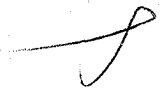


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June 7, 2010

Mary Ann Rossi

VIA FEDERAL EXPRESS

Barbara M. Kelly, Township Manager
East Caln Township
110 Bell Tavern Road
Downingtown, PA 19335

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p] 610.840.0204
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**Re: Application of Progressive Housing Ventures, LLC
Our File 191566-52791**

Dear Barbara:

Enclosed please find the original and four (4) copies of the Proposed Findings of Fact, Conclusions of Law, and Brief on Behalf of Applicants Progressive Housing Ventures, LLC and J. Loew & Associates, Inc.

Thank you.

Sincerely,



Mary Ann Rossi

MAR/s

Enclosures

cc: Samuel C. Stretton, Esquire – w/enclosure
David Malman, Esquire – w/enclosure
Patrick C. O'Donnell, Esquire – w/enclosure
Sarah E. Peck – w/enclosure
Jack Loew – w/enclosure

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BEFORE THE BOARD OF SUPERVISORS OF EAST CALN TOWNSHIP

In Re: Application of Progressive Housing Ventures, LLC, J. Loew & Associates, Inc., and the Borough of Downingtown for Conditional Use Approval

Proposed Findings of Fact, Conclusions of Law, and Brief on Behalf of Applicants Progressive Housing Ventures, LLC and J. Loew & Associates, Inc.

Proposed Findings of Fact

1. Applicants are J. Loew & Associates, Inc., Progressive Housing Ventures, LLC [collectively referred to as "Applicants"] and the Borough of Downingtown [the "Borough"].
2. The Borough of Downingtown is the legal owner of the property that is the subject of this application; Applicants are the equitable owners of a portion of the property that is the subject of this application for conditional use approval and have equitable rights to easements on the remainder. Exhibit A-20.
3. The property that is the subject of the conditional use application consists of 23.2± acres located in the Township of East Caln [hereinafter "the Property"].
4. The Property consists of approximately 7 acres, which are proposed for development as a community of 70 multi-family dwellings ["the Millrace"] and 16.2 acres, a portion of which is proposed for dwellings as Phase II of the overall development to be known as Kardon Ponds and the balance is proposed to be public open space owned by the Borough.

5. The Property is adjacent to other lands owned by the Borough and located in the Borough, which lands consist of approximately 26.5 acres [the "Adjacent Lands"].

6. The Adjacent Lands are the subject of a conditional use decision and order issued by Borough Council and dated July 15, 2008. Exhibit A-26.

7. Prior to the acquisition of the Property and the Adjacent Lands by the Borough, portions thereof had been used as a quarry to remove minerals from the ground. [N.T. 1-7-2010, pp. 60 *et seq.*]

8. When the quarry use ended, the open cavities left on the Property and the Adjacent Lands were used as a dump for industrial waste by-products of the industries that were then active in the Borough, including paper mills. *Id.* The limits of the filling activity on the Property are shown on Exhibit A-12a.

9. The use of the Property for dumping has resulted in environmental contamination of portions of the Property and the Adjacent Lands.

10. In or about 1999, Downingtown Borough received clearance from the Pennsylvania Department of Environmental Protection ["DEP"] under Act 2 to permit use of the Property for limited park and recreation and/or commercial buildings and related parking.

11. Since the late 1990's, the Borough has engaged in planning for development of the Property as a means to clean up the contamination and remove any threat of liability on account of the contamination. [N.T. 3-15-2010, pp.104 *et seq.*]

12. In July of 2006, the Borough issued a solicitation for bids to redevelop Kardon Park; Applicants were the successful bidders in the bid process. See, Exhibit A-20 [Agreement of Sale, First Amendment to Agreement of Sale and Second Amendment to Agreement of Sale].

13. Applicants propose to develop the Property and the Adjacent Lands pursuant to the plan marked as Exhibit A-4; development of the Adjacent Lands cannot move forward at this time due to pending litigation regarding the Borough's right to convey the Adjacent Lands for development.

