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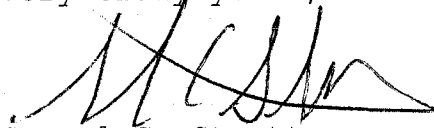
East Caln Township
Board of Supervisors
East Caln Township Building
110 Bell Tavern Road
Downingtown, PA 19335

Re: In re: Application of Progressive Housing
Ventures, LLC

Dear Board of Supervisors of East Caln Township:

Please be advised I represent the Protestant/
Respondent, Ann Feldman, in the captioned matter. Enclosed
please find the original and four (4) copies of the Brief
on behalf of Ann Feldman.

Very truly yours,



Samuel C. Stretton

SCS:jac
Enc.

Cc: David Malman, Esquire
Mary Ann Rossi, Esquire
Patrick O'Donnell, Esquire
Ann Feldman

VIA HAND DELIVERY

BEFORE THE EAST CALN TOWNSHIP BOARD OF SUPERVISORS

IN RE: APPLICATION OF :
PROGRESSIVE HOUSING VENTURES, :
LLC. :

BRIEF OF THE PROTESTANT/RESPONDENT, ANN FELDMAN

I. BRIEF PROCEDURAL AND FACTUAL HISTORY

The Protestant/Respondent, Ann Feldman, is a resident of Downingtown Borough. Her property line extends three feet into Second Lake. Since that is connected with Fourth Lake, which is at issue in this conditional use request by Progressive Housing Ventures, LLC, she has been given standing.

In essence, Progressive Housing Ventures, LLC, wishes to build approximately 70 units of housing on a 7 acre plot that is presently used for composting, which is located in East Caln Township. That area is presently zoned as R-4, which does not allow the cluster housing that Progressive Housing Ventures wishes to put on this particular property. Progressive Housing Ventures is joined in this conditional use request by the co-applicant, the Borough of Downingtown.

As a result, Progressive Housing Ventures has sought to have an amendment to the zoning laws of East Caln Township to allow this cluster, low density housing development. The zoning amendment has not been adopted yet

by the Board of Supervisors of East Caln Township. In anticipation of the new zoning being adopted, Progressive Housing Ventures and Downingtown Borough have sought a conditional use.

The present hearing is to seek a conditional use for the proposed, but not yet adopted zoning amendment. In other words, Progressive Housing Ventures is seeking a conditional use for something that doesn't even exist. To do that, they have spent approximately eight to nine hearings and township time to request a conditional use for a zoning amendment that has not been adopted. In other words, the proverbial cart has been put before the horse.

As part of the conditional use application, Progressive Housing Ventures is seeking to use a lake (Fourth Lake) and land owned by Downingtown Borough, but located in East Caln Township, to meet the open space and storm water requirements for this cluster housing development of 70 units that are proposed on this 7 acre track. As part of the conditional use, request the storm water management requirements and open space requirements cannot be met without using the public parkland of the Fourth Lake and land in Kardon Park, which is currently an actively used public park.

Whether there is another way the storm water management requirements could have been met is unknown since the essence of the eight or nine hearings has been the need to use the public parklands of the Fourth Lake for this private developer to meet their storm water management requirements and open space requirements.

During the course of the conditional use hearings, there was no dispute that the Fourth Lake is part of what is known as Kardon Park. There was no dispute that this is an actively used, public park on land owned by the Borough of Downingtown. It is also undisputed that the Fourth Lake is a part of the public park, which is also called The Ponds.

It is undisputed that people use this park on a regular basis. It is undisputed that the Fourth Lake has been used for fishing, ice skating and other activities. It is undisputed that this is public parkland. That was set forth in the testimony of Ann Feldman, Sarah Brown, Steve Sullins, the Borough of Downingtown Manager, Paul Stratman and Victor Kelly. Also, Sarah Peck, the owner of Progressive Housing Ventures confirmed this as a public park.

Although there was detailed testimony by experts as to the specifics of the storm water plan, the bottom line is

that the Fourth Lake would be the reservoir for the storm water run off from this project. There was testimony that a pipe would be put in and there was testimony that the contours of the lake would be changed. This testimony was set forth by Victor Kelly, the storm water management expert for Progressive Housing Ventures.

