

**FRIEDMAN, SCHUMAN, APPLEBAUM
NEMEROFF & McCaffery, P.C.**

**Peter S. Friedman, Esquire
Attorney I.D. No. 23740**

**Michael J. Savona, Esquire
Attorney I.D. No. 78076**

**Barbara R. Merlie, Esquire
Attorney I.D. No. 64221**

**101 Greenwood Avenue, Fifth Floor
Jenkintown, PA 19046-2636
215- 635-7200**

**BEFORE THE ZONING HEARING BOARD
OF CHELTENHAM TOWNSHIP**

Appeal of Matrix Ashbourne Associates, L.P.

Appeal No. 3336

**PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND MEMORANDUM OF LAW**

AND NOW, comes MATRIX ASHBOURNE ASSOCIATES, L.P., by and through its attorneys, Friedman, Schuman, Applebaum, Nemeroff, and McCaffery, P.C., and Peter S. Friedman, Esquire, Michael J. Savona, Esquire, and Barbara R. Merlie, Esquire, and respectfully submits the within Proposed Findings of Fact, Conclusions of Law and Memorandum of Law in the subject matter.

PROPOSED FINDINGS OF FACT

1. Applicant, Matrix Ashbourne Associates, L.P. (hereafter "Applicant") is a limited partnership organized under the laws of the Commonwealth of Pennsylvania, having an address at Forsgate Drive, CN4000, Cranbury, NJ 08512. [Application, Zoning Hearing Board ("ZHB") Exhibits 3.1 – 3.6]

2. Applicant is the owner of certain real estate located at the intersection of Ashbourne and Oak Lane Roads in Cheltenham Township (the "Property"), having an address of

1100 Ashbourne Road, which same property is also known as Montgomery County Tax Map Parcel No. 31-00-00688-00-1, Block No. 61, Unit No. 6, and is zoned R-1 Residential under the Cheltenham Township Zoning Ordinance. (*Id.*)

3. Applicant desires to develop the Property, which consists of a total 104.493 acres, as an Age-Restricted Development in accordance with Chapter 295, Zoning, Article XXXIII, Age Restricted Overlay District, of the Code of the Township of Cheltenham (hereafter the "Cheltenham Code" or the "Code"). (*Id.*; N.T. 9/14/10, p. 10) The proposed development will consist of 226 residential units, representing a substantial reduction from the original plan previously submitted which included 176 market-rate apartments and up to 294 age-restricted residences... (ZHB Exhibits 7.1-7.2) The Applicant's concept plan contemplates the preservation of 67 acres, or approximately 64 percent of the Property, as open space. (N.T. 6/8/10, p. 33)

4. On or about May 15, 2009, Applicant, by and through counsel, Peter S. Friedman, Esquire, filed the instant Application for Zoning Relief with the Cheltenham Township Zoning Hearing Board, in accordance with Chapter 295, Zoning, Article XXVII of the Cheltenham Code. The Applicant submitted an Addendum to the Application dated April 2010 and several additional Amended and Restated Addenda, the last of which is dated August 2010, clarifying the zoning relief requested for the Property. The Application and the Amended and Restated Addendum dated August 2010 are collectively referred to herein as the "Application."

5. Specifically, Applicant seeks the following relief from the Cheltenham Code (N.T. 6/8/10, pp. 3-5):

A. Zoning Relief from the rules and regulations of the "Age Restricted Overlay District" as outlined in Article XXXIII of Chapter 295 of the Cheltenham Code, as follows:

- i. A Special Exception in accordance with Cheltenham Code §295-242.B.1 for the Age-Restricted Development.
 - ii. A Special Exception in accordance with Cheltenham Code §295-242.B.3 for a Clubhouse with common areas and meeting rooms, indoor and outdoor recreational facilities and maintenance and security facilities.
 - iii. A Special Exception in accordance with Cheltenham Code § 295-242.B.3 for a swimming pool for the residents of the Age-Restricted Community only.
 - iv. A Variance from Cheltenham Code §243.B.8.a., to permit sanitary sewer facilities (if required) within the floodplain.
 - v. A Variance from Cheltenham Code §295-243.B.8.d., to permit development within areas having a slope of 15% or greater.
 - vi. A Variance from Cheltenham Code §295-243.B.8.e., to permit sanitary sewer Facilities (if required) within the Riparian Buffer Areas.
- B. A Variance from the rules and regulations of the "Floodplain Conservation District" as outlined in Cheltenham Code §295-156, so as to allow construction of replacement of the existing 8" T.C. Sanitary Sewer Line (if required) within the 100 Year Floodplain Area.
- C. Zoning Relief from the rules and regulations of the "Steep Slope Conservation District" as outlined in Article XXII of the Cheltenham Code, as follows:
- i. An Appeal from the determination of the Zoning Officer and/or Township Engineer pursuant to Cheltenham Code §295-164.B.2. regarding manmade steep slopes.
 - ii. From Cheltenham Code §295-167 for the construction of free-standing structures, buildings and retaining walls, internal accessways, driveways, parking areas, swimming pools, sanitary sewers, storm water management facilities, other underground utilities and landscaping.
 - iii. A Determination that the Lines and Grades Plans submitted with the Application substantially conforms with the Lines and Grade Plan(s) requirements set forth in Cheltenham Code §295-168.

iv. In the alternative to, C.iii, above, a Variance from Cheltenham Code §295-168 for not submitting plans conforming to the stated Lines and Grades Plan(s) requirements.

D. A Determination that the number of parking spaces shown on the Applicant's plans are not in excess of the maximum permitted under Cheltenham Code §295-221.F.

E. In the alternative to D., above, a Variance from the rules and regulations of "Parking and Loading" as outlined in Cheltenham Code §295-221.F., for a greater amount of parking of 568 parking spaces instead of the maximum permitted 120% of the required parking spaces which equals 463 parking spaces.

F. A Variance from the entirety of the rules and regulations of the "Preservation Overlay District" as outlined in Article XXIV of Chapter 295 of the Cheltenham Code.

G. In the alternative to F., above, an interpretation that the rules and regulations of the "Preservation Overlay District," as outlined in Article XXIV of Chapter 295 of the Cheltenham Code are not applicable due to the provisions of the last sentence of Cheltenham Code §295-241 and the other provisions in the Cheltenham Code.

6. Following duly advertised notice, the Zoning Hearing Board (hereafter the "Board") conducted hearings and/or heard testimony regarding the Application on April 20, 2010, May 10, 2010, June 8, 2010, June 21, 2010, August 9, 2010, September 14, 2010, October 14, 2010, and November 23, 2010, at which hearing the Board concluded testimony and directed that the Applicant and the Protestants submit proposed findings and conclusions, as well as legal argument, by December 14, 2010.

7. At the aforementioned hearings, Applicant appeared, with counsel. In addition, the Board granted party status to a group of interested residents, known as CC4A, who appeared and attended the hearings represented by counsel.

8. The concept plan presented as Exhibit A-1 (hereafter the "Plan") depicts the Applicant's proposed age-restricted community consisting of 226 dwelling units, 70 of which

will be single-family detached residences and 156 of which will be carriage homes, to be constructed in three-unit, or three-residence, buildings.

9. At the June 8, 2010 hearing, the Applicant presented expert testimony from Stuart Appel, a landscape architect and professional planner who was retained by the Applicant to perform land planning services, including preparation of the Plan. (N.T. 6/8/10, p. 24)

10. Mr. Appel's addressed the general criteria for granting special exceptions and variances, set forth in the Cheltenham Code § 295-209. The Property is situated along Ashbourne Road with some frontage on Jenkintown Road as well as Tookany Creek, and containing approximately 104 acres and zoned R-1 Residential, as defined by the Cheltenham Code. (N.T. 6/8/10, pp. 29-30; Exhibit A-1)

11. Of the 226 residential homes proposed in the Plan, 70 are small-lot single family homes situated mostly on the perimeter of the Property on the northern boundaries. The 156 carriage homes are planned in increments of three homes per building. (N.T. 6/8/10, pp. 29-30)

12. Access to the Property, as shown on the Plan, is taken from a central entrance at Oak Lane Road, an existing single light intersection, and from another entrance across from Boyer Road. Both accessways are tree-lined boulevards. The entrance at Oak Lane Road comes into a central turnaround and the second entrance terminates at residential area on the west side of the Property. In order to meet the requirements of the Fire Chief, the Applicant also included in the Plan an emergency access on the west side of the Property, to be blocked from public access by means of a gate or chain and to be used only for emergency purposes. (*Id.*, pp. 30-31)

13. The Plan includes residential clusters with central courts having rain gardens serving multiple functions, including storm water management, screening for parking areas and public amenities for the enjoyment of the residents. Each lot has a driveway that will

accommodate two vehicles and the minimum separation between buildings is 30 feet, as required by Cheltenham Code § 295-244. (*Id.*, pp. 31-32)

14. All of the units exceed the 100-foot setback from the property line required by Code § 295-244. The setbacks range from 122 feet to 271 feet in most areas, with setbacks in excess of several hundred feet in the most northern regions of the Property. (N.T. 6/8/10, p. 32)

15. The Plan includes a central clubhouse and swimming pool with an adjacent open space in the central portion of the Property. The Plan also proposes an extensive storm water management system, employing Best Management Practices and the use of bio-infiltration swales, water quality basins, and bio-infiltration basins spread throughout the Property, all of which meet or exceed the standards established by the Pennsylvania Department of Environmental Protection. (N.T. 6/8/10, pp. 32-33)

16. The Plan includes preservation of 67 acres of open space, or approximately 64 percent of the Property, well in excess of the amount of open space required by the Code, and envisions restoration of several natural areas including meadows and woodlands to their natural state. (N.T. 6/8/10, p. 33)

17. The Plan also provides a network of pedestrian walkways for circulation throughout the community. (N.T. 6/8/10, p. 35)

18. The overall density of the proposed community, using the standard calculation of gross tract area set forth in the Preservation Overlay ordinance, is 2.2 homes per acre. This density compares favorably to the density in the surrounding neighborhoods, which range from 2.2 in the northeast corner along Jenkintown Road, to 3.0 or 3.1 across the street in New Orleans and other areas, to as much as 5.6 in the area of Arbor and Boyer Roads. (*Id.*, pp. 36-37)

19. In order to obtain a special exception for development of the proposed age-restricted development, an applicant must meet the following requirements of the Cheltenham Code:

§ 295-240. Purpose.

