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IN RE: CONDITIONAL USE APPLICATION : BEFORE THE WESTTOWN
OF FOX CLEARING, LLC : TOWNSHIP BOARD OF
: SUPERVISORS, CHESTER
(UPI NOS. 67-2-7.1, 67-2-8, 67-2-9, 67-2-23) : COUNTY, PENNSYLVANIA

**FOX CLEARING, LLC’S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
IN SUPPORT OF CONDITIONAL USE APPLICATION**

Fox Clearing, LLC (“**Applicant**”), by and through its attorneys, Kaplin Stewart Meloff Reiter & Stein, P.C., hereby submits the following Proposed Findings of Fact and Conclusions of Law in support of its Conditional Use Application (“**Application**”) for a proposed single-family home residential development under Article IX, Sections 170-902(A) and 170-903 [Flexible Development Procedure] of the Westtown Township Zoning Ordinance (“**Zoning Ordinance**”).

I. PROPOSED FINDINGS OF FACT

A. The Parties

1. The parties to the Application are:

a. Applicant Fox Clearing, LLC, the legal and equitable owner of the Property (hereafter defined). *Exhibit A-2*.

b. Westtown Township Planning Commission (“**Township Planning Commission**”), the planning agency of Westtown Township (“**Township**”) created pursuant to Article II of the Pennsylvania Municipalities Planning Code (“**MPC**”).

c. The following individuals (each an “**Objector**”, collectively the “**Objectors**”):

- i. Matthew and Tamra Pusey – 1007 Old Hawthorne Drive;
- ii. Hans Levert – 904 Shiloh Hill Drive;
- iii. Judith Balthazar – 909 Shiloh Road;
- iv. Steve Madigosky – 924 Shiloh Road;
- v. Mary Jo and Andy Hopton – 1029 Shiloh Road;
- vi. Robert Pingar – 1003 Russell Lane;
- vii. Andrew and Christine Costagliola – 1017 Shiloh Road;
- viii. Andrew Holstein – 913 Shippen Lane;
- ix. David Giardiniere – 929 Oakburne Road;
- x. Melissa Hackman – 908 Shiloh Road;
- xi. Shirley LeClerc – 940 Kilduff Circle; and
- xii. Paul Vanscovitch – 911 Shiloh Hill Drive.

B. The Property

2. The Applicant is the owner or equitable owner of four parcels totaling approximately 80.886 +/- acres of land located along Shiloh Road in the Township (collectively, the “**Property**”):

- a. UPI #67-2-23, consisting of 64.956 acres;
- b. UPI #67-2-8, consisting of 9.133 acres;
- c. UPI #67-2-9 consisting of 1.133 acres; and
- d. UPI #67-2-7.1 consisting of 5.664 acres.

Exhibit A-2; N.T. 8/14/23, pp. 26-28.

3. The Property is zoned R-1 Residential District. *N.T. 8/14/23, p. 28.*

4. The Property is located on the east side of Shiloh Road about a half mile south of Little Shiloh Road, generally opposite the intersections of Shiloh and Oakburne Roads and Shiloh Road and Hunt Drive. *Exhibits A-2 (Conditional Use Plan – Overall Existing Resources Plan)*.

5. The Property has certain natural resource features on it including wetlands, 100-year floodplain, steep slopes, woodlands, and soils with seasonally highwater soils. *Exhibits A-2, A-4; N.T. 8/14/23 pp. 29-34.*

6. The Property has existing structures including multiple residential dwellings together with associated driveways and accessory structures, including a barn. *Exhibit A-2 (Conditional Use Plan – Overall Existing Resources Plan)*.

7. Two pipeline easements traverse the northeastern portion of the Property. *Exhibit A-2 (Conditional Use Plan – Overall Existing Resources Plan)*.

C. The Proposed Development

8. The Applicant proposes to construct a residential development of the Property consisting of 85 single-family homes together with the construction of internal streets, utilities, stormwater management facilities, landscaping, lighting, community recreation facilities and other associated development improvements. (“**Proposed Development**”). *Exhibits A-2 (Conditional Use Plan), A-4, A-11, A-14, A-18.*

9. The Proposed Development will be substantially in accordance with the Conditional Use Plan set forth below (*Exhibit A-0*):

