

BEFORE THE ZONING HEARING BOARD OF  
CHELTENHAM TOWNSHIP  
MONTGOMERY COUNTY, PENNSYLVANIA

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APPEAL NO. 3336  
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**PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND BRIEF OF PROTESTANTS**

**PROPOSED FINDINGS OF FACT**

1. Matrix Ashbourne Associates, L.P., is the owner of the premises located at 1100 Ashbourne Road, Cheltenham Township, Pennsylvania (N.T. June 8, 2010, 2).
2. The applicant is represented by Peter Friedman, Esquire with offices located at 101 Greenwood Avenue, 5<sup>th</sup> floor, Jenkintown, PA. (N.T. 6)
3. The protestants, CC4A and its individual members, are represented by David C. Onorato, Esquire, with offices located at 298 Wissahickon Avenue, Upper Gwynedd, North Wales, PA 19454. (N.T. 7)
4. The parties stipulated to the standing of the protestants, CC4A. (N.T. 7)
5. The applicant seeks to develop subject premises into a 226-unit development consisting of a minimum of 70 single-family residences and 156 carriage homes. (N.T. 30)
6. The applicant seeks the following zoning relief:
  - A. A variance from the rules and regulations of the floodplain district as outlined in CCS 295-156, so as to allow construction of portions of storm water management basins number 2C, 2D and 2E and the replacement of the existing

eight-inch T.C. sanitary sewer line, if required, within the 100-year floodplain area.

B. Variances from the rules and regulations of Steep Slope Conservation District as outlined in Article XXII of the Cheltenham Code as follows:

i. From CCS 295-167, for the construction of freestanding structures, building and retaining walls, internal access ways, driveways, parking areas, swimming pools, sanitary sewers, storm water management facilities and other underground utilities and landscaping.

ii. A determination that the lines and grades plans submitted with the application substantially conforms with the lines and grade plans requirements set forth in CCS 295-168.

iii. In the alternative to b.ii above, a variance from CCS 295-168 for not submitting plans conforming stated lines and grades plans requirements.

C. A determination that the number of parking spaces shown on the applicant's plans is not in excess of the maximum permitted under CCS 295-221.F.

D. In the alternative to c. above, a variance from the rules and regulations of the parking and loading is outlined in CCS 295-221.F for a greater amount of parking of 631 parking spaces instead of the maximum permitted 120 percent of the required parking spaces, which equals 491 parking spaces.

E. 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 CCS 295-242.B.1 for the age-restricted development.

ii. A special exception in accordance with CCS 295-242.B.3 for a clubhouse with common area and meeting rooms, indoor and outdoor recreational facilities and maintenance and security facilities.

iii. A special exception in accordance with CCS 295-242.B.3 for a swimming pool for the residents of the age-restricted community only.

iv. A variance from CCS 243.B.8.a to permit sanitary sewer facilities, if required, and storm water management basins, 2C, 2D and 2E, with the floodplain.

v. A variance from CCS 295-243.B.8.d to permit development with areas having a slope of 15 percent or greater.

vi. A variance from CCS 243.B.8.e to permit sanitary sewer facilities, if required, and storm water management basin number 1A, 2C, and 2E, within the Riparian Buffer areas.

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 provision of the last sentence of CCS 295-241. (N.T. 3-5)

7. The following documents were made part of the hearing:

ZHB Exhibits Listing

- ZHB-1. Listing of Exhibits
- ZHB-2. Copy of the language of the legal advertisement with notice of the hearing
- ZHB-3. Application to the Zoning Hearing Board referenced as Appeal 3336 and Addendum
- ZHB-4. Location map marked as Real Estate Registry Block 61, illustrating the location of the property
- ZHB-5. MEA Land Record Parcel Information on the Property dated 05/26/10
- ZHB-6. Building and Zoning recommendation letter dated 05/26/09
- ZHB-6.01 Building and Zoning recommendation letter dated 07/09/09
- ZHB-6.02 Building and Zoning recommendation letter dated 09/22/09
- ZHB 14.1, .2, .3 Revised Addendum to Application (08/14/09)
- ZHB 17.1, .2 Friedman letter dated 11/04/09 amending application
- ZHB 18.1, .2 Friedman letter dated 02/19/10 amending application
- ZHB 61.1, .2 Amended Zoning Plan, two sheets, dated 08/14/09, revised 05/03/10
- ZHB 62 Amended Steep Slopes Plan dated 08/14/09, revised 05/03/10
- ZHB 63 Site Plan
- ZHB 64 Site Plan – Conceptual Phasing Plan
- ZHB 66 KPO&H letter dated 11/03/10
- ZHB 67 Friedman letter dated 11/23/10

Applicant’s Exhibit List

- A-1.1, .2 Amended Zoning Plan, 2 sheets dated 8/14/09, revised 06/07/10
- A-2.1, .2 Curriculum Vitae of Stuart Appel
- A-3.1 – 3.13, 3.15-3.25 Booklet of Plans
- A-4 Giordano Design Book
- A-5 Appel-Wells letter
- A-6 Giordano Curriculum Vitae
- A-7 Decision of Zoning Hearing Appeal 3081