14. The proposed development in East Caln Township, and the zoning to permit it, has been under consideration by the Township since in or about late 2006. [N.T. 12-15-2009, p. 73].

15. The plan proposed for the Millrace includes 76% open space of which 62% or 14.2 acres will be public open space and 3.2 acres will be private open space; the ponds are roughly 26% of the open space. [N.T. 12-15-2009, p. 73].

16. The public open space will continue to be maintained by the Borough unless the Township directs otherwise and the new residents will make a contribution to said maintenance in an amount to be negotiated during the land development plan approval process. *Id.* at 74.

17. The proposed development includes new walking trails as an extension of the Lion's Trail and a new parking area; the trails are shown on Exhibit A-3.

18. The open space provided complies with proposed Section 225-7.F.4 of the Zoning Ordinance. [N.T. 12-15-2009, p. 74].

19. The elevations of the proposed buildings were presented in Exhibit A-14 and A-14A and their height complies with the proposed zoning ordinance amendment. [N.T. 12-15-2009, p. 76].

20. The testimony of Sarah Peck establishes, by reference to the exhibits, that the proposed development complies with the specific criteria of proposed Section 225-7.F. [N.T. 12-15-2009, pp. 71 *et seq.*].

21. The need for the type of housing proposed was established through the testimony of Ms. Peck based on her recent development of Green Street Mews [N.T. 1-7-2010, pp. 17 *et seq.*] and her market research subsequently and Andy Detterline based on her extensive experience with market research for new homes generally and with active adult and age-targeted housing specifically. [N.T. 1-7-2010, pp. 32 *et seq.*].

22. Vic Kelly, who was accepted as an expert in civil engineering [N.T. 12-15-2009, p. 37], testified regarding the method of managing storm water runoff from the proposed redevelopment.

23. One of the features of the Property is a series of ponds; currently there is not sufficient fresh water flow to the ponds. [N.T. 3-15-2010, p.14; pp. 86-87].

24. The storm water management system for the Property will be designed to direct fresh water flow to the ponds, which will improve their appearance and health. *Id.*

25. Mr. Kelly presented preliminary storm water management calculations to demonstrate that the Fourth Lake can accommodate the runoff from the proposed development. [N.T. 2-4-2010, pp.92 *et seq.*].

26. The storm water management facilities for the proposed development will be designed in compliance with the Best Management Practices Manual issued by the Pennsylvania Department of Environmental Protection such that the storm water will be filtered and cleansed prior to entering the Fourth Lake. [N.T. 4-5-2010, pp. 42-43].

27. Andreas Heinrich, who was accepted as an expert in traffic engineering, testified that, with implementation of the recommendations in the Traffic Impact Study with regard to site access, safe and efficient vehicular access would be provided to the proposed community. See Exhibit A-9.

28. Ray Ott, who was accepted as an expert in land use planning and fiscal impact analysis, testified that the fiscal impact of the proposed redevelopment will be positive. See Exhibits A-5 and A-5A.

29. The proposed community will be served by public water and public sewer. See Exhibit A-16 and testimony of Steve Sullins [N.T. 3-15-2010, pp. 106-107].

30. As part of the redevelopment of the Property, a Clean-Up Plan approved by DEP will be implemented resulting in the removal of environmental risks to the users of the Property. Exhibit A-33.

31. The benefits to the Township of East Caln and the public from the proposed redevelopment are as follows:

- a. Remediates contaminated soils pursuant to a Clean-Up Plan approved by DEP at no cost to the taxpayers.
- b. Increases and substantially improves the area of usable public park.
- c. Generates a positive annual fiscal impact for the Township.
- d. Returns a tax exempt property to the tax rolls of the Township.
- e. Provides affordable housing for seniors, first time homebuyers, and other demographic segments whose housing needs are not currently being met in Chester County.
- f. Creates a pedestrian-friendly community walkable to the town center and to public transportation, which reduces trip dependence on the automobile and is good for the environment.
- g. Enhances the environmental quality of the ponds through bio filtration plantings to cleanse storm water entering the ponds and through new wetlands plantings around the ponds' edges and through techniques to improve the flow of water to the ponds.