The purpose of this district is to provide accommodation for age-restricted housing developments by establishing regulations to permit development by special exception, tailored to the needs of residents 55 years of age and older, recognizing their different housing needs and relatively reduced impacts on surrounding land uses, as follows:

- A. By providing greater variety of housing to serve the needs of older persons who prefer an active and independent residential environment;
- B. By enabling the adaptive reuse of existing buildings and facilities;
- C. By encouraging the preservation of natural features, such as woodlands, streams and open space, by allowing compact development; and
- D. By encouraging maximum use of innovative and integrative green design and construction strategies emphasizing human health as a fundamental evaluative criterion for building and site design and for construction and operational strategies.

§ 295-241. Overlay.

The Age-Restricted Multiple-Dwelling Overlay District shall be an overlay on all parcels meeting the criteria contained in this section, as follows:

- A. An area of five acres or greater in single ownership;
- B. Located within a Residential, Institutional or Commercial Zoning District (the overlay does not apply to parcels within G - Manufacturing and Industrial Districts); and
- C. Frontage on state roads that are not limited-access highways, as follows:
 - (1) For parcels 5.0 to 8.0 acres: 450 feet; or
 - (2) For parcels 8.01 to 12.0 acres: 750 feet; or
 - (3) For parcels 12.01 to 30.0 acres: 850 feet; or
 - (4) For parcels 30.01 to 60.0 acres: 900 feet; or
 - (5) For parcels 60.01 acres and greater: 2,500 feet.

§ 295-241. Use Regulations

The following uses are permitted in the Age-Restricted Overlay District:

- A. Any use permitted in the underlying zoning district of this chapter.

B. The following uses are permitted by special exception only:

(1) Age-restricted, independent living, multiple-dwelling developments, by special exception, subject to the provisions set forth in this article. Each residential unit must be permanently occupied only by persons age 55 or above with the following exceptions:

- (a) A spouse under 55 years if married to a resident 55 years or older;
- (b) Up to 2 children or one child and one child in-law, over 18 years of age, residing with at least one parent over 55 years of age whose presence is required to care for that parent;
- (c) A spouse under 55 years of age who is a surviving member of a previously qualified household;
- (d) A live-in nurse or similar caregiver whose presence is required to care for an occupant over 55 years of age; and
- (e) Any adult child with special needs who must reside with at least one qualified parent.

* * * * *

(3) Other uses customarily incidental to age-restricted, independent living communities, including but not limited to clubhouse with common areas and meeting rooms, indoor and outdoor recreation facilities, dining facilities in residential buildings, and maintenance and security facilities.

20. The Property, comprised of over 104 acres, is well over the minimum size of five acres. (N.T. 6/8/10, p. 50) The proposed community will be a planned community incorporating the age restrictions outlined in the Code, with the homeowners association owning the clubhouse and other common elements in the community. (N.T. 6/21/10, pp. 91-93) The Property has frontage of over 3,000 linear feet on Ashbourne Road, a state highway of non-limited access. (N.T. 6/8/10, pp. 15-16; Exhibit A-1)

21. The Code also permits accessory uses customarily incidental to age-restricted, independent living communities, including a clubhouse with common areas and meeting rooms, and indoor and outdoor recreation facilities, such as swimming pools. § 295-242.B.3. The Applicant proposes to incorporate a clubhouse and swimming pool into this community, as shown in the testimony and requests special exceptions to permit those accessory uses. (N.T. 6/8/10, pp. 32-33)

22. Code § 295-245 sets forth the development requirements for an age-restricted development, as follows:

A. The proposed development shall be designed in accordance with an architectural plan with landscaping and shall be constructed in accordance with an overall site plan which shall be presented to the Zoning Hearing Board for its review and approval.

B. Site development is encouraged to utilize sustainable (green) development practices ("LEED" design practices) that will be implemented throughout the design, construction and operation of the development. A whole-development approach to sustainability should include water conservation, energy efficiency, material selection, resource conservation and environmental quality.

C. Parking shall be provided as follows:

(1) Parking requirement: 1.5 spaces per unit, one guest space for every five units, and one space per employee for the shift requiring the highest number of employees and otherwise meeting the requirements of § 295-221, Parking and loading.

(2) Parking for communities restricted to age 62 years and older in compliance with the Federal Fair Housing Act may be reduced if it can be shown that safe and accessible public transportation is located within 0.25 mile of the development as follows: 0.5 parking space per unit, one guest space for every five units, and one space per employee for the shift requiring the highest number of employees and otherwise meeting the requirements of § 295-221, Parking and loading.

(3) If a community contains accessory uses, then additional parking spaces for each accessory use shall be provided in accordance with the requirements of § 295-221, Parking and loading.

D. All utility lines servicing the site shall be placed underground. Any required aboveground utility structures, buildings, pump stations or other similar devices shall be screened from adjoining properties and road right-of-ways.

E. All buildings shall be served by public water and public sanitary sewerage.

F. Natural features. Natural features, such as woodlands, streams, and open space areas are encouraged to be preserved and incorporated into the development in accordance with Chapter 280, Trees.

G. Resident amenities. The developer shall provide a walkable community with an internal sidewalk network and two or more additional outdoor resident amenities including but not limited to covered walkways, accessible trails, patios, landscaped courtyards, seating areas, gardens, and facilities for passive or active recreation.

H. Landscaping. All areas, other than preserved natural features, not covered by building and impervious paving material shall be maintained as landscaped areas containing trees,

shrubs and ground covers. Native and noninvasive species are preferred. Known invasive plant species are prohibited.

- (1) Landscape buffers of at least 25 feet wide are required along all front, side, and rear property lines.
- (2) All lots developed under this district that are adjacent to a residential use shall provide additional screening along the residential property, using a mixture of evergreen and deciduous plant materials.
- (3) Parking lots fronting on a street shall be screened in accordance with § 295-221, Parking and loading.
- (4) Decorative fencing in combination with plant materials may be provided to discourage trespassing in accordance with § 295-223.

I. Lighting. All exterior lighting shall be designed to prevent glare onto adjacent properties. Pedestrian pathways need to be clearly marked and well lit. Lighting shall be sufficient for security and identification without allowing light to trespass onto adjacent sites. Illumination onto a residential use shall at no time exceed 0.5 footcandle at the property line. The height of fixtures shall be a maximum of 20 feet for parking lots and 16 feet for pedestrian walkways.

J. Refuse areas. The storage of refuse shall be provided inside the building(s) or within an outdoor area enclosed by either walls or opaque fencing with a self-closing, self-latching gate. Any refuse area outside of the building shall be designed to be architecturally compatible with the building(s), shall not be located in the front of the building, and be entirely screened by a fence or enclosure which is at least six feet high.

K. Service and loading. Service areas, loading areas and loading docks must be located to the side of or behind the building and visually screened from public streets and pedestrian ways with landscaping, privacy fencing or walls.

L. Architectural guidelines. The following guidelines shall apply to new construction and alteration of existing structures:

- (1) New construction and alterations to existing buildings are encouraged to utilize sustainable (green) building and development practices ("LEED" design practices) that will be implemented throughout the design, construction and operation of the building. A whole-building approach to sustainability should include water conservation, energy efficiency, material selection, resource conservation and indoor environmental quality.
- (2) Windows and doors shall be integrated within the unified architectural plan of the complex.
- (3) Blank and windowless walls are prohibited.
- (4) Exterior wall and detail materials are to be brick, stone (natural or man-made), stucco, wood or other approved materials on at least 75% of all building facades.

(5) In conjunction with the special exception application, the applicant shall provide representative color perspective renderings and elevations of all proposed buildings along with samples of the actual materials to be used. The applicant shall also provide graphic representations showing the relationship between the proposed development and structures on adjacent properties.

(6) For multiple building complexes, the architectural design among buildings shall be coordinated.

(7) Building design shall be architecturally in keeping with the ambience of the surrounding neighborhood.

(8) Architectural embellishments that add visual interest to facades and roofs, such as balconies, bay windows, perpendicular or angled offsets, use of multiple materials (brick with stone, etc), building courses, dormers, masonry, chimneys, cupolas, towers and other similar elements, shall be included in the design of buildings.

(9) Pedestrian entrances shall be easy to locate and provide protection from the elements.

(10) Upper stories of buildings above six stories shall be visually interrupted every 50 feet by the use of vertical and horizontal offsets, articulation, modulation or setbacks from the facade.

(11) The Zoning Hearing Board may approve the use of architectural concepts and designs which differ from those set forth above, if it can be demonstrated to the satisfaction of the Zoning Hearing Board that such concepts and designs further the legislative intent of this article and the intent of this subsection.

23. Laura C. Staines Giardino (hereafter "Ms. Staines"), a professional architect, addressed compliance with the architectural standards set forth in Code § 295-245.L. Ms. Staines' testimony included reference to a Power Point presentation (Exhibit A-4) representing the architectural features of the Plan.

24. With respect to Code § 295-245.L.1, Ms. Staines, who is accredited to design buildings in accordance with LEED standards, testified, and the Board finds, that the material proposed for the buildings is a sustainable material known by several names but commonly referred to as Hardiplank, made of a composite of wood pulp, cement, sand and water. While having the appearance of wood, this material is more durable and requires less maintenance but

allows for maintenance of the integrity of the surrounding community in its appearance. (N.T. 6/21/10, pp. 32-33) In addition, the Plan includes design features that will reduce waste, use energy-efficient materials for insulation and water-conserving fixtures, and use HVAC systems that will improve air quality; (*Id.*, p. 55) and that the clustering of buildings is an accepted sustainable-building practice. (*Id.*, p. 56)

25. The Plan includes a variety of exterior wall and detail materials, including brick and stone veneers, in addition to siding, in order to meet the requirements of Code § 295-245.L.4. (*Id.*, p. 25) Ms. Staines provided renderings of the representative color perspectives and elevations of the proposed buildings, as well as graphic representations showing the relationship between the proposed development and structures on adjacent properties, and provided samples of some of the materials proposed to be used, in compliance with Code § 295-245.L.5. The Applicant will ensure that the building designs are in keeping with the ambience of the surrounding neighborhood, in accordance with Code § 295-245.L.7 and will coordinate the architectural design of the buildings proposed for the development, as required by Code § 295-245.L.6, and the architectural embellishments proposed to be used to add visual interest, in compliance with Code § 295-245.L.8. (*Id.*, pp. 23-35)

26. The Plan also includes covered entrances to the residences, to provide protection from the elements, as required by Code § 295-245.L.9. (*Id.*, p. 29)

27. As outlined above, the Plan addresses the requirements of Code § 295-245A, as well as the architectural guidelines set forth in Code § 295-245.L. (*Id.*, pp. 35-36).