A-8	DeSantis Curriculum Vitae
A-9	March 2010 Traffic Impact Study for Ashbourne County Club
A-10	02/26/10 letter from Tavani to Kraynik
A-11	05/25/10 letter from McMahon to Kraynik
A-12	05/28/10 letter from Tavani to Kraynik
A-13.1 – 13.4	Revised illustrative sections
A-14	Mark Mayhew Curriculum Vitae
A-15.1 – 15.10	Taylor, Wiseman and Taylor plans
A-16.1 – 16.24	Taylor, Wiseman and Taylor 11” x 17” booklet
A-17	Letter dated 07/06/2010 from Taylor, Wiseman and Taylor
A-18.1 – 18.23	Memorandum from David Lynch to the Zoning Hearing Board dated 07/26/10
A-19.1 – 19.5	Enlarged details of steep slope locations
A-20	Eric W. Hetzel Curriculum Vitae
A-21	Fiscal Impact Analysis dated 03/25/10
A-22	Fiscal Impact Analysis Supplement dated 10/11/10
A-23	Soil Erosion and Sediment Control Plan
A-24	Reduced version of Exhibit A-23
A-25	Cross Sections Plan
A-26	Lines and Grades Plan
A-27	LEED for Home Checklist
A-28.1 - .5	Photographs of Sample Board
A-29	30 Year Limited Warranty on Hardie Plank Board

Protestants’ Exhibits

P-1	Letter dated 07/21/10 from David M. Lynch to Mark Mayhew
P-2	Curriculum Vitae of John O. Chambers
P-3	Roads and Streets, Shallow Excavations, et al.
P-4	Chamber’s delineation of severely limited soils

8. The development is being implemented pursuant to the Age-Restricted Overlay District. (N.T. 13)

9. Stuart D. Appel was qualified as a professional landscape architect and professional planner and the Board relied upon his credible testimony.

10. The subject property is the former Ashbourne Country Club consisting of approximately 104 acres and is located between Ashbourne Road, Jenkintown Road, and the Tookany Creek. (N.T. 29-30)

11. The subject premises will be accessed by two permanent means of ingress and egress from Ashbourne Road East and Ashbourne Road South and there will be an emergency access from the western part of the subject premises. (N.T. 31)

12. The applicant proposes a central clubhouse for the members of the community which would provide meeting rooms, a pool and other amenities. (N.T. 32-33)

13. The proposed plan proposes to preserve approximately 37 acres of natural area along the Tookany Creek. (N.T. 49)

14. Stuart Appel testified that the proposed development will comply with the special exception criteria set forth in sections 294-241 and 242 of the Cheltenham Township Zoning Ordinance. (N.T. 50)

15. Stuart Appel testified that the proposed development is at least five (5) acres, is located within the R-1 Zoning district, and has frontage on a state road. (N.T. 50)

16. Stuart Appel testified that the units will be offered for sale only, and would be limited to persons age 55 and over. (N.T. 51)

17. Stuart Appel testified that the Cheltenham Township Comprehensive Plan seeks to promote the unique areas of the township and to encourage the preservation and enhancement of these irreplaceable features. (N.T. 53)

18. Stuart Appel testified that despite the requirements of the age-restricted ordinance which prohibit construction within environmentally sensitive areas, the applicant proposes to build within areas of slopes greater than 15 degrees. (N.T. 76)

19. Stuart Appel testified that the applicant has no plans in place with respect to the level of maintenance of the proposed 37 acres of open space. (N.T. 96)

20. Stuart Appel testified that the applicant has not prepared a list of restrictions with respect to the use of the yards of each home. (N.T. 97-98)

21. Stuart Appel was unable to provide assurances that the homeowners' association would be able to sustain the maintenance of the overall open space of the entire project if the project was completed in phases. (N.T. 122-123)

22. Laura C. Staines Giordano was qualified as an expert in architecture and the Board relied upon her credible testimony.

23. Ms. Giordano testified that the applicant proposes two distinct home designs. Single-family homes which tend to be along the perimeter of the development. (N.T. June 21, 2010, 25)

24. Ms. Giordano testified that the applicant proposes facades to include brick and siding or stone and siding and variations to the elevation designs. (N.T. 25)

25. Ms. Giordano testified that the rear of the proposed homes will have variations including combinations of hip roofs and gables as well as the use of walkout basements along the perimeter of the site where grading allows. (N.T. 26?)

26. Ms. Giordano testified that carriage homes will comprise the majority of the homes within the community and are generally centralized, although a number will face Ashbourne Road South. (N.T. 27)

27. Ms. Giordano testified that carriage homes will be three-dwelling unit combinations and will have four different combinations of materials. (N.T. 28)

28. Ms. Giordano testified that the carriage homes will be constructed in a way that there is one front door along the façade facing each street and the end unit front doors will be on the side of each building. (N.T. 28-29)

29. Ms. Giordano provided testimony with regard to the choice of siding and roofing materials as well as representative color samples of the stone and brick veneers proposed. (N.T. 32-34)

30. Ms. Giordano testified that that a clubhouse and swimming pool are being proposed to be located centrally within the site upon entering the main entrance off Ashbourne Road South. (N.T. 36-37)

31. Ms. Giordano testified that the clubhouse will include multipurpose facilities, social gathering places, card rooms and other similar amenities. (N.T. 38)

32. Ms. Giordano testified that each carriage home will have three garages to accommodate six cars all facing the street side of each building. (N.T. 44)

33. Ms. Giordano offered no testimony or evidence of buildings in the surrounding neighborhood that included triplexes or buildings that contain six-car garages. (N.T. 47-48)

34. Ms. Giordano testified that the house plan design which includes the majority of the living space on the first floor makes the units age-targeted. (N.T. 50-51)

35. Ms. Giordano testified that the applicant does not intend to register the project for LEED certification. (N.T. 64)

36. Ms. Giordano testified that the vast majority of the proposed single-family homes that face toward Tookany Creek will have walkout basements as well as a handful of those that are to the western or left-hand side of the development. (N.T. 67-68)

37. Joseph J. DeSantis was qualified as an expert in traffic engineering and the Board relied upon his credible testimony.

