

**BEFORE THE ZONING HEARING BOARD
EAST WHITELAND TOWNSHIP
CHESTER COUNTY, PENNSYLVANIA**

OPINION OF THE ZONING HEARING BOARD

2016-24

Re: Appeal No. ~~2017~~ Application of Constitution Drive Partners LP and 9 Malin Road Development, LLC for (i) a variance from Section 200-57.C(6) of the Zoning Ordinance to permit single family attached dwellings and townhouses in rows of more than six units, with associated roads, driveways and grading to be located in both steep slope and very steep slope areas of the property formerly the site of the Bishop Tube complex (which is currently a brownfield site improved with dilapidated industrial buildings), located at 9 South Malin Road, 10 South Malin Road, and 1 South Malin Road (tax parcels 42-4-321, 42-4-321.1 and 42-4-321.2) and (ii) a variance from the six (6) foot height limitation on walls, as set forth in Section 200-93.B of the Ordinance, in order to construct two retaining walls on the Property, with varying heights up to a maximum of approximately 18 feet. The property is located in an RRD (Residential Revitalization District) Zoning District.

Hearing was held on the above-captioned application as originally scheduled for the November 28, 2016 meeting of the Zoning Hearing Board. At that meeting, the Applicants appeared and requested a continuance to the January 23, 2017 meeting of the Zoning Hearing Board. Hearings were then held on January 23, 2017, February 27, 2017 and March 15, 2017. Board Chairman David Hesson and Board member Karen Milner, as well as alternate member Kathleen Laubenstein, were present at all three hearings and comprise the voting panel on this matter. Board member Joseph Samuel was unable to attend the January 23, 2017 meeting of the Board, but has attended the subsequent two meetings and, hence has participated in the hearing process, without, however, being a member of the voting panel.

The Applicants have been represented by Louis J. Colagreco, Jr., Esquire, throughout the hearings, and the Township has entered its appearance as a party to the hearing through its Solicitor, Joseph J. McGrory, Jr., Esquire.

The following individuals requested to be recognized as parties to the proceedings: Jeff Jones, Peter Fixler, Rachel Johnson, Warren Reichle, Fred Donohoe, Elizabeth Stauffer, Kathleen Stauffer, Larry Stauffer, Betty Cloud, Tamara Holt, Patrick Loudon, Donna Morges, Michael Stauffer, Carol Rapp, Lewis Hitchcock, Angela Clayton, Janette Hooven, Jennifer Murray and Ginger Pohlman.

All of the above-referenced individuals were recognized as parties, with the exception of Ginger Pohlman, who does not live in reasonable proximity to the Subject Property.

The following exhibits were admitted into the Record:

- B-1 List of Prospective Parties
- T-1 List of Proposed Conditions
- T-2 Letter from Mr. McGrory to Zoning Hearing Board Solicitor dated March 10, 2017
- T-3 Letter from Mr. Colagreco to Zoning Hearing Board Solicitor of even date
- A-1 East Whiteland Township Zoning Hearing Board Application and Cover Letter dated October 31, 2016, Steep Slope Exhibit for 9 Malin Road Development, LLC – Existing Conditions prepared by InLand Design, LLC dated December 7, 2015 and Steep Slope Exhibit for 9 Malin Road Development, LLC – Proposed Development prepared by InLand Design, LLC dated December 7, 2015
- A-2 Letter dated January 6, 2017 from Louis J. Colagreco, Jr., Esquire to Scott Greenly re: Amendment to Zoning Hearing Board Application
- A-3 East Whiteland Township Zoning Ordinance, as amended (*incorporated by reference*)
- A-4 Affidavit of Mailing dated November 28, 2016
- A-5 Affidavit of Mailing dated January 23, 2017
- A-6 Notice published in Daily Local News on January 10, 2017 and January 16, 2017
- A-7 Redacted Real Estate Sales Contract dated March 17, 2014 between 10 Malin Road Associates, LP and 9 Malin Road Development LLC
- A-8 Deed between Central and Western Chester County Industrial Development Authority and Constitution Drive Partners, L.P. dated February 21, 2005 and recorded March 24, 2005 at Book 6443, Page 1567 in the Office of the Chester County Recorder of Deeds
- A-9 Rendered Site Plan prepared by InLand Design, LLC dated November 28, 2016
- A-10 Revised Steep Slope Exhibit for 9 Malin Road Development, LLC - Existing Conditions prepared by Inland Design, LLC dated December 7, 2015
- A-11 Revised Steep Slope Exhibit for 9 Malin Road Development, LLC – Proposed Development with Limits of Disturbance prepared by Inland

- Design, LLC dated December 7, 2015
- A-12 Steep Slope Impact Narrative and Report for Malin Road Development prepared by InLand Design, LLC dated October 31, 2016
 - A-13 Grading and Utility Plan 'A' Depicting Retaining Wall prepared by InLand Design, LLC dated January 30, 2015
 - A-14 Soil Remediation Area Exhibit prepared by InLand Design, LLC dated February 27, 2017
 - A-15 Constitution Drive Partners Proposed Variance Conditions of Approval
 - A-16 N/A
 - A-17 (a) Existing Conditions/Conservation Plan 'A' prepared by InLand Design, LLC dated January 30, 2015, last revised January 6, 2017
 - (b) Existing Conditions/Conservation Plan 'B' prepared by InLand Design, LLC dated January 30, 2015, last revised January 6, 2017
 - A-18 (a) Grading and Utility Plan 'A' prepared by InLand Design, LLC dated 2015, last revised January 6, 2017
 - (b) Grading and Utility Plan 'B' prepared by InLand Design, LLC dated 2015, last revised January 6, 2017
 - A-19 Cross Sections Identification Plan and Cross Sections prepared by LLC

Findings of Fact:

1. The subject of this application consists of three separate parcels of land located at 1 South Malin Road (UPI 42-4-321.2), 9 South Malin Road (UPI 42-4-321) and 10 South Malin Road (UPI 42-4-321.1).
2. The Subject Properties are owned and have acreage as follows:
 - 1 South Malin Road – 13.6 acres, owned by Constitution Drive Partners, LP by virtue of its deed recorded at Record Book 6443, page 1567;
 - 9 South Malin Road – 6.3 acres, owned by 10 Malin Road Associates by virtue of its deed recorded in Record Book 5172, page 2046; and

10 South Malin Road – 3.2 acres, also owned by 10 Malin Road Associates by virtue of its deed as above-referenced for 9 South Malin Road.

3. This application was filed by Constitution Drive Partners, LP as the legal owner of 1 South Malin Drive, and by 9 Malin Road Development, LLC as the equitable owner, pursuant to a pending purchase agreement, of the other two properties owned by 10 South Malin Road Associates.