32. The standards and criteria of Section 225-35.A(4) have been met or will be met as follows:

- a. Consistent with Purpose of Zoning Ordinance. The purpose of the proposed amendment to the R-4 Cluster Residential District to permit multi-family dwellings is to provide for residential development at various densities while preserving environmentally sensitive natural features and scenic landscapes.

Ray Ott testified that he reviewed the purposes of the Zoning Ordinance, as well

as the purposes of the proposed amendment to the R-4 Cluster Residential District, and concludes that the proposed development of Phase 1 is consistent with the intent of the Zoning Ordinance and specifically with the intent of the proposed amendment to the R-4 Cluster Residential District. [N.T. 11-11-09, pp. 32-34]. See, also, Exhibits A-3 and A-4.

b. Compliance with the Subdivision and Land Development Ordinance. Vic Kelly testified that the proposed use of the Property for residential dwelling units can be designed in compliance with the Township's Subdivision and Land Development Ordinance with the possibility that certain routine waivers may be requested. [N.T. 12-15-09 p. 46].

c. Mr. Ott testified that the proposed use and its location are consistent with the Comprehensive Plan. The Comprehensive Plan was prepared in 1999 and shows the Property on the Future Land Use Map as community facilities. [N.T. 11-11-09, pp. 34-35]. Because the plan for development of the Property improves the accessibility and use of the park, it is consistent with the Comprehensive Plan.

d. Demonstrated Need for the Proposed Use. Applicant presented testimony from Sarah Peck and Andy Detterline, who both testified to the need for the type of housing being proposed for the Property. Ms. Peck, who has experience as the developer of Green Street Mews, a recently completed town home community in the Borough of Downingtown, testified that the proposed dwelling units meet an unmet need in the marketplace. [N.T. 12-15-09, p. 72]. Ms. Detterline also spoke to the lack of housing similar to that being proposed.

[N.T. 1-7-10, p.43]. In addition, the proposed development will result in remediation of existing environmental contamination for the benefit of the health, safety and welfare of the public.

e. Consistency with Existing Land Uses. Exhibit A-2 shows the land uses surrounding the Property and demonstrates that the proposed multi-family dwellings form an appropriate transition from commercial and industrial uses to the west and single family detached residential to the east. Mr. Ott so testified as to the consistency of the proposed community to the uses surrounding it. [N.T. 11-11-09, p. 44].

f. Public Services. The Property is to be served by public water to be provided by the Downingtown Municipal Water Authority ["DMWA"] and by public sewer to be provided through the Borough of Downingtown by the Downingtown Area Regional Authority ["DARA"]. Exhibit A-16 establishes the ability and willingness of DMWA to serve the Property. Steve Sullins, Borough Manager for the Borough of Downingtown testified to the arrangements being made for DARA to provide sanitary sewer service to the Property. [N.T. 3-15-10, pp. 106-107]. There are existing water mains on the Property; Applicant submitted a concept plan for relocation of the mains [Exhibit A-25], and Mr. Kelly testified that final design of the relocation would be part of the subdivision plan approval process. [N.T. 3-15-10, p. 18-20].

g. Quality of Construction. Ms. Peck testified to the exterior materials that will be used for the homes as follows: "we are trying to evoke some of the historic character of the neighboring architecture. . . we are not looking for

monochromatic. We also have a variety of exterior materials, brick, and brick in varying tones. . .” [N.T. 12-15-09, p. 78]. Ms. Peck’s testimony also established the compliance of the proposed multi-family housing with the specific design criteria of proposed Section 225-7.F. [N.T. 12-15-09, pp. 79 *et seq.*] See Exhibits A-14, A-14a, and A-18.