38. Mr. DeSantis testified regarding the results of a traffic impact study that was performed on behalf of the Plaintiff. (N.T. 104-105)

39. Mr. DeSantis testified that under existing conditions, the area roadways are subject to moderate delay in congestion typical for this type of area and the longest delays are occurring at the intersections of Ashbourne and Ashmead, and Front Street. (N.T. 105)

40. Mr. DeSantis testified that a 240-unit age-restricted development will generate 71 morning peak hour trips and 87 afternoon peak-hour trips. (N.T. 106)

41. Mr. DeSantis testified that the impact of the new development will be largely felt at the Ashbourne and Oak Lane Drive intersection and at the Ashbourne, Ashmead and Front Street intersection. (N.T. 107)

42. Mr. DeSantis testified that his traffic study provides a list of recommendations for improvements of the intersection at Ashmead and Ashbourne and Front, which include widening the intersection and adding a left-hand turn lane as well as recommendations for upgrading the traffic signal. (N.T. 108)

43. Mr. DeSantis also testified that in his report he is recommending traffic signal timing adjustments at the intersection of Church and New Second Street. (N.T. 110)

44. Mr. DeSantis testified that as a result of some streets being only 24 feet wide, the plan proposes a total of 118 guest parking spaces throughout the site. (N.T. 116)

45. Mr. DeSantis testified that the streets of the development where the carriage homes are located will be 24 feet wide and on-street parking will not be permitted. (N.T. 127)

46. Mr. DeSantis testified that he would advise against on-street parking where the streets are 28 feet wide adjacent to the single-family homes. (N.T. 128)

47. Mr. DeSantis testified that there are a number of areas on the plan which do not permit guest parking including the cluster of single-family homes to the western edge of the property, nor along the entire northern ring of the development adjacent to the single-family homes and there are no guest parking spaces planned along the single-family homes to the east side of the project. (N.T. 128-130)

48. Mark Mayhew was qualified as an expert in civil engineering and the Board relied upon his credible testimony.

49. Mr. Mayhew testified that the applicants – Steep Slope Plan, delineates the steep slopes on the subject premises which are over 15% and those which are over 25%. (N.T. August 9, 2010, Pg)

50. Mr. Mayhew testified that in his opinion some of the areas of steep slopes on the premises are manmade and others are naturally occurring. (N.T. 28)

51. Mr. Mayhew testified that the golf course was constructed over eighty years ago and now there are pockets of mature trees throughout the site. (N.T. 35)

52. Mr. Mayhew testified that it is his opinion that the development would disturb only four limited areas of non-manmade steep slopes. (N.T. 38-39)

53. Mr. Mayhew testified that the majority of the single-family homes that are to be constructed with walkout basements would be constructed through an area of manmade steep slopes. (N.T. 42-43)

54. Mr. Mayhew testified that in his opinion a variance should be granted to construct within the steep slopes as a result of the site being unique because the golf course has created numerous steep slopes scattered throughout the site associated with tee boxes, bunkers, sand traps, greens, fairways and the construction of the existing clubhouse, parking lot, maintenance buildings and other auxiliary buildings. (N.T. 47-48)

55. Mr. Mayhew based his opinion that a variance should be granted on the belief that to construct anywhere on the site would require the disturbance of some steep slope. (N.T. 48)

56. Mr. Mayhew confirmed by his testimony that the Cheltenham Township Zoning Code 243.B.8.D prohibits construction within certain environmentally sensitive areas including steep slopes. (N.T. 48-49)

57. Mr. Mayhew testified that the applicant will be disturbing steep slopes. (N.T. 49)

58. Mr. Mayhew testified that the applicant will require relief for constructing roadways, free-standing structures, buildings, retaining walls, landscaping, grading in the steep slopes. (N.T. 51-52)

59. Mr. Mayhew testified that the applicant has attempted to minimize the impact of the development on steep slopes by moving the development south and east off of and away from areas established and identified as non-manmade steep slopes. (N.T. 53)

60. Mr. Mayhew testified that the lines and grades plan submitted by the applicant is deficient in four areas. (N.T. 56)

61. Mr. Mayhew testified that the lines and grades plan does not provide contours at two-foot intervals as required by the ordinance. (N.T. 56-57)

62. Mr. Mayhew testified that the lines and grades plan does not provide the necessary elevations as required by the ordinance. (N.T. 57)

63. In comparing the relief provided by decision in Appeal 3081 with the relief requested by this Appeal, Mr. Mayhew confirmed that the present proposal requires regrading of the golf course in its existing condition and therefore will require disturbing more manmade steep slopes. (N.T. 82)

