

**EAST GOSHEN TOWNSHIP  
PLANNING COMMISSION**

**Agenda**

**Wednesday, March 3, 2010**

**7:00 PM**

- A. Call to Order / Pledge of Allegiance
  - B. Review of Tracking Log / Determine need for Workshop Meeting
  - C. Public Comment on Non-Agenda Items
  - D. Approval of Minutes
    - 1. February 3, 2010**
  - E. Acknowledge Receipt of New Applications
    - 1. Tecniplast, 1345 Enterprise Dr (C/U)**
  - F. Subdivision Plans
  - G. Land Development Plans
    - 1. Lieberman Earley & Co., 1345 Enterprise Drive (L/D)**
    - 2. National Bank of Malvern, 1305 Paoli Pike (L/D)
  - H. Conditional Uses and Variances
    - 1. Lieberman Earley & Co., 1345 Enterprise Drive (C/U)**
    - 2. T-Mobile Northeast, LLC, West side of N. Chester Rd (C/U)**
    - 3. Tecniplast, 1345 Enterprise Dr (C/U)**
  - I. Ordinance Amendments
  - J. Old Business
    - 1. Discussion on "Traditions" Ind. Living Fac. project in West Goshen
  - K. New Business
  - L. Any Other Matter
  - M. Meetings and Dates of Importance

March 2, 2010	Board of Supervisors	7:00 PM
March 3, 2010	Planning Commission	7:00 PM
March 4, 2010	Park & Recreation	7:00 PM
March 8, 2010	Municipal Authority	7:00 PM
March 9, 2010	Board of Supervisors	7:00 PM
March 10, 2010	Conservancy Board	7:00 PM
March 11, 2010	Historical Commission	7:00 PM
March 11, 2010	Zoning Hearing – PA 504	
March 15, 2010	Deer Committee	7:00 PM
March 16, 2010	Board of Supervisors	7:00 PM
March 23, 2010	Board of Supervisors	7:00 PM
  - N. Correspondence
  - O. Goals
  - P. Adjournment
- **Bold Items indicate that the Planning Commission has new information to review for that application.**

**REMINDER – Newsletter Article Submission Due Date:**

**Article Due Date**

May 12, 2010  
August 11, 2010  
November 10, 2010

**Delivery Date**

July 1, 2010  
October 1, 2010  
January 1, 2011

**EAST GOSHEN TOWNSHIP  
PLANNING COMMISSION  
APPLICATION HISTORY  
Wednesday, March 3, 2010  
7:00 PM**

**1. SUBDIVISION & LAND DEVELOPMENT PLANS**

**Lieberman Earley & Company, 1345 Enterprise Drive (L/D)**

November 19, 2009	EB Walsh – application of NPDES Permit
November 20, 2009	Application Plan
December 4, 2009	EB Walsh – 60-day extension
December 10, 2009	Memo – new hearing date
December 16, 2009	Lieberman Earley & Co. – continuance
<b>December 29, 2009</b>	<b>Yerkes – L/D and C/U Plan Review</b>

**2. CONDITIONAL USE / VARIANCES / ZHB APPLICATIONS**

**Lieberman Earley & Company, 1345 Enterprise Drive (C/U)**

December 10, 2009	memo – new hearing date
December 16, 2009	Lieberman Earley – 90 Day extension

**National Bank of Malvern (C/U)**

January 8, 2010	Gawthrop Greenwood C/U Application
January 14, 2010	Gawthrop Greenwood C/U Application
January 26, 2010	Township Fire Marshall review
January 27, 2010	Buckley, Brion, McGuire C/U application
January 28, 2010	e-mail 60- day extension

**T-Mobile Northeast, LLC, West side N. Chester Rd. (C/U)**

January 26, 2010	Application Plans
January 27, 2010	1,000' notification ltr
February 23, 2010	RF Schematics