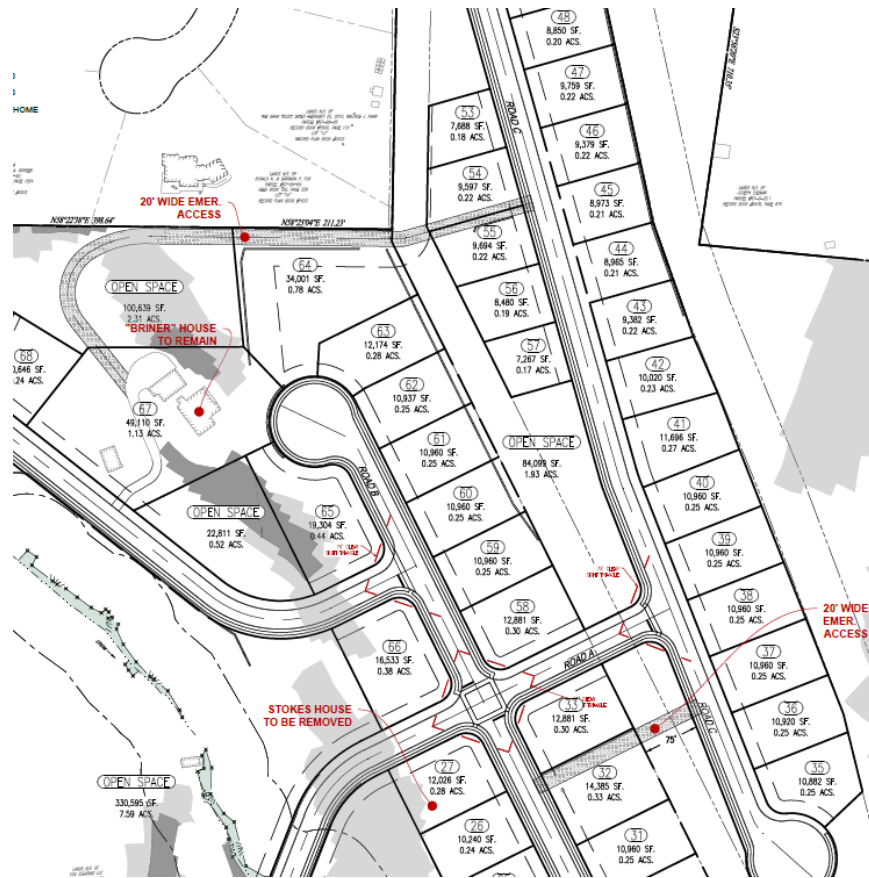


10. The Proposed Development proposes the demolition and removal of the existing Stokes house, the Miles house and the O'Brien house. The Briner house is proposed to remain. *Exhibit A-11; N.T. 8/14/23, pp. 75-77.*

11. The Proposed Development proposes two full movement accesses to and from Shiloh Road. *Exhibits A-2 (Conditional Use Plan), A-4, A-11, A-14, A-18.*

12. While an emergency access is not required under the Zoning Ordinance, if necessary, the Proposed Development proposes two separate internal emergency accesses to Road “C” to provide additional emergency vehicle accesses to the single-family homes proposed to be constructed along Road “C” in the event access from Road “A” to Road “C” is impassable. *Exhibit A-18; N.T. 8/14/23, pp. 457-458; 459-463.*

13. The additional emergency vehicle accesses to the single-family homes proposed to be constructed along Road “C” will be substantially in accordance with the plan set forth below (*Exhibit A-18*):



14. The Proposed Development provides more than the required 40% open space. *Exhibits A-2 (Conditional Use Plan), A-4, A-11, A-14, A-18; N.T. 8/14/23, pp. 37-38.*

15. At least 50% of the open space is located outside of floodplain areas, wetland areas and areas greater than 25% slope. *Exhibit A-4, A-11, A-14, A-18; N.T. 8/14/23, pp. 44-45.*

16. At least 10% of the net tract area (a total of 6.61 acres) is designated as possible active recreation areas. *Exhibit A-4, A-11, A-14, A-18; N.T. 8/14/23, pp. 45-46.*

17. The Proposed Development includes naturalized trails throughout the open space area that run to the eastern and southern property lines to provide possible future trail connections. *Exhibit A-4; N.T. 8/14/23, pp. 46-47.*

18. The open space will be owned and maintained by a future homeowners' association created for the Proposed Development. *Exhibit A-2 (Draft Planned Community Declaration); N.T. 8/14/23, pp. 47-48.*

19. The Proposed Development will be serviced by public water and public sewer. *Exhibit A-2 (Aqua PA Water Will Serve Letter dated April 12, 2023 and Public Sewer Will Serve Letter dated April 13, 2023); N.T. 8/14/23, pp. 48-49.*

20. The single-family homes in the Proposed Development are 38 feet or less in height. *Exhibits A-2 (Conditional Use Plan), A-4, A-11, A-14, A-18; N.T. 8/14/23, pp. 38-39.*

21. There is no minimum lot size or maximum impervious coverage proposed for the single-family home lots in the Proposed Development. *Exhibits A-2 (Conditional Use Plan), A-4, A-11, A-14, A-18; N.T. 8/14/23, p. 38.*

22. The Proposed Development provides the required 3 off-street parking spaces for a single-family home. *Exhibits A-2 (Conditional Use Plan), A-4, A-11, A-14, A-18.*

23. The Proposed Development provides all setbacks required under Sections 170-904.E.(10) and 170-904.F.(11). *Exhibits A-2 (Conditional Use Plan), A-4, A-11, A-14, A-18; N.T. 8/14/23, p. 39.*

24. The Proposed Development includes a stormwater management system designed in accordance with the Township Stormwater Management Ordinance and the stormwater regulations promulgated by the Pennsylvania Department of Environmental Protection. *Exhibits A-2 (Conditional Use Plan, Stormwater Management Report), A-4 (Stormwater Management Report), A-11, A-15; N.T. 8/14/23, pp. 49-56.*

D. Procedural Background

25. On May 4, 2023, the Applicant submitted the Application to the Township. *Exhibit A-2.*

26. In May and June, 2023, the Township professional consultants reviewed the Application and issued review letters. *Exhibit A-3; N.T. 8/14/23, pp. 39-40.*

27. On June 15, 2023, the Applicant responded to the Township professional consultants' reviews and submitted a revised Conditional Use Plan, Conservation Plan and Stormwater Management Report. The Applicant also supplemented the Application by submitting photos of views into Property from public rights of way, lighting plans and clearances from the Pennsylvania Historic Museum Commission. *Exhibit A-4; N.T. 8/14/23, pp. 40-42.*

28. In late June 2023, the Township consultants reviewed the revised Application and issued new review letters, including a review from the Township Police Chief. *Exhibit A-5; N.T. 8/14/23, pp. 42-43.*

29. On July 14, 2023, August 8, 2023 and August 22, 2023, the Applicant responded to the Township consultants' reviews and submitted a revised Conditional Use Plan as well as an alternative Conditional Use Plan addressing a steep slope ordinance interpretation by the Township Engineer. The Applicant also supplemented the Application by submitting an updated Crash Study

and a Traffic Speed Study. *Exhibits A-6, A-10, A-11, A-14; N.T. 8/14/23, pp. 43-44, 72, 75-77; N.T. 9/11/23, pp. 266-270.*

30. Based on the Applicant's responses and supplemental submissions, all items identified in the Township professional consultants' review letters applicable to the Application at the conditional use stage have been resolved and/or addressed.