64. Mr. Mayhew confirmed by his testimony that the prior relief granted by the Cheltenham Township Zoning Hearing Board did not permit construction in those areas of 15-25% steep slopes. (N.T. 98-99)

65. Mr. Mayhew confirmed that Cheltenham Township Zoning Hearing Board's prior decision granted no relief to construct in the steep slopes in the area associated with the proposed lots 35 through 47, 69 and 70, 60 and 59, 56 and 66. (N.T. 99-101)

66. Mr. Mayhew testified that the relief previously granted by the Cheltenham Township Zoning Hearing Board did not include the relief in the areas where the applicant's proposal includes storm water management facilities. (N.T. 101-102)

67. Mr. Mayhew testified that the applicant's proposal includes storm water management facilities which will encroach upon steep slope areas. (N.T. 104-106)

68. Mr. Mayhew testified that the applicant believes that storm water management facilities in steep slope areas are permitted and the applicant is seeking no relief to allow storm water management facilities to encroach upon these steep slope areas. (N.T. 102-104)

69. Mr. Mayhew testified that the net developable site area for the tract contains 65.3 acres. (N.T., Sept. 14, 2010, 8)

70. Mr. Mayhew testified that the net developable site area was computed by subtracting from the gross tract area, 100% of the flood plain, 100% of the wetlands, 100% of the water bodies or watercourses, 100% of the Riparian buffers and 100% of the steep slope area. (N.T. 5-7)

71. Mr. Mayhew testified that he sent his letter of July 6, 2010 (Exhibit A-17) to Mr. Lynch, the township engineer, to get a determination from Mr. Lynch with regard to the certain powers Mr. Lynch had under the Steep Slope Conservation District. (N.T. 15-16)

72. Mr. Mayhew testified that by his letter dated July 6, 2010, he was asking Mr. Lynch to agree or disagree on the designation of manmade steep slopes and to agree that the disturbances in the area that he designated as manmade steep slopes would be acceptable. (N.T. 16-17)

73. Mr. Mayhew testified that by sending his letter dated July 6, 2010 to Mr. Lynch, he was asking Mr. Lynch to make a determination that manmade steep slopes should be excepted from the rules of the Steep Slope Conservation District. (N.T. 17)

74. Mr. Mayhew testified that by letter dated July 21, 2010, Mr. Lynch declined to make a determination that manmade steep slopes were excepted from the rules of the Steep Slope Conservation District. N.T. 17)

75. The applicant stipulated at the time of the hearing that the relief from the steep slope ordinance that the applicant is requesting is limited to those areas depicted in applicant's Exhibits 15 and 16. (N.T. 39).

76. Mr. Mayhew testified that slopes 15% or greater comprise 25.69 acres of the site. (N.T. 95)

77. Mr. Mayhew testified that he has not calculated, and therefore he cannot provide the number of acres of steep slopes that will be built upon. (N.T. 96)

78. Mr. Mayhew testified that he did not calculate and could not provide what percentage of the 38.99 acres that the applicant has proposed that it will build upon will comprise steep slopes. (N.T. 96)

79. Erik W. Hetzel was qualified as an expert in fiscal and community impact studies and the Board relied upon his credible testimony.

80. Mr. Hetzel testified that he prepared a fiscal impact study for Ashbourne Country Club dated March 25, 2010. (Oct. 15, 2010 N.T. 5)

81. Mr. Hetzel testified that based on the assumption that there would be 226 new people living at the proposed development with no school-aged children, the township's net fiscal impact would be positive, with revenues exceeding costs in the

amount of \$203,467.00. Further, Mr. Hetzel testified that the school district would experience a net fiscal positive impact in the amount of \$1.76 million dollars per year.

(N.T. 12)

82. Mr. Hetzel testified that his projection of revenues in the fiscal impact study are based upon assumptions of fair market value in the homes in the development.

(N.T. 19)

83. Mr. Hetzel acknowledged in his testimony that his projection of annual impacts to the township and the school district are based upon a complete build-out of the project. (N.T. 21)

84. Mr. Mayhew was recalled as a witness and presented a soil erosion sediment control plan to the Board. (N.T. 50)

85. Mr. Mayhew explained the items contained within the proposed soil and erosion control plan. (N.T. 50-53)

86. Mr. Mayhew introduced an amended lines and grades plan so as to conform to Section 295-168.B.3. (N.T. 57)

87. Mr. Mayhew testified that the site consist of 14.4 acres of manmade steep slopes. (N.T. 61)

88. Mr. Mayhew testified that 10.7 acres of manmade steep slopes will be disturbed by the proposed development. (N.T. 61-62)

89. Mr. Mayhew testified that the proposed plan disturbs approximately 74% of the manmade steep slopes. (N.T. 62).

90. David M. Lynch testified as the Cheltenham Township engineer. (N.T. 24).

91. Mr. Lynch testified with respect to his letter dated July 26, 2010 concerning engineering impacts and zoning impacts on the subject property. (N.T. 26).

92. Mr. Lynch testified that he graded the engineering impacts as Level 1, Level 2 and Level 3 impacts. (N.T. 27)

93. Mr. Lynch testified a Level 1 engineering impact would have low to moderately sloping terrain with slopes generally less than 15 percent and isolated areas of steep slopes up to 25 percent. (N.T. 30).