4. The principal of Constitution Drive Partners, LP is Brian O’Neill, and the principal of 9 Malin Road Development is John Benson.

5. The Applicants propose to develop the three properties (collectively the “Subject Property” or the “Property”) which are all located within the RRD (“Residential Revitalization”) District of the Township, as a residential townhouse community, consisting of 228 single family attached (townhouse) dwelling units, as depicted in various exhibits submitted into the Record, including Exhibit A-9, A-11, A-18.A, A-18.B and A-19.

6. The Subject Property was previously owned by Bishop Tube Company, which constructed an industrial building on the northern section of the Property and conducted industrial operations thereon for many years.

7. Upon the cessation of Bishop Tube’s industrial operations, the company left the Subject Property with various sites of contamination primarily by chlorinated solvents including TCE.

8. There are three “hotspots” where the contamination occurred, as depicted on Exhibit A-10. The largest “hotspot” is within the boundary of the building itself, at the northern portion thereof, with a second hotspot just to the south of the east wing of the building, and the third and smallest of the three also within the boundaries of the existing building, south of the largest hotspot.

9. The Property is a “Superfund” site and there are “Potentially Responsible Parties” identified as being liable for the cost of the cleanup of the contamination.

10. Neither of the Applicants is a Potentially Responsible Party and, hence, neither has any direct legal obligation to participate in or bear any of the cost of the cleanup of the contamination.

11. The contaminants affect both the unsaturated soil areas identified on Exhibit A-10, and also the lower, water saturated soils and, therefore, also have contaminated the groundwater on the site.

12. As a component part of the proposed development of the Property, the Applicants have proposed a partial cleanup of the contamination, in the form of removal of unsaturated soils containing the contaminants.

13. The Applicants do not propose any further remediation of the contamination of the saturated soils and groundwater, and propose to construct portions of the development overtop of the hotspot areas, and propose to install vapor barriers to prevent the future occupants of such townhouses from breathing contaminants remaining in the saturated soils and groundwater under such dwelling units.

14. In the event that the Applicants were to proceed with the removal of the unsaturated soils (and, of course, the existing industrial building itself), the Applicants would propose to provide clean fill for the excavated areas.

15. Mr. Dobson, the Applicants' engineer, estimated that approximately 400,000 cubic feet of clean fill would be needed, including approximately 181,000 cubic feet of replacement of the contaminated unsaturated soils.

16. The Applicants propose to strip soil from the wooded and steeply sloped area to the south of the Subject Property (the "approximate borrow area" as depicted on Exhibit A-14) and to transport soil from the borrow area to the area of the building and the hotspots adjacent thereto.

17. The borrow area is almost entirely wooded, and consists of a major portion of natural steeply sloped areas leading upward toward the south border of the Property, where the railroad line is located, at a height substantially above the central portion of the Subject Property.

18. Once having stripped the trees and soil from the borrow area, the Applicants then propose to utilize that area entirely for development of roads, driveways, townhouses and utilities, as depicted on the various site plans submitted into the Record.

19. The Applicants propose to provide stormwater detention facilities, as depicted on the site plans, but owing to the potential for leachate of contaminants further into the groundwater/saturated soils, the Applicants do not propose to provide any infiltration of stormwater.

20. The Applicants propose, in conjunction with this development, to construct two retaining walls of varying heights, in the areas depicted on Exhibit A-13. The proposed south retaining wall would be along the south border of the Property, adjacent

to the railroad line, whereby the development property would be at the lower side of the retaining wall and the railroad property would be at the high side of the retaining wall.

21. The east retaining wall would be along the southern portion of the eastern section of the Property, west of the tributary of Little Valley Creek that traverses along the eastern border of the Property. The east retaining wall would provide for construction of dwelling units, driveways and roads on the upper side of the retaining wall, with the creek bed and riparian area adjacent thereto on the lower side of the east retaining wall.

22. Both retaining walls would have varying heights ranging up to 18 feet in height.

23. The Applicants initially proposed to provide safety fencing four feet in height along the higher portions of the retaining wall, but during the course of the hearing, agreed to install six (6) foot high safety fencing.

24. In addition to the large area of natural and wooded steep slope in the southern portion of the Subject Property, there is a section of manmade steep and very steep slope running in an east to west direction roughly in the center of the Property, and various other pockets of natural steep slope and very steep slope areas, all as depicted on Exhibits A-11 and A-19.

25. The large section of manmade very steep slope was done by the prior owner of the Property in order to accommodate an upper and a lower parking area. This area does not contain any trees or wooded component.

26. The Applicants propose to construct approximately 38 dwelling units within and immediately adjacent to the southern natural steep slope area (the steeply sloping section of the "borrow area"). The Applicants also propose to construct various additional dwelling units in the non-steep sloped portion of the borrow area, which also is a wooded section of the Property.

27. In the event that the Applicants could not construct the proposed 38 dwelling units within an immediately adjacent to the natural steep slope area within the overall borrow area, it is likely that the units lost would not be replaceable (given the intense development areas of the site being developed with townhouse units) and, hence, the total number of dwelling units within the development would be reduced to approximately 190.

28. The Subject Property is in close proximity to the "General Warren Village" residential community of East Whiteland Township, separated by the tributary of Little Valley Creek traversing in a south to north direction between the western-most homes within the General Warren Village community and the Subject Property (the creek itself being within the Subject Property).

29. The Applicants propose to connect the western-most part of Village Way cul-de-sac by a bridge across the creek to tie into the proposed street system, with that connection to be used only as an emergency access.

30. In addition, the Applicants propose to construct the eastern retaining wall at a distance of not less than 100 feet from the stream bed, to frame the eastern-most area of disturbance within the southern portion of the tract. (The east retaining wall would extend approximately 40% of the distance from the south border of the Property to the north border of the Property, with the northern 60% to have finish grades that would not require a retaining wall.)

31. The Applicants have been in discussions with both representatives of the Township Board of Supervisors (including Township Solicitor, Mr. McGrory) and representatives of Pennsylvania Department of Environmental Protection ("DEP") to discuss the details of the potential partial remediation of the site contaminants (i.e., in the unsaturated soils), with the Applicants and the Township submitting to the Board as Exhibit T-1 a list of proposed conditions in the event that the Board would grant the requested variances.

32. Many of the residents of General Warren Village sought and received party status in this proceeding, all of which were universally in opposition to the development in general, and to the partial remediation (of unsaturated soils only) of the contaminants.

33. Many expressed concerns about the potential expansion and aggravation of the contamination on the Subject Property "including the excavation of soil, opening up and disturbing contaminated land ... cannot control air flow of invisible vapors ... ground and stormwater contamination and erosion from the steep slopes ... contaminate the development site our neighborhood (General Warren Village) and other surrounding areas."