E. The Conditional Use Hearing

31. On August 14, September 11, October 24 and November 29, 2023, the Board held public hearings on the Application (collectively the "**Hearing**").

32. The Board granted party status to the Planning Commission and the Objectors, who live within close proximity of the Property. *N.T. 8/14/23, pp. 8-23.*

33. The Applicant presented expert testimony from the following witnesses: David W. Gibbons, P.E. (Civil Engineer – Howell Engineering); and Jon A. Seitz, P.E. (Traffic Engineer – TRG, Inc.).

34. The Applicant introduced Exhibits A-1 through A-21 in support of the Application, which were admitted into the Record.

35. The Planning Commission presented expert testimony from the following witnesses: Robert E. Flinchbaugh, P.E. (Township Engineer – CEG); Albert Federico, P.E. (Township Traffic Engineer – Albert Federico Consulting, LLC); and Gerald R. DiNuzio, Jr. (Township Fire Marshal and Emergency Management Coordinator).

36. The Planning Commission introduced Exhibits PC-1 through PC-9, which were admitted into the Record.

37. The Objectors did not present any expert testimony. Instead, the Objectors offered personal testimony.

38. The Objectors introduced Exhibits Robert Pingar (“**RP**”)-1 through RP-9 and Exhibits Hollstein (“**H**”)-1 through H-9. The Applicant objected to the admission of RP-5 through RP-9, which was sustained and those exhibits were not admitted. The other exhibits, Exhibits RP-1 through RP-4 and H-1 through H-9 were admitted into the Record.

39. At the Hearing, the Applicant demonstrated the Application and Proposed Development complies with all of the applicable objective specific and general conditional use standards and criteria under the Zoning Ordinance.

F. Specific Conditional Use Standards/Criteria

40. Section 170-902(A) of the Zoning Ordinance [Flexible Development Procedure] permits a flexible residential development on the Property by conditional use in the R-1 Residential District. *N.T. 8/14/23, pp. 35-36.*

41. Section 170-903.A of the Zoning Ordinance [Flexible Development Procedure] permits single-family detached dwellings. *N.T. 8/14/23, pp. 35-36.*

42. The Proposed Development was designed in accordance with the Conservation Design process required under the Flexible Development Regulations. *Exhibits A-2, A-4 (Conditional Use Plan, Conservation Plan), A-11; N.T. 8/14/23, pp. 29-35.*

43. The site design and layout of the Proposed Development considered primary and secondary conservation areas under the Flexible Development Regulations. *Exhibits A-2, A-4 (Conditional Use Plan, Conservation Plan), A-11; N.T. 8/14/23, pp. 29-35.*¹

44. 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

¹ Scenic views cannot be quantified for purposes of determining the permitted disturbance of secondary conservation areas on the Property under the Flexible Development Regulations.

development related aspects, including utilities and to provide ingress and egress to portions of the Proposed Development. *Exhibits A-2, A-4 (Conditional Use Plan, Conservation Plan), A-11; N.T. 8/14/23, pp. 29-35.*

45. The Proposed Development disturbs no more than 50% of the secondary conservation areas, which is the maximum disturbance permitted under the Flexible Development Regulations. *Exhibits A-2, A-4 (Conditional Use Plan, Conservation Plan), A-11; N.T. 8/14/23, pp. 29-35.*

46. The maximum density (without any bonus) of the Proposed Development permitted under the Flexible Development Regulations is 71 single-family dwelling units. *Exhibits A-2 (Conditional Use Plan), A-4 (Conditional Use Plan), A-11; N.T. 8/14/23, p. 36.*

47. The Proposed Development has a maximum net residential density of 4 single-family detached home units per acre. *Exhibits A-2 (Conditional Use Plan), A-4 (Conditional Use Plan), A-11; N.T. 8/14/23, p. 36.*

48. The Proposed Development's net residential density is 3.3 single family detached home units per acre, which is less than the 4 units per acre permitted under the Flexible Development Regulations. *Exhibits A-2 (Conditional Use Plan), A-4 (Conditional Use Plan), A-11; N.T. 8/14/23, p. 36.*

49. The Proposed Development is eligible for a density bonus under Section 170-904.A.(2).(a) of the Zoning Ordinance [Flexible Development Procedure]. *N.T. 8/14/23, p. 37.*

50. The applicable minimum required open space under the Flexible Development Regulations is 40 percent, or 32.35 acres. *Exhibits A-2 (Conditional Use Plan), A-4 (Conditional Use Plan), A-11; N.T. 8/14/23, p. 37-38.*

51. The Proposed Development includes 40.01 percent, or 32.36 acres, of minimum required open space. *Exhibits A-2 (Conditional Use Plan), A-4 (Conditional Use Plan), A-11; N.T. 8/14/23, p. 37-38.*

52. The Proposed Development includes 12.2 acres of qualifying incremental open space entitling the Applicant to a density bonus of 0.225 dwelling units per acre under Section 170-904.A.(2).(a) of the Zoning Ordinance [Flexible Development Procedure]. *Exhibits A-2 (Conditional Use Plan), A-4 (Conditional Use Plan), A-11; N.T. 8/14/23, p. 38.*

53. The Proposed Development provides a total of 47.62 acres of open space, which is 58.87 percent of the gross area of the Property. *Exhibits A-2 (Conditional Use Plan), A-4 (Conditional Use Plan), A-11; N.T. 8/14/23, p. 37-38.*

54. The Proposed Development's maximum density with the density bonus under Section 170-904.A.(2).(a) of the Zoning Ordinance [Flexible Development Procedure] is 86 single-family dwelling units. *Exhibits A-2 (Conditional Use Plan), A-4 (Conditional Use Plan), A-11; N.T. 8/14/23, p. 38.*

55. More than 50% of the Proposed Development's open space area is located outside of 100-year floodplain areas, wetlands and steep slopes greater than 25 percent. *Exhibits A-2 (Conditional Use Plan), A-4 (Conditional Use Plan), A-11; N.T. 8/14/23, pp. 44-45.*

