CONDITIONAL USE APPLICATION	:	BEFORE THE BOARD OF
OF TOLL PA XVIII, L.P. PURSUANT TO	:	SUPERVISORS OF WESTTOWN
ARTICLE IX, SECTION 170-900 ET SEQ. OF	:	TOWNSHIP
THE WESTTOWN TOWNSHIP ZONING	:	
ORDINANCE FOR DEVELOPMENT OF THE	:	
CREBILLY FARM (UPI NOS. 67-4-29, 67-4-29.1,	:	
67-4-29.2, 67-4-29.3, 67-4-29.4, 67-4-30, 67-4-31,	:	
67-4-32, 67-4-33, 67-4-33.1, 67-4-134)	:	

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**TOLL PA XVIII, L.P.’S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF APPLICATION FOR CONDITIONAL USE APPROVAL OF FLEXIBLE DEVELOPMENT OF THE CREBILLY FARM**

Toll PA XVIII, L.P. (“**Toll**” or “**Applicant**”), by and through its attorneys, Kaplin Stewart Meloff Reiter & Stein, P.C., hereby submits these Proposed Findings of Fact and Conclusions of Law in support of Toll’s application (“**Application**”) pursuant to Article IX, Sections 170-900 et seq. (“**Flexible Development Regulations**”) of the Westtown Township Zoning Ordinance (“**Zoning Ordinance**”) for conditional use approval of a 319-unit (317 new, 2 existing) proposed residential flexible development (“**Proposed Development**”) of the properties bounded by Route 202, Route 926, West Pleasant Grove Road and South New Street in Westtown Township (“**Township**”), Chester County, Pennsylvania (UPI Nos. 67-4-29, 67-4-29.1, 67-4-29.2, 67-4-29.3, 67-4-29.4, 67-4-30, 67-4-31, 67-4-32, 67-4-33, 67-4-33.1 and 67-4-134) consisting of approximately 322 acres of land commonly known as the “Crebilly Farm” (collectively, the “**Property**”).

## **BACKGROUND**

### **I. Crebilly I**

The Application was Toll's second application submitted to the Township seeking approval of the Proposed Development of the Property under the Flexible Development Regulations.

On October 18, 2016, Toll submitted its first application for conditional use approval of the Proposed Development ("**First Application**" or "**Crebilly I**"). The Township Board of Supervisors ("**Board**") held ten (10) hearings on the First Application at which multiple entities were granted party status and Toll, the Township and other parties introduced testimony and exhibits in connection with the First Application ("**Prior Record**"). On December 28, 2017, the Board orally voted to deny the First Application and, on February 12, 2018, the Board issued its written decision denying the First Application ("**Denial**"). On March 6, 2018, Toll appealed the Denial to the Chester County Court of Common Pleas ("**Lower Court**"). On October 1, 2018, the Lower Court affirmed the Board's Denial ("**Lower Court Opinion**"). On October 2, 2018, Toll appealed the Lower Court Opinion to the Commonwealth Court.

On December 12, 2019, the Commonwealth Court issued its opinion in Crebilly I affirming the Lower Court Opinion in part and reversing in part. A copy of the Commonwealth Court's opinion in Crebilly I is attached at **Exhibit "A"** ("**Commonwealth Court Opinion**"). In the Commonwealth Court Opinion, the Commonwealth Court affirmed the Lower Court Opinion by holding that Toll failed to satisfy the following objective conditional use requirements:

- Failing to provide a collector road between West Pleasant Grove Road and Route 926 pursuant to Section 170-503(C)(3) of the Zoning Ordinance; and

- Failing to identify all lands visible from any adjacent public road pursuant to Section 170-905(A)(1)(m) of the Zoning Ordinance.

Toll did not appeal the Commonwealth Court Opinion.

## **II. Crebilly II**

On August 16, 2019, Toll submitted the current Application for conditional use approval of a slightly modified Proposed Development<sup>1</sup> together with conditional use site plans, a stormwater management report, a traffic impact study, a fiscal impact study, a geotechnical investigation report and sewer/water feasibility letters. The Application addressed the two (2) bases for denial of the First Application set forth in the Commonwealth Court Opinion. Specifically, the current Application includes the following:

- A collector road designed in accordance with Township road specifications connecting West Pleasant Grove Road and Route 926 (Exhibits A-47, A-65, A-68, A-69); and
- Photos of the Property visible from any adjacent public road (Exhibit A-65, Sheet 6 of 71).

In connection with the Application, the Township Board of Supervisors held hearings on: December 18, 2019, January 30, August 31, September 14, October 22, November 17, December 16, 2020, January 26, February 23, March 23, April 21, May 26, and July 12, 2021 (collectively, the “**Hearings**”). At the conclusion of the July 12, 2021 hearing, the parties agreed to submit proposed findings of fact and conclusions of law on or before August 11, 2021 and the Township

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<sup>1</sup> The Proposed Development in the current Application slightly differs from the Proposed Development in the First Application. In the current Application, the Proposed Development: added the collector road running north-south from West Pleasant Grove Road to Route 926; moved the site access on Route 926 to opposite Bridlewood Boulevard; moved the easternmost site access on West Pleasant Grove Road westward; eliminated the right-in/right-out site access on Route 202; and altered the mix of housing types (townhomes vs. single family detached) but maintained the same overall density (317 + 2 existing)(N.T. 11/17/20, pgs. 622-623).

Board of Supervisors announced they will render a written decision on the Application on or before September 27, 2021.

At the Hearings, the Board agreed to incorporate the Prior Record from the First Application into the Record for the current Application. (N.T. 1/30/20, pg. 89).

### **PROPOSED FINDINGS OF FACT**

#### **III. The Parties<sup>2</sup>**

1. Toll is the equitable owner of the Property. (N.T. 2/22/17, pg. 123, lines 14-21)(Exhibit B-10).

2. Crebilly Farm Family Associates, L.P., David M. Robinson, Laurie S. Robinson and David G. Robinson, et. al. (collectively, the “**Robinson Family**”) are the legal owners of the Property. (N.T. 2/22/17, pg. 123, lines 1-9)(Exhibit A-4).

3. The Township Planning Commission is the Township planning agency created pursuant to the Pennsylvania Municipalities Planning Code (“**MPC**”) (N.T. 2/22/17, pgs. 66-69).

4. Thornbury Township is an adjacent municipality duly formed and existing under the laws of the Commonwealth of Pennsylvania. (N.T. 2/22/17, pgs. 50-52).

5. Birmingham Township is an adjacent municipality duly formed and existing under the laws of the Commonwealth of Pennsylvania. (N.T. 2/22/17, pgs. 62-64).

6. Neighbors for Crebilly, LLC is a Pennsylvania limited liability corporation formed for the purpose of advocating on behalf of its members in favor of responsible development of the Crebilly Farm. (N.T. 2/22/17, pgs. 38-49).

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<sup>2</sup> Toll preserves and incorporates by reference all objections to party status asserted in the record of the Hearings.

7. West Chester Area School Board is the governing body of the West Chester Area School District, which is the public school district for the Township duly formed and existing under the Pennsylvania Public School Code of 1949, as amended. (N.T. 2/22/17, pgs. 60-61).

8. Thornbury Farm Trust and Estate of H.B. Spackman own the property located at 1256 Thornbury Road at the intersection of Route 926 and South New Street. (N.T. 2/22/17, pgs. 27-29).

9. Brandywine at Thornbury Homeowners Association is comprised of the property and units owners of the Brandywine at Thornbury residential development located along Bridlewood Boulevard across Route 926 from the Property in Thornbury Township. (N.T. 2/22/17, pgs. 30-31).

10. Westminster Presbyterian Church is the owner of the property located at 10 West Pleasant Grove Road adjacent to the northeastern corner of the Property. (N.T. 2/22/17, pgs. 31-32).

11. Quarry Swimming Association is the owner of the property located at 1146 South New Street across from the Property. (N.T. 2/22/17, pg. 33).

12. Radley Run III Homeowners Association is comprised of the property and unit owners of the Radley Run residential development located along Birmingham Road in Birmingham Township. (N.T. 2/22/17, pgs. 55-58).

13. West Glen Homeowners Association is comprised of the property and unit owners of the West Glen residential development located along Dalmally Drive to the east of Route 202. (N.T. 2/22/17, pgs. 58-61).

14. Arborview Homeowners Association is comprised of the property and unit owners of the Arborview residential development located along West Pleasant Grove Road across from the Property. (N.T. 3/29/17, pgs. 207-209).

15. Westtown Village, LLC is the general partner of the owner of the Westtown Village shopping center located at the northeast corner of the intersection of Routes 202 and 926 across from the Property. (N.T. 2/22/17, pg. 79).

16. Gadaletto's Seafood Market is a business tenant in the Westtown Village located at 1193 Wilmington Pike across Route 202 from the Property. (N.T. 2/22/17, pgs. 52-53).

17. Multiple individuals requested and were granted party status. (*See, N.T. generally*).

#### **IV. The Property**

18. The Property is bordered by Route 202, Route 926, West Pleasant Grove Road and South New Street. (N.T. 2/22/17, pg. 122, lines 3-16)(Exhibits A-2, A-3).

19. The Property is zoned Agricultural/Cluster Residential and R-1 Rural Suburban Residential. (N.T. 2/22/17, pg. 122, lines 17-20)(Township Zoning Map).

20. The Property is in an area designated for cluster residential use under the Township Comprehensive Plan. (Township Comprehensive Plan).

21. The Property is approximately 322 acres. (N.T. 2/22/17, pg. 122, lines 21-23)(Exhibits A-2, A-3).

22. Most of the Property is currently farmed. (N.T. 9/19/17, pg. 1393, lines 14-19).

23. The Property is located in two (2) different watersheds – Brandywine Creek Watershed and the Chester Creek Watershed, neither of which are exceptional value or high quality watersheds (N.T. 2/22/17, pgs. 182-183)(Exhibit A-13).

24. A portion of the Radley Run and the Tributary 00074 to the Radley Run traverse the Property. (Exhibits A-2, A-3, A-13).

25. There is a pond located near and along the Property's Route 926 frontage. (N.T. 2/22/17, pg. 127, lines 1-3)(Exhibits A-2, A-3).

26. There are several delineated wetlands areas on the Property. (N.T. 2/22/17, pg. 127, lines 4-11)(Exhibits A-2, A-3).

27. The 100-year floodplain area is located in the southwestern corner of the Property along the Radley Run and the pond. (Exhibits A-2, A-3).