34. Members of the General Warren Village Community also pointed out that because the Subject Property is a Superfund site, it will ultimately be cleaned up, including the contaminated groundwater and saturated soils, whereas the partial

cleanup proposed by the Applicants would leave (in addition to potential contamination during the soil removal process) residual contaminants within the saturated soils and groundwater.

35. Maya van Rossum, the Delaware Riverkeeper, testified and also submitted a Post-Hearing Memorandum, submitting arguments against the grant of relief to the Applicants.

36. Little Valley Creek and the tributary which traverses the Subject Property ultimately flows into the Schuylkill River and thence on to the Delaware River. Hence, the opinions of the Delaware Riverkeeper are of interest to this Board. In her Memorandum, Ms. van Rossum opined as follows:

"Granting a variance to Constitution Drive Partners from the steep slope variance would undermine all these goals [as set forth in Section 200-57 of the Zoning Ordinance]. The site is significantly contaminated and borders Little Valley Creek, tributary to Valley Creek, an exceptional value stream. The Delaware Riverkeeper Network is concerned that the level of land disturbance proposed, including the steep slopes for which variance is sought, on this site given the high level of continuing contamination, poses both health risks and will result in ecological damage, including to the Little Valley Creek, will result in future costs to the township to respond to the degradation, and is not otherwise compatible with conservation."

37. Ms. van Rossum summarized her position as follows:

"This site will be cleaned up, it is a Superfund site. The question is who will clean it up. A partial cleanup by Constitution Drive Partners at this time, coupled with its massive development plans, is not the right way to ensure full and safe cleanup in the opinion of the Delaware River Keeper Network."

38. Concern of the residents regarding disturbance of steep slope areas was also summarized by the Post-Hearing Memorandum of Andrea C. Schran, as follows:

"Steep slope development has the potential to start a cycle of erosion and flooding. Roofs, concrete pavement, and other impervious surfaces increase the amount of rainwater that runs off the land surface.

There will be cutting down of trees no matter what side of the fence they're on, to build the retaining walls, no current landscaping will be able to replace these trees that have been on this land for a very long time. ... It is also known that removal of vegetation can increase the amount of sediment traveling down the slope, which is not good for the Little Valley Creek or residences along Fahnestock Road and Village Way. ...

I'm very concerned about steep slope development in our community and believe it is very dangerous for any future residents to live on steep slope developed areas."

39. Ms. van Rossum provided commentary during the period of public comment on the application, stating in part as follows:

"We believe, the Delaware Riverkeeper Network, and I believe being here tonight, that it is not appropriate for Mr. O'Neill or for his attorney to disparage or threaten this community, this township, and try to bully you into this. The fact of the matter is regardless of what they say and assert, the site will be cleaned up. It is a Superfund site. The question is how. The question is when. And the question is what would be the use of the site after the fact. Will this be a massive development or some other amenity, some real amenity for the community as a whole. And so we believe that a partial cleanup by Constitution Drive Partners at this time, coupled with the massive development plans that are proposed, is not the right way to ensure a full and safe cleanup of this site that will protect the community and protect Little Valley Creek, protect Valley Creek, protect the environment and result in something of value to future generations here in East Whiteland Township."

40. Mr. O'Neill, speaking for the Applicants, testified that "in order to clean the site up, we need every unit on this plan because it's millions of dollars," but no documentation of this assertion was submitted.

41. Mr. O'Neill also stated that "it's something that was never part of our negotiation with the Township. It was requested after the fact by the EAC, and we agreed to do it, which was above anything that any other developer would do."

Discussion:

As set forth in the heading to this Opinion, the Applicants request this Board to grant two variances from applicable Zoning Ordinance requirements. The first, which can be characterized as a use variance, is for permission to remove soil from the steep slope portions of the "borrow area" (which, of course, involves stripping out all of the trees within the borrow area) and thereafter to construct single family attached (townhouse) dwellings (some in rows of more than six units), with associated roads, driveways and grading in order to service those dwelling units. In addition to the variance request as pertains to the natural steep slope areas concentrated along the southern section of the Property, this variance request also encompasses very steep slope areas of manmade slopes (primarily the east to west ribbon in the central portion of the Property) and other smaller pockets of steep slope areas, both natural and manmade.

The second variance request, which can be classified as a dimensional variance, requests permission to install retaining walls along the southern section and eastern section of the Property in excess of the 6-foot height limitation for such walls, with varying heights up to a maximum of approximately 18 feet.

In order to be entitled to a variance, a property owner must meet the requirements of Section 910.2 of the Pennsylvania Municipalities Planning Code (MPC), 53 P.S. Section 10910.2. In summary, Section 910.2 contains the following standards for the grant of a variance: unique physical circumstances peculiar to the subject property which create an unnecessary hardship to the property; such physical circumstances prevent development of the property in strict conformity with the provisions of the zoning ordinance; the hardship is not self-created; the variance, if authorized, will not substantially impair neighboring properties or otherwise detract from the public welfare; and the variance is the minimum to afford relief.

The reasons for granting a variance must be substantial, serious and compelling. A party seeking a variance bears the burden of proving that (i) unnecessary hardship will result if the variance is denied, and (ii) the proposed use will not be contrary to the public interest. *Valley View Civic Association v. Philadelphia ZBA*, 501 Pa. 550, 462 A.2d 637 (1983).

We address first the Applicants' request for variances from the steep slope provisions of the Township Zoning Ordinance. We note, initially, that the Subject Property is located in the RRD (Residential Revitalization) Zoning District. The intent of the RRD District is to provide for and encourage reuse, redevelopment and revitalization of tracts that either will have or have undergone remediation pursuant to the Pennsylvania Land Recycling and Environmental Remediation Standards Act, 35 P.S. Section 6026.101, et. seq., or successor legislation, for single family attached dwellings and townhouses. Clearly, the overall development program as proposed by the Applicants are consistent with the stated intent of the RRD Zoning District use regulations (see Section 200-25.1 of the Ordinance).

Other than passive recreational use (not a "reasonable use" in the context of this application), permitted principal uses in the RRD Zoning District, as set forth in Attachment 1 to the Zoning Ordinance (Table of Permitted Uses for Residential Districts) are limited to single family attached residential dwellings (i.e., townhouses)

and multi-family residential dwellings, excluding multiplexes, mid-rise apartments and garden apartments. (The latter category of permitted uses thus encompasses only "stacked townhouse"—see definition of Multi-Family Dwelling in Section 200-14.)

Absent the grant of the requested variances from the steep slope protection requirements of Section 200-57, the Applicants' proposed development plan fails to comply with the requirements of Section 200-57. The stated intent of that section ("Steep Slope Protection") is "to protect hillsides and their related soil and vegetative resources, thereby minimizing adverse environmental effects. Specific objectives include the following:

(1) Conservation and protection of steep and very steep slopes from inappropriate development, such as excessive grading, land form alteration and extensive vegetation removal.