February 3, 2010

**Tecniplast, 1345 Enterprise Dr (C/U)**  
**February 23, 2010      Application**  
**Plans**

**3. ORDINANCE AMENDMENTS**

**4. ANY OTHER MATTER**

Application Name	Application (CU, LD, O, SD, V, SE, CA)	Type (Sk, P, F)	Date Filed	Start Date	Date to Yerkes/Consultant	Date to CCPC	Date to Abutting Prop. / ABC's	Extension	PC NLT Action Date	BOS NLT Action Date	Hearing Date	Drop Dead date
Leiberman Early (1345 Enterprise Drive)	CU	P/F	11/19/09	11/19/09	11/20/09	n/a	11/30/09	1	3/3/10	3/16/10	3/2/10	3/19/10
Leiberman Early (1345 Enterprise Drive)	LD	P/F	11/19/09	12/2/09	11/20/09	11/23/09	11/30/09	2	4/7/10	4/20/10	n/a	6/1/10
National Bank of Malvern (1305 Paoli Pike)	LD	P/F	11/24/09	12/2/09	12/7/09	12/4/09	11/25/09	1	4/7/10	4/20/10	n/a	5/1/10
T-Mobile	CU	P/F	1/26/10	1/26/10	1/28/2010	n/a	1/28/2010		3/3/2010	3/26/2010	3/16/2010	3/26/2010
Techniplast	C/U	S	2/23/2010	2/23/2010	2/25/2010	n/a	2/25/2010		4/7/2010	4/13/2010	4/13/2010	4/24/2010

Hearing opened and Continued to 6/1/10

5/25 w 60 day ext

Bold = New Application or PC action required

**EAST GOSHEN TOWNSHIP**  
**PLANNING COMMISSION MEETING**  
**February 3, 2010**

*The East Goshen Township Planning Commission held their regularly scheduled meeting on February 3, 2010 at the East Goshen Township building. Chairman George Martynick, and members Senya Isayeff, Megann Hedgecock, , Chuck Proctor and Peter Mylonas were present. Also present were Township Zoning Officer Mark Gordon, and Ginny Newlin from the Conservancy Board.*

**WORKSHOP SESSION – 7:00pm**

The minutes of January 6<sup>th</sup> were reviewed and corrected. Motion to be passed in the formal session.

George discussed the tracking log as well as the agenda for the evening. Discussion moved to the St. Francis Nursery School application. Peter felt that the church has another use for the nursery school and Senya added that the school seems to have a Christian background. Mark noted that this is not the first time someone has requested use of the church for a nursery school. George questioned members of options for this application. Mark suggested that the applicant request an extension, get council, and for the PC to make a recommendation to the BOS.

**FORMAL SESSION**

**A. Pledge of Allegiance**

George called the meeting to order at 7:33 pm and led those in attendance in the Pledge of Allegiance.

George asked those in attendance if there were any non-agenda items to be discussed.

Ginny Newlin from the Conservancy Board came forward to discuss the 100 foot riparian buffer. Ginny noted that she had received Willistown Township riparian buffer and will copy and pass along to all members of the PC.

**B. Approval of Minutes**

The minutes of January 6<sup>th</sup> were discussed. Peter made a motion to approve the minutes of January 6<sup>th</sup>, 2010 be approved as amended in the workshop. Chuck seconded the motion. No further comment was made and the motion passed unanimously.

**C. Land Development Plans**

The Mullen Property at 1661 E. Strasburg Road was discussed. George noted the use of a rain garden in the plan and asked Rob Lambert, representative for the Mullens to give a description of the property. Senya added that he is disappointed that you will not be able to see the property from the road, but added that he thought it was commendable for the Mullen's to bring a "Longwood Gardens" to East Goshen. Megann added that she would like to see the rain garden at completion of construction. Megann made a motion for recommendation to the BOS to approve the Land Development application of Matthew and Christine Mullen to construct a single family home and associated improvements as depicted on the plan dated August 12, 2009 and last revised December 19, 2009.

Lieberman Earley and Company has been granted an extension until April 2010.

**D. Conditional Uses and Variances**

St. Francis Nursery School at the United Church of Christ- Diana Corvino, owner of the nursery school was present. George questioned if this nursery school is a collaboration between the church and school. Ms. Corvino noted that the school will operate as a separate entity, but would create a friendly atmosphere with the church. George added that considering the level of involvement between the church and school, this seems like a business arrangement. Peter asked if the nursery school would be staffed by the church, at which Ms. Corvino said this could be a possibility, but not yet planned out.

It was noted that the original zoning application states that this property is not intended to have a second use and that the Planning Commission sees this as a separate business paying rent to the owner. Ms. Corvino noted that church space rent is much lower than commercial property and that is why most nursery schools are housed in churches. Megann asked if there would be religious education/Christian education in the curriculum. Ms. Corvino noted that there would be an open prayer with no special emphasis on a specific religion.