28. The Property contains areas of steep slopes that generally lie along the watercourses. (N.T. 2/22/17, pgs. 125-126)(Exhibits A-2, A-3).

29. The most densely wooded areas on the property are in the northeastern corner of the Property along West Pleasant Grove Road and in the southwestern corner of the Property near the intersection of Route 926 and South New Street. (N.T. 2/22/17, pgs. 127-128)(Exhibits A-2, A-3).

30. There are no identifiable geological rock formations or outcroppings on the Property. (N.T. 2/22/17, pg. 127, lines 21-24)(Exhibits A-2, A-3).

31. The geology of the Property is primarily located within the Glenarm Wissahickon formation of the Piedmont Province and the soils are generally classified as silty sand or sandy loam. (Exhibit A-14).

32. The seasonal high water table soils on the Property are located along the tributary to the Radley Run. (Exhibits A-2, A-3).

33. All other existing environmental features, including existing vegetation, tree masses, tree lines, hedgerows, trees over 6" in diameter, wetland vegetation, meadow, pasture, cropland, orchard, cultivated ornamental garden areas are identified on the existing conditions plan for the Property. (N.T. 2/22/17, pgs. 127-128)(Exhibits A-2, A-3).

## V. Existing Structures on the Property

34. The Property has multiple existing structures on it including, single family homes, stables, barns, springhouses, equestrian facilities, sheds and additional accessory structures. (Exhibits A-2, A-3, A-19).

35. The farmstead on the Property located along South New Street contains the following structures: (a) David G. Robinson (Joshua and Lydia Hunt) farmhouse; (b) serpentine garage; (c) former stable; (d) springhouse residence; (e) David & Laurie Robinson house (1119 New Street); (f) corncrib; and (g) barn yard wall. (N.T. 4/19/17, pgs. 533-538)(Exhibits A-2, A-3, A-19).

36. The equestrian center located east of the New Street farmstead contains the following structures: (a) carriage house; (b) horse barn (stables); (c) blacksmith shop; (d) stud barn; (e) caretaker's house (1127 New Street); (f) block garage; (g) barn #2; and (h) farm shop. (N.T. 4/19/17, pgs. 533-538)(Exhibits A-2, A-3, A-19).

37. The farmstead on the Property located along Route 926 (Street Road) contains the following structures: (a) barn #1; (b) scale house; (c) corncrib; (d) former springhouse converted to chapel; and (e) modern single-family house. (N.T. 4/19/17, pgs. 533-538)(Exhibits A-2, A-3, A-19).

38. The eastern portion of the Property closer to Route 202 contains the following structures: (a) Darlington Tavern; (b) garage; (c) Michael Brennan house; (d) block outbuilding; and (e) J.Q. Taylor tenant house. (N.T. 4/19/17, pgs. 533-538)(Exhibits A-2, A-3, A-19).

39. The Darlington Tavern is eligible for inclusion in the National Register of Historic Places. (N.T. 4/19/17, pg. 537, lines 12-17).

40. The equestrian center nature of the Property makes it eligible for inclusion in the National Register of Historic Places as a "gentleman's farm". (N.T. 4/19/17, pg. 538, lines 9-15).



41. The Township has no historic preservation ordinance. (N.T. 9/19/17, pg. 1400, lines 8-15).

**VI. Battle of Brandywine**

42. The Property is not located within the Battle of Brandywine Battlefield National Historic Landmark. (N.T. 4/19/17, pg. 546, lines 14-24)(Exhibit A-20).

43. The southwestern corner of the Property along South New Street is located within a 1989 planning study area that recommended expansion of the Battle of Brandywine Battlefield National Historic Landmark area. (N.T. 4/19/17, pg. 546, lines 3-9, pgs. 547-548)(Exhibit A-20).

44. The Battle of Brandywine Battlefield National Historic Landmark area was not expanded into the areas recommend for inclusion under the 1989 planning study. (N.T. 4/19/17, pg. 546, lines 10-13).

45. There are no definitive accounts of any combat activity occurring on the Property during the Battle of Brandywine. (N.T. 4/19/17, pg. 550, 552; N.T. 5/23/17, pgs. 625-627; N.T. 8/29/17, pg. 1281, lines 21-24, pg. 1282, line 1, pg. 1334, lines 22-24, pg. 1335, lines 1-3).

46. It is possible that troop movements may have occurred over the far southwestern corner of the Property along South New Street prior to the main engagements of the Battle of Brandywine which occurred south of the Property. (N.T. 4/19/17, pg. 552; N.T. 5/23/17, pgs. 625-627; N.T. 8/29/17, pgs. 1279-1282, pg. 1294, lines 23-24, pg. 1295, line 1, pg. 1303)(Exhibits A-21, PC-17).

47. The Township has no historic preservation ordinance. (N.T. 9/19/17, pg. 1400, lines 8-15).

## VII. Proposed Flexible Development

### A. Conditional Use Site Plan

48. A flexible residential development is permitted by conditional use in the Agricultural/Cluster Residential and R-1 Rural Suburban Residential Zoning Districts. (N.T. 2/22/17, pg. 124, lines 2-4).

49. Toll proposes to construct a 319-unit residential development of the Property consisting of 2 existing homes, 182 new single-family homes and 135 new town/carriage houses (“**Proposed Development**”) under the Flexible Development Regulations. (N.T. 11/17/20, pg. 622; Exhibits A-47, A-65, A-68, A-69, A-72).

50. The Proposed Development will also include the construction of internal streets, utilities, stormwater management facilities, landscaping, screening, community recreation facilities and other associated development improvements. (Exhibits A-47, A-65, A-68, A-69, A-72).

51. The Proposed Development was designed in accordance with the Conservation Design process required under the Flexible Development Regulations. (N.T. 11/17/20, pgs. 625-630; Exhibits A-47, A-65, A-66A, A-66B, A-67, A-68, A-69, A-72).

52. The site design and layout of the Proposed Development considered primary and secondary conservation areas under the Flexible Development Regulations. (N.T. 11/17/20, pgs. 625-630; Exhibits A-47, A-65, A-68, A-69, A-72).<sup>3</sup>

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<sup>3</sup> Scenic views cannot be quantified for purposes of determining the permitted disturbance of secondary conservation areas on the Property under the Flexible Development Regulations. *See*, Commonwealth Court Opinion.

53. The Proposed Development does not intrude into any primary conservation areas except as permitted for regulated activities such as watercourse or wetland crossings to provide for development related aspects, including utilities and to provide ingress and egress to the Proposed Development. (N.T. 11/17/20, pgs. 625-631; Exhibits A-47, A-65, A-66A, A-66B, A-67, A-68, A-69, A-72).

54. The Proposed Development disturbs no more than 50% of the secondary conservation areas, which is the maximum disturbance permitted under the Flexible Development Regulations. (N.T. 11/17/20, pgs. 625-631; Exhibits A-47, A-65, A-66A, A-66B, A-67, A-68, A-69, A-72).

55. Single-family detached homes and townhomes are permitted forms of residential use under the Flexible Development Regulations. (N.T. 11/17/20, pgs. 635-636; Sections 170-903.A and 170-903.C of Zoning Ordinance).

56. A community clubhouse and recreation facilities are permitted accessory uses under the Flexible Development Regulations. (N.T. 11/17/20, pgs. 635-636; Section 170-903.H of Zoning Ordinance).

57. The maximum density (without any bonus) of the Proposed Development permitted under the Flexible Development Regulations is 319 dwelling units. (N.T. 11/17/20, pgs. 636-637; Exhibit A-83).

58. The Proposed Development has a net residential density of approximately 3 single family detached homes per acre, which is less than the 4 units per acre permitted under the Flexible Development Regulations. (N.T. 11/17/20, pgs. 636-637; Exhibit A-83).

59. The Proposed Development has a net residential density of approximately 7 town or carriage homes per acre, which is less than the 10 units per acre permitted under the Flexible Development Regulations. (N.T. 11/17/20, pgs. 636-637; Exhibit A-83).

60. The Proposed Development provides approximately 196 acres of open space, which is 61 percent of the gross area of the Property. (N.T. 11/17/20, pgs. 637-638; Exhibits A-47, A-65, A-68, A-69, A-72).

61. The minimum required open space under the Flexible Development Regulations is 60 percent. (N.T. 11/17/20, pgs. 637-638)(Exhibits A-47, A-65, A-68, A-69, A-72).

62. Over half of the Proposed Development's open space area is located outside of 100-year floodplain areas, wetlands and steep slopes greater than 25 percent. (N.T. 11/17/20, pgs. 641; Exhibits A-47, A-65, A-68, A-69, A-72).

63. The Proposed Development open space areas have a minimum width of 75 feet and a minimum area of half an acre, which are the minimums required under the Flexible Development Regulations. (N.T. 11/17/20, pgs. 641; Exhibits A-47, A-65, A-68, A-69, A-72).

64. The Proposed Development's open space has sufficient area available to provide up to 10 percent active recreation if required by the Township Board of Supervisors. (N.T. 11/17/20, pgs. 641-642; Exhibits A-47, A-65, A-68, A-69, A-72).

65. The Proposed Development provides sidewalks, walking trails and fitness trails connecting the residential community to the open space areas. (N.T. 11/17/20, pgs. 641-642; Exhibits A-47, A-65, A-68, A-69, A-72).

66. The total impervious coverage for the townhouse development area of the Proposed Development is approximately 34 percent. (N.T. 11/17/20, pgs. 638-639; Exhibits A-47, A-65, A-68, A-69, A-72, A-83).

67. The maximum total impervious coverage under the Flexible Development Regulations for the townhouse development area of the Proposed Development is 45 percent. (N.T. 11/17/20, pgs. 638-639; Exhibits A-47, A-65, A-68, A-69, A-72).

68. There is no maximum impervious coverage under the Flexible Development Regulations for the single-family home development area of the Proposed Development. (N.T. 11/17/20, pg. 638).

69. The homes in the Proposed Development will be equal to or less than 38 feet in height, which is the maximum permitted under the Flexible Development Regulations. (N.T. 11/17/20, pg. 639)(Exhibits A-47, A-65, A-68, A-69, A-72).

70. No row of townhomes in the Proposed Development exceeds 120 feet in any dimension and do not contain more than 5 units in a single row. (N.T. 11/17/20, pg. 639; Exhibits A-47, A-65, A-68, A-69, A-72).