h. Environmentally Sensitive Design. The Property is unique in that it is partially a brownfields site. Paul Stratman, P.E., who was accepted as an expert in environmental engineering and geology, testified to the historic use of the Property and the adjacent property in the Borough of Downingtown and to its current contamination. [N.T. 1-7-10, pp. 59 *et seq.*] He testified to an environmental assessment that was performed in the 1990’s by the Borough of Downingtown to secure a release of liability to use a portion of the Property for recreation.¹ [N.T. 1-7-10, p. 64]. Mr. Stratman further described the Clean Up Plan that has been approved by the Pennsylvania Department of Environmental Protection [“DEP”] for the Property. [N.T. 1-7-10, p. 66]. Mr. Stratman further identified the areas of wetlands on the Property and Exhibit A-24, Army Corps of Engineers approval of Nationwide Permit 38, was introduced into evidence. Mr. Stratman further testified that findings of no adverse impact to bog turtles or to the East Lancaster Avenue historic district were also made by the appropriate reviewing agency. [N.T. 1-7-10, p. 70]. The site plan reflects the concern for the environmental conditions of the Property and Exhibit A-4 illustrates the quantity

¹ The 7± acres on which the multi-family buildings are to be located were never used for recreation, but have historically been used for composting, storage and related public works purposes by the Borough of Downingtown. [N.T. 3-15-10 p. 106].

and quality of open space that will be provided as part of the development of the Property.

i. Access. Andreas Heinrich, who was admitted as an expert in transportation and traffic engineering, testified that the proposed development will operate with safe and efficient access and that he had no concerns about internal circulation except to verify emergency vehicle access with emergency management during the subdivision and land development plan review process. [N.T. 2-4-10, pp. 61-63].

j. Sanitation and Water Supply. See subparagraph f. above.

k. Screening and Landscaping. Landscape plans were submitted to demonstrate compliance with the requirements of Chapter 185. See, Exhibits A-17a and A-17b.

l. Entrance Area Landscaping. Ms. Peck testified to the proposed landscaping at the boundaries of the Property to establish compliance with this subparagraph. [N.T. 1-7-10, pp. 21 *et seq.*].

m. Disruption of Existing Natural Features. See subparagraph h. above.

n. Parking. Ms. Peck testified to parking, as did Mr. Heinrich. That testimony and the site plan establish compliance with (indeed, exceed) the parking requirements of the Zoning Ordinance.

o. Signage. Ms. Peck testified that an entrance sign will be located on Norwood Road and appropriate directional and traffic control signs will be

provided as needed. Signage for the trails will be provided as deemed appropriate by the Township.

p. Storm Water Management. Mr. Kelly provided storm water management calculations and testified that there is sufficient available capacity in the Fourth Lake (also referred to during testimony as Pond 3) to permit it to be used as part of the storm water management for the Property during a 100 year storm. The storm water management design will incorporate the principles of the DEP Best Management Practices Manual and provide for water quality through the use of rain gardens, inlet snouts and similar devices. Even when Mr. Kelly re-calculated the volume of runoff using the curve numbers and the size of the pond testified to by Mr. Differ [while not accepting the assumptions as correct], he determined that the capacity of the Fourth Lake was adequate to receive storm water from the 100 year storm. [N.T. 5-6-2010, pp. 67-71].

Proposed Conclusions of Law

1. The Applicants have standing to pursue this application for conditional use approval.
2. The testimony and exhibits presented during the conditional use hearings establish that the proposed redevelopment meets the standards and criteria of the Zoning Ordinance including the requirements of Section 225-7.F.
3. Provided that Applicants comply with the conditions imposed by this Decision, the proposed redevelopment will not have an adverse impact upon the public health, safety or welfare.

Brief on Behalf of Applicants

Applicants seek conditional use approval pursuant to the proposed amendment to Section 225-7.B(3)(d), which permits multi-family dwellings by conditional use approval in the R-4 Cluster Residential Development District. The specific criteria for multi-family dwellings is stated in Section 225-7.F. Further specific and general criteria for conditional uses are stated in Section 225-35.

- A. Applicants met their burden as to the specific and general criteria for conditional use approval.