28. The proposed clubhouse and swimming pool will not adversely affect the public health, safety and welfare of the Cheltenham community or create any adverse affect on the air

quality, noise level or neighborhood esthetics (*Id.*, pp. 37-39) and the inclusion of a clubhouse and swimming pool are consistent with the Cheltenham Township Comprehensive Plan, by providing active and passive recreation for the residents (*Id.*, p. 40).

29. There is adequate parking on site for the clubhouse and swimming pool (*Id.*) and the clubhouse and swimming pool will not adversely affect public services and facilities such as public water, sewer, refuse collection, police and fire protection and public schools (*Id.*, pp. 40-41).

30. The Plan meets the requirements of Code § 295-245.G by providing an internal walkway network as a resident amenity, as well as additional walking trails throughout the open space network along the Tookany Creek Parkway and the proposed rain gardens associated with the guest parking areas. Moreover, each individual unit will have a private garden, patio or terrace area. (*Id.*, pp. 41-42)

31. The Applicant also seeks a variance from Cheltenham Code §243.B.8.a., to permit sanitary sewer facilities (if required) within the floodplain. This section defines the "Net Developable Site Area" ("NDSA") as the Gross Tract Area minus certain environmentally sensitive areas, including one hundred percent of the floodplains. It is not yet determined whether the Applicant will be required as part of land development approval to construct sanitary sewer facilities within the floodplain. Accordingly, the Applicant requests a variance from this section based on the unique nature of the Property and the measures proposed by the Applicant to minimize the impact of such facilities, including limiting the disturbance in these areas and restoring the areas to their pre-disturbance condition, if it becomes necessary to construct them within the floodplain. (N.T. 9/14/10, pp. 65-66)

32. The Applicant seeks a variance from Cheltenham Code §295-243.B.8.d., to permit development within areas having a slope of 15% or greater. This section prohibits development within one hundred percent of slopes of 15% or greater measured over a 1' contour interval, again, in order to protect environmentally sensitive areas. The testimony on this variance request was extensive and included testimony presented by the Applicant's experts, the protestants (CC4A), as well as the Township's Director of Engineering, Zoning & Inspections, David M. Lynch, with respect to the nature of the slopes on the Property.

33. The previous use on the Property as a golf course resulted in numerous instances of grading and mounding in order to provide appropriate contours for a challenging course, with elevated greens, tee boxes, sand traps, cart path construction, construction of the clubhouse, auxiliary buildings, roadways and the parking lot, as well as other landscaping features typically provided on a golf course. The Property presents a unique challenge due to the manmade steep slopes scattered throughout the site. Construction on the site without disturbing the steep slopes would be impossible. (N.T. 8/8/10, pp. 47-48) Design of storm water management facilities and erosion control are more complicated than on a smaller site. (*Id.*, p. 60) Due to the unique topography of the site, which has three different water sheds, the Plan includes three different sanitary sewer connection points as well as three different storm water systems. (*Id.*, p. 93)

34. The Applicant's consultants conducted testing of many of the steep slope areas in order to determine whether the slopes created for the previous use existed naturally or were manmade in order to provide the requisite features for the golf course. Those tests revealed that a vast majority of the slopes on the Property that are proposed to be disturbed are, in fact, manmade rather than naturally occurring. (N.T. 8/9/10, pp. 32-39)

35. Consistent with those findings, and assuming literal enforcement of the provisions of the Steep Slope Overlay District, the area on the Property available for development would be extremely limited unless those steep slopes that are considered environmentally sensitive are distinguished from the steep slopes that are manmade. Confining the development to that limited area would result in a haphazard design of several pockets of residential units, eliminating the cohesiveness of the proposed community and creating the need for a disjointed road system and utility network, all of which is contrary to the Zoning Ordinance requirements for orderly development in the Age-Restricted Overlay District.

36. The intent of protecting environmentally sensitive areas is directed to native, forested slopes or slopes along riparian buffers – areas that the Applicant will not disturb – and the Applicant has met the intent of Code § 295-243.B.8.D. (N.T. 8/9/10, pp. 47-50) The estimated amount of manmade slope area on the Property is approximately 14.4 acres, and the estimated size of the manmade slope area projected to be disturbed by the development is approximately 10.7 acres, or approximately 74 percent of the manmade slope area. (N.T. 10/14/10, pp. 61-62)

37. The Plan contemplates elimination of a previously proposed outlet pipe running from basin 2-A in order to minimize the disturbance of non-manmade, slopes. (*Id.*)

38. In order to graphically demonstrate the distinction between manmade slopes and non-manmade slopes, Mr. Mayhew superimposed a blue line on a copy of the Plan, in order to show the areas of non-manmade, environmentally sensitive slopes that the Applicant proposes to disturb. (Exhibit A-16.6) He used four parameters: the topography of the site, historical aerial photographs, soil samples, and on-site physical inspections of the terrain on the Property, including vegetation. (N.T. 8/9/10, pp. 27-37) Areas of non-manmade steep slopes proposed to

be disturbed are identified as follows: (i) just north of single-family home number 18 (approximately 900 square feet); (ii) behind single-family homes numbered 35 through 37 (approximately 3,400 square feet); and (iii) behind single-family homes numbered 49 and 50 (approximately 600 square feet). None of the residential units is proposed within the area of the steep slopes. The design takes into account the existing topography and in all of these cases the existing grade is dropping off from the proposed roadways to the rear of the homes, allowing construction of walkout basements as well as minimizing the amount of fill required and the amount of earth work necessary, thus providing a transition to the natural slope. (N.T. 8/9/10 pp. 38-43) Disturbance to manmade steep slopes and the above-identified non-manmade steep slopes can be accomplished without negatively impacting erosion from the site or sediment off-site. (*Id.*) The Applicant submitted a Soil Erosion and Sediment Control Plan that addresses the measures the Applicant will take pursuant to the Plan in order to control erosion and sediment during construction.

39. The Board finds Mr. Mayhew's testimony and his analysis regarding the manmade/non-manmade character of the steep slopes to be credible, persuasive and compelling.

40. The Board finds that the testimony of John O. Chambers on behalf of the protestants – that based on his analysis of the soils on the Property all of the steep slopes should be protected from development (N.T. 11/23/10, pp. 89-93) – is insufficient to negate the findings herein with regard to the nature of the steep slopes.

41. The Board appreciates the testimony of David Lynch with regard to his analysis (memorialized in Mr. Lynch's memorandum dated July 26, 2010; Exhibit A-18) of the zoning and engineering impacts on the Property from the proposed development. Nevertheless, the Board does not agree with his suggestion that based on such analysis and the Code provisions

relating to the protection of steep slopes the maximum number of residential units that would be permitted on the Property is 168. (N.T. 11/23/10, pp. 26-42)

42. The Applicant submitted to Mr. Lynch on July 6, 2010 a letter from Taylor, Wiseman & Taylor, Mr. Mayhew's firm (Exhibit A-17), requesting a determination pursuant to Code § 295-164.B.2 that the steep slopes being disturbed by the proposed development are manmade steep slopes, that construction of the development can be accomplished without causing erosion of the slopes or result in soil failure, stream siltation or contamination of surface waters or an increase in the total runoff into any water course, or an increase in the point discharge levels or velocities at any given point of collection and discharge, and that such construction will not be injurious to the health, safety and welfare of Township residents; and that accordingly the Applicant is exempt from the provisions of Article XXII of the Cheltenham Code relating to the Steep Slope Overlay District. In response to the Applicant's July 6, 2010 letter, Mr. Lynch issued a letter dated July 21, 2010, addressed to Mr. Mayhew (Exhibit P-1), declining to issue the requested determination.

43. Soil types as identified by the U.S. Department of Agriculture may be changed based on actual surveys. Mr. Chambers' conclusions regarding the soils on the Property were based on assumptions made by reference to U.S. Department of Agriculture surveys conducted some forty years ago, not on any site or field survey conducted by Mr. Chambers, and without consideration of what the measurement of slopes was at that time. (N.T. 11/23/10, p. 112)

44. Erosion and sedimentation control measures typically address runoff concerns when a development proposes disturbance of steep slopes. (N.T. 11/23/10, p. 105) In addition, in some instances cited by Mr. Chambers the limitations associated with certain types of soils – limitations that would restrict development – were related not to whether steep slopes were

involved but to other factors such as frost action and depth to the saturated zone. These soil characteristics can be addressed with appropriate design and construction measures. (*Id.*, p. 110)

45. The analysis conducted by Mr. Lynch and on which his conclusions were based consisted of a grading system he developed, not on a standard engineering practice for grading slopes. (N.T. 11/23/10, pp. 43-44) Mr. Lynch's conclusion that only 168 homes may be built on the Property without disturbance to steep slopes does not take into account the steep slope impacts of the roads within the development or the storm water management facilities. (*Id.*, p. 48) Moreover, developing only 168 residential units, versus the 226 proposed by the Applicant, would not result in any measurable difference in the Level 2 or Level 3 engineering impact with respect to the need for disturbance of steep slopes for roadways and utilities. (*Id.*, p. 50)

46. Notably, with regard to sediment erosion measures, Mr. Lynch stated in his memorandum dated July 26, 2010 (Exhibit A-18, p. 4):

There are sediment/erosion measures that can adequately protect all terrain types from erosion during earth disturbance activities (including Level 3 activities): limiting the extent of earth disturbance activities, Super Silt Fence, Diversion Berns [sic], Conveyance Channels, Sediment Basins, etc. provided these measures are properly designed, implemented, inspected and maintained.

The Board agrees with this observation and finds that given the Applicant's intention to implement such measures, the analysis provided by Mr. Lynch is irrelevant to the determination of the Applicant's compliance with the intent of the steep slope protection provisions of the Code.

47. The Applicant seeks a variance from Cheltenham Code §295-243.B.8.e., to permit sanitary sewer facilities (if required) within the Riparian Buffer Areas. The Applicant also requests a variance from the rules and regulations of the "Floodplain Conservation District" as outlined in Cheltenham Code §295-156, so as to allow construction of replacement of the

existing 8" T.C. Sanitary Sewer Line (if required) within the 100 Year Floodplain Area. It is not yet determined whether the Applicant will be required as part of land development approval to construct sanitary sewer facilities within the riparian buffer or within the floodplain. Accordingly, the Applicant requests a variance from these sections based on the unique nature and characteristics of the Property and the measures proposed by the Applicant to minimize the impact of such facilities if it becomes necessary to construct them within the riparian buffer.