56. The Proposed Development's 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. *Exhibits A-2 (Conditional Use Plan), A-4 (Conditional Use Plan), A-11; N.T. 8/14/23, pp. 44-45.*

57. 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. *Exhibits A-2 (Conditional Use Plan), A-4 (Conditional Use Plan), A-11; N.T. 8/14/23, pp. 44-46.*

58. The Proposed Development provides sidewalks and walking trails connecting the residential community to the open space areas and future township trails. *Exhibits A-2 (Conditional Use Plan), A-4 (Conditional Use Plan), A-11; N.T. 8/14/23, pp. 46-47.*

59. There is no maximum impervious coverage under the Flexible Development Regulations for the single-family home lots in the Proposed Development. *N.T. 8/14/23, p. 38.*

60. The single-family homes in the Proposed Development will be equal to or less than 38 feet in height, which is the maximum permitted height under the Flexible Development Regulations. *Exhibits A-2 (Conditional Use Plan), A-4 (Conditional Use Plan), A-11; N.T. 8/14/23, p. 38.*

61. 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-2 (Conditional Use Plan), A-4 (Conditional Use Plan), A-11; N.T. 8/14/23, p. 39.*

62. The setback from curb for 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-2 (Conditional Use Plan), A-4 (Conditional Use Plan), A-11; N.T. 8/14/23, p. 39.*

63. The setback from all perimeter property lines for single family detached homes in the Proposed Development is equal to or greater than 50 feet, which is the minimum required under

the Flexible Development Regulations. *Exhibits A-2 (Conditional Use Plan), A-4 (Conditional Use Plan), A-11; N.T. 8/14/23, p. 39.*

64. There are no required residential setbacks from pipelines under the Zoning Ordinance.

65. 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-2 (Conditional Use Plan), A-4 (Conditional Use Plan), A-11; N.T. 8/14/23, p. 39.*

66. The Proposed Development provides landscaping throughout the development, including on the lots and near the proposed units. *Exhibits A-2 (Conditional Use Plan), A-4 (Conditional Use Plan), A-11.*

67. 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-2 (Draft Planned Community Declaration); N.T. 8/14/23, pp. 47-48.*

G. Stormwater Management System

68. The engineering and design of the Proposed Development's stormwater management system is beyond the limited scope of the conditional use process and would occur later during the subdivision and land development process. *N.T. 8/14/23, p. 56.*

69. Nevertheless, the Applicant provided testimony and exhibits demonstrating the Proposed Development's stormwater management system is feasible. *Exhibits A-2 (Conditional Use Plan, Stormwater Management Report), A-4 (Conditional Use Plan, Stormwater Management Report), A-11, A-15; N.T. 8/14/23, pp. 51-56.*

70. The stormwater basins in the Proposed Development's stormwater management system are designed to infiltrate stormwater volume for the net increase in volume of the two-year storm event. *Exhibits A-2 (Conditional Use Plan, Stormwater Management Report), A-4 (Conditional Use Plan, Stormwater Management Report), A-11, A-15; N.T. 8/14/23, pp. 51-56.*

71. The open storage areas or settling ponds portions of the Proposed Development's stormwater management system are accessory to the stormwater basins infiltration facilities. *Exhibits A-2 (Conditional Use Plan, Stormwater Management Report), A-4 (Conditional Use Plan, Stormwater Management Report), A-7, A-8, A-9, A-11, A-15; N.T. 8/14/23, pp. 57, 59-65; N.T. 9/11/23, pp. 271-274.*

72. The stormwater system for the Proposed Development will provide water quality measures and other best management practices. *Exhibits A-2 (Conditional Use Plan, Stormwater Management Report), A-4 (Conditional Use Plan, Stormwater Management Report), A-11, A-15; N.T. 8/14/23, pp. 55-56.*

73. The Township and the Pennsylvania Department of Environmental Protection will review, approve and permit the stormwater system for the Proposed Development during the subdivision and land development process. *N.T. 8/14/23, pp. 56.*

H. Traffic, Access and Street Design

74. The Proposed Development proposes two full movement accesses to and from Shiloh Road, one opposite Hunt Drive and the other opposite Oakbourne Road. *Exhibits A-2 (Conditional Use Plan), A-4, A-11, A-13, A-18.*

75. Both accesses to the Proposed Development from Shiloh Road are safe and efficient and provide adequate sight distances. *Exhibits A-2 (Conditional Use Plan, Transportation Impact Study), A-4, A-6, A-11, A-13, A-18; N.T. 8/14/23, pp. 74-76; N.T. 9/11/23 pp. 181-196.*

76. The only improvements required to provide the necessary safe stopping sight distance are the removal of some shrubbery and minor grading, both of which would occur on property the Applicant owns or controls. *Exhibits A-2 (Conditional Use Plan, Transportation Impact Study), A-4, A-6, A-11, A-13, A-18; N.T. 9/11/23 pp. 195-196.*

77. The traffic anticipated to be generated by the Proposed Development is typical of that which would normally be expected from a similarly situated residential development. *N.T. 9/11/23 pp. 193.*

78. The traffic anticipated to be generated by the Proposed Development will have a negligible impact on the levels of service along Shiloh Road. *Exhibits A-2 (Transportation Impact Study), A-4, A-6, A-11, A-14, A-18; N.T. 9/11/23 p. 191.*

79. The traffic anticipated to be generated by the Proposed Development will not significantly increase traffic congestion or create a traffic hazard. *Exhibits A-2 (Transportation Impact Study), A-4, A-6, A-11, A-14, A-18; N.T. 9/11/23 pp. 190-192.*

80. The street design of the Proposed Development is properly related to the proposed land use and the adjacent streets. *Exhibits A-2 (Conditional Use Plan), A-4, A-6, A-11, A-14, A-18; N.T. 9/11/23, pp. 196-197.*