71. The separation between single family detached homes in the Proposed Development is equal to or greater than 30 feet, which is the minimum required under the Flexible Development Regulations. (Exhibits A-47, A-65, A-68, A-69, A-72).

72. The separation between townhomes in the Proposed Development is equal to or greater than 60 feet, which is the minimum required under the Flexible Development Regulations. (Exhibits A-47, A-65, A-68, A-69, A-72).

73. Toll requested a modification under the Flexible Development Regulations to reduce the separation distance between townhomes from 60 feet to 30 feet. (Exhibit A-69).

74. The setback from curb for single family detached homes and townhomes in the Proposed Development is equal to or greater than 30 feet, which is the minimum required under the Flexible Development Regulations. (N.T. 11/17/20, pg. 639; Exhibits A-47, A-65, A-68, A-69, A-72).

75. The setback from right of way line of an exterior street for townhomes in the Proposed Development is equal to or greater than 100 feet, which is the minimum required under the Flexible Development Regulations. (N.T. 11/17/20, pg. 639; Exhibits A-47, A-65, A-68, A-69, A-72).

76. The setback from all perimeter property lines for single family detached homes in the Proposed Development is equal to or greater than 50 feet and for townhomes in the Proposed Development is equal to or greater than 100 feet, which are the minimums required under the Flexible Development Regulations. (N.T. 11/17/20, pg. 639; Exhibits A-47, A-65, A-68, A-69, A-72).

77. The Proposed Development provides a minimum of 2 parking spaces per dwelling unit driveway in addition to a 2-car garage for each dwelling unit. (Exhibits A-47, A-65, A-68, A-69, A-72).

78. The Flexible Development Regulations require a minimum of 2.5 off-street parking spaces for each dwelling unit. (Exhibits A-47, A-65, A-68, A-69, A-72).

79. The Proposed Development provides landscaping throughout the development, including on the lots and near the proposed units. (Exhibits A-47, A-65, A-68, A-69, A-72).

80. The Proposed Development provides screening around the perimeter of the Property (to the extent not already wooded) and to the rear of proposed homes along South New Street. (Exhibits A-47, A-65, A-68, A-69, A-72).

81. A future homeowners' association will be established for the Proposed Development that will own, operate and maintain all private improvements, including stormwater management facilities, open space areas, recreational facilities and streets (if not accepted for dedication). (Exhibit A-71A).

**B. Stormwater Management and Erosion and Sedimentation Control**

82. The Proposed Development includes stormwater basins generally located at the lower portions of the Property along the watercourses that will collect stormwater runoff conveyed off the individual lots and units into the storm sewers in the internal roadways or from overland flow. (N.T. 11/17/20, pgs. 647-657)(Exhibits A-47, A-65, A-68, A-69, A-72, A-73).

83. All stormwater basins are designed to infiltrate with a minimum infiltration capacity of half an inch per hour. (N.T. 11/17/20, pgs. 647-657)(Exhibits A-47, A-65, A-68, A-69, A-72, A-73).

84. The stormwater system for the Proposed Development will provide water quality measures and other best management practices. (N.T. 11/17/20, pgs. 647-657)(Exhibits A-47, A-65, A-68, A-69, A-72, A-73)

85. The stormwater system for the Proposed Development will be further designed, engineered and permitted during the land development process. (N.T. 11/17/20, pgs. 647-657)(Exhibits A-47, A-65, A-68, A-69, A-72, A-73).

86. The Township and the Pennsylvania Department of Environmental Protection ("DEP"), through the Chester County Conservation District, its agent, will review, approve and permit the stormwater system for the Proposed Development. (N.T. 11/17/20, pgs. 647-657).

87. As part of the land development process, Toll will be required to obtain approval of an erosion and sedimentation control plan in accordance with DEP's and the Township's regulations. (N.T. 11/17/20, pgs. 647-657).

88. The stormwater system for the Proposed Development is feasible and demonstrates the ability to provide stormwater management. (N.T. 11/17/20, pgs. 647-657; Exhibits A-47, A-65, A-68, A-69, A-72, A-73).

### **C. Accesses, Street Design and Traffic**

89. The Proposed Development proposes the following accesses: (a) a Route 926 full movement signalized access at a four-way intersection with Bridlewood Boulevard; (b) a West Pleasant Grove Road access opposite Dunvegan Road; (c) a West Pleasant Grove Road access west of Hidden Pond Way; (d) a West Pleasant Grove Road access at the Collector Road; and (e) emergency accesses to South New Street and Route 926. (N.T., 8/31/20, pgs. 228-281; Exhibits A-47, A-65, A-68, A-69, A-72, A-73).

90. All site accesses to the Proposed Development are safe and efficient and provide adequate sight distances. (N.T. 11/17/20, pgs. 647-657; Exhibits A-45A-45F, A-47, A-65, A-68, A-69, A-72, A-73, A-85, A-86, A-87, A-88, A-89, A-90, A-91)

91. The accesses to Route 926, including the traffic signal, will require approval and permits from the Pennsylvania Department of Transportation ("**PennDOT**"). (N.T. 11/17/20, pgs. 647-657).

92. PennDOT determines the required roadway and any traffic signal improvements to the Route 926/S. New Street intersection, Route 926 access opposite Bridlewood Boulevard, Route 926/Route 202 intersection, Route 202/West Pleasant Grove Road intersection and the Route 202/Stetson School/Skiles Boulevard intersection (N.T. 11/17/20, pgs. 647-657).



93. In accordance with Township Subdivision and Land Development Ordinance requirements, Toll will widen and improve the Township roadways along the Property frontages as is required. (N.T. 11/17/20, pgs. 647-657; N.T. 5/26/21, pgs. 1341-1355; Exhibits A-47, A-59, A-65, A-68, A-69, A-72, A-75, A-89).

94. There exists adequate Property road frontage area to improve the Township roadways as required under the Township Subdivision and Land Development Ordinance. (N.T. 11/17/20, pgs. 647-657; N.T. 5/26/21, pgs. 1341-1355; Exhibits A-47, A-59, A-65, A-68, A-69, A-72, A-75, A-89).

95. The Proposed Development's internal streets provide a safe, efficient roadway network that connects homes within the Proposed Development to public streets considering existing topography of the Property and minimizing the amount of cut and fill as well as disturbances to existing natural resources. (N.T. 11/17/20, pgs. 647-657; N.T. 5/26/21, pgs. 1341-1355; Exhibits A-47, A-59, A-65, A-68, A-69, A-72, A-74A-F, A-75, A-84, A-89).

#### **D. Water and Wastewater**

96. Aqua Pennsylvania will supply the Proposed Development with public water. (Exhibit A-15, A-70).

97. In accordance with the Township's Wastewater Management (Act 537) Plan, wastewater generated by the Proposed Development will be treated and disposed of via an on-site wastewater treatment plant with land application via drip disposal. (Exhibits A-60, A-61, A-62, A-63, A-64).

98. It is feasible to provide on-site wastewater treatment and drip disposal to service the wastewater generated by the Proposed Development. (N.T. 10/22/20, pgs.478-488; N.T. 10/22/20, pgs. 526-544; Exhibits A-60, A-61, A-62, A-63, A-64).

99. The proposed on-site wastewater treatment options and drip disposal are wastewater systems approved by PA DEP. (N.T. 10/22/20, pgs. 526-544; Exhibit A-63).

100. Public sewer for the Proposed Development is available and feasible if the Township Board of Supervisors amends the Township's Wastewater Management (Act 537) Plan to place the Property in the Township's public sewer service area. (N.T. 10/22/20, pgs. 526-544; Exhibit A-64).

#### **F. Township Reviews and Toll Responses**

101. The Township's professional consultants reviewed and commented upon the Application and Toll responded to the Township's review comments in writing and through testimony and evidence introduced during the Hearings. (*See*, all Notes of Testimony and Applicant's Exhibits including, Exhibits A-43A-43D; A45A-45, A71, A-71A, A-71B).

102. Toll satisfied all outstanding conditional use related Township review comments.

### **ARGUMENT**

#### **I. Legal Standard**

The Pennsylvania Municipalities Planning Code ("MPC") provides that a zoning ordinance may contain provisions for conditional uses to be allowed or denied by the governing body pursuant to public notice and hearing and recommendations by the planning agency and pursuant to express standards and criteria set forth in the zoning ordinances. *In re Thompson*, 896 A.2d 659, 670 (Pa. Cmwlth. 2006); Section 603(c)(2) of the MPC [53 P.S. §10603(c)(2)]. A conditional use is nothing more than a special exception which falls within the jurisdiction of the municipal governing body rather than a zoning hearing board. *Collier Stone Company v. ZHB for Twp of Collier*, 710 A.2d 123 (Pa. Cmwlth. 1998). As in the case of special exceptions, the use which may be established or maintained as conditional uses are prescribed by the zoning ordinance and the standards to be applied to the granting or denial thereof are set forth in the zoning

ordinance. *City Planning Commission v. Threshold, Inc.*, 12 Pa. Cmwlth. 104, 315 A.2d 311 (1974). A special exception is not an exception to the zoning ordinance, but rather a use to which the applicant is entitled provided the specific objective standards enumerated in the ordinance for the special exception are met by the applicant. *Blancett-Maddock v. ZBA*, 163 Pa. Cmwlth. 193, 640 A.2d 498, 500-501 (1994), *petition for allowance of appeal denied*, 540 Pa. 604, 655 A.2d 992 (1995).

Because the law regarding conditional use and special exceptions is virtually identical, the burden of proof standard is the same for both. *Sheetz, Inc. v. Phoenixville Borough Council*, 804 A.2d 113 (Pa. Cmwlth. 2002), *petition for allowance of appeal denied*, 573 Pa. 669, 820 A.2d 706 (2003). An applicant for conditional use has the burden to demonstrate compliance with the specific objective criteria of the zoning ordinance. *Levin v. Bd. of Supervisors of Benner Twp.*, 669 A.2d 1063 (Pa. Cmwlth. 1995), *affirmed*, 547 Pa. 161, 689 A.2d 224 (1997). Once the applicant meets the requirements, he has made out his prima facie case and the application must be granted unless the objectors present sufficient evidence that the proposed use will have a detrimental effect on the public health, safety, and welfare. *Bailey v. Upper Southampton Twp.*, 690 A.2d 1324 (Pa. Cmwlth. 1997). Where a particular use is permitted in a zoning district, it is presumed that the local governing body has already considered that such use satisfies local concerns for the general health, safety and welfare and that such use comports with the intent of the zoning ordinance. *In re Brickstone Realty Corp.*, 789 A.2d 333, 341 (Pa Cmwlth. 2001).