Mr. Kelly was very clear that using his calculations, the lake would be altered (5/6 N.T. 72-75).

Question: So to make sure I understand, you are indicating that the figures you came up with, the average in using your formulas, is that based on altering the sides of the Fourth Lake, changing the sides?

Answer: We looked at some preliminary benching of the mitigated wetlands on the south side of the pond. It's insignificant to the total number overall, but we looked at the volume. If you look at it as it is, that is roughly the average for those depths.

Question: So whatever you are doing, either your theoretical model or what you plan to do, you are not planning on altering or changing the sides or the banks of the Fourth Lake in any way?

Answer: We are not to that level of detail. We haven't modeled this basin and maybe it's a different reference but when we model it, we will actually run the water in, run the water out, see what the depth is, put in all of the storage information. What we have done is averages. We have looked at certain depths and how much more volume are you getting. I testified earlier to the

fact that the two or four inches or five inches or whatever the depth it ends up being would be in addition to what is flowing through the pond already." (5/6 N.T. 73, 74).

Therefore, the testimony was clear that it appears there is going to be a change in the lake, but he couldn't give any certainty saying there were no plans yet.

Mr. Kelly was asked on May 6th, as he had been asked several times at earlier hearings, about what plans and preliminary studies and what permits.

Question: So what you are telling us then, as I understand your testimony, you are telling us you have done some preliminary studies, but in terms of permits, approvals and things like that, we are just to trust you that it's going to be done, am I correct?

Answer: No. I think I testified to the same question earlier. You don't have to trust me. We have to get the permits in order to build the project, so without the permits, we can't build the project." (5/6 N.T. 77)

The Solicitor for the Borough then noted and confirmed how vague this was. He, in essence, indicated the conditional use approval, if given, would be invalid and void unless Progressive Housing could come back with particular applications and reports (5/6 N.T. 78).

Mr. Kelly was then asked by the Solicitor about the change in the lake and Mr. Kelly indicated he didn't know

specifically, but he thought it would be a 10% increase, so there would be 2 $\frac{3}{4}$ to 2.65 of an inch or more (5/6 N.T. 76, 77).

It should be noted that Mr. Kelly, during the May 6, 2010 hearing, gave a different set of curve numbers than he had presented at an earlier testimony. Mr. Kelly's "curve testimony" seems to indicate a change every time he testified. At one point, Mr. Kelly had said that the pre-development would be a 78 and post development would be a 90.5 curve. Mr. Kelly indicated since his first analysis, the pre-development numbers at the top of the chart use 80% of the existing conditions on site and that gave him a pre-development curve number of 82. The post development curve number is 90.8 (5/6 N.T. 69). What was most striking about Mr. Kelly's testimony was the acreage he was using when calculating his curve numbers was incorrect. This was the square footage/acreage for the site at issue (5/6 N.T. 72, 73). The correct acreage by the Army Corp of Engineers map was 6.962 acres. Mr. Kelly used 6.692 acres. He was also off on the square footage of the Fourth Lake surface.

The testimony of the other expert, Mr. Paul Stratman, also discussed the capping of the alleged contamination. He was questioned extensively about a lack of serious studies and long term studies as to the effect of a foot

and a half of soil on top of the contamination on which 70 units were going to be built. There were no studies as to the long term effect of the contamination.

Mr. Stratman's testimony was contradictory. At the conditional use hearing, he testified about serious contamination but, in previous testimony before the Downingtown Borough, he minimized the amount of contamination.

But, Mr. Stratman did confirm, as did other witnesses, that the Pennsylvania Department of Environmental Protection had given Act 2 clearance for the use of this as a park without any danger to the public. Under the Pennsylvania Department of Environmental Protection, there was no need for further capping for the park to be continued to be used for residents.

There was testimony by Sarah Peck, the principal in the Progressive Housing Ventures. She testified about how this 70 housing unit development would be an asset to the community, etc. As noted, she confirmed that this was parkland where the Fourth Lake was located.

There was also testimony by Andy Detterline as to the walkability of this project to train stations and other areas. Detterline also testified to the need for this type of housing in East Caln Township. But this testimony was

refuted by Ann Feldman, who did a separate walkability study and showed the distances of Ms. Detterline were incorrect. Further, Ann Feldman, had pointed out that there were other similar types of housing being sold in that area, so there was no additional need for this type of housing.