A conditional use is analogous to a special exception. Cases decided on burdens of proof, etc. in a special exception context apply with equal force to a conditional use proceeding. *In Re: Appeal of Edwin R. Thompson et al.*, 896 A.2d 659 (Pa. Commw. 2006), *appeal den'd* 916 A.2d 636 (Pa. 2007). An applicant for conditional use approval has the burden to demonstrate compliance with the specific criteria of the ordinance. *Levin v. Board of Supervisors of Benner Township*, 669 A.2d 1063 (Pa. Commw. 1995), *aff'd* 689 A.2d 224 (Pa. 1997).

Not all of the criteria of Section 225-35 are specific. There is a distinction between specific and general ordinance criteria. As to the general criteria, the burden of production is on the protestors. *In Re: Appeal of the Cutler Group*, 880 A.2d 39 (Pa. Commw. 2005), *appeal den'd* 897 A.2d 461 (Pa. 2006). Specific criteria have been held to include traffic impact, provision of public services, etc. *Bray v. Zoning Hearing Board of Adjustment*, 410 A.2d 909 (Pa. Commw. 1980). Once the applicant has met its burden, the burden shifts to the protestors to

prove that the proposed use is not, in fact, consistent with the promotion of public health, safety and general welfare. *In Re: Appeal of Brickstone Realty Corp.*, 789 A.2d 333 (Pa. Commw. 2001), *appeal den'd* 806 A.2d 863 (Pa. 2002).

In the instant matter, Applicants submitted the following reports: Fiscal Impact and Revised Fiscal Impact; Addendum to Fiscal Impact Report; Traffic Impact Study for Phase 1; September 2008 Traffic Impact Study; Updated September 2008 Traffic Impact Study; Storm water management calculations; Post Remediation Plan; DEP approval of Clean-Up Plan; Excerpt from the Best Management Practices DEP Manual; Protocol for Excavation/Grading in Historic Fill; Excerpt from Clean-Up Plan; and Supplement to Conceptual Storm Water Management Design. In addition, Applicants submitted the following plans: East Caln Property; Overall Site; Limits of Fill and Wetlands; landscape plans; trail and sidewalk plans; and water main mapping. These reports and plans, along with testimony from expert and fact witnesses, more than meet the burden to demonstrate compliance with the specific ordinance criteria.

Nor is it fatal, or even harmful, to the application that the ordinance amendment that will constitute the legislative determination that this type of use is consistent with the zoning plan and presumptively consistent with the health, safety and welfare of the community [*Cutler Group, supra at 42*] has not yet been adopted. It has become customary in land use matters involving a petition for zoning ordinance amendment for the municipality to take testimony on the ultimate use of the property before adopting the ordinance amendment. So long

as the amendment is duly adopted before the conditional use decision is issued, there is no procedural defect.

The case of *Valenti, et al. v. Washington Township*, 737 A.2d 346 (Pa. Commw. 1999), is helpful by analogy. In *Valenti*, the SALDO was amended while a subdivision plan was pending. The new ordinance had more favorable provisions. The Township granted waivers to permit the applicant to take advantage of the more favorable ordinance provisions. The court affirmed the lower court, which held that an applicant for subdivision approval may accept the benefit of favorable provisions and may reject adverse changes to the ordinance. The Commonwealth Court held that the Township did not err in granting the waivers.

Here, the Township has the right to adopt an amendment to its Zoning Ordinance that would authorize the use proposed by the Applicants. It then has the right to issue a conditional use decision based on the record made before it. So long as all procedural steps are correctly taken before each action, it matters little when the evidentiary record is actually made.

Ms. Feldman's reliance upon *Lehigh Asphalt Paving and Construction Company v. Board of Supervisors of East Penn Township*, 830 A.2d 1063 (Pa. Commw. 2003), is misplaced. As the court notes, Section 917 was added to the Municipalities Planning Code ["MPC"] to protect a landowner from amendments to ordinances made after the time an application for special exception or conditional use is filed. Prior to 1988, municipalities could harm landowners by making uses subject to special exception or conditional use approval and then

adopt ordinance changes that would adversely affect the use and claim that the applications were then subject to the new ordinance amendments. Section 917, which echoes the provisions of the since repealed Section 603(c)(2.1), prevents this abuse.