Objectors must introduce concrete evidence to a “high degree of probability” that the proposed use will generate an adverse impact greater than that which is normally generated by that type of use and that such impact poses a substantial threat to the health and safety of the community. *Id.* A.2d at 341-342. The evidence in opposition to a conditional use cannot consist

of mere bald assertions or personal opinions and perceptions of the effect of the conditional use on the community. *In re Appeal of the Cutler Group, Inc.*, 880 A.2d 39, 43 (Pa. Cmwlth. 2005). The degree of harm required to justify denial of the conditional use must be greater than that which normally flows from a similarly situated proposed use. *Id.*

Conditional use proceedings only involve the proposed use of the land and do not involve the particular details of the proposed development. *Schatz v. New Britain Twp. ZHBA*, 141 Pa. Cmwlth. 525, 596 A.2d 294 (1991). Zoning only regulates the use of land and not the particulars of development and construction. *Id.* An applicant cannot be required to provide specific engineering design details of its proposed development at the conditional use stage. *In re Appeal of Drumore Crossings, L.P.*, 984 A.2d 589, 596 (Pa. Cmwlth. 2009). Detailed design of the proposed development and compliance with detailed requirements of the zoning ordinance and subdivision and land development ordinance, while required for ultimate subdivision approval, are not required for conditional use approval and are beyond the limited scope of the conditional use proceeding. *In re Thompson*, A.2d at 672.

Moreover, a conditional use applicant is not required to prove consistency with a municipality's comprehensive plan. *Aldridge v. Jackson Twp.*, 983 A.2d 247, 258-259 (Pa. Cmwlth. 2009). A recommendation set forth in a comprehensive plan but not specifically legislated into the zoning ordinance cannot defeat the granting of a conditional use. *Schatz v. New Britain Twp.*, 141 Pa. Cmwlth. 525, 531, 596 A.2d 294, 297 (1991). Comprehensive plans do not have the effect of zoning ordinances but only recommend land uses which may or may not eventually be provided by a legally enforceable zoning ordinance. *FPA Corporation Appeal*, 25 Pa. Cmwlth. 221, 225, 360 A.2d 851, 854 (1976).

## **II. The Proposed Development Satisfies the Applicable Specific Standards under the Flexible Development Regulations**

The Proposed Development satisfies the applicable specific standards for a flexible residential development under Article IX, Sections 170-900 et seq. [Flexible Development Regulations] of the Zoning Ordinance. In accordance with the proposed Findings of Fact, the materials submitted with the Application and the testimony/evidence Toll introduced at the Hearings, the Proposed Development satisfies the specific Flexible Development Regulations as follows:

- The flexible development procedure is applicable to the Proposed Development and the Property's base zoning classification [§170-901, §170-902];
- The Proposed Development satisfies the applicable site plan design standards [§170-905];
- Single family detached dwellings and townhomes are permitted uses [§170-903];
- Community clubhouse and recreation facilities are permitted accessory uses [§170-903];
- The Proposed Development satisfies the applicable base and net residential density standards [§170-904];
- The Proposed Development satisfies the minimum amount of required open space [§170-904];
- The open space areas provided in the Proposed Development satisfy the applicable open space use, design, ownership and maintenance standards [§170-907];
- The housing sites in the Proposed Development satisfy the applicable specific design standards [§170-904];

- The single family detached homes and the town/carriage homes in the Proposed Development satisfy the applicable specific design requirements [§170-904];
- The single family detached homes and the town/carriage homes satisfy the applicable property line and road setbacks [§170-904];
- The town/carriage homes satisfy the 60 foot minimum building to building separation distance [§170-904];
- The requested modification to reduce the town/carriage home minimum building to building separation distance to 30 feet is a more preferred design for those dwelling units [§170-904]; and
- A community homeowners’ association will be created for the Proposed Development to own, operate and maintain common facilities [§§170-904, 170-908].

**III. The Proposed Development Satisfies the Applicable General Conditional Use Standards under the Zoning Ordinance**

The Proposed Development satisfies the applicable general conditional use standards under Article XX, Section 170-2009.D of the Zoning Ordinance.<sup>4</sup> In accordance with the proposed Findings of Fact, the materials submitted with the Application and the testimony/evidence Toll introduced at the Hearings, the Proposed Development satisfies the applicable general conditional use standards as follows:

- The Proposed Development is authorized as a conditional use under the Zoning Ordinance which deems it an appropriate use not adverse to the public health, safety and general welfare;

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<sup>4</sup> Toll is not required to prove consistency with the Township Comprehensive Plan nor is it required to provide detailed engineering or architectural designs of what is to be constructed in the Proposed Development. Therefore, those general conditional use standards are not applicable.

- The Proposed Development will consist of a harmonious group of buildings;
- The Proposed Development’s demand upon public services and facilities will be adequately accommodated; and
- The traffic generated by the Proposed Development is the normal amount of traffic to be generated by a similarly situated use and will be accommodated in a safe and efficient manner.

#### **IV. The Board of Supervisors Must Approve the Conditional Use Application**

Toll satisfied its burden of proof by demonstrating compliance with the applicable specific objective conditional use standards under the Flexible Development Regulations and the applicable general conditional use standards under the Zoning Ordinance. In Crebilly I, the Commonwealth Court determined as a matter of law there were only two conditional use standards Toll failed to satisfy: (1) providing a collector road from West Pleasant Grove Road to Route 926; and (2) supply photos of all lands visible from any adjacent public road. *See*, Commonwealth Court Opinion. The Prior Record from Crebilly I was incorporated into the Record for the current Application. Toll’s current Application satisfied the two unsatisfied conditional use standards cited by the Commonwealth Court in the Commonwealth Court Opinion by providing a collector road and including photos of all lands visible form adjacent public roads. As such, Toll’s Application now satisfies all applicable Flexible Development Regulations and conditional use standards. Therefore, the Township Board of Supervisors must approve Toll’s Application. *Bailey v. Upper Southampton Twp., supra.*

The objectors to the Application failed to introduce concrete evidence to a “high degree of probability” that the Proposed Development will generate an adverse impact greater than that which is normally generated by a similarly situated type of use and that such impact poses a

substantial threat to the health and safety of the community. *In re Brickstone Realty Corp.*, A.2d at 341-342. The degree of harm required to justify denial of the Application must be greater than that which normally flows from a similarly situated proposed use. *In re Appeal of the Cutler Group, Inc.*, A.2d at 43. The evidence in opposition to the Application cannot consist of mere bald assertions or personal opinions and perceptions of the effect of the Proposed Use on the community. *Id.* Moreover, the Application cannot be denied based upon inconsistency with the Township's Comprehensive Plan. *Schatz, supra.*

### **CONCLUSIONS OF LAW**

1. Toll has standing to file and maintain the Application.
2. The Application, including the conditional use site plan, complies with Article IX, Sections 170-900 et seq. [Flexible Development Regulations] of the Zoning Ordinance.
3. The Application, including the conditional use site plan, satisfies the applicable objective conditional use standards under Article IX, Sections 170-900 et seq. [Flexible Development Regulations] of the Zoning Ordinance.
4. The Application, including the conditional use site plan, satisfies the applicable general conditional use standards under Article XX, Section 170-2009.D of the Zoning Ordinance.
5. Objectors to the Application failed to introduce sufficient evidence demonstrating that the Proposed Development would have a detrimental effect on the public health, safety, and welfare more so than that which normally flows from a similarly situated proposed use.
6. Inconsistency with the Township's Comprehensive Plan cannot be a basis to deny the Application.



7. The requested modification under Section 170-904 of the Flexible Development Regulations to reduce the town/carriage home minimum building to building separation distance to 30 feet is a more preferred design of those dwelling units and is hereby granted.

8. The Application, including the conditional use site plan, is hereby approved pursuant to Section 170-906.A of the Flexible Development Regulations and Section 170-2009.C of the Zoning Ordinance.

9. An application for subdivision and land development approval of the Proposed Development shall be submitted on or before one (1) year from the date this decision is final and unappealable unless extended by the Township Board of Supervisors, which shall not be unreasonably withheld.

Respectfully submitted,

**KAPLIN STEWART MELOFF REITER  
& STEIN, P.C.**



By:

Gregg I. Adelman, Esquire

Dated: August 11, 2021

Attorneys for Applicant  
Toll PA XVIII, L.P.

**EXHIBIT "A"**

**COMMONWEALTH COURT OPINION**

2019 WL 6770135

Only the Westlaw citation is currently available.

THIS IS AN UNREPORTED PANEL DECISION OF THE COMMONWEALTH COURT. AS SUCH, IT MAY BE CITED FOR ITS PERSUASIVE VALUE, BUT NOT AS BINDING PRECEDENT. SEE SECTION 414 OF THE COMMONWEALTH COURT'S INTERNAL OPERATING PROCEDURES.

Commonwealth Court of Pennsylvania.

V.

IN RE: Appeal of the FEBRUARY 12, 2018 DECISION OF the **WESTTOWN** TOWNSHIP BOARD OF SUPERVISORS DENYING TOLL PA XVIII, L.P. 'S CONDITIONAL USE APPLICATION FOR A FLEXIBLE DEVELOPMENT OF **CREBILLY** FARM

Appeal of: **Toll PA XVIII, L.P.**

No. 1366 C.D. 2018

Argued: May 6, 2019

Filed: December 12, 2019

BEFORE: HONORABLE **P. KEVIN BROBSON**, Judge,  
HONORABLE **PATRICIA A. McCULLOUGH**, Judge,  
HONORABLE **MICHAEL H. WOJCIK**, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY JUDGE **WOJCIK**

\*1 Toll PA XVIII, L.P. (Toll) appeals from an order of the Court of Common Pleas of Chester County (trial court) that affirmed a decision of the **Westtown** Township Board of Supervisors (Board) denying its conditional use application (Application) for a flexible residential development. Toll contends that the Board erred by denying Toll's Application where Toll met the objective criteria under Article IX, Flexible Development Regulations (Flexible Development Regulations), §§ 170-900-170-909, of "The **Westtown** Township Zoning Ordinance of 1991" (Ordinance). For the reasons that follow, we affirm in part and reverse in part.