Without going into any detailed summary, in essence, the testimony was that Sarah Peck wanted to build 70 housing units of cluster housing on this 7 acre piece of land in East Caln Township. The soil was contaminated and she was going to put an 18 inch cap and build on top of that. She was seeking a zoning amendment to the current R-4 zoning classification so she could build this type of housing. The amendment had not been passed at the time of the conditional use hearings. Ms. Peck was seeking a conditional use from the not yet adopted, new zoning requirement. As part of that conditional use plan that she was proposing, she was proposing a storm water management plan and open space plan that would not use land owned by her, but would use public parkland owned by the Borough of Downingtown. This parkland was and is actively used as a park. This public park and lake was being used to meet Progressive Housing Ventures' open space and storm water management requirements.

The Petitioner, Ann Feldman, has vigorously protested this development. Ann Feldman respectfully requests the Board of Supervisors of East Caln Township deny this request for conditional use for the reasons set forth below.

II. ARGUMENT

A.) The Board of Supervisors has no authority to approve a conditional use that will require the use of a public park and the Fourth Lake of that public park to satisfy a private developer's billboard or management requirements. This would violate the Public Trust Doctrine. The use of the Fourth Lake and Kardon Park would require Orphans' Court approval.

In essence, what is proposed is to use public parkland for private developer's use. This is done under the theory of a conditional use. To use the public parkland for a private development or something other than a public park, there has to be Orphans' Court approval. Progressive Housing Ventures also is using this public park and lake to meet the open space requirements. This cannot be allowed, at least without Orphans' Court approval under the Public Trust Doctrine. The Public Trust Doctrine has existed for many years and was established by the Pennsylvania Supreme Court in the case of Board of Trustees of Philadelphia

Museums v. Trustee of the University of Pennsylvania, 96 A. 123 (Pa., 1915). The Public Trust Doctrine prohibits the sale or lease or use of actively used public parkland to a private developer or interest.

Recently, the Supreme Court revisited the Public Trust Doctrine in the case of In re Erie Golf Course, 992 A.2d 75 (Pa., 2010).

The Pennsylvania Supreme Court did not negate the Public Trust Doctrine, but in the context of the Dedicated and Donated Property Act (53 P.S. 3381 to 3386), the Court increased the power of the Orphans' Court to decide whether a public parkland could be utilized or sold for other purposes when the sale was pursuant to the Dedicated and Donated Property Act.

In any event, under either the Board of Trustees of Philadelphia Museums case, which is the Public Trust Doctrine case, or under In re Erie Golf Course, public land cannot be sold, leased or utilized for private purposes without Orphans' Court approval. The Board of Supervisors no longer has the power to do so.

In this case, neither Progressive Housing nor Downingtown Borough has sought any Orphans' Court approval for the use of the Fourth Lake or Kardon Park. There has been no petition to the Chester County Orphans' Court to

seek the use of Kardon Park and Fourth Lake for storm water management and open space requirements of the applicant, Progressive Housing Ventures.

Further, in the lower portion of Kardon Park, there is still pending in the Orphans' Court of Chester County, a request by the Borough of Downingtown to sell public parkland to Sarah Peck and Progressive Housing Ventures for the development of a 304 housing development. No decision has been made as of the time of this brief. But, even in that petition with Judge Platt, there was no request to utilize the Fourth Lake for the reasons set forth in this matter, and both Progressive Housing Ventures and the Borough of Downingtown have indicated that the Fourth Lake would remain a public park even if there was court approval to sell some of the Kardon Park land for the 304 housing development that Sarah Peck has proposed in the other section of Kardon Park.

Therefore, Ann Feldman, by her counsel, Samuel C. Stretton, Esquire, respectfully requests this Honorable Board of Supervisors deny the request for a conditional use since this Honorable Board does not have the power to grant this conditional use because of the Public Trust Doctrine, and further because of the recent decision in In re Erie Golf Course, 992 A.2d 75 (Pa., 2010), which place the power

to sell actively used parkland only in the Orphans' Court. There can be no conditional use unless there is court approval to lease or sell public parkland for a private use.

B.) The Board of Supervisors should dismiss this claim since the Borough of Downingtown did not approve intervention in this conditional use hearing on a timely basis.