48. The Applicant, in consultation with Mr. Lynch, contemplates investigating the condition of a terra cotta sewer pipe that services the old clubhouse and maintenance area on the golf club grounds in order to determine the pipe's condition. (N.T. 9/14/10, pp. 65-66) The decision as to whether the pipe must be replaced will be made by Mr. Lynch and the Applicant has agreed to replace the pipe if required. To do so will require working within both the floodplain and the riparian buffer; accordingly, the Applicant requests a variance to permit such work if it is found to be necessary based on the condition of the existing pipe. Should replacement of the pipe be necessary, the Applicant will limit disturbance to the area and will restore the pre-existing, nonconforming conditions following the work. The replacement of a non-conforming pipe with a similar, nonconforming pipe represents the minimum variance necessary to ensure the proper operation of the facility. (*Id.*)

49. The Applicant also seeks zoning relief from the rules and regulations of the "Steep Slope Conservation District" as outlined in Article XXII of the Cheltenham Code, as follows:

- A. An Appeal from the determination of the Zoning Officer and/or Township Engineer pursuant to Cheltenham Code §295-164.B.2. regarding manmade steep slopes.
- B. A variance from Cheltenham Code §295-167 for the construction of free-standing structures building and retaining walls, internal accessways,

driveways, parking areas, swimming pools, sanitary sewers, storm water management facilities, other underground utilities and landscaping.

- C. A Determination that the Lines and Grades Plans submitted with the Application substantially conforms with the Lines and Grade Plan(s) requirements set forth in Cheltenham Code §295-168.
- D. In the alternative to, C., above, a variance from Cheltenham Code §295-168 for not submitting plans conforming to the stated Lines and Grades Plan(s) requirements.

50. The "Steep Slope Conservation District" regulations are set forth in sections 295-163 through 295-170 of the Cheltenham Code. Generally, these regulations are designed to protect natural features and minimize erosion. Areas with a terrain gradient less than 15% are exempt from the regulations, as are certain developments that existed prior to adoption of this overlay district. The regulations permit the Township Engineer to exempt manmade slopes from the regulations in this overlay district if certain conditions are met, to wit:

[T]he alteration, regrading, clearing, or construction upon such slope can be accomplished without causing erosion of the slope, and will not result in soil failure, stream siltation, and contamination of surface waters and/or an increase in the total runoff into any watercourse or an increase in the point discharge levels or velocities at any given point of collection and discharge and will not be injurious to the health, safety and welfare of Township residents. It shall be the burden of the Applicant to demonstrate that the slopes were manmade and to establish the absence of impact in accordance with the criteria stated herein.

Cheltenham Code § 295-164.B.2. In addition, in order to obtain a variance from the use restrictions in this overlay district, an applicant must submit a Lines and Grades Plan, prepared by a design professional licensed in Pennsylvania.

51. In accordance with Code § 295-164.B.2, the Applicant requested a determination by the Township Engineer that the existence of manmade slopes on the Property would exempt those areas on the Property having manmade slopes from the provisions of the Steep Slope Conservation District. The Township Engineer, Mr. Lynch, declined to act on the Applicant's

request. Mr. Lynch's analysis is discussed more fully, *supra*, in connection with the variance request from Code §§ 295-243.B.8.d. The Board finds, in light of Mr. Lynch's decision not to act, that it is appropriate for the Board to make a determination that the Applicant may disturb manmade slopes on the Property and that the Applicant meets the standards set forth in Code § 295-164B.2 and is therefore entitled to a favorable determination pursuant to that section.

52. The Applicant seeks a determination by the Board that the revised Lines and Grades Plan is consistent with the requirements of § 295-168.B of the Code. The revised Lines and Grades Plan shows contour lines at two-foot intervals, while the earlier Lines and Grades Plan originally submitted by the Applicant showed contours at four-foot intervals, in accordance with the direction provided by the Township Engineer. The revised Lines and Grades Plan meets the requirements of Code § 295-168.B, as outlined above, with one minor exception, to wit, that all utilities within 25 feet of the site be included. Any such omission is *de minimis*. (N.T. 10/14/10, pp. 56-58; N.T. 8/9/10, pp. 57-61)

53. The Applicant has submitted to the Zoning Hearing Board the following plans which collectively constitute the "Applicant's Lines and Grades Plans" (Letter Peter S. Friedman, Esquire, to Neil Sklaroff, Esquire, dated November 23, 2010):

Soil, Erosion and Sediment Control Plan (Sheet 1 of 1) dated October 5, 2010.

"Lines and Grades" Plan (Sheets 5 and 6 of 10) dated March 25, 2010, last revised October 11, 2010.

Sanitary Concept Plan (Sheet 1 of 10 (incorrectly labeled 9)) dated March 25, 2010, last revised July 1, 2010.

Storm water Concept Plan (Sheet 2 of 10 (incorrectly labeled 9)) dated March 25, 2010, revised July 1, 2010.

Amended Steep Slopes Plan (Sheet 3 of 10), dated August 17, 2009, last revised July 1, 2010.

Steep Slopes Disturbance (Sheet 4 of 10), dated July 1, 2010.

Cross Sections (Sheets 7, 8, 9 & 10 of 17) dated March 25, 2010, last revised October 5, 2010.

Cross Sections (Sheet 11 through 17) dated October 5, 2010.

Amended Zoning Plan (Sheets 1 and 2 of 2), dated August 14, 2009, last revised June 7, 2010.

54. In addition, Applicant agrees to comply with the applicable requirements of the Montgomery County Conservation District and the regulations of the Pennsylvania Department of Environmental Protection as respects soil erosion and sediment control notes and details. (*Id.*)

55. In response to a request by Mr. Lynch, the Applicant submitted a memorandum prepared by Mr. Mayhew providing the additional, minor technical information not depicted on the Lines and Grades Plan.

56. Applicant's Lines and Grades Plans, as supplemented by the memorandum prepared by Mr. Mayhew, addresses the requirements of Code § 295-168B.

57. The revised Lines and Grades Plan, along with the cross-sections plan, the additional cross-sections plan (Exhibits A-25.1 and A-25.2), and the Soil Erosion and Sedimentation Control Plan (Exhibit A-23), and the concept plan and other plans previously submitted to the Board, in their totality, exceed the requirements of Code § 295-168.B, and no variance from this section of the Code is necessary. (N.T. 10/14/10, pp. 57-58) Submission of these plans is far more than is necessary or appropriate at this stage because specifying the precise erosion controls before the development plan is engineered and submitted pursuant to the

land development process is premature; *i.e.*, that it is more appropriate to wait until farther along in the design process to specify the erosion control measures. (N.T. 8/9/10, p. 62)

58. The Soil Erosion and Sedimentation Control Plan (hereafter the "SE/SC Plan") was revised in order to provide additional protection to non-manmade slopes behind the single-family residences along Road K, as shown on the SE/SC Plan. There is an existing fairway and green in that area and the revised SE/SC Plan shows the area being converted to a storm water management facility. In order to minimize the disturbance to non-manmade slopes, the SE/SC Plan has been revised to eliminate the outlet structure from the detention basin in this area that originally was proposed to run through non-manmade slopes to the 13th fairway. Instead, the outfall from the detention basin (basin 2-A) will flow through a storm water pipe behind these residences, in an area already subject to disturbance to another detention basin (basin 3-A) in the center of the Property, directly behind the traffic circle at the foot of the main entrance from Ashbourne Road. Although the storm pipe does not require relief for disturbance of steep slopes, the SE/SC Plan was revised in order to provide additional protection for the non-manmade slopes. (N.T. 10/14/10, pp. 58-61)

59. The Applicant requests a variance from Cheltenham Code § 295-167 for the construction of free-standing structures, buildings and retaining walls, internal accessways, driveways, parking areas, swimming pools, sanitary sewers, storm water management facilities, other underground utilities and landscaping within the Steep Slope Conservation District. Code § 295-167 provides as follows:

A. The following uses shall be permitted in the Steep Slope Conservation District without the submission of a lines and grades plan:

- (1) Wildlife sanctuary, woodland preserve, arboretum and passive recreation areas, including parks, but excluding enclosed structures.

(2) Cultivation and harvesting of crops in accordance with recognized soil conservation practices.

(3) Nonstructural accessory uses necessary for the operation and maintenance of the above permitted uses.

(4) Similar uses to the above which are in compliance with the intent of this article.

B. The following uses shall be permitted in the Steep Slope Conservation District upon review and approval by the Township Engineer of a lines and grades plan submitted by the applicant and prepared in accordance with the requirements of § 295-168.

(1) Sealed public water supply wells.

(2) Sanitary or storm sewers and storm water management facilities.

(3) Underground utility transmission lines.

(4) On-site sewage disposal systems, when constructed in compliance with the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. § 750.1 et seq., as may be amended from time to time.

60. The extent of the relief depends on the distinction between manmade and non-manmade slopes. The Board finds that the slopes identified in the Plan as manmade are exempt from the restrictions set forth in this section of the Code, thus rendering the necessary relief from this section to be *de minimis*, relating to a very small area of non-manmade slopes totaling 0.11 acre, in order to construct a retaining wall and associated grading, disturbing approximately 4,000 square feet. (N.T. 9/14/10, p. 63) Accordingly, the Applicant requires a minimal variance from this section, in order to disturb a small portion of the non-manmade steep slopes. Absent such zoning relief, the Applicant would not be able to comply with Code § 295-167 due to the extremely unique nature of the site because there is not sufficient area on the Property to develop a permitted use without some disturbance to the steep slopes, given the topography of the existing golf course, and the proposed disturbance will not have any negative impact on the public or on existing streams. The Applicant, in planning the proposed development, took steps to protect the non-manmade steep slopes on the Property, by placing the improvements away

from those sensitive areas (N.T. 8/9/10, pp. 51-53) Consequently, there is no proposed construction up to the limit of a continuous, non-manmade steep slope. (*Id.*, p. 54)

61. The Applicant also requests a determination by the Board that the number of parking spaces shown on the Applicant's Plan are not in excess of the maximum permitted under Cheltenham Code § 295-221.F, which specifies that no more than 120% of the required minimum parking is permitted. In the alternative, the Applicant seeks a variance from § 295-221.F, to permit a greater amount of parking, totaling 568 parking spaces, instead of the maximum permitted 120% of the required parking spaces which equates to 463 parking spaces.