**I. Background**

Toll is the equitable owner of 322 acres of land located in **Westtown** Township (Township), Chester County, Pennsylvania, collectively known as "**Crebilly**

Farm" (Property).<sup>1</sup> The Property is bounded by U.S. Route 202 (also known as Wilmington Pike), PA Route 926 (also known as Street Road), West Pleasant Grove Road and South New Street. See Reproduced Record (R.R.) at 339a (site location map). Most of the Property is zoned Agricultural/Cluster Residential (A/C District), and a portion is zoned R-1 Rural Suburban Residential (R-1 District) under the Ordinance.

In October 2016, Toll submitted its Application to the

Township proposing to develop a flexible development<sup>2</sup> on the Property under the Flexible Development Regulations of the Ordinance. Specifically, Toll proposed to construct a 319unit flexible development consisting of 2 existing homes, 200 new single-family homes and 117 new town/carriage houses (Proposed Development). The Proposed Development also includes the construction of internal streets, utilities, stormwater management facilities, landscaping, screening, community recreation facilities and other associated improvements as

well as 197.15 acres of open space. Along with the Application, Toll submitted a conditional use site plan (Plan), as well as two alternate conditional use site plans, a stormwater management plan, a traffic impact study, a fiscal impact study, a geotechnical investigation report and sewer/ water feasibility letters.

The Township Planning Commission (Commission), following several public meetings, recommended conditional approval of the Application. Thereafter, the Board held several public hearings on the Application, at which the Commission, adjacent townships, the local school district, local businesses, neighboring homeowner associations, neighboring property owners and a special interest association were granted party status.

\*2 In support of its Application, Toll presented expert witnesses, who testified on land planning, stormwater management, geology, wastewater engineering, traffic engineering, historic resources and fiscal/community impacts, as well as numerous exhibits. Those opposed to the Application also presented testimony and exhibits. Based on the evidence presented, the Board made 178 findings. Of relevance here, the Board found that most of the Property is located in an area designated for cluster residential use under the Township's comprehensive plan and Ordinance. Board of Supervisors' Decision, 12/28/17, Findings of Fact (F.F.) Nos. 28, 29. The majority of the Property is farmed, though it is also used for residential purposes and improved with single-family homes, stables, barns, springhouses, equestrian facilities, sheds and additional accessory buildings. F.F. Nos. 30, 45. A flexible residential development is permitted by conditional use in the A/C and R-1 Districts. F.F. No. 54.

Despite finding that the Proposed Development is a permitted use on the Property and complies with numerous provisions of the Ordinance, the Board rejected the Application on the basis that Toll failed to: (1) construct four new separate turning lanes at the intersection of Route 926 and South New Street; (2) provide a public "collector road" running north/south through the Property between West Pleasant Grove Road and Route 926; (3) preserve "scenic views"; and (4) provide a

meaningful review of the Proposed Development's site accesses by not revising the Plan to show possible alternative site access locations.

With regard to the turning lanes, the Board found that the Proposed Development is anticipated to generate approximately 2,742 vehicle trips per weekday and 210 vehicle trips during the weekday morning peak hours and 266 vehicle trips during the weekday afternoon peak hours.

The Proposed Development will cause an increase in the overall delay at the intersection of Routes 202 and 926, which require certain improvements to mitigate traffic impacts. Independent of Toll's Proposed Development, the Pennsylvania Department of Transportation (PennDOT) contemplates the completion of certain improvements at the intersection of Routes 202 and 926. In order to mitigate the traffic impacts of the Proposed Development, Toll will provide a southbound Route 202 right-turn lane and a second eastbound Route 926 left-turn lane and eliminate the splitphasing operations of the existing signal at the intersection. In the event PennDOT does not complete the Routes 202/926 intersection improvements prior to development of the Property, Toll agrees to complete such improvements. PennDOT, at a minimum, will require Toll to provide left turn lanes at all four approaches to the intersection of Route 926/South New Street, as well as replace and upgrade all of the signal equipment and mast-arms at the intersection. Longer left turn lanes at all four approaches to the intersection of Route 926/South New Street are required. If Toll fails to provide or contribute toward the turn lanes, traffic generated from the Proposed Development will not be able to be safely and efficiently managed on the existing road network. The traffic impacts from the Proposed Development will adversely impact the traffic conditions at the intersection of Route 926/South New Street. Toll failed to mitigate such impacts. F.F. Nos. 136-140, 144, 147-149.

\*3 With regard to the collector road, the Board found that Section 170-503(C)(3) of the Ordinance requires Toll to link its road network to existing or proposed intersections or other points of controlled and/or signalized access to collector and/or arterial highways. Toll failed to adequately

provide a collector road from West Pleasant Grove Road to Route 926. F.F. Nos. 92-96. As for the scenic views, the Board found that Toll did not identify scenic views as part of its required site analysis under Conservation Design requirements set forth in Section 170-1617(C)(1)(c) of the Ordinance. The Board also found that Toll did not take into account all lands visible from any adjacent public road, measured as viewed from a height of four feet above the surface of the road looking in any direction or angle across the Property, based on winter conditions when existing vegetation offers the least obstruction of view as part of its site analysis submission as required by Section 170-905(A)(1). F.F. No. 44, 59-60.

Finally, with regard to revising the Plan to show alternative site access locations, the Board found that Toll initially proposed the following accesses for the Proposed Development: (a) a Route 202 right-in/right-out-only access; (b) a Route 926 full movement signalized access at a “T” intersection; (c) a West Pleasant Grove Road access opposite Dunvegan Road; (d) a West Pleasant Grove Road access opposite Hidden Pond Way; and (e) an emergency access from South New Street. As a result of review comments from PennDOT and the Township, Toll agreed to modify the access to the Proposed Development as follows: (a) the Route 926 signalized access would be moved opposite Bridlewood Boulevard to create a four-way intersection; and (b) the easternmost West Pleasant Grove Road Access that was originally opposite Hidden Pond Way would be located to the west in order to provide adequate sight distance without re-profiling West Pleasant Grove Road. Toll was willing to eliminate the Route 202 right-in/right-out-only access. Notwithstanding, Toll did not revise its Plan to depict the location of the relocated access intersection or Route 926/Bridlewood Boulevard access, the easternmost West Pleasant Grove Road access, or the Route 202 access. The Board found it could not fully consider the merits of the location of the access points without the benefit of a revised plan showing precisely what Toll intends to develop on the Property. The Board further found it could not determine whether the alternate access points comply with the Ordinance unless and until such

plan is submitted and reviewed by consultants. Thus, the Board voted unanimously to deny the Application. F.F. Nos. 131-135. From this decision, Toll filed a land use appeal with the trial court. Without taking additional evidence, the trial court concluded that the Board properly denied Toll's conditional use application on at least four separate grounds and affirmed. However, the trial court rejected the applicability of the “scenic views” Conservation Design requirement upon finding it was not objective. Notwithstanding, the trial court determined that Toll still failed to comply with the Conservation Design requirement to depict “all lands visible from any adjacent public road” and found that to be a valid basis for the Board's decision. Toll's appeal to this Court followed.<sup>3</sup> Appellees filed briefs in support of and in opposition to Toll's appeal.<sup>4</sup>

## II. Issues

\*4 Toll contends that the Board erred in determining that Toll failed to satisfy four separate Ordinance requirements. First, the Board erred in determining that Toll was required to construct improvements at the intersection of Route 926 and South New Street. Such improvements are controlled by PennDOT, not the Board, and are located offsite. Second, the Board erred in determining that Toll was required to construct a collector road through the Property. Third, the Board erred by denying Toll's Application based on its failure to depict “all lands visible from any adjacent public road.” Board of Supervisors' Decision at 47. The purpose of depicting such lands is to preserve scenic views from existing streets, which the trial court held is not an objective standard that requires compliance. Finally, Toll claims that the Board erred in determining that Toll is required to revise its Plan to depict alternate site access locations discussed and evaluated during the hearings on the Application. Toll maintains that it satisfied all of the applicable objective standards for conditional use and that no party demonstrated that Toll's Proposed Development would result in harm greater than that which would normally flow from

such a proposed use. Therefore, Toll asks this Court to reverse the trial court's order and approve its Application.

### III. Discussion

#### VII. A. PennDOT Intersection

Toll contends that the Board erred in requiring Toll to construct public roadway improvements, i.e., turning lanes at the intersection of Route 926 and South New Street. First, Toll argues that the turning lanes at all four approaches to the intersection are warranted under preexisting conditions without the Proposed Development ever being constructed. Toll's Proposed Development did not generate the need for improvements at this intersection. An increase in traffic at an already impaired intersection is not a basis to deny a conditional use application when the proposed use generates traffic normally generated by the type of proposed use. In order to defeat a conditional use application on this basis, there must be conclusive evidence demonstrating a high degree of probability that the proposed use will generate *abnormal* traffic patterns not normally generated by that type of proposed use or pose a substantial threat to the health and safety of the community. Such evidence was not presented here.

Second, Toll asserts that the improvements the Township seeks are offsite. Toll does not own or control the properties adjacent to the other three approaches. The Proposed Development will not take access from the Route 926/South New Street intersection. The closest proposed site access to the Proposed Development is approximately 2,500 feet to the east of the intersection. *See* R.R. at 629a.

Third, Toll maintains that the intersection is signalized and under the jurisdiction and control of PennDOT. The Board does not have the authority to regulate or dictate what improvements, if any, are required at this intersection, which is governed by PennDOT through the Highway Occupancy Permit application process.

The Pennsylvania Municipalities Planning Code<sup>5</sup> (MPC) provides that a zoning ordinance may contain “provisions for conditional uses to be allowed or denied by the governing body after recommendations by the planning agency and hearing, pursuant to express standards and criteria set forth in the zoning ordinance.” Section 603(c)(2) of the MPC, [53 P.S. § 10603\(c\)\(2\)](#). “A conditional use is nothing more than a special exception which falls within the jurisdiction of the municipal governing body rather than the zoning hearing board.” *In re Thompson*, 896 A.2d 659, 670 (Pa. Cmwlth.