(2) Avoidance of potential hazards to life and property from the disruption of ecological balance that may be caused by increased runoff, flooding, soil, erosion and sedimentation, blasting and ripping of rock, and landslide and soil failure.

(3) Protection of the entire township from uses of land that may result in subsequent expenditures for public works and disaster relief and adversely affect the economic wellbeing of the township.

(4) Encouragement of the use of steep and very steep slopes for open space and other uses that are compatible with the conservation and protection of natural resources."

The provisions of Section 200-57 apply both to "steep slopes" and to "very steep slopes." Pursuant to the definitions of these terms, a steep slope occurs when a change in elevation of 15% or more occurs over a horizontal distance of 10 feet. Similarly, a very steep slope occurs when an area of land is characterized by a change in elevation of 25% or more over a horizontal distance of 10 feet.

The Applicants, in submission of their development plan and more specifically the "steep slope exhibit," has characterized and depicted steep slopes and very steep slopes, and has also subcategorized each of these two classifications as "manmade" and "natural." The Zoning Ordinance itself, on the other hand, does not so distinguish between natural slopes and manmade slopes. We note, however, that consistent with the statement of intent, the large area of natural steep slope conditions in the southern portion of the tract (i.e., the entire steep slope section of the "borrow area") is forested and thus distinguishable from both the manmade slopes and manmade very steep

slopes (lacking extensive wooded areas), and the smaller pockets of natural steep slope and very steep slope areas as depicted on the plan.¹

We turn then to the requirements of subsection C and D of Section 200-57. Subsection C sets forth uses which are permitted in the areas of steep slope and very steep slope (both natural and manmade). Townhouse dwellings are not included within those permitted uses.

Subsection D separately sets out what are called "prohibited uses" in those same areas, and specifically states that such uses and activities "are specifically prohibited and shall not be subject to variance." Among the uses and activities so prohibited are "cut and fill," "removal of top soil" and "roads and parking lots, other than those associated with subsection F(4) which are limited to such activities 'where required by the regulations for the district applicable to the lot' without consideration of this Section 200-57, provided that no practicable alternative alignment or locations exist'."²

In analyzing the Applicants' request for variances from all categories of steep slopes and very steep slopes on the Subject Property, we conclude that, as to the "ribbon" of very steep manmade slopes (traversing east to west below the existing building and above the main parking lot of the Bishop Tube usage) there would be no discernible damage to public health, safety and welfare (or in particular to environmental protections) by granting a variance to re-contour and eliminate that component of the manmade steep slopes. Likewise, there is a small band below the existing parking lot for which the same analysis applies. Thirdly, there is a variety of smaller areas of natural very steep slopes, as depicted on the two steep slope exhibits; again, it would be unduly restrictive to deny the Applicants' request for a variance from these "pockets" of natural very steep slopes, as the development portion of the site must be regraded anyway to accommodate the townhouse development. Thus, there would be minimal environmental degradation if variances are granted with respect to

¹ The stated intent includes the protection of "soil and vegetative resources" within steep slope and very steep slope areas, and also the protection against "extensive vegetation removal." I.e., one of the principal purposes in preserving steep slope and very steep slope areas is to protect forested areas within such conditions, where applicable.

² The Township Solicitor and the Applicants' counsel have both opined that the prohibition in subsection D against this Board's grant of variances to allow uses and activities "specifically prohibited" under subsection D, is void and unenforceable, as being preempted by the authority set forth in Section 910.2 of the Pennsylvania Municipalities Planning Code ("MPC"), specifically authorizing the Zoning Hearing Board to grant variances. We concur, on the advice of our Solicitor, with this position, and therefore conclude that we have authority to grant variances, even in the face of such language. We do note, however, that such strong language as set forth in the Zoning Ordinance at a minimum specifies a strong policy decision against this Board's granting of variances from the prohibitions set forth in subsection D, except in extraordinary circumstances.

these components of the steep slope and very steep slope components of the Subject Property.

With regard to the much more substantial and forested natural steep slope area along the south of the Property (comprising a substantial portion of the "borrow area"), the same analysis produces a different result. To grant a variance to completely denude the forested section of the site and to remove topsoil from these natural steep slope areas would result in substantial environmental degradation, leading inevitably to further soil erosion, stream pollution and accelerated runoff due to the removal of the forested area of the steep slope, as it is a natural absorption system for limiting accelerated runoff and fostering groundwater recharge.

Will denial of the requested variance with regard to a substantial portion of this area of the tract leave the Applicants unable to make reasonable use of their Property? Based upon the applicable case law, the answer is clearly "no." To the contrary, the preservation of this area of the site leaves the Applicants with a remaining potential for constructing approximately 190 townhouse dwellings on the Property, while still preserving this most environmentally sensitive area of the tract.

The Pennsylvania Commonwealth Court analyzed the validity of the Town of McCandless Zoning Ordinance in *Jones v. Zoning Hearing Board of the Town of McCandless*, 578 A.2d 1369 (Pa. Cmwlth. 1990). In that case, the zoning ordinance limited and/or prohibited the development of steeply sloped and forested areas, resulting in a reduction in the development potential of the property (including for townhouse development), but leaving a development potential of between 89 and 100 townhouse dwelling units on the approximate 70% of the property not restricted by the environmental protection provisions of the zoning ordinance. In sustaining the validity of the ordinance provisions protecting natural resources such as steep slopes, forests, floodplains and streams, Commonwealth Court stated that "the ordinance weighs the maintenance of the ecological balance in the D-district with the property owner's right to develop his property ... We conclude that the challenged portions of the ordinance are not arbitrary or unreasonable, but rather substantially related to the purpose which they purport to serve." 578 A.2d at 1371.

Commonwealth Court went on to conclude:

"The property just cannot be developed as intensively for residential purposes as it could prior to the amendment of the ordinance. ... Landowner has not been deprived of the viable use of his property." 578 A.2d at 1372.

Similarly, in *Appeal of Walter C. Czop, Inc.*, 403 A.2d 1006 (Pa. Cmwlth. 1979), the landowner requested a variance from the zoning ordinance provisions precluding development of floodplain and steep slope areas of the tract (comprising approximately 24% of the total gross tract area). Commonwealth Court affirmed the denial of the requested variances.