62. The Board finds that the parking regulations in Code § 295-221 are not intended to apply to an age-restricted development such as that proposed by the Applicant, particularly given the inclusion of 70 single-family residences in the Plan. The parking spaces proposed in the Plan include 116 guest parking spaces to accommodate guests of the single-family residences. The existing Code regulations apply primarily to parking lots and prohibit parking between a building and the street, in effect prohibiting driveways. The limitation of 1.5 spaces per unit for multifamily residences is reasonable due to the ability of residents to share those spaces if necessary; *i.e.*, one party uses the space when another party is not using the space. This practice, however, is not practical for single-family residences, thus requiring parking specifically designed for use by guests. For this reason, the Plan includes the guest parking areas, resulting in a total number of parking spaces in excess of the limit of 120% of required parking.

63. Rather than use a wider cartway, and in an effort to reduce impervious coverage, the Applicant designed the project with 24-foot cartways. Consistent with that design, the

Applicant elected to include the guest parking areas, incorporated into rain gardens and landscaping, in order to improve the quality of the streetscape and screen the impact of the parking areas. (N.T. 6/8/10, pp. 58-59) A strict interpretation of Code § 295-221.F would result in a hardship to the Applicant in light of the nature of the age-restricted community proposed.

64. The zoning ordinance of Upper Providence Township addresses parking specifically for an age-restricted development. Calculation of the parking proposed for the subject Plan using that Township's standard of two spaces per residential unit plus .5 spaces per guest unit results in a requirement of 565 spaces, a number very close to the total number of spaces proposed, 568. (*Id.*, pp. 59-60)

65. On the issue of parking, the Applicant also presented the expert testimony of Joseph J. DeSantis, principal and president of McMahon Associates, and a professional traffic engineer. The required number of off-street parking spaces for the proposed development is 386.

66. As discussed previously, the limitation on the number of parking spaces set forth in Code § 295-211.F, prohibiting more than 120 percent of the required parking, is not intended to be applicable to an age-restricted housing development such as that proposed by Applicant. (N.T. 6/21/10, p. 112) Using this standard, the limit on parking spaces for each individual unit would be 1.8, a number that is not reasonable. Mr. DeSantis testified that in his 28 years' experience as a professional traffic engineer, he has never encountered a zoning ordinance that contained maximum parking limitations on individual residences. In addition, as Mr. Appel testified, the maximum parking regulations are inconsistent with a single-family development. Whereas when there are multifamily units, the residents may share parking, there is a need for guest parking for single-family units because there is no opportunity to share the available

parking spaces. Accordingly, the Plan is designed to provide guest parking within the rain gardens. (N.T. 6/8/10, pp. 58-59) The Board agrees, and finds that such limitations are more typically applied to large parking areas, such as those for an office park, for large retail facilities or even a large apartment complex where parking is shared by multiple persons, and are based on industry recommendations designed to limit the use of parking areas in order to reduce the impact on the environment from an excessive amount of paving. (*Id.*, pp. 113-114) The Board finds, therefore, that literal application of this ordinance provision would prohibit a standard 20-foot driveway leading to a garage that can accommodate two vehicles. (*Id.*, p. 115)

67. While 46 guest parking spaces are required for this Plan, the Applicant proposes 116 spaces. If the 120 percent maximum specified in Code § 295-221.F were to be applied to the guest spaces, the maximum allowed would be 56. However, literal application of this limitation in the context of an age-restricted community would undermine the Applicant's design to have small clusters of parking spaces interspersed throughout the community, making the guest parking areas accessible to the residences as opposed to having one central parking area that would require both residents and guests to walk much farther from the parking area to the residential units. The need for specific guest parking areas is also necessary given the 24-foot width of the roads, making parking on the roads infeasible. If the maximum of 56 guest parking spaces were applied, the number of spaces would be inadequate for the 226 units in the community. Given the typical application of a minimum number of spaces, as opposed to a maximum, and the nature of this age-restricted community, the provision of 116 guest parking spaces is a reasonable approach and strict application of the maximum limit on parking would result in unnecessary hardship to the Applicant. (*Id.*, pp. 116-119, 125)

68. The Applicant seeks an interpretation or, in the alternative, a variance, from the entirety of the rules and regulations of the Preservation Overlay District as outlined in Article XXIV of Chapter 295 of the Cheltenham Code [§§ 295-186 to 295-191]. In the alternative, the Applicant seeks an interpretation that the rules and regulations of the Preservation Overlay District are not applicable due to the provisions of the last sentence of Cheltenham Code § 295-241 as well as other provisions in the Cheltenham Code.

69. Code § 295-186 includes in the legislative intent of the Preservation Overlay District the following: "A. To encourage innovation and to promote flexibility, economy and ingenuity in the residential development of large tracts, including subdivisions and land developments." Code § 295-187 establishes the extent of the Preservation Overlay District as follows:

A. The Preservation Overlay District is defined and established to include and be an overlay upon all parcels having five or more acres or any residential site with a development proposal of eight dwelling units or more within any residential district designated on the Cheltenham Township Zoning Map. All property within the district used or intended to be developed for residential purposes shall comply with the provisions of this article.

70. The Property falls within the Preservation Overlay District due to its size, having well more than five acres, and its location within the R-1 Residential District and the proposal to develop more than eight dwelling units. However, Code § 295-241, establishing the Age-Restricted Overlay District, provides that in order to avoid any conflicts with an underlying zoning district when the provisions of the Age-Restricted Overlay District apply, those provisions take precedence over the provisions of an underlying district. This provision renders inapplicable the provisions of the Preservation Overlay District. The Board finds that the proposed Plan meets the intent of Article XXIV as an innovative approach for redevelopment of an extremely large parcel in a manner that recognizes and is sensitive to the environmentally

sensitive nature of a portion of the Property as well as the adjacent Tookany Creek and is designed to make the most viable use of the Property while complementing the neighboring community. The Applicant's intention is to develop the Property in phases, limiting the physical impact of construction on the neighborhood and disruption to the community surrounding the site. (N.T. 6/8/10, pp. 60-61)

71. In accordance with the requirements of Code § 295-209.C.(1), the Applicant retained Mr. DeSantis of McMahon Associates to conduct an analysis of the impact of the proposed age-restricted development on the traffic in the area, in order to determine whether the proposed Plan would adversely affect the public health, safety and welfare as a result of any changes in traffic.

72. The results of the traffic impact study (Exhibit A-9) show that the impact on traffic in the area of the development will be *de minimis*. An age-restricted community does not generate a significant amount of traffic and has a minimal impact on peak-hour traffic. Although the study was done on the assumption that the development would have 240 residential units, now reduced to 226, the result of the study would not be significantly different if it were revised to reflect the lower number of units. (N.T. 6/21/10, pp. 101-108)

73. Nevertheless, the Applicant's traffic consultant made recommendations with regard to improving some of the adjacent intersections in order to ease any traffic impact resulting from the development. Specifically, he recommended widening Ashbourne Road at the intersection of Ashbourne and Front, to accommodate left-turn and right-turn lanes; upgrading the traffic signal at that intersection to improve accommodations for pedestrians; improving the intersection of Ashbourne and Oak Lane Road by widening the road for right-turn lanes; delineating a stand-by storage area for traffic at the intersection of Ashmead and Ashbourne,

where there is a pick-up and drop-off area used by parents of school children; and adjusting the timing at the Church Road and New Second Street.

74. The Applicant is willing to implement the recommendations, and the existing roadways can accommodate the projected traffic generated by the age-restricted development on the Property. (*Id.*, pp. 108-110)

75. The proposed development will not substantially injure or detract from the use of the neighboring property or adversely affect the public health, safety and welfare due to changes in traffic conditions. (*Id.*, p. 125)

76. As required by Code § 295-209.C.(4), the Applicant presented testimony regarding the anticipated effect of the proposed age-restricted development on the logical, efficient and economical extension or provision of public services and facilities such as public water, sewers, refuse collection, police and fire protection and public schools. Mr. Erik W. Hetzel, an expert in fiscal impact studies, testified on behalf of the Applicant with regard to a Fiscal Impact Analysis he prepared (Exhibit A-21, supplemented by Exhibit A-22). Using a spreadsheet model published by the Rutgers University Center for Urban Policy Research, and frequently used by Mr. Hetzel in connection with dozens of projects in other municipalities, Mr. Hetzel calculated the project revenues and expenses that would be attributable to both the Township and the school district as a result of the proposed development. (N.T. 10/14/10, pp. 5-9)

77. The net fiscal impact for the Township, with revenues exceeding costs on an annual basis at full build-out of the proposed development, would amount to \$203,467. The net fiscal impact on the school district would also be positive, with revenues exceeding costs annually in the amount of \$1.76 million. The total net positive impact to the Township and the

school district amounts to \$1.96 million annually, assuming that tax rates remain the same and the background assumptions regarding the transfer tax and other factors remain the same. (*Id.*, pp. 12-13)

78. The Township will not incur any unreimbursed costs in connection with review of the Applicant's land development application, or recording of the land development plan, or in issuing building permits, nor would the school district. The Township would, to the contrary, earn revenue from the building permit fees that would be paid in connection with the development. (*Id.*, pp. 13-14) Another source of revenue for the Township and the school district would be transfer taxes – estimated to be approximately \$580,400 to each of the taxing authorities. All revenues to the school district are pure revenue given the age-restricted nature of the development and the absence of additional school-age children.

79. The development of the proposed community will not place an undue burden on police, fire, emergency services, public works, or the school district. (*Id.*, pp. 16-17)

80. The Board directed that the parties file written Proposed Findings of Fact and Conclusions of Law in order to summarize their positions with respect to the evidence produced before the Board. (N.T. 11/23/10, p. 130)

81. Adequate public notice of the dates, times and places of the public hearings held by the Board in consideration of this application were made in accordance with the Municipalities Planning Code, and the hearings were commenced in a timely manner as provided under the Municipalities Planning Code as well as the Cheltenham Code.

PROPOSED CONCLUSIONS OF LAW

1. Applicant, Matrix Ashbourne Associates, L.P., filed an application for zoning relief from the Cheltenham Township Zoning Ordinance, codified as Chapter 295 of The Code of the Township of Cheltenham, pursuant to § 909.1(a)(3) and § 910.2 of the Pennsylvania Municipalities Planning Code (hereafter "MPC"), 53 P.S. §§ 10909.1(a)(3) and 10910.2, and pursuant to Article XXVII of the Cheltenham Township Zoning Ordinance.