2006).<sup>6</sup> “An applicant for conditional use has the burden to demonstrate compliance with the specific criteria of the ordinance.” *Id.* Once an applicant shows compliance with the specific requirements of an ordinance, it is presumed that the use is consistent with the promotion of health, safety, and general welfare. *Thompson*, 896 A.2d at 670; *In re Brickstone Realty Corp.*, 789 A.2d 333, 341-42 (Pa. Cmwlth. 2001). “The burden then shifts to objectors to prove that the proposed use is not, in fact, consistent with the promotion of health, safety, and general welfare.” *Brickstone*, 789 A.2d at 340. An application must be granted unless the objectors present “sufficient evidence that the proposed use has a detrimental effect on the public health, safety, and welfare.” *Thompson*, 896 A.2d at 670; *Brickstone*, 789 A.2d at 341-42. “[T]he degree of harm required to justify denial of the conditional use must be greater than that which normally flows from the proposed use.” *In re Cutler Group, Inc.*, 880 A.2d 39, 43 (Pa. Cmwlth. 2005).

\*5 With regard to traffic, an anticipated increase in traffic for a proposed use would not on its own serve to defeat a request for special exception or conditional use. *See Brickstone*, 789 A.2d at 341-42; *Bray v. Zoning Board of Adjustment*, 410 A.2d 909 (Pa. Cmwlth. 1980). “Moreover, an increase in traffic at or near an already dangerous intersection is not a sufficient basis for denying a special exception when the proposed use would contribute less traffic than a ‘normal use’ of the same type.” *Brickstone*, 789 A.2d at 342. Indeed, to defeat a special exception or conditional use



“on the grounds of traffic conditions, there must be a high probability that the proposed use will generate traffic patterns not normally generated by that type of use and that such ‘abnormal’ traffic will pose a substantial threat to the health and safety of the community.” *Id.*

Section 170-2009(D) of the Ordinance sets the standards for conditional use approval. Of relevance here, Section 170-2009(D)(1)(h) provides:

The burden of proof shall be upon the applicant to prove to the satisfaction of the Board ..., by credible evidence, that the use will not result in or substantially add to a significant traffic hazard or significant traffic congestion. The peak traffic generated by the development shall be accommodated in a safe and efficient manner. Such analysis shall consider any improvements to streets that the applicant is committed to complete or fund.

Here, to show compliance with Section 170-2009(D)(1)(h) of the Ordinance, Toll bore the burden of proving, to the satisfaction of the Board, by credible evidence, “that the use will not result in or substantially add to a significant traffic hazard or significant traffic congestion.” To that end, Toll presented the testimony of Nicole R. Kline, P.E., Senior Project Manager for McMahan Associates, who was accepted as an expert in traffic engineering. Kline testified that the left turn lanes at all four approaches were warranted under existing conditions. Because the traffic congestion is preexisting, Kline maintained Toll should not bear the responsibility of making the improvements. However, the Board rejected Kline's testimony as not credible as it relates to the traffic impact from the Proposed Development based on inconsistencies between her testimony and the traffic impact study that she prepared and her reticence in response to questions regarding impacts to the South New Street intersection. Board of Supervisors' Decision, at 46-47. Instead, the Board relied upon the Township's traffic engineering expert, Albert P. Federico, P.E., Senior Project Manager for Kimley Horn. Federico testified that the Proposed Development as currently designed would necessitate left turn lanes at all four approaches to the South New Street Intersection longer than those already

warranted under existing conditions. He testified that “if [Toll did] not provide the left turn lanes or contribute toward the turn lanes that the traffic generated from the [Proposed] [D]evelopment [would] not be able to be safely and efficiently managed on the existing road network as modified or upgraded by [Toll].” R.R. at 2229a. The Board credited Federico's testimony and found that the traffic impacts from the Proposed Development would adversely impact the traffic conditions at the South New Street Intersection, creating a traffic hazard and adding to significant traffic congestion. F.F. No. 148.

Although the significant traffic congestion along Route 202 corridor is preexisting, the Board credited Federico's testimony that the Proposed Development would substantially contribute to that congestion and pose a threat to the health and safety of the community. F.F. No. 148. Upon review, Toll did not carry its burden of proving that its Proposed Development would not result in or substantially add to a significant traffic hazard or significant traffic congestion. As Toll did not satisfy its initial burden, the burden never shifted to the objecting parties to prove that the proposed use is contrary to the health, safety and general welfare.

\*6 As to whether Toll was required to mitigate the traffic impacts of its Proposed Development by constructing four turn lanes at the intersection of Route 926 and South New Street, Section 170-2009(B)(1) of the Ordinance provides that “[i]t shall be the burden of the applicant to demonstrate compliance with the standards for conditional use contained in this section and with any other relevant stipulations of this chapter, and to indicate means by which potential impacts from the proposed use will be mitigated.”

Toll argues that the Board cannot compel such improvements because this intersection is “offsite.”<sup>7</sup> Toll claims that

Section 503-A(b) of the MPC,<sup>8</sup> prohibits the Township from requiring “offsite” road improvements. As to whether the road improvements are offsite or onsite, Section 502-A of the

MPC,<sup>9</sup> defines “onsite improvements” as: “all improvements constructed on the applicant's

property, or the improvement constructed on the property abutting the applicant's property necessary for the ingress or egress to the applicant's property.”

According to Toll, the improvement must be on the Property or abut the Property and be necessary for the ingress or egress for the road improvement to be considered “onsite.” As Toll points out, only one of the four new turning lanes abuts Toll's Property, and they are not necessary for the ingress or egress to the Proposed Development because other access is contemplated.

However, as the Board points out, Toll's reliance on the MPC is misplaced in the context of a conditional use approval. Section 503-A of the MPC specifically pertains to land development or subdivision approval, providing:

*No municipality shall have the power to require as a condition for approval of a land development or subdivision application the construction, dedication or payment of any offsite improvements or capital expenditures of any nature whatsoever or impose any contribution in lieu thereof, exaction fee, or any connection, tapping or similar fee except as may be specifically authorized under this act.*

53 P.S. § 10503-A (emphasis added). This provision is inapplicable in the context of a conditional use application. *See Borough of Hummelstown v. Borough of Hummelstown Zoning Hearing Board* (Pa. Cmwlth., No. 2067 C.D. 2012, filed August 1, 2013) (holding that this provision pertains to a land development or subdivision application not a request for a special exception to which appropriate conditions can be attached).<sup>10</sup>

Regardless of whether the proposed accesses and improvements are onsite or offsite, Toll persuasively argues that the Board cannot compel such improvements because the intersection is controlled by PennDOT. Indeed, design and improvement of the four turning lanes fall under the jurisdiction of PennDOT as part of the Highway Occupancy Permit application process. *See* Sections 408 and 420 of the State Highway Law.<sup>11</sup> As Federico testified, PennDOT would have “jurisdictional authority over the design of the turn lanes.” R.R. at 2235a; *see* R.R. at 1289a

(“The proposed accesses and improvements along [Routes] 202 and ... 926 ... will require PennDOT approval.”). The Township may condition approval on Toll obtaining a Highway Occupancy Permit with PennDOT, *see Smithfield v. Kessler*, 882 A.2d 17, 22 (Pa. Cmwlth. 2005); *CACO Three, Inc. v. Board of Supervisors of Huntingdon Township*, 845 A.2d 991, 998 (Pa. Cmwlth. 2004); however, the Township cannot deny Toll's Application on the basis that its Plan did not depict changes to PennDOT-controlled roadways. Therefore, we reverse on this claim.

### **B. Collector Road**

\*7 Next, Toll argues that the Ordinance does not require it to construct a collector road through the middle of the Property to address existing regional traffic congestion on Route 202. The Township's Growth Management Plan, which serves as its comprehensive plan, contains general goals, including working with PennDOT and developers to continually increase traffic safety and address congestion at Routes 202 and 926. According to the Growth Management Plan, which is 17 years old, if the Property is developed, a new road should be required running parallel to Route 202. The Plan further suggested that this “road link” be constructed to encourage persons who wish to turn westward from southbound Route 202 to take an alternate route. Thus, the goal was to alleviate existing traffic. Toll argues that the “road link” or “collector road” is unrelated to its Proposed Development. The Board improperly imposed upon Toll the Growth Management Plan's general goal of requiring a collector road in order to alleviate existing regional traffic congestion. Toll maintains that a conditional use applicant is not required to prove consistency with the municipality's comprehensive plan.<sup>12</sup> Toll contends that construction of a collector road is not required by the Ordinance. According to Toll, flexible developments are governed by Flexible Development Regulations and are not subject to the general provisions contained in Section 170-503(C) of the Ordinance. The Flexible Development Regulations do not require



a collector road. Even assuming such requirements applied, there are no existing collector roads on the adjacent properties to connect to and a collector road is not needed to provide reasonable access to the Proposed Development. Thus, Toll's failure to provide a collector road through its Property is not a valid basis for denial of its application. Toll contends that the Board's attempt to address regional existing traffic congestion on the "back" of a private property owner is tantamount to an unlawful taking without compensation. "[A]n applicant seeking conditional use approval must prove compliance with both the use-specific and general conditional use standards and criteria explicitly set forth in the applicable zoning ordinance." *In re AMA/American Marketing Association, Inc.*, 142 A.3d 923, 932 (Pa. Cmwlth. 2016). Applications for flexible development in the Township are governed by the Flexible Development Regulations, §§ 170-900-170-909 of the Ordinance. Section 170-902 of the Ordinance provides that the Flexible Development Regulations' procedure may be applied in the A/C and R-1 Districts when approved by the Board as a conditional use.

In addition, the conditional use design standards found in the A/C District (Section 170-503) and the R-1 District (Section 170-603) also apply to an application for flexible development, unless the flexible development procedures "exceed" or "address matters not covered by" the standard design criteria in the A/C and R-1 Districts. Sections 170-503(B) and 170-603(B) of the Ordinance. Section 170-503(A) of the Ordinance governs design standards for "all uses permitted by right, special exception and *conditional use in the A/C District.*" (Emphasis added.) Section 170-503(A)(7) of the Ordinance requires compliance with access and traffic control as required by Sections 170-503(C) and 170-1510 of the Ordinance.

Section 170-503(C) provides, that as a condition for approval, an applicant must "prove to the satisfaction of the Board ... that the proposed use or development will provide safe and efficient vehicular ... traffic access, circulation and control" consistent with six requirements, including the development of collector roads. Specifically,

Section 170-503(C)(1)-(3) of the Ordinance requires that an applicant seeking the Board's approval of a proposed development to establish:

(1) Traffic access shall be fully coordinated *with adjacent existing and future development*, including but not limited to providing and promoting appropriate traffic access to/ from adjacent properties.