What *Valenti* makes clear is that a municipality may permit a landowner to take advantage of more favorable ordinance provisions enacted after an application has been filed. Contrary to Ms. Feldman's assertion that it is "absurd and illogical" to seek a conditional use without an enabling ordinance, it is a procedure that protects a municipality from unintended adverse consequences of adopting an ordinance without a complete understanding of the implications of the use thereby enabled. This procedure has been adopted by many municipalities for this reason. Since rezoning is a purely legislative act, a municipality can seek such evidence as it needs to make it comfortable to exercise that discretion.

In the proposed findings of fact, Applicants specify how each of the criteria of Section 225-35 has been addressed, regardless of being specific or general. The burden, therefore, shifted to the protestors. The protestors failed to produce any credible evidence of a detriment to the public health, safety or welfare from the proposed multi-family development. Accordingly, conditional use approval should be granted.

B. Ms. Feldman's reliance on *Edgmont Township* Is Misplaced.

Ms. Feldman's counsel asserts that Applicants failed to meet their burden because the testimony was merely a promise to comply, which is insufficient to

establish compliance with the criteria of the zoning ordinance. *Edgmont Township v. Springton Lake Montessori School, Inc.*, 622 A.2d 418 (Pa. Commw. 1993). This matter is readily distinguishable from *Edgmont* and later cases have clarified that holding.

In *Edgmont Township*, the applicant sought to gain special exception approval for a pre-school. There were several ordinance requirements that were admittedly not met by the application. The applicant school promised that it would be in compliance prior to opening the school without further explanation or evidence. The court held that a mere promise to comply is insufficient. The court held that: "[I]t was incumbent on the school to come forward with evidence detailing how it was going to be in compliance with the requirements."

Ms. Feldman seeks to characterize the testimony in this matter on behalf of Applicants as a mere promise to comply because, for example, the NPDES permit has not yet been issued. More recent cases have, however, acknowledged that conditional use approval is but one step in the land use approval process and that:

Detailed design of the proposed development and compliance with detailed requirements of the Ordinance and SALDO, while required for ultimate subdivision approval, are not required for conditional use approval and are beyond the limited scope of the conditional use process.

In Re: Thompson, supra at 672.

In the instant case, Mr. Kelly testified that he had made calculations to determine the amount of storm water that would need to be managed. He also testified that he had analyzed the capacity of the Fourth Lake to accommodate

that water. He then described how he would comply with the requirements to obtain a permit, *i.e.*, he would follow the DEP Best Practices Manual. He described the types of storm water controls that are available to him in finalizing the design. The testimony was quite specific and provides the basis for a finding that the storm water management plan will comply and a reasonable condition to assure such compliance.

Likewise, case law is clear that, where permits from an agency outside the municipality are required for a land development, it is appropriate to approve the application with the condition that the outside agency permits are received. *In Re: Appeal of Shawn F. McGlynn, et al.*, 974 A.2d 525 (Pa. Commw. 2009), citing *Kohr v. Lower Windsor Township Board of Supervisors*, 910 A.2d 152 (Pa. Commw. 2006).

Also instructive is the decision in *In Re: Appeal of Drumore Crossings, L.P.*, 984 A.2d 589 (Pa. Commw. 2009). In *Drumore*, objectors argued that the application for conditional use approval should not have been granted because the applicant had not identified specific design details of the proposed sewage treatment system. The court held that such specific engineering design details cannot be required at the conditional use stage of development. *Id.* at 595. The Court also noted that the type of sewage treatment system was a decision for DEP, not the municipality. *Id.*

Here, Ms. Feldman is seeking such specific design detail that is not required at this time. Moreover, the Board has the discretion to approve with

conditions rather than deny the application. *In Re: Appeal of McGlynn, supra* at 536.