The hearings were presented as a co-application by the Borough of Downingtown, which owns the property where the Fourth Lake and Kardon Park is located and by Progressive Housing Ventures. Progressive Housing Ventures has an agreement of sale to purchase the seven acres in East Caln Township for the 70 unit housing development.

Ann Feldman, also a Downingtown Borough Councilperson, testified that a review of the Borough of Downingtown minutes does not reflect any approval by the Borough of Downingtown to be a co-applicant in this conditional use process.

At the last conditional use hearing, Solicitor Patrick O'Donnell of Downingtown Borough appeared and said there had been approval in the agreement of sale that was approved at the August 2007 meeting, according to Mr.

O'Donnell's statement of record (5/21 N.T. 10-13). Mr. O'Donnell was uncertain of the date.

A review of the minutes of the Borough of Downingtown for August 2007 did not reflect an approval of intervention. In fact, until the resolution that was passed by Downingtown Borough on May 19, 2010, immediately before the last conditional use hearing, there was no previous resolution allowing intervention by the Borough of Downingtown. The Borough of Downingtown minutes reflect the approval of the agreement of sale. But, they do not reflect the approval of Amendment One. Amendment One involves options on property. The second Amendment was adopted on or about September 16th, which was after the Borough supposedly signed on as an applicant in the conditional use hearing, which contained general terminology about cooperation of the Borough of Downingtown with Progressive Ventures. Nowhere is there specific approval of Downingtown's involvement as a co-applicant until the May 19, 2010 ordinance after all but the last hearing was completed.

There has never been a formal resolution adopted by the Borough Council until immediately before the last hearing, allowing the Borough to participate. Since Friends of Kardon Park were not allowed to participate as a

party because supposedly there was not a timely adoption of a by law and approval to participate, similarly, the Borough of Downingtown shouldn't be allowed to participate.

Without the Borough of Downingtown's participation, Progressive Housing Ventures can't move forward. Progressive Housing Ventures doesn't own the land where the Fourth Lake is located. The Fourth Lake and Kardon Park, which is land only owned by the Borough of Downingtown, are needed by Progressive Housing Ventures to meet their open space and storm water requirements for this conditional use.

Ms. Peck indicated that she didn't need the Borough of Downingtown since Progressive Housing has an equitable interest. She stated that because Progressive Housing has an agreement of sale to purchase the 7 acres. But, she has no agreement of sale or any equitable interest in the Kardon Park or the Fourth Lake. The agreement of sale does not include the lake or Kardon Park. Therefore, Ms. Peck would need the Borough of Downingtown who owns that lake and park to be a co-applicant. Without the Borough of Downingtown's involvement, this case should be dismissed since Progressive Housing Ventures would not have standing. Since the Borough of Downingtown didn't vote to participate

in the first 8 hearings, all references to the use of the lake and the park should be stricken.

C.) The conditional use should be denied since the proposed zoning has not been adopted.

This argument appears to be almost a no-brainer. Progressive Housing Ventures is seeking a conditional use of zoning that doesn't even exist. In other words, the zoning amendment that would allow this type of housing development has not been passed by East Caln Township. Despite that, Progressive Housing is seeking a conditional use from this proposed, but not adopted, zoning amendment.

Present counsel could find no case law that allows a conditional use on the speculation that a zoning ordinance or zoning amendment might be or would be adopted in the future. The reason there is no case law is because it's absurd and illogical to seek a conditional use from something that doesn't exist, from something that has no legal effect.

Further, under the Pennsylvania Municipal Planning Code, 53 P.S. 10917, the statute very clearly states that when a conditional use has been filed, the subject matter of such application, no change or amendment of the zoning, shall affect the decision on the conditional use application and the applicant can be entitled to a decision

in accordance with the provisions of the zoning ordinance at the time the request for a conditional use was duly filed [53 P.S. 10917].

Apparently, the purpose of this statute was to protect the developer from a borough or council changing the ordinance to preclude the development. But, the statute language is very clear. In this case, the developer wants the conditional use not from the existing ordinance, but from a future ordinance that hasn't been passed. This statute very clearly notes that cannot take place and the conditional use could only be from the existing ordinance. Obviously, with the evidence presented here, in view of the existing R-4 zoning, no conditional use could be granted.