\*8 (2) Traffic access to use(s) within any development site shall be provided by a fully developed internal network of local roads or private drives, paths and *trails which also shall link any proposed use or development to existing or proposed intersections or other points of controlled and/or signalized access to collector and/or arterial highway(s).*

(3) *Continuous collector street(s) and trail(s) shall be developed as part of the subject use or development to provide internal through connection(s) between existing collector and/or arterial streets and trail(s), as applicable, and as required by the Board ... to provide reasonable access to the subject use or development.* (Examples may include but are not limited to: a through collector street connecting the intersection of Skiles Boulevard and U.S. Route 202 with West Pleasant Grove Road and PA Route

926); a through collector street connecting Walnut Hill/ Shady Grove Roads to **Westtown** Road; and a through collector street connection to PA Routes 352 and 926.) (Emphasis added.) Section 170-1510 of the Ordinance provides criteria in order to minimize traffic congestion and hazard, control street access and encourage the orderly development of street or highway frontage, but does not require construction of a collector road. Section 170-201 of the Ordinance defines "collector street" as:

A street designed and located to provide means of access to traffic off local streets and to provide access for through traffic between

residential neighborhoods and districts within the Township to major streets and/or a street used for access to nonresidential properties, i.e., commercial, industrial, professional, etc.

Similarly, Section 170-603(A) of the Ordinance governs design standards for “*all* uses permitted by right, special exception and *conditional use in the R-1 District.*” (Emphasis added.) Section 170-603(A)(4) of the Ordinance merely requires compliance with access and traffic control as required by Section 170-1510.

Toll argues that the above standards do not apply to its Proposed Development because the flexible development procedures set forth in Flexible Development Regulations of the Ordinance solely govern flexible developments. However, Sections 170-503(B) and 170-603(B) expressly provide that the flexible development procedures govern only “where those standards exceed or address matters not covered by” Sections 170-503 and 170-603, respectively. The Flexible Development Regulations contain only one passage referring to collector roads requiring the designation of the type of street (arterial, collector, or local depending upon its function). Section 170-905(B)(1) of the Ordinance. Therefore, the flexible development procedures do not exceed or address matters covered by the general design standards. Where a design standard requirement is not specifically addressed by the Flexible Development Regulations, the design standards of Section 170-503(A) apply to Toll's Application, more specifically, the access and traffic control provisions of Section 170-503(C), because Toll is seeking a conditional use in the A/C District. **IX.** Toll's Plan failed to provide a “continuous collector street” from West Pleasant Grove Road to Route 926 as required by Section 170-503(C) (3) of the Ordinance.

\*9 Toll claims that compliance with this provision is not required or even possible because there is no existing collector street on the adjacent property located to the north of West Pleasant Grove Road upon which to connect. As the Board recognized, due to site constraints, it is not likely that the collector road on the north side of West Pleasant Grove Road could align exactly to continue straight south to Route 926. However, the definition of “collector street” does not require

a direct link to a collector street. Moreover, Section 170-503(C)(1) provides, with emphasis added, that “[t]raffic access shall be fully coordinated *with adjacent existing and future development ....*” Federico did not testify that the requirements for a collector street could not be met in this case, and Toll did not offer any evidence to that effect. To accept Toll's position would inhibit the development of any collector roads within the Township and ignore future development. The Board did not err in concluding that a collector road will provide a reasonable internal through connection between West Pleasant Grove Road and Route 926, running parallel to and serving as an alternate for a small portion of Route 202.

As for Toll's argument that a collector road is not necessary because its Plan proposes other means of accessing the Property, Section 170-503(C)(3) of the Ordinance requires “reasonable access” to a development. Insofar as Toll argues that such a requirement is the equivalent to an unlawful taking, Toll did not challenge the substantive validity of the Ordinance or present the issue to the Board for consideration. Consequently, Toll did not preserve this issue for review. *See Piccolella v. Lycoming County Zoning Hearing Board, 984 A.2d 1046, 1060 n.4 (Pa. Cmwlth. 2009).* Upon review, the Board did not err or abuse its discretion by denying Toll's conditional use application for failure to provide a collector road.

### **C. Scenic View**

Next, Toll argues that the Board and trial court wrongfully denied its Application on the basis that it failed to comply with the Ordinance's Conservation Design process by omitting visible land data. The Board denied Toll's Application, in part, for its failure to account for “scenic views.” As the trial court properly held, the term “scenic view” is not an objective standard. Nevertheless, the trial court upheld the Board's determination that Toll failed to depict “all lands visible from any adjacent public road” as required under Section 170-905(A)(1)(m) of the Ordinance. Toll contends that, because it was not required to

preserve “scenic views” from existing streets, there is no valid basis to require Toll to analyze “all lands visible from any adjacent public road.” In addition, Toll also maintains that Section 170-905(A)(1) (m) directly conflicts with the screening requirements under Sections 170-905(G) and 170-1508 of the Ordinance. Further, Toll argues that the Township's Zoning Officer determined that the Application was complete without requiring Toll to separately depict “all lands visible from any adjacent public road,” *see* R.R. at 1740a-42a, and the Board is bound by this determination of completeness.

A flexible development must comply with the Conservation Design criteria of Section 170-1617 of the Ordinance. In addition, it must comply with the flexible design standards of Section 170-905(A) of the Ordinance. Pursuant to Section 170-905(A)(1) of the Ordinance, an applicant seeking conditional use approval for a flexible development must prepare a site analysis that identifies the following 13 items, with emphasis added:

(a) Degree of slope, in the following ranges: less than 15%, as measured at two-foot contour intervals; 15%-25% and greater than 25%, as measured at five-foot contour intervals.

(b) Areas subject to floodplain regulations, including floodway, flood-fringe, and approximated floodplain areas, as delineated by the Flood Insurance Study for **Westtown** Township prepared by the U.S. Department of Housing and Urban Development and the Federal Insurance Administration. [Amended 9-5-2017 by Ord. No. 2017-3]

(c) Water bodies and watercourses, both perennial and seasonal.

\*10 (d) Drainage basin and subbasins.

(e) Wetlands, as defined by this chapter.

(f) Generalized soil types as designated in the Soil Survey of Chester and Delaware Counties (USDA, 1963).

(g) Generalized geological characteristics, including rock formation type(s).

(h) Existing vegetation, denoted as to type, including treemasses, treelines, and hedgerows; individual freestanding trees over six inches [diameter at breast height]; wetland vegetation; meadow, pasture, or cropland; orchard; cultivated and ornamental garden areas; etc.

(i) Existing structures and other improvements.

(j) Historic resources, including structures, ruins, sites, traces, and relationship to the bounds of any National Register historic district.

(k) Existing paths and trails.

(l) Scenic views.

(m) *All lands visible from any adjacent public road. Visibility shall be measured as viewed from a height of four feet above the surface of the road looking in any direction or angle across the subject property, and shall be based on winter conditions (whether actual or estimated at the time of inventory) when existing vegetation offers the least obstruction of view. Areas predominantly obscured from view may be excluded from inventory of visible lands subject to Township approval.*

Section 170-200 of the Ordinance defines “view” as the “relative ability to see a given object from a designated location.”

While “scenic views,” as the trial court determined, is wholly subjective, identification of “all lands visible from any adjacent public road,” is not. It is an objective measure seeking an

inventory of what land is visible from the road, not whether the view is “scenic.” Obscured views may be excluded. Section 170-905(A)(1)(m) of the Ordinance. Identifying visible views is the counterpart to identifying vegetation, such as treelines and hedgerows. *See* Section 170-905(A)(1)(h) of the Ordinance. Toll failed to identify any lands visible from the adjacent public roads.

Contrary to Toll's assertions, the identification of all lands visible from any adjacent public road does not conflict with the Ordinance's screening requirements. Section 170-905(A) of the Ordinance provides considerations for the Board in granting a conditional use application by describing conditions that exist *prior to* development. Conversely, Section 170-1508 addresses the requirement of providing and continually maintaining a visual barrier or landscape screen *post* development.

Toll also relies on the Township's Zoning Officer's determination that Toll's resubmitted Application was “complete” without requiring Toll to separately depict “all lands visible from any adjacent public road.” Section 170-2009(C)(1) of the Ordinance, which governs the conditional use application review procedures, provides:

The application shall be reviewed by the Zoning Officer. If it is deficient with regard to any required components, procedures, or fees, the Zoning Officer shall so notify the applicant.

This review and notification shall occur prior to the scheduling of a public hearing on the application. If such identified deficiencies are not remedied in the form of a resubmitted application, such deficiencies shall constitute grounds for denial of the application by the Board ... subsequent to public hearing.

\*11 Relying on *Nextel Partners, Inc. v. Clarks Summit Borough/Clarks Summit Borough Council*, 958 A.2d 587 (Pa. Cmwlth. 2008), Toll maintains that the Board is bound by the Zoning Officer's determination of completeness. In *Nextel*, the ordinance required the zoning officer to “refuse to accept an incomplete application which does not provide sufficient information to determine compliance with this Ordinance.”

*Nextel*, 958 A.2d at 592. The applicant failed to attach its required site plan to its conditional use application. Notwithstanding this deficiency, the governing body accepted the application along with a \$600 application fee, which we interpreted as acceptance of a completed form. We opined that if the governing body believed the application was incomplete, “it had an obligation under its [o]rdinance to refuse to accept.” *Id.* at 593-94. Once an application is accepted and retained, the time limitations of the MPC govern. *Id.* at 594. “Further, after application acceptance, technical requirements and interpretations may be addressed collaboratively as ordinance compliance is assessed.” *Id.*

Toll's reliance on *Nextel* is misplaced. Unlike the ordinance in *Nextel*, the Ordinance here does not compel the Zoning Officer to reject an incomplete application. Rather, the Ordinance requires the Zoning Officer to advise the applicant of any deficiencies detected. Moreover, *Nextel* clearly holds that after an application is accepted, review turns to whether the applicant complied with the technical requirements of the ordinance. 958 A.2d at 593. Although the Zoning Officer's review did not reveal that the visible land data was missing, his declaration of completeness did not excuse Toll from complying with the technical requirements of the Ordinance or otherwise bind the Board in their determination of compliance. *See Nextel*.