In *Kassouf v. Zoning Hearing Board of Scott Township*, 535 A.2d 261 (Pa. Cmwlth. 1987), the landowner applied for a use variance to permit construction of townhouses on property zoned for single family detached dwellings. The applicant asserted that because of the extensive cost of developing steeply sloping land with extensive grading activities, development of single family dwellings was prohibitively expensive, thus justifying the grant of the variance to build townhouses instead. The zoning hearing board denied the requested variance, noting that "financial hardship alone is not enough to support the grant of a variance." The board noted, with the affirmance of Commonwealth Court, that a development of single family detached dwellings would not be prohibitively expensive if the appellant did not attempt to maximize the number of lots, incurring the extensive expenses attributable to re-grading the steeply sloping terrain. Commonwealth Court held that "extreme topography is not, in and of itself, legally sufficient to make the grant of a variance necessary."

The same results were reached in *Appeal of Nardozza*, 405 A.2d 1020 (Pa. Cmwlth. 1979) and *Marple Gardens v. ZBA of Marple Township*, 303 A.2d 239 (Pa. Cmwlth. 1973).

In short, we hold, consistent with the cited precedents, that denial of the variance request as applied to the natural steep slope areas of the "borrow area" of the tract does not unduly restrict the development of the Subject Property as a whole, as the entire remainder of the Property (including the remainder of the steep slope areas as discussed above) remain available for development.

The Applicants further assert that the combination of (i) the Ordinance's restriction against soil removal and development of the southern natural steep slope area, in combination with the presence of contaminated (unsaturated) soils in the three "hotspots" on the tract, coupled with the Applicants' commitment (which it has no legal obligation to make) to partially clean up the contamination of the site, creates the unnecessary hardship to justify the requested variance as applied to the southern

forested and steep slope area within the "borrow area" of the tract. We disagree with the Applicants' position, vis-à-vis the impact of contaminants on the site.

First, the Applicants' argument is purely one of economic impact. The only evidence in support of this argument is the Applicants' statement that all of the proposed 228 dwelling units are necessary to counteract the excessive cost of the partial cleanup of the contaminants on the site. The Applicants chose, however, not to provide any supporting documentation whatsoever with regard to this conclusory statement. It is, of course, the Applicants' burden to prove entitlement to variances, based upon unnecessary hardship. In *Fretz v. Hilltown Township Zoning Hearing Board*, 336 A.2d 464 (Pa. Cmwlth. 1975), the applicant sought a variance based upon the physical characteristics of the property, specifically soil conditions adverse to on-site sewage disposal permits for dwelling houses, that a variance should be granted to allow construction of stores and offices. Aside from this conclusory assertion, the applicant failed to submit supporting documentation of the allegedly adverse soil conditions, such that the Commonwealth Court concluded that "this evidence falls far short of proving that there is no possibility of constructing dwelling houses ..." 336 A.2d at 467.

Even assuming that the Applicants had submitted supporting documentation to justify the assertion that all 228 of the proposed townhouses were essential for the Applicant's ability to pursue the development (along with the partial cleanup of the contaminants), this Board would still be obligated to deny the requested variance as applied to the southern natural steep slope and wooded area of the tract. In the *Kassouf, Nardozza and Marple Gardens* cases, as cited above, the applicants cited pre-existing conditions other than steep slopes to justify their respective arguments that construction of single family detached dwellings would not be economically feasible.

In affirming the denial of the variance in *Nardozza*, Commonwealth Court commented as follows:

"The Board denied the requested variance, noting that financial hardship alone is not enough to support the grant of a variance and that a single family dwelling development would not be prohibitively expensive if appellant did not maximize the number of lots." *Kassouf*, 35 A.2d at 263

The Court specifically rejected the applicant's argument that he had established that the extreme topography of the property made development within the confines of the zoning ordinance prohibitively expensive, thereby entitling him to a variance.

Similarly, the *Nardozza* variance application was based upon alleged economic infeasibility of compliance with applicable zoning ordinance requirements. The applicant there cited the excessive excavating costs, rendering compliance with the zoning ordinance economically infeasible. That is precisely the same argument made by the Applicants in the instant case, in their attempt to justify the complete destruction of the wooded steep slope area within the "borrow area" of the tract.

The Court in *Marple Gardens* again dealt with a similar situation, where the applicant's variance request was based in part on (i) the applicant's lack of knowledge regarding the underlying rock formations of the land before purchasing the tract, and (ii) the economic infeasibility of developing the property for single family dwellings, because the cost of building foundations on the shallow rock subsurface of the soil was too costly.

In rejecting these arguments, Commonwealth Court noted that "certainly, this [topography of the property and the potential for rock close to the surface] was patently clear to Marple Gardens when it purchased the property." 303 A.2d at 242. The Court concluded that "the main thrust of Marple Gardens' case in this record is its claim of economic hardship caused by the additional cost of construction of foundations for single family dwellings if built on this land." Similarly, the Applicants' argument in the instant case is based upon the additional cost of partial remediation of the contaminated soils in the vicinity of the hotspots of the Subject Property, an insufficient basis for the grant of the requested variance for the environmentally sensitive wooded steep slope area within the borrow area, along the south border of the Property. To paraphrase the Court in *Marple Gardens*, "surely the applicants were aware of the contamination of the subject property before they agreed to purchase it."

Even assuming, *arguendo*, that the Applicants' economic hardship basis for the requested variance as applied to the southern steep slope area would have been sufficient to satisfy the Applicants' burden to demonstrate unnecessary hardship, the Applicants would be barred under the doctrine of self-created hardship from asserting same. Clearly, the prior owner, which created the contamination, would be guilty of self-created hardship in any argument that it was entitled to variances owing to its own contamination of the Subject Property. The question is then raised, do the Applicants stand in the same shoes as the original property owner, or can their status as subsequent owners insulate them from the "self-created" hardship requirement. There is conflicting case law on this issue.

In *McClure Appeal*, 203 A.2d 534 (Pa. 1964), the Pennsylvania Supreme Court analyzed this issue, stating as follows:

"Assuming, *arguendo*, this land cannot be, as a practical matter, used for residential purposes, and that the requirement of such use constitutes a 'hardship' can Fidelity [the subsequent purchaser of the land] lay claim to such 'hardship' as an 'an unnecessary hardship' and on the basis of such 'hardship' obtain a variance? Examining the record before this board, it is clear beyond question that, when Fidelity purchased this land, the land was zoned residential, that such fact was known to Fidelity, and that, despite such knowledge and with its eyes open, Fidelity purchased this land. Under such circumstances, Fidelity is in no position to claim an 'unnecessary hardship.' ... Fidelity's knowledge of the zoning restriction of the use of this land when it purchased it bars effectively the requested variance." 203 A.2d at 537.