94. Mr. Lynch testified that Level 1 impact would be places where there are steep slopes associated with tee boxes, sand traps and greens from the golf course which are isolated and away from other areas of steep slopes (N.T. 31).

95. Mr. Lynch testified that Level 2 engineering impacts are a more significant engineering concern than Level 1 engineering impacts (N.T. 31).

96. Mr. Lynch testified that Level 2 engineering impacts include areas where there is 15 to 25 percent steep slope, including the area of the property that drops off steeply to the flood plan of the Tookany Creek. (N.T. 32).

97. Mr. Lynch testified that a Level 2 engineering impact will also include isolated steep slopes of 15 to 25 percent near drainage areas and near other areas of mass steep slope. (N.T. 32 - 33).

98. Mr. Lynch testified that a Level 3 engineering impact is the most severe impact which would include steep slopes that are in stream banks, riparian buffers, flood plans and mass steep slopes greater than 25 percent. (N.T. 34).

99. Mr. Lynch testified that Exhibit B to his report dated July 26, 2010 marked as Exhibit A-18 depicted the areas of Level 2 and Level 3 engineering impacts. (N.T. 35).

100. Mr. Lynch testified that pursuant to his review and classification of the engineering impacts, he determined that there are eight (8) single-family homes that have no zoning impact. (N.T. 36).

101. Mr. Lynch testified that there are twenty (20) carriage home lots, for a total of 60 carriage homes that have no zoning impact. (N.T. 36).

102. Mr. Lynch testified that a total of 68 homes could be constructed pursuant to the applicants plan without any relief from the steep slope ordinance. (N.T. 36).

103. Mr. Lynch testified that regardless of the number of houses that are built on the subject premises, the applicant will require relief from the steep slope ordinance for the construction of roads storm water management and utilities. (N.T. 37).

104. Mr. Lynch testified that the construction of 16 single-family homes would cause a Level 1 engineering impact and 28 carriage lots would cause a Level 1 engineering impact for a total of 84 carriage homes that would require a Level 1 engineering impact. (N.T. 37 and 38).

105. Mr. Lynch testified that a total of 24 single-family homes have either no impact or have an engineering Level 1 impact. (N.T. 42).

106. Mr. Lynch testified that there are 144 carriage homes that either have no engineering impact or a Level 1 engineering impact. (N.T. 42).

107. Mr. Lynch testified that added together, the total number of single-family homes and carriage homes with either with no engineering impact or a Level 1 engineering impact is 168 homes. (N.T. 42)

108. Mr. Lynch testified that with exception of roads which may require zoning relief, the applicant could construct 168 homes with either no engineering impact or a Level 1 engineering impact. (N.T. 42).

109. Mr. Lynch testified that his analysis which characterized engineering impacts was his way of judging the scale and scope of the steep slope impacts. (N.T. 44).

110. Mr. Lynch testified that with fewer homes there's likely a need for less storm water management facilities and therefore less impact of steep slope. (N.T. 52).

111. Mr. Lynch testified that with fewer homes constructed on site require fewer roads internally and fewer roads would mean less impact on the site. (N.T. 54).

112. Mr. Lynch testified that fewer homes on the site would impact steep slopes less. (N.T. 54).

113. Mr. Lynch testified that the more impact on steep slopes generally would require a greater need for mitigation of the effects of building over steep slopes. (N.T. 54).

114. Mr. Lynch testified that the steep slope ordinance does not make a distinction between natural and man made steep slopes. (N.T. 62).

115. Mr. Lynch testified that on doing his analysis, he made no distinction between man made steep slopes or non-man made steep slopes. (N.T. 63).

116. John O. Chambers was qualified by the Board as an expert in civil engineering and the Board relied upon his credible testimony.

117. Mr. Chambers testified that steep slopes are a concern in land development because the land development itself disturbs the natural environment. The steeper the grading of the land, the higher risk of environmental damage. (N.T. 76).

118. Mr. Chambers testified that many communities including Cheltenham Township have decided to protect those areas of steeper gradient by passing ordinances for steep slopes to reduce their risk of environmental damage. (N.T. 76).

119. Mr. Chambers testified that steep slopes can be affected by environmental forces such as wind, rain and the steepness of the slope itself. (N.T. 76).

120. Mr. Chambers testified that the stability of a slope will be affected when it is disturbed. Grading, removal of vegetation inclusion, of impervious coverage will additional risk of run off. (N.T. 77).

121. Mr. Chambers further testified that the steeper the slope, the faster the run off and the less infiltration of the water into the soil. Where water runs off it takes soil with it. (N.T. 77).

122. Mr. Chambers testified that adding or removing soil can change the steepness of the slope and impact erosion. (N.T. 77).

123. Mr. Chambers testified that there is no difference between man made verses natural steep slope in that if you disturb the steep slope, the exact same forces are in place. (N.T. 77).

124. Mr. Chambers testified that gravity, wind and rain will work on man made steep slopes just as natural steep slopes. (N.T. 78).

125. Mr. Chambers testified that he reviewed the soils that were delineated on the plans submitted by the applicant. (N.T. 78).