81. While an emergency access is not required under the Zoning Ordinance, if necessary, the Proposed Development proposes two separate internal emergency accesses to Road "C" to provide additional emergency vehicle access to the single-family homes proposed to be constructed along Road "C" in the event access from Road "A" to Road "C" is impassable. *Exhibit A-18; N.T. 8/14/23, pp. 457-458; 459-463.*

82. The internal street design of the Proposed Development is safe and efficient. *Exhibits A-2 (Conditional Use Plan), A-4, A-6, A-11, A-13, A-14, A-18, A-21; N.T. 8/14/23, pp. 73-74; N.T. 9/11/23, pp. 196-201; N.T. 11/29/23, pp. 468-472.*

I. The Pipelines

83. Two pipeline easements traverse the northeastern portion of the Property, one owned by Enterprise Products and the other owned by Buckeye. *Exhibit A-2 (Conditional Use Plan – Overall Existing Resources Plan).*

84. The easement for the Enterprise Products pipeline dates back to 1941. *Exhibit A-4; N.T. 8/14/23, pp. 158-159.*

85. It is not certain what product is flowing through each of the pipelines although it is believed the Enterprise Products pipeline is empty at this time. *Exhibit A-19; N.T. 11/29/23, pp. 464-466.*

86. The Proposed Development proposes to encroach into both pipeline easement areas. *Exhibits A-2 (Conditional Use Plan), A-4 (Conditional Use Plan), A-11; N.T. 8/14/23, pp. 112-114.*

87. Enterprise has reviewed the Proposed Development and conditionally approved the pipeline encroachments. *Exhibit A-20; N.T. 11/29/23, pp. 467-468.*

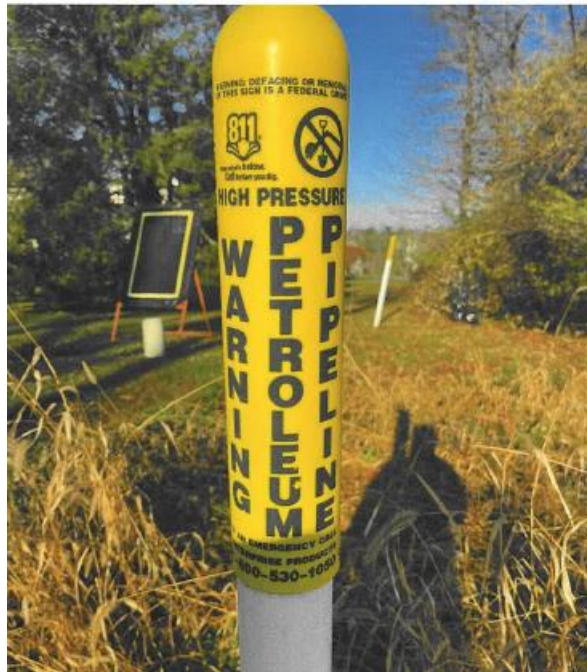
88. Buckeye will not review the Proposed Development's pipeline encroachments at this time but will do so later during the land development process. *N.T. 11/29/23, pp. 467-468.*

89. While there are no zoning regulations regarding setbacks from the pipelines, the proposed residences to be constructed in the Proposed Development will be set back 50 feet from the physical Buckeye pipeline. *Exhibits A-2 (Conditional Use Plan), A-4 (Conditional Use Plan), A-11; N.T. 8/14/23, p. 114-116.*

90. The Enterprise and Buckeye pipelines traverse through adjacent properties and those in the immediate vicinity of the Property, some of which have had residences since the 1980's. *Exhibit A-16; N.T. 11/29/23, pp. 455-458.*

91. The Enterprise and Buckeye pipelines are located closer to existing residences than what is proposed in the Proposed Development. *N.T. 11/29/23, p. 457.*

92. A pipeline is even located in the backyards of some existing residences as shown below (*Exhibit H-3; N.T. 11/29/23, pp. 450-452*):



93. Residential developments have been constructed and continued to be proposed throughout Chester County over and around pipelines with residences located much closer than what is being proposed in the Proposed Development. *N.T. 8/14/23, pp. 156-157.*

J. General Conditional Use Standards

94. Section 170-2009.D of the Zoning Ordinance provides certain general conditional use standards for all proposed conditional uses in the Township.

95. With respect to Section 170-2009.D.(1).(a) of the Zoning Ordinance, Section 170-902(A) of the Zoning Ordinance [Flexible Development Procedure] permits a flexible residential development on the Property by conditional use in the R-1 Residential District and Section 170-903.A of the Zoning Ordinance [Flexible Development Procedure] permits single-family detached dwellings. *N.T. 8/14/23, pp. 35-36.*

96. With respect to Section 170-2009.D.(1).(b) of the Zoning Ordinance, the Applicant is not required to demonstrate the Application is consistent with the Township's Comprehensive Plan.²

97. With respect to Section 170-2009.D.(1).(c) of the Zoning Ordinance, the Proposed Development is a use permitted by conditional use on the Property.

98. With respect to Section 170-2009.D.(1).(d) of the Zoning Ordinance, the Applicant submitted conceptual exterior elevations of the proposed single-family homes to be constructed in the Proposed Development that are "harmonious", which is a subjective term. *Exhibit A-2 (Conceptual Exterior Elevations).*

99. With respect to Section 170-2009.D.(1).(e) of the Zoning Ordinance, the Proposed Development is not proposed to be constructed in stages at this time.

100. With respect to Section 170-2009.D.(1).(f) of the Zoning Ordinance, the Proposed Development is a permitted use, has typical impacts of those associated with a similarly situated residential development, and there are adequate public facilities to service the Proposed

² 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 an application for approval 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).