Finally, Ms. Feldman's argument that the application for conditional use approval should be denied due to inconsistency with the Comprehensive Plan must be rejected. At such time as the Board adopts the ordinance amendment, it will have made a legislative determination of consistency with the zoning plan. In *Aldridge, et al. v Jackson Township*, 983 A.2d 247 (Pa. Commw. 2009), objectors argued that the conditional use application should have been denied for lack of consistency with the Comprehensive Plan. The Court noted that it resists attempts by local governing bodies to deny conditional use applications based on an alleged lack of consistency with the Comprehensive Plan. *Id.* at 258. The law is that where a zoning ordinance permits a conditional use, there is legislative acceptance of consistency with the zoning plan. *Id.* at 259, citing *In Re: Cutler Group, supra*.

The burden of the protestors here is to demonstrate "to a high degree of probability" that the use will adversely affect the public welfare in a manner not customarily expected from the type of use. *Aldridge, supra* at 253. The protestors presented no evidence that even comes close to meeting this standard.

C. The Use of the Fourth Lake for Storm Water Management is Not Prohibited and Should be Encouraged.

1. Orphans' Court Approval is Not Required.

Ms. Feldman relies upon the Public Trust Doctrine and/or *In Re: City of Erie*, 992 A.2d 75 (Pa. 2010). Of course, reliance on the Public Trust Doctrine is

unavailing since the Supreme Court affirmed the Commonwealth Court's holding that the Public Trust Doctrine is common law that was codified in the Donated or Dedicated Property Act, 53 P.S. §§3381 *et seq.* [hereinafter "the Act"].

Nor does the Act require Orphans' Court approval under the circumstances of this case. The Act does not require Court approval of a continued use of public property. It requires approval of the proposed sale or change in use of public property. The Fourth Lake is not proposed to be conveyed and its use is not proposed to change.

All parties to the pending Orphans' Court litigation stipulated that the seven acres proposed for development are not and never have been used as parkland. They are, therefore, not subject to Orphans' Court jurisdiction. The proposal for this Phase 1 does not include any change in use of the park land. It is not clear that directing storm water to an existing pond is even a use of land.² Nothing in the *City of Erie* decision would support the contention that Orphans' Court approval is required under the circumstances of this case. As it turns out, not only does the proposed use not change any of the uses of the park land, the result of the new development will be such that the public's use and enjoying of the lands is enhanced: 1) directing storm water to the existing pond and the addition of the plantings and bio filtration devices improves the health and functionality of the pond over the existing condition, (2) capping the contaminated lands and eliminating their present soggyess will make them safe and more

² In *In Re: Appeal of Thompson, supra*, the court noted that "stormwater discharge" was not listed as a "use" permitted in the zoning district at issue and further noted that the Council did not determine whether the discharge of stormwater constitutes a "use" of land. *Id.* at 674.

usable by the public, and (3) the addition of considerably more public parking and trails will enhance the usage of the park.

If this were a privately owned piece of property, the municipality could approve a plan that incorporated the Fourth Lake into the storm water management facilities and, after construction, accept dedication of the open space. No one would argue that to be an illegal or improper result. The result here is the same and is no more illegal or improper than the example just given. The Borough does not need court permission to do what is lawful, logical, proper and in the best interest of its citizens.

2. Enhancement of the Fourth Lake is a Valid Public Purpose.

The Borough of Downingtown, as owner of the Fourth Lake, has made a determination that it is in the interest of the public to permit the Applicants to incorporate the pond into their storm water management facilities. There is ample testimony regarding the current condition of the pond and on the manner in which its incorporation into the storm water management facilities will improve its appearance and health. It will enhance the pond and therefore the experience of the public using the park.

Indeed, one must question the motives of the protestors here who allege that they seek the preservation of park land. No park land is being converted to another use under this application. The evidence establishes that, to the contrary, the amount of land available to the public is increased under this proposal. New public trails and parking are to be added to the park and a safe pedestrian crossing to access the Struble Trail is proposed. The development of

the seven acres will result not only in remediation of existing contamination, but improvement to the park land to be retained by the Borough.

Were the motives of the protestors truly to preserve park land, they would be praising the Borough and the Applicants rather than seeking to keep the Fourth Lake in its current, less than optimal condition.