The case of Lehigh Asphalt Paving and Construction Company v. Board of Supervisors of East Penn Township, 830 A.2d 1063 (Pa. Comm., 2003) noted that a subsequent curative amendment process did not apply to a property owner who did not seek to challenge the validity of the original zoning ordinance, but sought to rely upon it. The decision was pursuant to the aforementioned 53 P.S. 10917. In other words, future or changed zoning rules after the conditional use request has been made are not be considered.

Therefore, Ann Feldman respectfully requests this Honorable Court deny the request for a conditional use since the underlying zoning for which the conditional use is being sought, has not been adopted. The current R-4 zoning would not allow for this conditional use and testimony has not been presented for a conditional use on the current zoning. Therefore, this request for a conditional use should be denied.

D.) The conditional use should be denied since there are not enough specifics. There were no reports or plans ever presented, no specific permits, but only promises. There are no documents or reports prepared. This is in violation of the East Caln Conditional Use Regulations.

Under East Caln Township's Conditional Use Regulations found at 225-35, there are very specific requirements that must be met for a conditional use.

Under subsection (4) of the East Caln Conditional Use Requirements, the following requirements are set forth, which are summarized, though not in a verbatim fashion:

In evaluating an application to the Board of Supervisors for a conditional use, the Board shall require the applicant to provide information to indicate that the standards and criteria have been met. The applicant shall submit a report, which describes how the standards and criteria have actually been met or will be met to ensure that the proposed use is consistent with the purpose of the article whereby it is permitted...the proposed use will

satisfy all relevant provisions and requirements of the subdivision and land development ordinance, and the proposed use and its location are consistent with and responsive to the comprehensive plan, in particular the plan for land use, circulation, community facilities and utilities and there is a demonstrated need for the proposed use and it will contribute to the maintenance of the health, safety, morals and general welfare of the township, and the proposed land use is consistent with the nature of the conforming land use existing on immediate adjacent properties and it will not detract from or cause harm to neighboring properties and the proposed use reflects an environmentally sensitive approach to land planning and design based on thorough site analysis and evaluations related to topography, soils, vegetation, hydrology, geology, visual quality and related site conditions and characteristics and will not result in excessive traffic volume. [Partial quotations and summaries of the Conditional Use Regulation 225-35(A) (4) (a) through (h)].

Further, in the same ordinance, under subsections (m) and (p), the proposed use will not be disruptive to streams and ponds and vegetations and other natural resources and the proposed plan will be developed using effective storm water management techniques and soil erosion and sedimentation control techniques [Conditional Use Regulation 225-35(A) (4) (m) and (p)]. These conditions have not been met.

There has been no plan submitted of an environmentally sensitive approach. More importantly, there are no plans to indicate that the streams and ponds and vegetations will not be disrupted and that effective storm water techniques are in place. The only thing that was testified by Victor

Kelly was conceptual ideas. He did not have any specific plans. When confronted by Mr. Stretton and others, he always said we'll take care of it when we get the permits.

But, East Caln Township's Conditional Use Requirements require more. It requires a plan in place. These conditions have not been met by Progressive Housing Ventures.

Further, under the same regulation under subsection (B) (5) of 225-35, there are specific requirements for site analysis maps and plans, and plans drawn to scale, particularly in terms of water resources. That was not done by Mr. Kelly. In fact, the question about the curve figures he kept changing, he was uncertain how much the contour of the pond would be changed. Mr. Kelly had no reports whatsoever. It got to the point that the Solicitor of the Township had to step in and note that if things change, it wouldn't be approved. But, the Township conditional use ordinance (225-35) requires these in advance. Mr. Kelly, as noted earlier, could not even be specific as to how much more water would go into the Fourth Lake.

East Caln Township has specific requirements for reports, etc., as noted above in this conditional use

hearing that have not been met and Pennsylvania case law also requires the same.

The seminal case is that of Edgmont Township v. Springton Lake Montessori School, Inc., 622 A.2d 418 (Pa. Comm., 1993). The school, at the time, admitted that its plan did not meet the specific requirements of the zoning ordinance, but promised it would be in compliance later. The Commonwealth Court rejected and reversed the special exception, noting "a self serving declaration of future intent to comply is not sufficient to establish compliance with the criteria contained in the ordinance." Id 420.