#### **D. Alternate Access**

Lastly, Toll maintains it was not required to revise its Plan to show alternative accesses evaluated in response to traffic review comments. The Plan for the Proposed Development depicts: a right-in/right-out on Route 202; one signalized “T” intersection with Route 926 between Bridlewood Boulevard and Route 202; and two unsignalized accesses on West Pleasant Grove Road, opposite Dunvegan Road and Hidden Pond Way. The accesses onto Routes 202 and 926 are under the jurisdiction and control of PennDOT; the accesses on West Pleasant Grove Road are under the jurisdiction and control of the Township. After filing the Application, PennDOT and the



Township reviewed the accesses and made comments expressing their preferences. As a result, Toll evaluated possible alternative access locations should it be required to relocate site access. However, Toll maintains that it was not required to relocate its access points and therefore it was not required to revise and resubmit its entire Plan to depict possible alternative accesses. Toll claims that the Board's denial of Toll's Application on this basis is unjustified.

Section 170-2009(B) of the Ordinance delineates the submission and content of conditional use applications. It requires an “*accurate* site plan prepared by a qualified professional.” Section 170-2009(B)(3) of the Ordinance (emphasis added). In addition, Section 170-2009(B)(6)(a) requires that the site plan show “the applicant's *intentions* with regard to ... [s]ite access.” (Emphasis added).

Toll's Plan for the Proposed Development depicts four access points to the surrounding roadways: (1) a right-in/right-out access on Route 202; (2) a signalized “T” intersection with Route 926 between Bridlewood Boulevard and Route 202; (3) an unsignalized access on West Pleasant Grove Road opposite Dunvegan Road; and (4) an unsignalized access on West Pleasant Grove Road opposite Hidden Pond Way. R.R. at 791a, 1288a, 2055a. Subsequent to filing the Application, both the Township and PennDOT expressed unofficial preferences that the Proposed Development's signalized Route 926 access align directly across from Bridlewood

Boulevard in neighboring Thornbury Township. R.R. at 1542a. The Township's traffic engineer, Federico, reviewed the Plan and issued a letter commenting that the right-out access on Route 202 may be blocked during peak hours and the accesses along West Pleasant Grove Road and Route 926 needed adjustments for safety. R.R. at 1288a, 1290a. He made recommendations and requested a transportation impact study to include, *inter alia*, consideration of the intersection of South New Street and West Pleasant Grove Road, an alternative analysis of Routes 202 and 926 without anticipated PennDOT improvements, and post-development turn-lane analysis. R.R. at 1289a-1290a.

\*12 In response, Toll evaluated possible alternative access locations in a revised traffic impact study. *See* R.R. at 1297a-1378a. Toll concedes it did not amend its Plan for two reasons. First, the potential alternative access locations along Route 926 and the elimination of the Route 202 access, as discussed above, fall under the control and jurisdiction of PennDOT, not the Township. Second, neither PennDOT nor the Township required Toll to revise or relocate any of its proposed site access locations. Rather, the proposed revisions were in response to review comments and recommendations. F.F. Nos. 133-134; R.R. at 1894a. Although Toll was willing to make the revisions if required, *see* R.R. at 1894a, the Plan, as submitted, accurately depicted Toll's “intentions with regard to ... [s]ite access.” *See* Section 170-2009(B)(6)(a) of the Ordinance. Although the Board found that it could not fully consider the merits of the alternative access points without a revised plan, F.F. No. 135, the record belies this finding. Federico reviewed, commented on, testified to and issued review letters regarding the alternative access locations. *See* R.R. at 1292a-96a. He testified that he reviewed all of the proposed accesses – those included on the Plan as well as the alternate access points. R.R. at 2195a. Federico did not testify that any of the proposed access locations will create an abnormal impact or substantial threat to the health or safety of the community. In his last comment letter, Federico focused on the collector road and the efficiency (not safety) of the Route 202 access and the need for turning lanes at PennDOT controlled intersections. *See* R.R. at 1294a-96a. Thus, we conclude that the Board erred by denying Toll's Application on this basis.

#### IV. Conclusion

For the foregoing reasons, we reverse the trial court's order insofar as the Board improperly denied Toll's Application on the basis that Toll's Plan did not depict changes to PennDOT-controlled roadways or depict alternate site accesses. We

### Footnotes

affirm the order in all other respects and uphold the Board's denial of the Application because Toll failed to satisfy all of the requirements of the Ordinance.

Judge Fizzano Cannon did not participate in the decision of this case.

## **XII. ORDER**

AND NOW, this 12<sup>th</sup> day of December, 2019, the order of the Court of Common Pleas of Chester County (trial court), dated October 1, 2018, is REVERSED IN PART insofar as it denied Appellant Toll PA XVIII, L.P.'s conditional use application for failure to depict changes to roadways controlled by the Pennsylvania Department of Transportation and alternate access points on its conditional use site plan; the trial court's order is AFFIRMED in all other respects.

### **All Citations**

Not Reported in Atl. Rptr., 2019 WL 6770135



- 1 **Crebilly** Farm Family Associates, L.P., David M. Robinson, Laurie S. Robinson and David G. Robinson (collectively, **Crebilly** Farm Family) are the legal owners of the Property.
- 2 The Ordinance defines “flexible development” as:  
An area of land, controlled by a landowner, to be developed as a single entity for a number of dwelling units, the development plan for which does not correspond in lot size, bulk or type of dwelling, density, lot coverage, and required open space to the regulations established in any one residential district created, from time to time, under the provisions of this chapter.  
Section 170-201 of the Ordinance.
- 3 Where, as here, the trial court did not take any additional evidence, our review is limited to determining whether the local governing body committed an error of law or an abuse of discretion. *Robal Associates, Inc. v. Board of Supervisors of Charlestown Township*, 999 A.2d 630, 634 (Pa. Cmwlth. 2010). An abuse of discretion occurs when findings of fact are not supported by substantial evidence, which is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Northampton Township v. Zoning Hearing Board Northampton Township*, 969 A.2d 24, 27 n.1 (Pa. Cmwlth. 2009). “In conditional use proceedings where the trial court has taken no additional evidence, the Board is the finder of fact, empowered to judge the credibility of witnesses and the weight afforded to their testimony; a court may not substitute its interpretation of the evidence for that of the Board.” *In re Richboro CD Partners, L.P.*, 89 A.3d 742, 754-55 (Pa. Cmwlth. 2014).
- 4 Appellees are the Township; **Crebilly** Farm Family; Brandywine at Thornbury Homeowners Association; Neighbors for **Crebilly**, LLC; and Thornbury Homeowners Association. The Township filed a brief in opposition. **Crebilly** Farm Family joins in the brief and reply brief filed by Toll. Brandywine at Thornbury Homeowners Association joins solely in support of Toll's argument regarding the collector road. Neighbors for **Crebilly**, LLC offers two independent alternate bases for affirming the denial of the Application. Thornbury Homeowners Association filed a notice of non-participation.
- 5 Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §§ 10101-11202.
- 6 Because the law regarding conditional uses and special exceptions is virtually identical, the burden of proof standards are the same for both. *Thompson*, 896 A.2d at 670.
- 7 The Board asserts that Toll waived the issue of whether the South New Street Intersection is an offsite improvement by failing to raise this issue before the Board. Board's Brief at 21. However, Toll had no advance notice that the failure to make these improvements would serve as a legal basis for the Board's denial. Toll properly raised this issue at the first opportunity to do so and it was addressed by the trial court. See Trial Court Op., 10/1/18, at 13. Therefore, we decline to find waiver.
- 8 Added by the Act of December 19, 1990, P.L. 1343, as amended, 53 P.S. § 10503-A(b).
- 9 Added by the Act of December 19, 1990, P.L. 1343, 53 P.S. § 10502-A.
- 10 Section 414(a) of this Court's Internal Operating Procedures authorizes the citation of unreported panel decisions issued after January 15, 2008, for their persuasive value, but not as binding precedent. 210 Pa. Code § 69.414(a).
- 11 Act of June 1, 1945, P.L., 1242, as amended, 36 P.S. §§ 670-408, 670-420.
- 12 Contrary to the Board's assertions, Toll did not waive this issue. See R.R. at 2591a-92a (Toll's proposed findings of fact submitted to the Board in support of its Application challenging the requirement of a “collector road”).



**KAPLIN STEWART MELOFF REITER & STEIN, P.C.**

By: Gregg I. Adelman, Esquire  
Attorney I.D. No. 84137  
Union Meeting Corporate Center  
910 Harvest Drive  
P.O. Box 3037  
Blue Bell, PA 19422  
(610) 941-2552

Attorneys for Applicant  
Toll PA XVIII, L.P.

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IN RE: CONDITIONAL USE APPLICATION	:	BEFORE THE BOARD OF
OF TOLL PA XVIII, L.P. PURSUANT TO	:	SUPERVISORS OF WESTTOWN
ARTICLE IX, SECTION 170-900 ET SEQ. OF	:	TOWNSHIP
THE WESTTOWN TOWNSHIP ZONING	:	
ORDINANCE FOR DEVELOPMENT OF THE	:	
CREBILLY FARM (UPI NOS. 67-4-29, 67-4-29.1,	:	
67-4-29.2, 67-4-29.3, 67-4-29.4, 67-4-30, 67-4-31,	:	
67-4-32, 67-4-33, 67-4-33.1, 67-4-134)	:	

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**CERTIFICATE OF SERVICE**

I, Gregg I. Adelman, Esquire, do hereby certify that on August 11, 2021, a true and correct copy of the foregoing Toll PA XVIII, L.P.’s Proposed Findings of Fact and Conclusions of Law was served via electronic mail upon the following:

Patrick M. McKenna, Esquire  
PMcKenna@gawthrop.com  
Solicitor to the Westtown Township Board of Supervisors

Fronefield Crawford, Jr.  
fcrawford@fcrawfordlaw.com  
Solicitor to Birmingham Township

Kristin S. Camp, Esquire  
kcamp@buckleyllp.com  
Solicitor to the Westtown Township Planning Commission

Kathy L. Labrum, Esquire  
info@donaghuelabrum.com  
Solicitor to Thornbury Township

Mark P. Thompson, Esquire  
mthompson@lambmcerlane.com  
Attorney for Neighbors for Crebilly, LLC

\_\_\_\_\_  
Gregg I. Adelman