Development. *Exhibit A-2 (Aqua PA Water Will Serve Letter dated April 12, 2023 and Public Sewer Will Serve Letter dated April 13, 2023); N.T. 8/14/23, pp. 48-49.*

101. With respect to Section 170-2009.D.(1).(g) of the Zoning Ordinance, the Applicant is not required to comply with subjective/non-objective general criteria such as whether a use is consistent with the character of the surrounding neighborhood. The Proposed Development is a permitted use, which is a legislative indication the Proposed Development is consistent with the spirit, purposes and intent of the Zoning Ordinance.

102. With respect to Section 170-2009.D.(1).(h) of the Zoning Ordinance, the Proposed Development will not result in or substantially add to a significant traffic hazard or significant traffic congestion and the peak traffic generated by the development shall be accommodated in a safe and efficient manner. *Exhibits A-2 (Transportation Impact Study), A-4, A-6, A-11, A-14, A-18; N.T. 9/11/23 pp. 190-192.* The traffic anticipated to be generated by the Proposed Development is typical of what would normally be expected from a similarly situated residential development. *N.T. 9/11/23 pp. 193.*

II. LEGAL ANALYSIS

A. Nature of a Conditional Use

A conditional use is a permitted use. A conditional use may only be denied if: (i) opponents demonstrate the impact of the proposed use on the public welfare is greater than that which might be expected from such a use in normal circumstances; and (ii) the abnormal impact creates a public health or safety issue. *Ruddy v. Lower Southampton Township Zoning Hearing Board, supra.*; *New Bethlehem Borough Council v. McVay*, 467 A.2d 395 (Pa. Cmwlth. 1983).³ The existence of

³ 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. *Millcreek Road Associates, LP v. Board of Commissioners of Lower Merion Township*, No. 1050 C.D. 2020, 282 A.3d 391, *citing Williams Holding Group, LLC v. Board of Supervisors of West Hanover Township*, 101 A.3d 1202 (Pa. Cmwlth. 2014).

a conditional use provision in a zoning ordinance indicates a legislative determination that the use is consistent with the municipality's zoning plan and is a use which is presumptively consistent with the public health, safety, and welfare. *Borough of Perkasio v. Moulton Builders*, 850 A.2d 778 (Pa. Cmwlth. 2004); *Ruddy v. Lower Southampton Township Zoning Hearing Board*, 669 A.2d 1051 (Pa. Cmwlth. 1995). By permitting a particular use as a conditional use, the governing body has pre-determined such use will not have an adverse impact upon the public interest in normal circumstances. *LTS Development, Inc. v. Middle Smithfield Township. Board of Supervisors*, 862 A.2d 686 (Pa. Cmwlth. 2004).

The Commonwealth Court enunciated the general rule governing special exceptions and conditional uses in *In re Appeal of Brickstone Realty Corp.*, 789 A.2d 333 (Pa. Cmwlth. 2001):

A special exception [or conditional use] is a conditionally permitted use, allowed by the Legislature if specifically listed standards are met. A special exception [or conditional use] is thus not an "exception" to the zoning ordinance, but a use permitted conditionally, the application for which is to be granted or denied by the zoning hearing board pursuant to express standards and criteria. **Where a particular use is permitted in a zone by special exception [or conditional use], it is presumed that the local legislature 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.** Thus, once the applicant for a special exception [or conditional use] shows compliance with the specific requirements of the ordinance, it is presumed that the use is consistent with the promotion of health, safety, and general welfare. 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. (citations omitted)(emphasis added).

Here, the Township permits single-family detached homes in a flexible residential development in the R-1 Residential District in accordance with the applicable Zoning Ordinance regulations. The Proposed Development complies with the applicable Zoning Ordinance regulations. As such, the Township has legislatively determined the Proposed Development is

consistent with the Township’s zoning plan and is not adverse to the public health, safety and welfare. *See, e.g. Evans v. Zoning Hearing Board of Easttown Township*, 396 A.2d 889 (Pa. Cmwlth. 1979); *In re Cutler Group, Inc.*, 880 A.2d 39 (Pa. Cmwlth. 2005).

B. Applicant’s Evidentiary Burden

A conditional use applicant only has the burden of proving the proposed use satisfies the specific objective criteria under a zoning ordinance. *Appeal of Neill*, 634 A.2d 749 (Pa. Cmwlth. 1993); *Millcreek Road Associates, LP, supra*; *Williams Holding Group, supra*. Where a conditional use application complies with the applicable objective criteria of a township’s ordinances, the application must be approved. *Goodman v. Bd. of Commissioners of the Twp. of Whitehall*, 411 A.2d 838, (Pa. Cmwlth. Ct. 1980).

A conditional use applicant bears only the burden of persuasion and does not bear the burden of going forward with proof of compliance with general health, safety and welfare criteria imposed upon conditional uses even where a zoning ordinance places the burden upon the applicant to demonstrate compliance with those criteria in the first instance. *See, In re Cutler Group, Inc., supra*. Accordingly, general, non-specific, or non-objective requirements are not “part of the threshold persuasion burden and presentation duty of the applicant” seeking approval of a conditional use.⁴ *Williams Holding Group, supra*. The focus is on the specific criteria relevant to a conditional use because it is unfair to require a landowner to conform to a general “policy statement.” *Appeal of George Baker*, 339 A.2d 131, 135 (Pa. Cmwlth. 1975).

Sections 170-903 through 170-908 of the Zoning Ordinance [Flexible Development Procedure] provide the applicable specific objective conditional use criteria for the Proposed

⁴ A subjective or vague requirement “may be either one that may not be enforced or one for which an applicant bears no initial evidentiary burden.” *See, Millcreek Road Associates, LP; Williams Holding Group.*

Development. As set forth in the above Proposed Findings, the Applicant introduced evidence and testimony demonstrating the Application and Proposed Development comply with all applicable specific objective conditional use criteria. Therefore, the Applicant has satisfied its evidentiary burden entitling it to an approval of the Application and the Proposed Development.

Section 170-2009.D of the Zoning Ordinance provides the applicable general conditional use criteria for the Proposed Development. While not required to do so, as set forth in the above Proposed Findings, the Applicant demonstrated the Proposed Development complies with the applicable general conditional use criteria.