The Applicants, in their Memorandum of Law, properly cite *Allegheny West Civic Council v. Zoning Board of Adjustment of the City of Pittsburgh*, 689 A.2d 225 (Pa. 1997). The Court there stated that "unnecessary hardship is established by evidence that the physical features of the property are such that it cannot be used for a permitted purpose or that the property can be conformed for a permitted use only at a prohibitive expense." 689 A.2d at 227. The facts of the instant case are, however, distinguishable from the facts in the *Allegheny West* decision. In that case, the applicants had purchased the subject property in 1985, without the knowledge that it was contaminated. The existence of the contamination was not revealed until the applicant entered into a subsequent contract to sell the property to the Urban Redevelopment Authority of Pittsburgh, et al., some seven years later, when environmental testing showed that the site was contaminated (although not to a level which apparently was requiring remediation by the Pennsylvania DEP). In contrast, the Bishop Tube property's contamination was well known to the Applicants when they purchased the Property, and the Applicants, prior to doing so, were able to assure themselves that they were not potentially responsible parties, and had no legal obligation to clean up the contamination of the Bishop Tube property.

In the *Ryan on Zoning Treatise*, at Section 6.2.13, the authors analyze the circumstances under which a subsequent purchaser will be tarred with the prohibition of asserting self-created hardship, owing to his predecessor having been the source of the contamination (or other circumstances). We quote from the *Ryan Treatise*:

"Most of the cases stating that an applicant who purchased land with knowledge of the hardship is barred from seeking relief involved a simple claim of financial or economic hardship which would be insufficient to

support a variance if sought by the original owner. ... In these cases, the court cites the applicant's knowledge as an alternative reason for its holding. ...

It is well settled that a variance will not be granted on the grounds of economic hardship alone. ... This is especially so when a person buys with knowledge of the economic hardship. In such a case, the general rule is that the owner cannot complain thereof and assert such hardship as a basis for obtaining a variance. ..." *Andress v. Zoning Board of Adjustment*, 188 A.2d 709 (Pa. 1963).

These are precisely the circumstances under which the Applicant's case has been presented to this Board.³

The last component of our analysis of this issue relates to the requirement in the MPC and as mirrored in the Township Zoning Ordinance that a 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." (MPC Section 910.2; East Whiteland Township Zoning Ordinance Section 200-115.D(3).) This is a requirement for which the Applicants bear the burden of proof. We are not convinced that this burden has been carried by the Applicants, even with the support of the Township Board of Supervisors, based upon the "Stipulated Conditions" agreed to by both the Applicants on the one hand, and the Township Board of Supervisors on the other hand. The facts in support of the argument, that the Applicants have carried this burden, are that (i) the property has not been even partially cleaned up since the contamination of the hotspots was identified, and (ii) the partial remediation of the contamination by removal of the unsaturated soils (but leaving the saturated soils and groundwater for future remediation by either the government or potentially responsible parties, or some combination thereof) is in the public interest. It is abundantly clear, however, that the residents who live in the closest proximity to the Subject Property are unanimously and intensely of the opinion that the Applicants' development project, even including the partial remediation of the contaminants on the Property, would in fact substantially impair the appropriate use of their nearby properties, and would also be detrimental to public welfare. Some measure of the basis for this argument is

³ The Applicants further have asserted that (i) they are not potentially responsible parties and have no legal obligation to perform any remediation of the tract whatsoever, and (ii) they are voluntarily undertaking the cost of the partial remediation of the contaminants on the site in spite of having no legal obligation to do so. How, we ask ourselves, can such a voluntarily incurred expense create a basis for a claim of hardship? We think it cannot.

founded in the fear that once the contaminated soils are excavated from the Property, vapors will contaminate and cause health risks to the residents of General Warren Village. There is, however, no evidence in the Record to support this component of the opposition of the residents of General Warren Village.

A more persuasive argument, in our view, is that the construction of the project as proposed by the Applicants, with its intense development of the Property (including 100% development of the restricted wooded slope area of the tract) will leave the groundwater and unsaturated soils not only un-remediated, but less likely ever to be remediated, once homes are constructed overtop of the hotspots. This argument was best summarized by Ms. Rossum, the Delaware Riverkeeper as quoted in our Findings of Fact above. Her counterargument, simply stated, is that redevelopment of this Property should await a full remediation, which will in due course take place, since the Property is classified as a Superfund site, giving administrative priority to a full cleanup program. Given that neither the Applicants nor the opponents have provided us sufficient evidence to resolve this dilemma, we must decide the issue on the basis of burden of proof, which is upon the Applicants for this element of the requested variance relief.

While we thus must deny the Applicants' request for a variance to remove the soils and trees from, and then develop houses on, the wooded steep slope area along the southern portion of Property, we also recognize that the Stipulated Conditions between the Applicants and the Township were based upon an assumption that the Applicants' development plans as presented into the Record would be given carte blanche by this Board. As we cannot do so, we also will include in our Order below the opportunity for the Township and the developer to renegotiate the Stipulated Conditions, so long as they are in compliance with the Decision and Order of this Board as set forth below.

This brings us to consideration of the second variance request by the Applicants, that the 6-foot limitation on the height of the proposed retaining walls be eliminated, so that the Applicants' retaining walls can go to a height of approximately 18 feet. We will partially grant this variance request, but not to the "carte blanche" extent requested by the Applicants.

First, the southern retaining wall must be relocated close to the toe of the steep slope area (See Appendix A appended hereto), a byproduct of which should, we believe, result in a reduction of the total height of that retaining wall at its highest point.

Secondly, particularly with respect to the eastern retaining wall, the impact on the properties in closest proximity to that wall (the western-most of the General Warren Village homes) would no longer look at a wooded hillside across the creek, but rather a massive retaining wall, some 18 feet in height at its highest point. We believe that both issues can be remedied by limiting the height of a single retaining wall to 9 feet. As was done in other situations of a similar nature in East Whiteland Township (e.g., the CubeSmart development), retaining walls can be stepped such that a combination of two retaining walls, separated by a landscaped terrace area of approximately four feet, would achieve essentially the same result for the Applicants as a massive retaining wall, but with less aesthetic adverse impact on the neighboring property owners and the community as a whole. Thus, we conclude that the Applicants have not demonstrated, in their request for 18-foot high retaining walls, that the relief requested is the minimum variance to afford relief from the 6-foot limitation.⁴

ORDER

AND NOW, this ____ day of April, 2017, the application of Constitution Drive Partners, L.P. and 9 Malin Road Development LLC for certain variances from the Zoning Ordinance requirements applicable to their property at 9 South Malin Road, 10 South Malin Road and 1 South Malin Road (tax parcel numbers 42-4-321, 42-4-321.1 and 42-4-321.2) is hereby GRANTED in part and DENIED in part, as follows:

1. The requested variance from Section 200-57.C(6) of the Ordinance to allow townhouses (including rows of up to seven (7) within a single building), roads, driveways and utilities to be constructed within and upon (i) natural areas of slope between 14% and 25% ("steep slopes") and in excess of 25% ("very steep slopes") and (ii) manmade areas of slope between 15% and 25% ("manmade steep slopes") and in excess of 25% ("manmade very steep slopes") is hereby GRANTED with respect to all such steep and very steep slope areas (natural and manmade) as depicted on Exhibits A-11 and A-18, with the exception of the steep slope areas (natural and manmade) along the southern border of the Property, as to which steep slope areas the variance

⁴ Indeed, it is simple math that the Applicants are requesting a 200% increase in the height of individual retaining walls by going to an 18-foot height request, in the face of a 6-foot height limitation.

request is hereby DENIED.⁵ The steep and very steep slope areas for which this variance is GRANTED shall be subject to the conditions set forth hereinbelow.