The entire testimony of Mr. Stratman and Mr. Kelly and Ms. Peck consisted of promises of future intent. All the testimony was self serving and not consistent with local ordinance 225-35. There is a promise they will be in compliance, a promise they will meet all the requirements. But, there are no reports and nothing specific and when confronted on cross-examination, they could not be specific. There were no reports for the storm water management or open space requirements that met the requirements of the conditional use ordinance 225-35 for East Caln Township.

This concept was affirmed in the case of Lafayette College v. Zoning Hearing Board of the City of Easton, 588

A.2d 1323 (Pa. Comm., 1991). The Commonwealth Court in that case reversed a parking plan saying that the trial court modified the plan and approved a plan that had not been submitted by the college.

It appears that this line of cases establish the concept that an applicant seeking a special exception or conditional use must specifically demonstrate how it will satisfy all applicable ordinance requirements and cannot rely merely on mere intention or promise or later ability to meet the requirements.

More recently, there has been the case of Broussard v. Zoning Board of Adjustment of the City of Pittsburgh, 907 A.2d 494 (Pa., 2006). Broussard seems to suggest that the applicant still has to demonstrate compliance with the applicable ordinance requirements. The issue in Broussard was whether the applicant was required, under the ordinance, to present a parking contract in recordable form as part of its application for a special exception for off-site parking. The Pennsylvania Supreme Court found that the zoning code was not explicit as to when the off-site parking agreement in recordable form must exist. The Pennsylvania Supreme Court held that the approval of the special exception for the off-site parking was based upon a reasonable interpretation of the zoning code. But, keep in

mind, in the present case, the East Caln Zoning Code requirement for conditional use (225-35) is very specific about the requirement for reports. The Supreme Court confirmed that the application was properly granted when the original plans were fully compliant.

"We conclude that, where the plan, as submitted addresses all of the ordinance's prerequisites for the special exception sought, and reasonably shows that the property owner is able to fill them in accordance with the procedures set forth by the zoning code (as reasonably interpreted by the Board), the reviewing Court should not reverse the grant of such an exception on the sole basis that some of the items described in the plan may be completed at a later date." Id 502.

In the current situation, in terms of the storm water management and open space requirements, the aforementioned conditional use regulation 225-35(A)(4) is very specific and its terms have not been met. The Broussard case, therefore, does not appear to change the existing case law. The Pennsylvania Supreme Court's decision seems to suggest that the original plans and submissions demonstrated the applicant must comply with all applicable zoning ordinances. But, in the present case, Progressive Housing Ventures, has not done that, and has gone back to promises and good intentions, etc.

In the case of In re Thompson, 896 A.2d 659 (Pa. Comm., 2006), the Commonwealth Court again restated the

concept "that an applicant for conditional use has the burden to demonstrate compliance with the specific criteria of the ordinance." Id 670.

Progressive Housing Ventures has not demonstrated compliance with the conditional use statute.

For all of these reasons, the Protestant/Respondent, Ann Feldman, respectfully requests that this conditional use be denied.

One glaring example is when Mr. Kelly testified that he would do the grading first and then get the NPDES permit. But, the problem is the rules for those permits require the seeking of the permit before there is any construction or grading. That is just another example of why this conditional use should be denied.

E.) Conditional use should be denied since the conditional use plan is not in compliance with the Comprehensive Plan of East Caln Township.

The Comprehensive Plan for East Caln Township for the Fourth Lake and Kardon Park refers to it as a community facility. In reviewing the Comprehensive Plan, the term community facility is defined as a park or open space.

The plan developed by Progressive Housing Venture is certainly not a park, but is cluster housing.

Further, under the East Caln Comprehensive Plan, there is a requirement to protect the Brandywine Creek and the flood plain. This area, according to the Comprehensive Plan, is within a flood plain. This housing development and conditional use that is being sought is totally inconsistent with the Comprehensive Plan's goal to protect the Brandywine Creek and the flood plain area.

In conclusion, the Comprehensive Plan of East Caln Township, which was developed in 1999 in which the current Supervisors participated in various capacities, is inconsistent with the conditional use requirements sought by Progressive Housing Ventures. This inconsistency should result in the denial of the conditional use.