No other party to the Hearing introduced evidence or testimony demonstrating the Applicant failed to comply with the specific objective conditional use standards applicable to the Proposed Development. No other party to the Hearing satisfied its burden rebutting the Applicant's entitlement to an approval of the Application and the Proposed Development.

C. Planning Commission's and Objectors' Evidentiary Burden

Once the Applicant demonstrated the Application and Proposed Development comply with the applicable specific objective conditional use requirements under the Zoning Ordinance, the burden shifted to the Planning Commission and Objectors to demonstrate through substantial evidence that the Proposed Development will detrimentally affect the public health, safety and welfare to a greater degree than a "normal" or "typical" single-family development. *Mann v. Lower Makefield Township*, 634 A.2d 768 (Pa. Cmwlth. 1993); *Dotterer v. Zoning Hearing Board of Upper Pottsgrove Township*, 588 A.2d 1023 (Pa. Cmwlth. 1991).

The Planning Commission's and Objectors' burden of demonstrating the Application and the Proposed Development do not comply with the general health, safety and welfare criteria imposed upon conditional uses is not satisfied by showing the Proposed Development will have

effects that are no different than those which normally result from the construction of such use. *Moyer's Landfill, Inc. v. Zoning Hearing Board of Lower Providence Township*, 450 A.2d 273 (Pa. Cmwlth. 1982). Rather, the Application may only be denied if the Planning Commission or Objectors demonstrate the impact of the Proposed Development on the public welfare is greater than that which might be expected from such a use in normal circumstances and that the abnormal impact creates a public health or safety issue. *Ruddy v. Lower Southampton Township Zoning Hearing Board, supra.*; *New Bethlehem Borough Council v. McVay*, 467 A.2d 395 (Pa. Cmwlth. 1983). Moreover, the Planning Commission and Objectors cannot meet their burden of showing the Proposed Development would violate the health, safety and welfare of the community by merely speculating as to possible harm. Rather, the Planning Commission and Objectors must show a "high degree of probability" the Proposed Development will substantially affect the health and safety of the community. *Manor Healthcare Corp. v. Lower Moreland Township Zoning Hearing Board*, 590 A.2d 65 (Pa. Cmwlth. 1991).

Here, the Planning Commission produced three expert witnesses: Mr. Flinchbaugh, Mr. Federico and Mr. Dinunzio.

Mr. Flinchbaugh testified the: (i) site is not suitable for development because of the lack of access to Road C between the two pipelines (*N.T. 10/24/23, pp. 295-297*); (ii) proposed lots in the Proposed Development contained more than 25% of precautionary slopes (*N.T. 10/24/23, pp. 297-300*); and (iii) open space in the Proposed Development improperly included the open stormwater basin storage areas which he believes are not accessory to stormwater infiltration, and as a result, the open space density bonus would be reduced (*N.T. 10/24/23, pp. 300-303*).

The Applicant rebutted Mr. Flinchbaugh's testimony through the testimony of Mr. Gibbons, its expert civil engineer, as follows: (i) if necessary, the Proposed Development will

include two separate internal emergency accesses to Road “C” to provide additional emergency vehicle access to the single-family homes proposed to be constructed along Road “C” in the event access from Road “A” to Road “C” is impassable. *Exhibit A-18; N.T. 8/14/23, pp. 457-458; 459-463*; (ii) while not agreeing with Mr. Flinchbaugh’s interpretation and application of the relevant Zoning Ordinance provision (Section 170-402.D.(3).(f)), the Proposed Development could be modified to comply. *Exhibit A-14; N.T. 9/11/23, pp. 266-270*; and (iii) the open storage areas or settling ponds portions of the Proposed Development’s stormwater management system are accessory to the stormwater basins infiltration facilities similar to prior approved residential developments in the Township, and therefore, are properly included in the open space calculations. *Exhibits A-2 (Conditional Use Plan, Stormwater Management Report), A-4 (Conditional Use Plan, Stormwater Management Report), A-7, A-8, A-9, A-11, A-15; N.T. 8/14/23, pp. 57, 59-65; N.T. 9/11/23, pp. 271-274.*

Mr. Federico testified that: (i) the alignments of sections of proposed Road A and Road D in the Proposed Development have undesirable sharp horizontal curves near vertical curves (*N.T. 10/24/23, p. 327*); (ii) there is a lack of secondary emergency access to Road C in the Proposed Development (*N.T. 10/24/23, pp. 327-329*); (iii) the design of Road C does not have a level landing area at its intersection with Road A in the Proposed Development (*N.T. 10/24/23, pp. 329-331*); and (iv) the Proposed Development does not comply with the minimum “block” requirements (*N.T. 10/24/23, pp. 332*).

On cross-examination, Mr. Federico admitted his June 29, 2023 review letter, Exhibit A-5, only cited two reasons why the Application and Proposed Development did not comply: (i) insufficient sight distances for the Proposed Development accesses; and (ii) the undesirable sharp horizontal curves near vertical curves in the Proposed Development internal roads. *Exhibit A-5*;

N.T. 10/24/23, p. 339. Mr. Federico admitted the Applicant's additional Speed Study satisfied his concerns regarding the sight distances for the Proposed Development accesses. *Exhibit A-6; N.T. 10/24/23, pp. 339-340.* Mr. Federico also admitted the proposed roadway designs satisfied the applicable Township Ordinance provisions and his opinion about the desirability of the horizontal and vertical curvature arose out of a PennDOT highway guidance manual that is not part of the Township Ordinance. *N.T. 10/24/23, pp. 340-341.* In addition, Mr. Federico admitted on cross-examination none of the streets in the Proposed Development actually formed "blocks" as defined under the Township Ordinance. *N.T. 10/24/23, pp. 344-346.*