2. The Cheltenham Township Zoning Hearing Board commenced proceedings in this matter in accordance with the relevant provisions of § 908 of the MPC and complied with all the requirements related thereto, including advertising and the time of commencement of hearings as required under the MPC.

3. The Board finds that the Applicant has demonstrated that it has met the requirements for a special exception in accordance with Cheltenham Code §295-242.B.1 for the Age-Restricted Development and that the proposed development will not be contrary to the public interest.

4. The Board finds that the Applicant has demonstrated that it has met the requirements for a special exception in accordance with Cheltenham Code §295-242.B.3 for a Clubhouse with common areas and meeting rooms, indoor and outdoor recreational facilities and maintenance and security facilities.

5. The Board finds that the Applicant has demonstrated that it has met the requirements for a special exception in accordance with Cheltenham Code § 295-242.B.3 for a swimming pool for the residents of the Age-Restricted Community only.

6. The Board finds that the Applicant has demonstrated that it is entitled to a variance from Cheltenham Code §243.B.8.a., to permit sanitary sewer facilities (if required)

within the floodplain and that the literal enforcement of this section will cause unnecessary hardship to the Applicant.

7. The Board finds that the Applicant has demonstrated that it is entitled to a variance from Cheltenham Code §295-243.B.8.d., to permit development within areas having a slope of 15% or greater, where the slopes in question are identified by the Applicant as being manmade slopes and that the literal enforcement of this section will cause unnecessary hardship to the Applicant.

8. The Board finds that the Applicant has demonstrated that it is entitled to a variance from Cheltenham Code §295-243.B.8.d., to permit development within areas having a slope of 15% or greater, where the slopes in question are identified by the Applicant as being non-manmade slopes, based on the *de minimis* area being disturbed in accordance with Applicant's Plan and that the literal enforcement of this section will cause unnecessary hardship to the Applicant.

9. The Board finds that the Applicant has demonstrated that it is entitled to a variance from Cheltenham Code §295-243.B.8.e., to permit sanitary sewer Facilities (if required) within the Riparian Buffer Areas and that the literal enforcement of this section will cause unnecessary hardship to the Applicant.

10. The Board finds that the Applicant has demonstrated that it is entitled to a variance from the rules and regulations of the "Floodplain Conservation District" as outlined in Cheltenham Code §295-156, so as to allow construction of replacement of the existing 8" T.C. Sanitary Sewer Line (if required) within the 100 Year Floodplain Area and that the literal enforcement of this section will cause unnecessary hardship to the Applicant.

11. The Board finds that the failure of the Zoning Officer to respond to Applicant's request for a determination pursuant to Cheltenham Code §295-164.B.2., regarding manmade steep slopes, constituted a deemed denial of said request. The Board finds, in addition, that denial of a finding that the Applicant is exempt from the provisions of the Steep Slope Ordinance, to the extent that the Applicant has demonstrated that a significant portion of the steep slopes on the Property are manmade, was in error.

12. The Board finds that the Applicant has demonstrated that it is entitled to a variance from Cheltenham Code §295-167 in order to be permitted to construct free-standing structures, buildings and retaining walls, internal accessways, driveways, parking areas, swimming pools, sanitary sewers, storm water management facilities, other underground utilities and landscaping within the areas on the Property identified as having manmade steep slopes and that the literal enforcement of this section will cause unnecessary hardship to the Applicant.

13. The Board finds that the Lines and Grades Plans submitted with the Application, as amended by the Applicant, substantially conforms with the Lines and Grade Plan(s) requirements set forth in Cheltenham Code §295-168.

14. In light of the foregoing Conclusion, the Board finds that a variance from Cheltenham Code §295-168 is unnecessary.

15. The Board finds that the number of parking spaces shown on the Applicant's Plan are not in excess of the maximum permitted under Cheltenham Code §295-221.F.

16. In light of the foregoing Conclusion, the Board finds that a variance from the rules and regulations of "Parking and Loading" as outlined in Cheltenham Code §295-221.F., for a greater amount of parking of 568 parking spaces instead of the maximum permitted 120% of the required parking spaces which equals 463 parking spaces, is unnecessary.

17. The Board finds that the rules and regulations of the "Preservation Overlay District," as outlined in Article XXIV of Chapter 295 of the Cheltenham Code are not applicable due to the provisions of the last sentence of Cheltenham Code §295-241, that the provisions of the Age Restricted Development District controls in the event of a conflict with an underlying district.

18. In light of the foregoing Conclusion, the Board finds that a variance from the entirety of the rules and regulations of the "Preservation Overlay District" as outlined in Article XXIV of Chapter 295 of the Cheltenham Code is unnecessary.

MEMORANDUM OF LAW

The Zoning Hearing Board is compelled to review and make findings concerning the necessary elements required to grant any variance, as set forth in § 910.2 of the Pennsylvania Municipalities Planning Code, 53 P.S. § 10910.2. These requirements include the following:

1. That there are unique physical circumstances or conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that the unnecessary hardship is due to such conditions, and not the circumstances or conditions generally created by the provisions of the Zoning Ordinance in the neighborhood or district in which the property is located;
2. That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property;

3. That such unnecessary hardship has not been created by the [Applicant];
4. That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare; and
5. That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation at issue.

See, 53 P.S. §10910.2; *Sweeney v. Zoning Hearing Bd. of Lower Merion Township*, 534 Pa. 197, 626 A.2d 1147 (Pa. 1993).

Cheltenham Code § 295-209 sets forth the following criteria in addition to those provided in the MPC:

- A. An applicant for a special exception shall have the burden of establishing both:
 - (1) That his application falls within the provision of this chapter which accords to the applicant the right to seek a special exception; and
 - (2) That allowance of the special exception will not be contrary to the public interest.
- B. An applicant for a variance shall have the burden of establishing both:
 - (1) That a literal enforcement of the provisions of this chapter will result in unnecessary hardship, as that term is defined by law, including court decisions; and
 - (2) That allowance of the variance will not be contrary to the public interest.
- C. In determining whether the allowance of a special exception or a variance is contrary to the public interest, the Board shall consider whether the application, if granted, will:
 - (1) Adversely affect the public health, safety and welfare due to changes in traffic conditions, drainage, air quality, noise levels, natural features of the land, neighborhood property values and neighborhood aesthetic characteristics.
 - (2) Be in accordance with the Cheltenham Township Comprehensive Plan.
 - (3) Provide the required parking.

(4) Adversely affect the logical, efficient and economical extension or provision of public services and facilities such as public water, sewers, refuse collection, police and fire protection and public schools.

(5) Otherwise adversely affect the public health, safety, morals or welfare.

D. In all cases, the applicant's burden of proof shall include the duty of presenting credible evidence sufficient to persuade the Board that the applicant has satisfied the criteria set forth in Subsections A(1) and B(1) of this section. In any case where the Board requests that the applicant produce evidence relating to the criteria set forth in Subsection C of this section or where any other party opposing the application shall claim that an allowance of the application will have any of the effects listed in Subsection C of this section, the applicant's burden of proof shall include the burden of presenting credible evidence sufficient to persuade the Board that allowance of a special exception or variance will not be contrary to the public interest with respect to the criteria so placed in issue.

Applicant seeks the following relief from the Cheltenham Code (N.T. 6/8/10, pp. 3-5):

A. Zoning Relief from the rules and regulations of the "Age Restricted Overlay District" as outlined in Article XXXIII of Chapter 295 of the Cheltenham Code, as follows:

- i. A Special Exception in accordance with Cheltenham Code §295-242.B.1 for the Age-Restricted Development.
- ii. A Special Exception in accordance with Cheltenham Code §295-242.B.3 for a Clubhouse with common areas and meeting rooms, indoor and outdoor recreational facilities and maintenance and security facilities.
- iii. A Special Exception in accordance with Cheltenham Code § 295-242.B.3 for a swimming pool for the residents of the Age-Restricted Community only.
- iv. A Variance from Cheltenham Code §243.B.8.a., to permit sanitary sewer facilities (if required) within the floodplain.
- v. A Variance from Cheltenham Code §295-243.B.8.d., to permit development within areas having a slope of 15% or greater.
- vi. A Variance from Cheltenham Code §295-243.B.8.e., to permit sanitary sewer Facilities (if required) within the Riparian Buffer Areas.

B. A Variance from the rules and regulations of the "Floodplain Conservation District" as outlined in Cheltenham Code §295-156, so as to allow

construction or replacement of the existing 8" T.C. Sanitary Sewer Line (if required) within the 100 Year Floodplain Area.

- C. Zoning Relief from the rules and regulations of the "Steep Slope Conservation District" as outlined in Article XXII of the Cheltenham Code, as follows:
- i. An Appeal from the determination of the Zoning Officer and/or Township Engineer pursuant to Cheltenham Code §295-164.B.2. regarding manmade steep slopes.
 - ii. From Cheltenham Code §295-167 for the construction of free-standing structures, buildings and retaining walls, internal accessways, driveways, parking areas, swimming pools, sanitary sewers, storm water management facilities, other underground utilities and landscaping.
 - iii. A Determination that the Lines and Grades Plans submitted with the Application substantially conforms with the Lines and Grade Plan(s) requirements set forth in Cheltenham Code §295-168.
 - iv. In the alternative to, C.iii, above, a Variance from Cheltenham Code §295-168 for not submitting plans conforming to the stated Lines and Grades Plan(s) requirements.
- D. A Determination that the number of parking spaces shown on the Applicant's plans are not in excess of the maximum permitted under Cheltenham Code §295-221.F.
- E. In the alternative to D., above, a Variance from the rules and regulations of "Parking and Loading" as outlined in Cheltenham Code §295-221.F., for a greater amount of parking of 631 parking spaces instead of the maximum permitted 120% of the required parking spaces which equals 491 parking spaces.
- F. A Variance from the entirety of the rules and regulations of the "Preservation Overlay District" as outlined in Article XXIV of Chapter 295 of the Cheltenham Code.
- G. In the alternative to F., above, an interpretation that the rules and regulations of the "Preservation Overlay District," as outlined in Article XXIV of Chapter 295 of the Cheltenham Code are not applicable due to the provisions of the last sentence of Cheltenham Code §295-241 and the other provisions in the Cheltenham Code.

The Board will address each of these matters *seriatim*.