126. Mr. Chambers testified soils and steep slopes are correlated in that soils are further classified by their steepness. (N.T. 78).

127. Mr. Chambers testified that the same type of soil will be classified based on the steepness with the classification of A through E. (N.T. 78).

128. Mr. Chambers testified that the applicants Soil Erosion and Sedimentation Control Plan by Taylor, Wiseman & Taylor dated October 5, 2010, marked as Exhibit A-23, does show the soil delineation and soil types. (N.T. 79).

129. Applicants A-23 has provided a chart of the soils that are shown on the plan and there is a demarcation on the plan itself regarding the soils that exist on the site. (N.T. 79).

130. Mr. Chambers explained to the Board that the chart provided by the applicant on applicants Exhibit A-23 identifies the soils that are on the site and their impact to erosion, as slight impact, moderate impact and severe impact.

131. Mr. Chambers testified that there are soils on the site that present severe hazard to erosion and they are generally related to the steeper slopes. (N.T. 85).

132. Mr. Chambers testified that there are soils also that are poorly suited for construction which are also correlated to the steeper slopes. (N.T. 85).

133. Mr. Chambers presented a plan marked as Exhibit P-4 which highlights for the Board the locations of the soils that present a higher risk of erosion and are less suited for construction. (N.T. 85).

134. Mr. Chambers testified as to the area of soils on the site that are very limited as far as a development of the type proposed by the applicant. (N.T. 87).

135. Mr. Chambers testified that single lots 5, 11, 12, 17 through 34, 37 through 54, 56 and 65 through 70 are lots that are proposed on severely limited soils. (N.T. 88).

136. Mr. Chambers testified that carriage homes lots 21-25 and 32-35 are impacted by severely limited soils. (N.T. 89).

137. Mr. Chambers testified that 77 of the 226 homes proposed by the applicant would involve developing in severely limited soil areas. (N.T. 89).

138. Mr. Chambers opined that the proposed plan negatively impacts the steep slopes on the site. (N.T. 90).

139. Mr. Chambers testified that the proposed development would have a negative impact on erosion, streams, siltation and soil failure. (N.T. 91).

140. Mr. Chambers testified that the proposed development will affect the natural features on the site by entirely changing the nature of the slopes on the site. (N.T. 91).

141. Mr. Chambers further testified that the proposed plan which affects the natural features will negatively impact the environment. (N.T. 91).

142. Mr. Chambers testified that the applicant can develop the site without significantly impacting steep slopes. (N.T. 91).

143. Mr. Chambers testified that it is his opinion that the applicant can still build on the proposed site and avoid the steep slopes and the severely limited soils. (N.T. 91-92).

144. Mr. Chambers testified that it is his opinion that his delineation as to limited soils and it's correlation with the testimony of Mr. Lynch represents the minimum relief necessary to allow the applicants to develop the property. (N.T. 92).

145. Mr. Chamber testified that should the zoning hearing board grant relief requested by the Applicant that decision would be inconsistent with the Legislative intent of the steep slope ordinance. (N.T. 92).

146. Mr. Chambers testified that the Legislative intent of the ordinance was to protect inappropriate development and the excessive grading as well as to permit and encourage areas of open space, so as to constitute a harmonious physical development of the Township. (N.T. 93).

### **PROPOSED CONCLUSIONS OF LAW**

1. Pursuant to the Pennsylvania Municipalities Planning Code and the Cheltenham Township Zoning Ordinance, the Cheltenham Township Zoning Hearing Board is empowered to grant variances where it is alleged that strict conformance with the governing regulations result in an unnecessary hardship. Similarly the Zoning Hearing Board is empowered to grant special exceptions from the criteria of the ordinances met by the application.

2. Under the circumstance of this matter, the applicant has not met its burden to establish that, due to the unique characteristics of the property, a failure to grant relief in order to construct a minimum of 70 single-family residences and a maximum of 156 carriage homes would result in an unnecessary hardship.

3. Under the circumstances of this matter, the applicant has failed to meet its burden to establish that there are unique physical circumstances or exceptional topography or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions.

4. Under the circumstances of this matter, the applicant has failed to meet its burden in establishing that because of such physical circumstance or conditions, there is no possibility that the property can be developed in strict conformity with provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable a reasonable use of the property.

5. Under the circumstances of this matter, the applicant has failed to meet its burden that the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in use.

6. Under the circumstances of this matter, the applicant has failed to meet its burden in establishing that, due to the unique circumstances of the property, including the existence of steep slopes, a failure to grant relief to allow disturbance of areas designated as having steep slopes for the proposed free-standing structures, building and retaining walls, internal access ways, driveways, parking areas, sanitary sewers, storm water management facilities and underground utilities and landscaping would result in an unnecessary hardship.

7. Under the circumstances of this matter, the applicant has failed to meet its burden in establishing that, due to the unique physical characteristics of the property, a failure to grant relief to allow development of areas having steep slopes of 15 percent or greater will result in an unnecessary hardship.

8. Under the circumstances of this matter, the applicant has failed to meet its burden to establish that the variances requested are the minimum variances that will afford the applicant relief and represent the minimum departure from the governing regulations.