D. The Role of the Borough of Downingtown.

Ms. Feldman argues that this conditional use application should be dismissed because the Borough of Downingtown did not properly act to make itself a party to the hearings or a co-applicant.

There are many reasons that this argument must fail, but perhaps the simplest is that the Applicants have standing regardless of the Borough's participation as co-applicant. Ms. Feldman is just flat wrong that because the Applicants do not own the Fourth Lake, they cannot make this application.

The MPC does not require that an applicant be a fee simple landowner. At all times during this process, the Applicants have had equitable rights in the Property pursuant to the Agreement of Sale and the amendments thereto. Regardless of what else the Second Amendment to the Agreement of Sale establishes, it establishes that the Borough has full knowledge of the application and that the Borough agreed to grant such easements as the Applicants might require on the Borough's land to improve the park. Exhibit A-20. As such, the Second Amendment does grant equitable rights to Applicants sufficient to afford them standing independent of the Borough.

Moreover, any defect in the Borough's standing to be co-applicant was cured before the end of the hearings. Just as Friends of Kardon Park were afforded numerous opportunities to establish their standing, so should the Borough have the same opportunity. Unlike Friends of Kardon Park, the Borough took appropriate and appropriately documented action to establish its standing and authority to act as co-applicant.

E. The Recommendation of the Planning Commission.

Exhibit B-12 contains the recommendation of the Planning Commission that conditional use approval be granted with conditions. Sarah Peck testified about the recommended conditions at the hearing on April 5, 2010. [N.T. 4-5-2010, pp. 89-113].

For the most part, Applicants are willing and able to comply with the recommended conditions. There were, however, some caveats: With regard to the recommendation that the trail be a minimum of 10' wide, paved equal to or better than Borough trail spec., allow for dogs, and be ambulance accessible, the Borough currently does not permit dogs in its parks. Therefore, compliance with that aspect of this condition would depend upon the Borough permitting dogs in its park.

In addition, ambulance access is problematic because the specifications for bridges that would accommodate an ambulance would dramatically change the pastoral, wooded character of the park. The Applicant proposes to improve the foot bridges with a bridge design that will be able to carry the weight of a

Gator vehicle equipped for medical emergency purposes and that will still be aesthetically consistent with the open space design.

As with the recommendation on dogs, the recommendation to introduce grass carp into the Fourth Lake is subject to permitting requirements during the land development process, by both the Township and the Pennsylvania State Fish and Boat Commission, the DEP and any other appropriate regulatory authorities.

As noted above, it is appropriate for any approval to be conditioned upon receipt of third party permits such as NPDES, DEP approval of a revised phasing plan, etc.

A final word about the preservation of park land: Ms. Feldman argues that park land should be preserved and protected. The overwhelming evidence of record is that this development will lead to not only preservation, but enhancement of the park land.

Ms. Peck testified to the continued use and enjoyment of the park, including the Fourth Lake, by the public. The improvements to the park will transform a linear trail to add new trails through more pristine and pastoral settings and through wooded areas. There would be new parking in addition to new trail. [N.T. 4-5-2010, p. 111].

Most importantly, the site will be remediated. The contamination, which currently sits on the surface of the land, will be contained by an 18" cap covered by 6" of top soil. [N.T. 1-7-2010, pp. 63-64; p. 66] and Exhibit A-33. Persons could safely stay in the park longer than 10 minutes and could safely walk off the

trails and on to the grassy areas. Mr. Stratman testified that caps have been used for hundreds of years and will remain effective indefinitely with a good maintenance and care program. [N.T. 3-15-2010, p. 98]. A detailed plan is in place to protect the public during installation of the cap. Exhibit A-32. A by-product of the capping and re-grading is that the presently soggy, lumpy open space areas will be drained properly and made much more pleasant to walk upon.

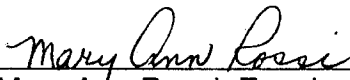
The Borough should be commended for acting to avoid liability for the contamination at the Property while at the same time bringing needed residential development to the urban center.

CONCLUSION

For all of the foregoing reasons, Applicants request that this Board grant the conditional use approval.

Respectfully submitted,

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