With regard to the special exceptions sought by the Applicant, the record establishes that the proposed use, an age-restricted, independent living, multiple dwelling development, as well as the proposed accessory clubhouse and swimming pool, are permitted uses within the age-restricted overlay district. Code § 295-242.B.1, 3. The Property is more than five (5) acres and is in single ownership,¹ in compliance with Code § 295-241.A, and is located within a residential district, the R-1 District, as required by Code § 295-241.B. In addition, the Property has more than 3,000 feet of frontage on a state road (Ashbourne Road) that is not a limited access highway, in compliance with Code § 295-241.C.5, which requires frontage of greater than 2500 feet for parcels measuring 60.01 acres and greater.

A special exception is not an exception to a zoning ordinance, but rather a use, which is expressly permitted, absent a showing of a detrimental effect on the community. *Manor Healthcare Corp. v. Lower Moreland Township Zoning Hearing Board*, 139 Pa.Cmwlth. 206, 590 A.2d 65 (1991). The applicant for the proposed use has both the duty to present evidence and the burden of persuading the board that the proposed use satisfies the objective requirements of the ordinance for the grant of a special exception. Once the applicant meets these burdens, a presumption arises that the use is consistent with the health, safety and general welfare of the community. The burden then normally shifts to the objectors of the application to present evidence and persuade the Board that the proposed use will have a generally detrimental effect. Where ... the ordinance specifically places the burden on the applicant to show that the proposed use will not have a detrimental effect, the applicant only retains the burden of persuasion. Objectors still retain the initial presentation burden with respect to the general matter of the detriment to health safety, and general welfare. *Manor Healthcare*. The evidence presented by objectors must show a high probability that the use will generate adverse impacts not normally generated by this type of use and that these impacts will pose a substantial threat to the health and safety of the community.

Greaton Properties v. Lower Merion Tp., 796 A.2d 1038, 1045-46 (Pa.Cmwlth. 2002) [emphasis supplied]. Consequently, the salient question is whether the proposed age-restricted development, if the subject application were to be granted, would result in a more adverse impact

¹ Counsel for the Applicant was questioned regarding whether the Deed for the property had been submitted and indicated that he believed that the Deed had been provided; however, out of an abundance of caution a copy of the Deed is attached hereto.

than any other age-restricted development. The Applicant presented ample evidence that due to the existing golf course on the Property, and the unique topography resulting from the extensive use of steep slopes to accommodate the needs of the golf course, any age-restricted use of the Property would be limited by the restrictions imposed by the Steep Slope Overlay regulations. The protestants, CC4A, failed to carry their burden of demonstrating a “high probability that the use will generate adverse impacts not normally generated by this type of use[,]” as required by *Manor Healthcare, supra*. The Board is not persuaded by the testimony of the protestants’ witnesses, David Lynch and John Chambers, who merely echoed the underlying basis for the Township’s Steep Slope Overlay District, without demonstrating that the measures taken by the Applicant to minimize any adverse impact on the environmentally sensitive resources on or near the Property would be insufficient to protect those resources, or that any other age-restricted development on the Property would better serve the public interest in protection of such resources.

The protestants failed to meet their burden of showing that the impact of the proposed development would constitute a substantial threat to the public health and safety of the surrounding community. The testimony of both witnesses was shown on cross-examination to be irrelevant to the showing made by the Applicant, as both witnesses acknowledged that with proper measures to control erosion and runoff the proposed development would protect the natural resources on and adjacent to the Property. Accordingly, the Applicant has met the requirements to justify the special exceptions requested in order to permit the age-restricted development and the accessory clubhouse and swimming pool and is therefore entitled to relief pursuant to Cheltenham Code §§ 295-242.B.1 & 3.

The Applicant seeks variances from Cheltenham Code §§ 295-243.B.8.a., d and e, in order to permit sanitary sewer facilities (if required) within the floodplain and riparian buffer area and to permit development within areas having a slope of 15% or greater. In addition, the Applicant seeks relief from Article XXII of the Code, comprising the provisions of the Steep Slope Overlay District. The testimony presented with regard to these variances demonstrates that the requested variances are necessary to permit the reasonable development of the Property and will not result in adverse impact on the public health, safety and welfare of the Township. The placement of the sewer facilities within the protected floodplain and riparian buffer area may not be necessary, depending on the decision by the Township during the development process with regard to the need for additional sewer facilities, and depending as well on the outcome of testing of the existing terra cotta pipe within the riparian buffer area. However, the Applicant proposes to minimize the impact of any work within the protected non-manmade slope area and the impact of replacing the terra cotta pipe, if necessary. Should the need arise for the work within these sensitive areas, the Township will have an opportunity to ensure that the work does not adversely impact the protected areas. Accordingly, the Board finds that grant of the requested variances from Code §§ 295-243.B.8.a & e is justified.

With regard to the variance from Code § 295-243.B.2.d, the Board considers the Applicant's testimony on the nature of the steep slopes on the Property persuasive. The majority of the steep slopes on the Property were created in order to provide the necessary features for the golf course that has existed on the site for decades. The Applicant's consulting engineer reviewed the slopes on the site, studied historical aerial photographs, conducted soil testing, inspected the slopes and calculated the depth of naturally existing components in the slopes, and concluded that the contents of most of the steep slopes exhibits characteristics of having been

manmade rather than occurring naturally as part of the environment on the Property. The Board finds this testimony to be credible and considers the testimony presented by the witnesses for the protestants to be, though accurate, unpersuasive with regard to the findings and opinion of Mr. Mayhew. The record shows that of the slopes that have been identified as non-manmade steep slopes, the Applicant proposes to disturb a minimal amount, only 0.11 acre, by limiting the work being done within those areas and re-designing the storm water management facilities in order to avoid construction of facilities within the protected area.

The Board respects the decision of Mr. Lynch, declining to issue the determination requested by the Applicant regarding the steep slopes on the Property, and appreciates the analysis prepared by Mr. Lynch regarding the engineering and zoning impact he anticipates from the proposed development. Nevertheless, given the more extensive record developed in this proceeding on the nature of the steep slopes and the steps the Applicant proposes to implement in order to protect the non-manmade slopes on the site, the Board accepts the Applicant's characterization of the steep slopes and therefore determines that the majority of the steep slopes being disturbed by the proposed development are manmade steep slopes, that construction of the development can be accomplished without causing erosion of the slopes or result in soil failure, stream siltation or contamination of surface waters or an increase in the total runoff into any water course, or an increase in the point discharge levels or velocities at any given point of collection and discharge, and that such construction will not be injurious to the health, safety and welfare of Township residents; and that accordingly the Applicant is exempt from the provisions of Article XXII of the Cheltenham Code relating to the Steep Slope Overlay District, pursuant to Code § 295-164.B.2

Accordingly, the Applicant is entitled to construct free-standing structures, buildings and retaining walls, internal accessways, driveways, parking areas, swimming pools, sanitary sewers, storm water management facilities, other underground utilities and landscaping within the areas having manmade slopes, consistent with the intent of Code § 295-167. Moreover, the Board is satisfied that the Lines and Grades Plan submitted with the Application substantially conforms to the extensive requirements set forth in Cheltenham Code § 295-168 and that no variance from that section is necessary. The Lines and Grades Plan, as supplemented, provides adequate assurance that sufficient protection with regard to erosion and sedimentation controls, and runoff from construction, is provided for this development. Given the absence of action by the Township Engineer to approve or disapprove the Applicant's Lines and Grades Plans, the Board will treat such absence as a deemed denial and is satisfied that the Lines and Grades Plans meet the requirements of Code § 295-168.

With regard to the parking requirements of Code § 295-221.F, the Board is persuaded that although the number of parking spaces shown on the Applicant's plans – 568 spaces – is technically in excess of the maximum permitted under this section, which would amount to 463 parking spaces, or 120% of the required parking, the intent of the maximum specified in this section does not contemplate a development such as the age-restricted residential community proposed. The parking spaces provided for guests of the single-family units are designed in such a way to accommodate the needs of an age-restricted community and include innovative measures to minimize storm water problems as well as to provide landscaping and rain gardens that will enhance the overall appearance of the community and screen the parking spaces to complement the residential nature of the development. Based on this interpretation, there is no need for a variance from Code § 295-221.F.

The final variance requested by the Applicant relates to the entirety of Article XXIV of the Code, the Preservation Overlay District. The provisions of this Article conflict with those of the Age-Restricted Overlay District, which was adopted later than the Preservation Overlay District. In providing for the Age-Restricted Overlay District, the Township made a legislative determination that in order to facilitate the development of age-restricted communities, the regulations contained in Article XXXIII shall take precedence over the provisions of any underlying zoning district. This determination is codified in Code § 295-241. The Board, therefore, is constrained to recognize the Township's decision in specifying such preference and to conclude that the regulations set forth in Article XXIV are inapplicable to the proposed development. While the Board finds no ambiguity in this language, its decision in this regard would remain the same in light of the mandate in Section 10603.1 of the Municipalities Planning Code, 53 P.S. § 10603.1, that where doubt exists, the language of a zoning ordinance should be interpreted, in favor of the landowner and against any implied extension of restrictions on the use of one's property. *See, e.g., Adams Outdoor Advertising, LP v. Zoning Hearing Bd. of Smithfield Township*, 909 A.2d 469, 481 (Pa.Cmwlth. 2006), and cases cited therein. In reaching this conclusion, the Board notes that given the applicability of the Steep Slope Overlay provisions, and the Applicant's showing with regard to the protection of non-manmade steep slopes, the stated purpose of the Preservation Overlay District is met in this instance and application of Article XXIV is unnecessary. The proposed development meets the legislative intent of Article XXIV and Article XXXIII, as well as Article XXII regulating steep slopes.

In order to justify a variance, an applicant must meet the following test, enunciated in *Valley View Civic Association v. Zoning Board of Adjustment*, 501 Pa. 550, 555-556, 462 A.2d 637, 640 (1983):

The party seeking the variance bears the burden of proving that (1) unnecessary hardship will result if the variance is denied, and (2) the proposed use will not be contrary to the public interest. The hardship must be shown to be unique or peculiar to the property as distinguished from a hardship arising from the impact of zoning regulations on an entire district. Moreover, mere evidence that the zoned use is less financially rewarding than the proposed use is insufficient to justify a variance. (Citations omitted.)