## **BRIEF**

### **I. INTRODUCTION**

By its application, Appeal No. 3081, this applicant sought and received relief from the Cheltenham Township Zoning Hearing Board to construct approximately 300 residential living units while at the same time preserving the Ashbourne County Club golf course. In fact, with that application, the applicant offered to restrict 90 percent of the golf course property from further development. With this prior application, the applicant for the most part preserved the environmentally sensitive areas of the tract and for the most part avoided construction within the floodplains, wetlands, water bodies, watercourses, steep slopes and Riparian buffers.

The same applicant now comes to the Cheltenham Township Zoning Hearing Board in an effort to construct a 226-unit residential community comprised of single-family and triplex carriage homes. The applicant's latest proposal is under the Age-Restricted Overlay District which was adopted by Cheltenham Township in February of 2008. Contrary to applicant's previous proposal wherein only eight (8) acres of the 104-acre golf course were subject to development, the applicant now proposes to develop in excess of 65 acres of the site, which is in excess of the developable area as laid out pursuant to the requirement of the Age-Restricted Overlay District. The testimony

presented from the applicant revealed that the applicant proposes to regrade virtually the entire golf course, changing its current grades and contours. To do what it proposes, the applicant needs extensive relief from the provisions of the Age-Restricted Overlay District and from the Cheltenham Township Steep Slope Conservation District.

With respect to steep slopes, the applicant has offered no testimony that the relief it requests is the minimum necessary to relieve any unnecessary hardship that it claims is caused by the Cheltenham Township zoning regulations. Protestants respectfully request that the Cheltenham Township Zoning Hearing Board deny the applicant's request and offer this brief in support of their position.

## II. ARGUMENT

### A. THE ORDINANCES

Chapter 295 of the Cheltenham Township Code establishes an Age-Restricted Overlay District. One of the stated purposes of the District is enumerated in § 295-240.C as follows:

By encouraging the preservation of natural features, such as woodlands, streams and open space by allowing compact development; and...

The ordinance attempts to accomplish its stated purpose of preserving natural features by limiting development to within the net developable site area ("NDSA") and provides that the NDSA shall be the gross tract area minus the following environmentally sensitive areas:

- a. 100% of floodplains;
- b. 100% of wetlands;
- c. 100% of water bodies and watercourses;
- d. 100% of slope of 15% or greater measured over a 1-ft. use contour interval; and

- e. 100% of Riparian buffers.

The legislative intent of steep slope conservation District set forth in § 295-163 through § 295-171 of the Cheltenham Township Zoning Code. Section 295-167 permits certain uses without the submission of a lines and grades plan to include wildlife sanctuaries, woodland preserves, arboretum and passive recreations areas including parks and cultivation and harvesting of crops. No structures of any kind are a permitted use.

Section 295-167.B of the Cheltenham Township Steep Slope Conservation District provides additional permitted uses with the condition that a lines and grades plan submitted pursuant to §295-168 approved by the township engineer. With the submission and approval of the lines and grades plan, the following uses are permitted:

1. Sealed public water wells;
2. Sanitary or storm sewers and storm water management facilities;
3. Underground utility transmission lines; and
4. On-site sewage disposal systems.

It is clear from a review of both the Age-Restricted Overlay District and the Steep Slope Conservation District, that Cheltenham Township places a significant importance on the preservation of the natural features of the township and, in particular, in preserving the steep slope areas. In fact, subparagraph D of § 295-163, “Legislative intent of the Steep Slope Conservation District,” provides specifically as follows:

To permit only those uses of steep slope areas that are compatible with the preservation of existing natural features, including vegetation cover, by restricting the grading of steep slope areas.

B. THE RELIEF REQUESTED

With respect to steep slopes, the applicant requests a variance from § 295-167 to permit construction of free-standing structures, buildings, and retaining walls, internal

access ways, driveways, parking areas, swimming pools, sanitary sewers, storm water management facilities and other underground utilities and landscaping within the steep slope areas of the subject premises. The applicant also seeks to be excused from submitting the necessary lines and grades plan as set forth in § 295-168. The applicant further seeks relief from the provisions of the Age-Restricted Overlay District at § 295-243.B.8.d which prohibits any development in the areas of slope greater than 15 percent.

The applicant does not enumerate specifically those lots or other features of the plan which need relief from the steep slope ordinance. Instead, the applicant simply requests blanket relief from the applicable provisions relative to steep slopes and has agreed on the record to limit its request to those areas of steep slopes designated on its plans.

The protestants strongly urge the Board to examine the exhibits provided which delineate the areas of steep slopes. Specifically, the protestants encourage the Board to examine the applicant's amended steep slopes plan (A-15.3) and the steep slopes disturbance plan (A-15.4). Also, the Board is encouraged to review applicant's Exhibit A-16.24, which overlays the expected site disturbance from the applicant's previous proposal, on top of the applicant's plan. What is clear from review of these plans, are two undisputable facts: (1) Where the prior proposal limited the area of disturbance, applicant's current proposal decimates the vast majority of the subject premises; and (2) where the prior proposal had limited the disturbance of the most severe steep slope areas on the premises, applicant's current proposal, which seeks to construct as many units on the site as possible, encroaches significantly upon significant areas of steep slopes on the site.

### C. CHARACTERIZATION OF STEEP SLOPES

As applied to the subject application, neither the Age-Restricted Overlay District nor the Steep Slope Conservation District makes a distinction between original or manmade slope areas. Nevertheless, the applicant spent a significant amount of time on testimony and exhibits trying to differentiate between the two.