The Applicant further rebutted Mr. Federico's testimony through the testimony of Mr. Gibbons, its expert civil engineer, as follows: (i) the Proposed Development's roadway curvature is normal, acceptable and desirable (*Exhibit A-21; N.T. 11/29/23, pp. 468-474*); (ii) if necessary, the Proposed Development will include two separate emergency accesses to Road "C" to provide additional emergency vehicle access to the single-family homes proposed to be constructed along Road "C" in the event access from Road "A" to Road "C" is impassable. *Exhibit A-18; N.T. 8/14/23, pp. 457-458; 459-463*; and (iii) the road design complies with the Township Ordinance which does not require a leveling area for Road "C", which is a through street. *N.T. 8/14/23, p. 73; Exhibit A-4 (June 15, 2023 Howell Engineering Response Letter).*

Mr. Dinunzio testified he has emergency access concerns regarding the Proposed Development, regardless of the possible cause, because the Property only has one access and there is only one road access to the proposed homes to be constructed on Road C in the Proposed Development. *N.T. 10/24/23, p. 378, 386.*

On cross-examination, Mr. DiNunzio admitted there are two points of access to the Proposed Development from Shiloh Road and he would “feel more comfortable” if Road C had a second point of emergency access. *N.T. 10/24/23, p. 385-387.*

The Applicant rebutted Mr. DiNunzio’s testimony through the testimony of Mr. Gibbons, its expert civil engineer, by demonstrating, if necessary, the Proposed Development will include two separate emergency accesses to Road “C” to provide additional emergency vehicle access to the single-family homes proposed to be constructed along Road “C” in the event access from Road “A” to Road “C” is impassable. *Exhibit A-18; N.T. 8/14/23, pp. 457-458; 459-463.*

The Objectors produced no expert witnesses. The Objectors did not present any competent, non-speculative, factual or probative evidence at the Hearing.⁵

Moreover, the Objectors’ testimony and statements were hearsay, not supported by any evidence and speculative, which is not probative evidence upon which the Board may rely. *See, Kretschmann Farm, LLC v. Township of New Sewickley*, 131 A.3d 1044 (Pa. Cmwlth. 2016)(where landowners' testimony or documents, including the hundreds of e-mails expressing concern about the environmental and health impact of a compressor station, were mere expressions of concern but did not constitute probative evidence of harm which does not meet an objector’s burden of showing that the compressor station would adversely affect the public health, safety and welfare in a way not expected for a usual compressor station).

⁵ In his case in chief, Mr. Pingar attempted to demonstrate the Proposed Development roads contain a cul-de-sac exceeding the maximum permitted length of 1,500 linear feet. *N.T. 11/29/23, p. 413.* However, Mr. Pingar produced no expert testimony or probative evidence regarding the length of any cul-de-sac in the Proposed Development. The Applicant previously demonstrated the length of any cul-de-sac in the Proposed Development is less than 1,500 linear feet. *Exhibit A-4 (June 15, 2023 Response to Twp Eng Review).*

Neither the Planning Commission nor the Objectors introduced any evidence demonstrating the Applicant failed to comply with the specific objective conditional use standards applicable to the Proposed Development.

Neither the Planning Commission nor the Objectors introduced any concrete evidence demonstrating to a high degree of probability the Proposed Development will have a greater adverse effect impact than that which would normally be associated with a similarly situated single-family home flexible residential development and that such abnormal impact would create a public health and safety issue.

Neither the Planning Commission nor the Objectors elicited any testimony from the Applicant's expert witnesses that would satisfy the Planning Commission's or Objectors' burden of demonstrating the Proposed Development will have a greater detrimental effect upon the public health, safety and welfare than that which would normally be expected from a similar warehousing and distribution facility.

No other party to the Hearing satisfied its burden rebutting the Applicant's entitlement to an approval of the Application and the Proposed Development.

III. PROPOSED CONCLUSIONS OF LAW

1. The Applicant is the owner or equitable owner of the Property and has standing to file and maintain the Application.

2. The Proposed Development is permitted under Sections 170-902(A) and 170-903.A of the Zoning Ordinance [Flexible Development Procedure] which permits a flexible residential development of single-family homes on the Property by conditional use in the R-1 Residential District.

3. The Proposed Development is consistent with the Township’s zoning plan and the public health, safety and welfare because it is a permitted use on the Property.

4. The Applicant’s expert witnesses are found to be credible and their testimony to be relevant and probative in support of the Application.

5. The Applicant’s evidence of record is relevant and probative in support of the Application.

6. The Application and Proposed Development comply with Article IX, Sections 170-900 et seq. of the Zoning Ordinance [Flexible Development Regulations].

7. The Application and Proposed Development satisfy the applicable objective conditional use standards under Article IX, Sections 170-900 et seq. of the Zoning Ordinance [Flexible Development Regulations].

8. The Application and Proposed Development satisfy the applicable general conditional use standards under Article XX, Section 170-2009.D of the Zoning Ordinance.

9. The Proposed Development is not required to be consistent with the Township’s Comprehensive Plan. *Aldridge v. Jackson Twp.*, 983 A.2d 247, 258-259 (Pa. Cmwlth. 2009).

10. The Applicant has satisfied its evidentiary burden under Pennsylvania law and conditional use legal standards.

11. No other party to the Hearing introduced credible, relevant or probative evidence demonstrating the Applicant has not met its evidentiary burden.

12. No other party to the Hearing introduced credible, relevant or probative evidence demonstrating to a “high degree of probability” the Proposed Development would create a greater adverse impact than that which would normally be expected from a similar use of the size and type proposed.

13. No other party to the Hearing introduced credible, relevant or probative evidence demonstrating the Proposed Development will have an adverse impact on the public health or safety in accordance with Pennsylvania law and applicable conditional use legal standards.

14. The Applicant is entitled to an approval of the Application and the Proposed Development.

15. The Application and the Proposed Development is hereby approved.

16. 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.**



Dated: December 18, 2023

By: _____
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