In order to establish that an unnecessary hardship exists, an applicant must prove that either (1) the physical characteristics of the property are such that it could not be used in any case for any purpose permitted in that zoning district or that it could only be used for a permitted purpose at prohibitive expense, or (2) the characteristics of the property are such that the lot has either no value or only distress value for any purpose permitted by the zoning ordinance. *Wagner v. City of Erie Zoning Hearing Board*, 675 A.2d 791, 799 (Pa.Cmwlth. 1996), citing *Laurento v. Zoning Hearing Board*, 162 Pa.Cmwlth. 226, 638 A.2d 437 (1994); *Isaacs V. Wilkes-Barre City Zoning Hearing Board*, 148 Pa.Cmwlth. 578, 612 A.2d 559 (1992).

When an applicant seeks a variance of a dimensional nature rather than a use variance, however, a less stringent standard is applicable, as noted by the Supreme Court in *Hertzberg v. Zoning Bd. of Adjustment of City of Pittsburgh*, 554 Pa. 249, 257, 721 A.2d 43, 47 (1998):

When seeking a dimensional variance within a permitted use, the owner is asking only for a reasonable adjustment of the zoning regulations in order to utilize the property in a manner consistent with the applicable regulations. Thus, the grant of a dimensional variance is of lesser moment than the grant of a use variance, since the latter involves a proposal to use the property in a manner that is wholly outside the zoning regulation.

There are unique physical circumstances or conditions, including exceptional topographical conditions peculiar to the Property, that justify the variances granted hereby. Those physical conditions create a hardship for the Applicant in that the previous use on the Property resulted in the creation of numerous steep slopes in order to provide a challenging and

scenic golf course for the members of the now-defunct golf course, leaving the potential uses of the Property quite limited if the zoning ordinance provisions are given literal effect.

The proposed use, the age-restricted development, is a use permitted by the Cheltenham Code by special exception. As discussed, *supra*, the Applicant has met the requirements for a special exception and the protestants have failed to undermine that showing. Accordingly, the variances requested by the Applicant in this matter are in the nature of dimensional variances, not use variances, and the Applicant seeks only reasonable adjustment of the applicable regulations in order to develop the Property in a manner consistent with the purpose of the age-restricted district.

The testimony presented by the Applicant demonstrates that the proposed age-restricted development has been designed with particular attention to the Comprehensive Plan, the performance standards of Article XXXIII, the nature and appearance of the surrounding community, the architectural standards of Article XXXIII, the environmentally sensitive areas of the Property and its surroundings and the intent of Article XXII, the impact of the development on traffic in the area, the adequacy of parking within the development, and the overall impact the proposed development will have on the health and welfare of the neighborhood as well as the community at large.

The record fully supports a conclusion that the proposed development will not adversely affect the public health, safety and welfare and that without the variances sought by the Applicant the unique nature of the Property will cause unnecessary hardship and will prevent the use of the Property in a manner that is consistent with the applicable regulations for an age-restricted residential community.

The unique character of the Property, due to its size as well as the numerous manmade slopes, in addition to the existence of three defined water sheds, required a design that includes three distinct sanitary connections as well as three different storm water systems. Despite the challenging characteristics of the site, however, the relief sought by the Applicant represents the minimum necessary to permit development of the Property as an age-restricted community consistent with the underlying purposes of Article XXXIII.

The protestants, CC4A, presented no verifiable evidence disputing the Applicant's showing that only a portion of the areas identified as having steep slopes on the Property requires protection from disturbance. Moreover, the Applicant's Plan carefully addresses the concerns with regard to erosion and sedimentation control, as well as storm water management, and meets the underlying intent of the Steep Slope Overlay District. The record contains ample evidence that the Applicant endeavored to design a plan that minimizes the impact both on the Property itself and its environmentally sensitive areas as well as on the neighboring community. These factors support the Board's conclusion that there is a sufficient basis upon which to grant the requested variances. *See, e.g., North Chestnut Hill Neighbors v. Zoning Board of Adjustment of the City of Philadelphia*, 928 A.2d 418 (Pa.Cmwlth. 2007). Literal enforcement of the applicable provisions of the Code would result in unnecessary hardship due to the particular conditions of the Property, which conditions are unique to the Property and were not created by the Applicant. Regardless of the fact that the unique topography of the site existed when the Applicant purchased the Property, that fact alone does not preclude the granting of variances that are otherwise justified. *See, Solebury Township v. Solebury Township Zoning Hearing Board*, 914 A.2d 972, 976 (Pa.Cmwlth. 2007).

PROPOSED CONCLUSION

WHEREFORE, in consideration of all the foregoing, the Cheltenham Township Board of Supervisors finds that the application of Matrix Ashbourne Associates, L.P., shall be GRANTED.

Respectfully submitted,

FRIEDMAN, SCHUMAN, APPLEBAUM,
NEMEROFF & McCAFFERY, P.C.

By: 
Peter S. Friedman, Esquire
Attorney for Applicant

Dated: December 17, 2010

Record and Return to:

Robert F. Hassel
c/o Commonwealth Land Title Insurance Company
Two Logan Square, Suite 500
Philadelphia, Pennsylvania 19103

SPECIAL WARRANTY DEED

THIS INDENTURE made this 15th day of MARCH, 1999, between Ashbourne Country Club, a Pennsylvania not-for-profit corporation (the "Grantor"), and Matrix/Ashbourne Associates, L.P., a New Jersey limited partnership (the "Grantee").

WITNESSETH

THAT the said Grantor for and in consideration of the sum of _____ : lawful money of the United States of America, well and truly paid by the said Grantee to the said Grantor, at or before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, has granted, bargained and sold, released and confirmed, and by these presents does grant, bargain, sell and release and confirm unto the said Grantee, its successors and assigns:

ALL THAT CERTAIN lot or parcel of land situate in Cheltenham Township, Montgomery County, Pennsylvania, and being more fully described on the property description (the "Property Description") attached hereto and made part hereof as Exhibit A (the "Property").

TOGETHER WITH all the buildings and improvements, ways, streets, alleys, driveways, passages, waters, water-courses, rights, liberties, privileges, hereditaments and appurtenances, whatsoever unto the Property belonging, or in any wise appertaining, and the reversions and

STATE OF PENNSYLVANIA :
COUNTY OF Montgomery : SS.

ON THIS, the 15th day of March, 1999, before me, the undersigned Notary Public for the State and County aforesaid, Fred Greenberg personally appeared, who acknowledged herself/himself to be the President of Ashbourne Country Club, a Pennsylvania not-for-profit corporation, and further acknowledged that she, as such officer and being authorized to do so, executed the foregoing instrument as the act and deed of the corporation for the purposes therein contained by signing the name of the corporation by herself as such officer.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Janet M. Masters
Notary Public
My Commission Expires: 10/14/2002

NOTARIAL SEAL
JANET M. MASTERS, Notary Public
Whitpain Twp., Montgomery County
My Commission Expires October 14, 2002

EXHIBIT A



Barry L. Wert, P.E., P.L.S.
Jelrey A. Wert, P.E., P.L.S.
Robin K. Youmans, P.E.
Kenneth M. Fretz, Sr., P.L.S.
Mark R. Flaherty, Survey Manager
Joseph J. Fielder, Inspection Manager
Ralph A. Wert, P.E., P.L.S. 1956-1994

Civil Engineers & Land Surveyors · 410 Derstine Avenue, PO Box 647, Lansdale, PA 19446-0608 · 215-855-3111 · Fax 855-51

February 19, 1999

M6497

Ashbourne Country Club

Tract Boundary

ALL THAT CERTAIN lot or piece of ground situate in Cheltenham Township, Montgomery County, Pennsylvania, being shown on a Plan of Survey, prepared for Ashbourne Country Club by Metz Engineers, Civil Engineers and Surveyors, Lansdale, Pennsylvania, dated December 28, 1998 and last revised February 5, 1999, and being more fully described as follows:

BEGINNING at a point, the intersection which the centerline of Jenkintown Road (41.50' wide) makes with the centerline of Ashbourne Road (41.50' wide); thence, extending along the said Ashbourne Road centerline, South 40°52'20" West, 1082.75 feet to an angle point in Ashbourne Road; Thence, still along the said centerline of Ashbourne Road the next five courses and distances: 1) North 52°37'00" West, 1349.81 feet to a point; 2) North 51°45'50" West, 453.87 feet to a point; 3) North 50°39'40" West, 370.54 feet to a point; 4) North 50°51'30" West, 333.31 feet to a point; 5) North 48°52'30" West, 282.31 feet to a point in line of land of N/L Michael A. & Debra Coules; Thence, extending along the said Coules lands and lands of various owners, North 45°13'00" East, 998.81 feet to a corner of lands of N/L Cheltenham Township; thence, extending along the said Township lands the five following courses and distances; 1) South 52°11'30" East, 68.97 feet to a point; 2) South

Herbert H. Metz, Inc. Since 1912

M6497/1gls/schC

METZ ENGINEERS

Ashbourne Country Club

February 19, 1999

Page 2 of 2

22°41'30" East, 162.82 feet to a point; 3) North 79°20'20" East, 137.39 feet to a point; 4) North 85°49'30" East, 481.63 feet to a point; 6) North 18°00'30" East, 273.93 feet to a point in the southerly legal right-of-way line of Tookany Creek Parkway (100' wide); thence, extending along said legal right-of-way line, South 78°15'30" East, 122.71 feet to an angle point; thence, extending South 73°32'00" East, 359.47 feet to a point in the bed of Tookany Creek Parkway; thence, extending South 35°11'00" East, 238.19 feet to a point on the said legal right-of-way line, said point being in the line of lands of other lands of N/L Cheltenham Township; thence, extending along said Township lands the four following courses and distances; 1) South 51°32'00" West, 210.81 feet crossing Tookany Creek to a point; 2) South 28°10'00" East, 269.88 feet to a point; 3) South 64°25'00" East, 777.37 feet crossing and recrossing Tookany Creek to a point; 4) North 73°51'40" East, 149.81 feet to a point in the centerline of Jenkintown Road; Thence, along the centerline of Jenkintown Road the next two courses and distances: 1) South 16°01'30" East, 136.51 feet to a point; 2) South 18°04'00" East, 994.89 feet to the place of beginning.

Containing 107.6899 Acres be the same more or less.

BEING ASSESSMENT PARCEL NUMBER 31-00-00688-00-1.

BEING the same premises which Elizabeth Queiroz, Countess of Santa Eulalia, widow by Deed dated March 1, 1928 and recorded in Montgomery County, in Deed Book 1044 page 78 conveyed unto Ashbourne Country Club (Pa. Corp.), in fee.