2. The requested variance from Section 200-93.B of the Ordinance, to allow construction of retaining walls along the southern and eastern section of the Property (the southern wall to separate higher areas to the south from development areas to the north, and the eastern wall to separate development areas to the west from lower areas near the creek to the east) as depicted on Exhibit A-13 is hereby GRANTED in part and DENIED in part with respect to both walls, subject to the conditions set forth hereinbelow.

The variances herein granted are expressly subject to the following conditions:

a. The steep slope areas for which the variance from Section 200-57.C(6) is DENIED (as depicted on Appendix A) shall be preserved to the greatest extent possible in their natural condition, thus the removal of trees (except for dead trees, if any) and/or regrading and/or removal of soil is hereby prohibited. To implement this condition (i) proposed Units 165-202, the roads, driveways and utilities (including stormwater control facilities) adjacent thereto shall be deleted from the development plan, (ii) the southern retaining wall shall be moved close to the toe of the steep slope area as depicted on Appendix A, and (iii) the slope areas to the south of the relocated retaining wall shall be left in their natural condition. (The portions of Units 148-157 and 163-164, and the utility lines proposed to the south of those units within the steep slope area may be constructed, in spite of their encroachment into the steep slope area).

b. The southern retaining wall shall be (i) relocated to the location substantially as depicted on Appendix A and (ii) reduced in height if reasonably feasible, with a height limit of 9 feet for any one wall segment, allowing the Applicants to construct "terraced walls" to achieve a total height of no more than 18 feet, with a landscaped terrace of approximately four feet (4') in width separating a lower and high retaining wall. (The dimensions of the terraced areas shall be subject to review and modification by the Township engineer during land development plan review.)

c. The eastern retaining wall may remain in the location proposed by the Applicants, subject to the 9-foot height limitation, in combination with the right to

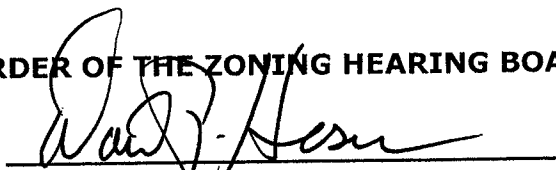
⁵ Appended to this Order as Appendix A is a marked up excerpt from Exhibit A-11 and A-19, depicting the area of steep slopes for which the variance is denied.

utilize more than one wall segment, separated by landscaped terracing as described in subparagraph b.

d. All portions of the southern and eastern retaining walls exceeding four (4) feet in height shall have a fence six feet in height (measured from the top of the wall) either atop the wall or immediately adjacent (on the high side) thereto. The construction of the fence shall be "child proof," such that no child will be able to either climb over or slip under the fence. Where Applicants employ segmented walls, only the upper wall shall be required to be fenced.

e. The Applicants shall comply with all conditions as negotiated between the Applicants and the Township, as set forth in Appendix "B" appended hereto; provided, however, that during the course of land development plan review, the Township Board of Supervisors may either (i) add additional conditions, per paragraph 15 of Appendix "B," and/or modify any conditions which, in the discretion of the Board of Supervisors, should be modified to better serve the public health, safety and general welfare, in light of the partial denial of the Applicants' variance requests. Without limiting the foregoing, the Board and the Applicants may seek to ensure a more complete remediation of the contaminated conditions of the site (i.e., remediation of saturated soils and groundwater as well as unsaturated soils) by assessing (with governmental intervention) such costs on the identified potentially responsible parties ("PRPs") in lieu of or in mitigation of costs to be undertaken by the Applicants (as the Applicants are not PRP's) and/or to otherwise reduce or eliminate the portion of the costs or remediation to be borne by the Applicants, as not being PRP's.