F.) The Applicant, Progressive Housing Ventures, has failed its burden of proof for a conditional use.

A conditional use, unlike a special exception, may be approved by the Board of Supervisors. A conditional use is one specifically recognized as being consistent with the zoning plan. As such, it is therefore presumed that it does not adversely affect the public interest.

The requirements of a conditional use has been set forth in Northampton Area School District v. East Allen Township Board of Supervisors, 824 A.2d 372 (Pa. Comm., 2003).

"A conditional use is one specifically recognized by the legislature as consistent with the zoning plan. Bailey v. Upper Southampton Township, 690 A.2d 1324 (Pa. Comm., 1997). As such, it is presumed the particular type of use does not, of itself, adversely affect public interest. Id. Therefore, a conditional use application should be granted unless it is proven the impact on the public is greater than that which might be expected in normal circumstances. Id.

[5][6] In addressing an application for a conditional use, a zoning board must employ a shifting burden of persuasion. Sheetz, Inc. v. Phoenixville Borough Council, 804 A.2d 113 (Pa. Comm., 2002). First, the applicant must persuade the board its proposed use satisfies the ordinance's *337 objective criteria. H.E. Rohrer, Inc. v. Zoning Hearing Board of Jackson Township, 808 A.2d 1014 (Pa. Comm., 2002). Once it does so, a presumption arises that the proposed use is consistent with the general welfare. Id. The burden then shifts to objectors to rebut the presumption by proving, to a high degree of probability, the proposed use will adversely affect the public welfare in a way not normally expected from the type of use. Id. Mere speculation as to possible harm is insufficient." Id. 376. 377.

Clearly, the conditional use being sought is inconsistent with the current R-4 zoning. Therefore, there is no presumption that the conditional use would not affect the public interest. Further, the conditional use does not satisfy the current R-4 zoning objective criteria. The applicant has not met this burden. Any future or contemplated zoning change cannot be considered.

Further, Ann Feldman has demonstrated it is adverse to the public interest to use public parkland for private use.

Further, such is prohibited without Orphans' Court approval.

In conclusion, the applicant, Progressive Housing Ventures, has failed on its burden of proof for a conditional use.

Having made the above arguments, the Protestant/ Respondent, Ann Feldman, would also point out that public parks and open space should be protected. This is a very dangerous precedent to establish to allow the use of public park land for private use and development. This is almost an unheard of concept, which could have many unfortunate ramifications and unintended consequences if this is allowed in the future. There is a need for all elected officials to properly guard and safeguard park land and open space since there was so little of it left.

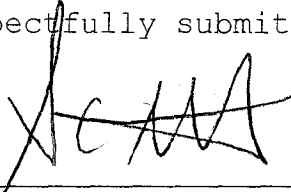
Public land and park land always creates a dilemma for supervisors. There is always a need for additional revenue. Park land at times seems like an easy fix to resolve shortages in township and borough financial situations. That is one reason why the Public Trust Doctrine was developed and one reason why Orphans' Court approval is needed. There is a need to protect this land against the financial needs of every borough and township.

Further, the scope of this development is very worrisome. Building houses that presumably are supposed to last for a hundred years or more on top of highly contaminated soil with only 18 inches between the soil and the housing, without long term studies as to the effect of this capping could potentially create grave liability concerns for the township in the future. It must be remembered, once this project is completed, the developer walks away without liability. The liability will be on the township if there are future problems or illnesses due to contamination. On this property, trees and other vegetation are going to be planted that are going to cut right through the cap. There could be flooding and runoff. This project seems ill conceived without the long term safeguards that should be in place.

But, most importantly, public park land and the public Fourth Lake should be protected and not utilized by a private developer to satisfy open space and storm water

requirements. The conditional use application should be denied for all of the reasons stated in this Brief.

Respectfully submitted,



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BEFORE THE EAST CALN TOWNSHIP BOARD OF SUPERVISORS

IN RE: APPLICATION OF :
PROGRESSIVE HOUSING VENTURES, :
LLC. :

CERTIFICATE OF SERVICE

I hereby certify I am serving a copy of the Brief of the Protestant/Respondent, Ann Feldman, in the captioned matter upon the following persons in the manner indicated below.

Service by hand delivery addressed as follows:

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Respectfully submitted,

June 3, 2010
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