Section 295-164.B(2) permits the township engineer to except manmade steep slopes from provisions of the Steep Slope Conservation District. Here, the township engineer has declined to grant that exception. Accordingly, the analysis should not be between manmade versus original steep slopes, but rather between steep slopes which are of an engineering concern. The applicant's current proposal requires disturbance of significant areas of steep slopes adjacent to the perimeter of the proposed development along roads N, K, B, and A. Although there are other areas of steep slopes throughout the site, the vast majority of those steep slopes which are associated with the golf course, tees, greens and bunker areas are isolated and random throughout the site. By seeking to make a distinction between manmade versus original steep slopes, the applicant is asking the Zoning Hearing Board to ignore the actual physical attributes of the steep slopes on the site as if there was no concern as with respect to the most severe areas of steep slopes versus those limited pockets of steep slopes adjacent to the tees, greens and bunkers.

The protestants strongly urge the Zoning Hearing Board to consider the testimony of David Lynch, the township engineer, Mr. Lynch laid out in specific detail, for the Board's consideration, the location and the severity of each area of steep slopes on the site. Of the 226 homes proposed by the applicant, Mr. Lynch determined that the

applicant could construct 168 homes with limited engineering concerns to the disturbance of steep slopes.

D. THE LAW

Section 10910.2 of the Municipal Planning Code provides the following with respect to granting of variances:

(a) The board shall hear requests for variances where it is alleged that the provisions of the zoning ordinance inflict unnecessary hardship upon the applicant. The board may by rule prescribe the form of application and may require preliminary application to the zoning officer. The Board may grant a variance, provided that all of the following findings are made where relevant in a given case:

(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 to reasonable use of the property.

(3) That such unnecessary hardship has not been created by the appellant.

(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.

(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 in issue.

(b) In granting any variance, the board may attaché such reasonable conditions and safeguards as it may deem necessary to implement the purposes of this act and the zoning ordinance.

It is settled principle the power to grant variances should be exercised sparingly and only in exceptional circumstances. *McClure Appeal*, 415 Pa. 285, 203 A2d. 543 (1964). The necessary corollary of this rule is that the scope of the variance should not exceed what is reasonably necessary to relieve an unnecessary hardship caused by the zoning regulation. *Cook v. Zoning Hearing Board of the Township of Ridley*, 47 Pa. 160, 403 A2d. 1157 (1979). In the case of *Southland Corp. v. East Caln Township Zoning Hearing Board*, 45 Pa. 591, 405 A2d. 1078 (1979), the Commonwealth Court reversed a decision of the lower court and affirmed the decision of the East Caln Township Zoning Hearing Board denying the request for the variance where the proposal by Southland Corporation did not represent the minimum variance that would afford relief. In that case, the testimony showed that Southland insisted on erecting the largest of three standard designs and offered no testimony to support why it required the largest of the three over the smallest of the three. The Court concluded that minimization of the variance is a factor, even if a validity variance situation were involved.

In a strikingly similar case to the one at issue, Commonwealth Court in the case of *Kassouf v. Zoning Hearing Board of Scott Township* affirmed the decision of the trial court which affirmed the denial of the variance where the applicant did not minimize the relief requested.

In *Kassouf*, the applicant sought a variance to build 117 townhomes on grounds that the topography of the property makes a single-family dwelling development prohibitively expensive. There was testimony from the applicant's engineer, who stated

that although the property could hold 63 lots, much of the development would be costly because of the steeply sloping land and the extent of grading that would be necessary. The Township presented the testimony of a registered professional engineer, who testified that development of the property for single-family homes was perfectly feasible if the lots were not maximized. The township engineer testified that while conceding that the topography in some areas of the parcel was extreme, the most steeply sloped areas should be “throwaway areas” so as to reduce the overall grading costs, thereby reducing the cost per lot. The Court concluded that it is not disputed that the property is, in places, “hilly and unique,” but extreme topography is not, in and of itself, legally sufficient to make the grant of a variance necessary.

Here, the applicant seeks a variance to build over areas of steep slopes throughout the subject premises. The applicant has offered no testimony to support the extent of relief it is requesting. The applicant simply offered its experts to testify that there are steep slopes throughout the site and therefore it would be impossible to develop on the subject premises without some disturbance of steep slopes. The law, however, would require the Zoning Hearing Board to reject the applicant’s request for a variance from the Steep Slope Conservation District provisions and from the requirements of the Age-Restricted Overlay District which prohibit construction within the steep slope area. The applicant has the burden to establish why the relief it is requesting is the minimum amount necessary in order to overcome any hardship. Contrary to the applicant’s all or nothing testimony, the Board heard significant testimony from Mr. Lynch, the township engineer, who confirmed that development of the site was possible, albeit with a lesser number of lots, but without significant disturbance of steep slopes. Further, the

protestants' expert witness, civil engineer John Chambers, confirmed that the applicant's proposal would require development over soils which are characterized as severely limited due to the possibility of erosion and an inability to support construction activities.

The applicant has failed to meet its burden for relief from the Cheltenham Township zoning ordinances as to steep slopes and therefore its application should be denied.

Respectfully submitted,

KERNS, PEARLSTINE,  
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