BY ORDER OF THE ZONING HEARING BOARD



David P. Hesson

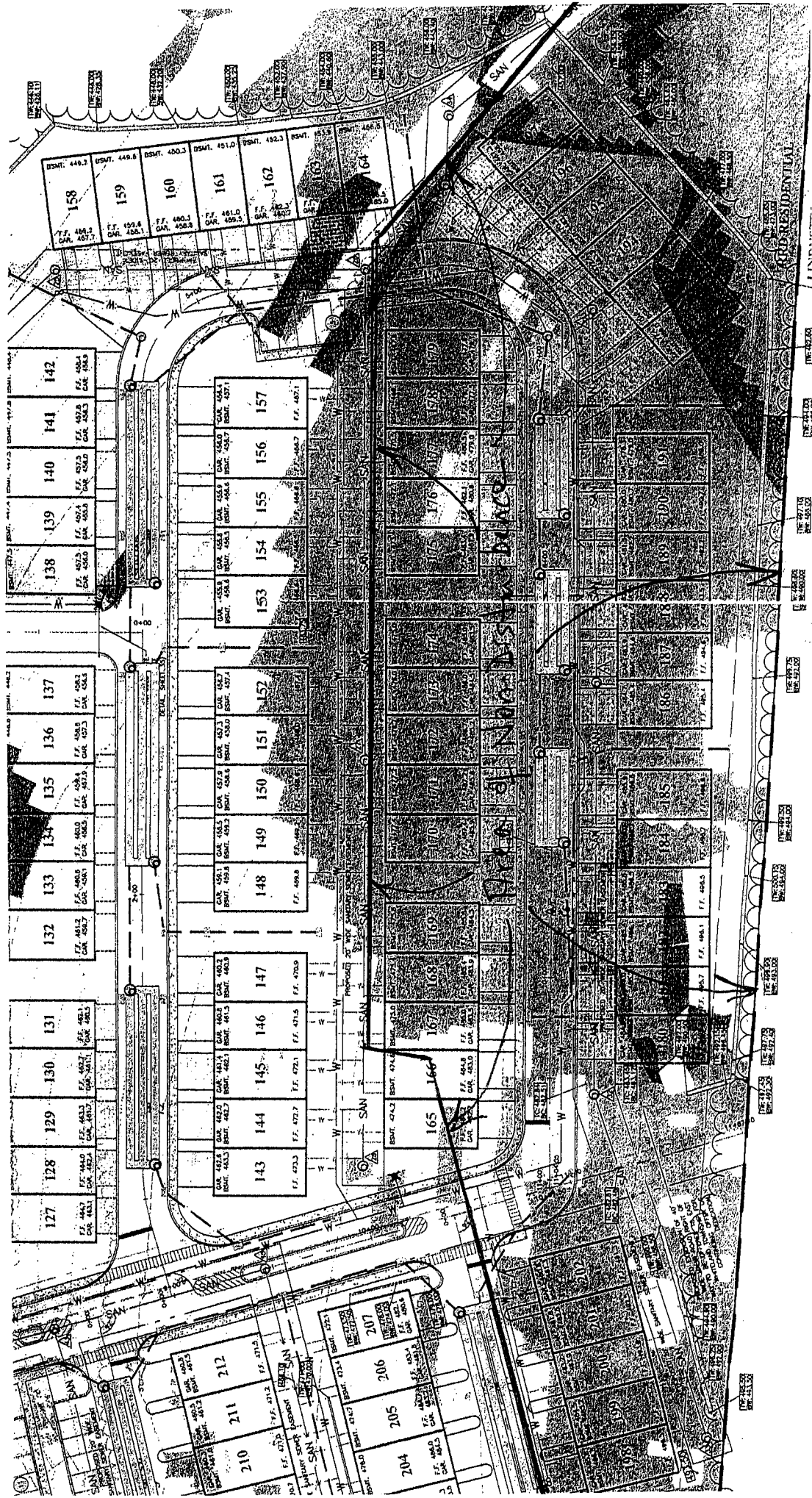


Karen Milner



Kathleen Laubenstein

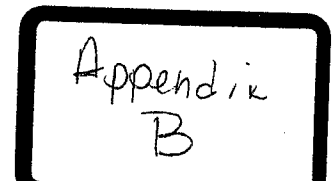
Appendix
A



**CONSTITUTION DRIVE PARTNERS
FORMER BISHOP TUBE SITE
EAST WHITELAND TOWNSHIP**

PROPOSED VARIANCE CONDITIONS OF APPROVAL

1. The Developer shall deposit Twenty Thousand Dollars (\$20,000.00) in an escrow account to be established by the Township, the purpose of which is to fund the Township's retention of an environmental professional, the selection of whom will be at the Township's sole discretion, to provide the Township with guidance on the environmental issues applicable to the Bishop Tube Site, including remediation of the Bishop Tube Site and the redevelopment of the Bishop Tube Site. If the escrow account should fall below Five Thousand Dollars (\$5,000.00) at any time, Developer shall replenish fund to Ten Thousand Dollars (\$10,000.00) upon such occurrence or occurrences.
2. At the time of creation of the Homeowners Association (HOA), the Developer shall make a one time, nonrefundable deposit of \$20,000 into an escrow account to be solely controlled by the HOA, which funds may only be used by the HOA to inspect and/or repair any vapor mitigation systems required to be installed and operated in residential units at the Property.
3. The Developer agrees to implement the remedial scope of work developed by Environmental Standards (as may be amended) and approved by the Pennsylvania Department of Environmental Protection (DEP), including remediating all unsaturated soils with any concentrations of TCE above Act 2 residential standards in the three (3) identified soil "hot spot" areas of concern, and securing approval from DEP for the unsaturated soils in these three (3) "hot spot" areas of concern to the satisfaction of DEP, in addition to meeting all requirements of Developer set forth in the March 17, 2005 Consent Order and Agreement, as amended or may be amended, between DEP and Constitution Drive Partners, L.P., and in any Remediation Scope of Work developed by or on behalf of Constitution Drive Partners, L.P. for the Bishop Tube Site, and approved by DEP.
4. No earth disturbance, construction or redevelopment activities (other than building demolition activities) to occur at the three (3) soil "hot spot" areas of concern, until completion of the necessary soil excavation required at the three (3) soil "hot spot" areas in accordance with the DEP approved Remediation Scope of Work, as may be amended.
5. In addition to securing DEP approval for the unsaturated soils in the three (3) soil "hot spot" areas of concern, the Developer shall obtain written confirmation from DEP that soil hot spot remediation was completed in accordance with DEP approved Remediation Scope of Work, as may be amended.



6. Installation of vapor mitigation systems on any residential structures (i) located within 100 feet of groundwater with volatile organic contaminant (VOC) concentrations in excess of Act 2 residential statewide health standards, or (ii) that may be required pursuant to DEP's new vapor guidance. Vapor mitigation systems shall be designed and certified by Applicant's professional engineer, and to be reviewed and approved by the Township's special environmental engineer, with the review costs paid for by Applicant. The Developer's professional engineer will also certify that the vapor mitigation systems were installed properly.
7. The Developer shall obtain a stormwater construction NPDES permit from DEP/ Chester County Conservation District.
8. There shall be reasonable future access granted to DEP and the PRPs to monitor groundwater wells, and to implement any future groundwater remedy that may be selected by DEP.
9. Utilities at the site shall be designed and installed by Developer to prevent the potential for vapor mitigation into residential structures, as well as the migration of contaminated groundwater into the utilities.
10. There shall be recordation of an environmental covenant pursuant to the Uniform Environmental Covenants Act (UECA), requiring residents to operate and maintain their vapor mitigation systems in perpetuity. The requirement to operate and maintain the systems will also be contained within the HOA documents. The recorded UECA covenant shall also require that no subsurface disturbance (other than building construction and utility installation and maintenance activities) will take place within the portion of the site where vapor mitigation systems would be required on residential structures.
11. The Developer agrees to comply with all of the provisions of the East Whiteland Township Zoning Code, specifically Section 200-25.1, entitled RRD Residential Revitalization District, unless relief is granted by the Zoning Hearing Board.
12. The Developer must remediate the soils in the three (3) soil hot spot areas identified by DEP. The remediation must be to the residential statewide health standard for soil and address the related vapor mitigation issue through pathway elimination. Developer shall submit a Report for DEP approval demonstrating remediation of the unsaturated soils in these three hot spot areas of concern as set forth herein. Said Report shall conform to the requirements of 25 Pa.Code 250.411 (Final Report) to the satisfaction of DEP.
13. Until the remediation of the three (3) soil hot spot areas is fully completed, which shall include post-excavation samples and approval of the remediation by DEP, Developer shall not start the construction of any residential units or appurtenances thereto on the Bishop Tube property. The only permitted activity during this time shall be the installation of temporary roads to support the remediation process.

14. Developer shall submit a demolition plan to the Township and DEP prior to the demolition of any structures on the Bishop Tube property.
15. The Township Board of Supervisors retains the right to add additional reasonable conditions and safeguards related to the applicable Subdivision and Land Development Plan and Application in accordance with the Township's Subdivision and Land Development Ordinance and other applicable ordinances.