It was also noted by Ms. Corvino that the church did see her current nursery school program and feels that their location is ideal. Peter asked how many students, at which Ms. Corvino answered around 30 students would be enrolled in various classes. Peter noted that the maximum allowance in the existing variance is 25 students. Peter advised the applicant to consider seeking council to find a legal reason that was not presented today. Various PC members advised the applicant to possibly have new plans drawn, meet with council to assist with legality and possibly seek a variance. Ms. Corvino asked for an extension to look into all that was suggested to her.

T-Mobile Northeast LLC.-Mr. Petrosa was present to discuss the 49 foot structure along the west side of North Chester Road north of Boot Road. Mr. Petrosa added that he feels the current changes to the cell tower meets all requirements. George questioned if there was maintenance access to the pole. Mr. Petrosa noted that access for maintenance is the same as PECO, which consists of pulling over in the right away and also noted that there is very little maintenance involved.

Eric Ritter showed simulated photos of the pole with 3 cabinets, 9 feet above ground. Peter asked Mr. Ritter to supply better photos showing the northbound side. Mr. Ritter advised that he would take some shots coming down the road. Peter also asked the radius of site coverage looking to achieve. It was noted that a maximum diameter is one mile.

***Public Comment:***

Mr. Jim Kercho-4513 Barker Drive noted that the cell tower would be unsightly and unnecessary.

**E. Old Business-** Traditions is currently conducting a traffic study.

***Public Comment:*** Mr. Keith Dickerson-1212 Culbertson Circle is concerned with safety issues in the immediate area of the traffic study and has observed that about 67% of the traffic is heading towards Route 202 and the Exton area. Mr. Dickerson also added that the residents of East Goshen have an obligation to the community to oppose this construction and that he is looking to get a voice of residents. Mr. Dickerson added that he is looking for support of East Goshen. Senya noted that East Goshen has spend much time and money looking into the issues that arise with this construction. East Goshen, as a neighboring township cannot get involved in matters of other townships, but can express concerns, out of concern of its residents. Senya suggested that someone speak to state senate.

**F. Adjournment**

Motion to adjourn the meeting was made by Senya and seconded by Peter. The meeting adjourned at 9:32 p.m.

Respectfully submitted, \_\_\_\_\_  
*Linda Jones, Recording Secretary*

41 TECNIPLAST  
3 pgs

Conditional Use Application and Checklist

**East Goshen Township**

To: Township Zoning Officer

Name of Applicant: Tecniplast

Applicant Address: P.O. Box 1457, Exton, PA 19341

Telephone Number: 877-669-2243 Fax: 484-875-0511

Email Address: tbertz@tecniplastusa.com

Property Address: 1345 Enterprise Drive, West Chester, PA

Tax Parcel Number: 53-4-171  
53-4-172 Zoning District: BP Acreage: 12  
53-4-173

Description of proposed use:

See attached.

Conditional Use is provided in Zoning Ordinance Section: 240-21.C(1)  
240-21.C(18)(b)  
240-21.C(19) and 240-33.A(2)

We hereby acknowledge that we have read this application and state that the above is correct and agree to comply with all provisions of the East Goshen Township Zoning Ordinance applicable to this project and property.

Signature of Applicant

Date

Attest: \_\_\_\_\_

**\* Review the formal Planning Commission review procedure on page three.**



### **Description of Proposed Use**

Applicant is seeking to utilize an existing building for multiple principal uses. More specifically, the applicant is seeking to utilize the building as an assembly facility and business office. The assembly facility will be utilized for the assembly of small metal cages. The business office will be utilized for sales and management.

In addition, the conditional use application contains a request pursuant to Section 240-33.A(2) to reduce the off-street parking requirements. Under the Multiple Principal Use regulations in Section 240-33.F(2), 280 parking spaces are required. There are currently 193 parking spaces available on site. The plan filed with the application shows 95 parking spaces conditionally reserved for potential future use. Applicant shall enter into an agreement with the Township requiring applicant to maintain each conditionally reserved area as attractively landscaped open space and convert some or all of the conditionally reserved area to additional off-street parking if at any time the Board of Supervisors finds (based upon the results of field investigations and recommendations of the Township Engineer) that additional parking is needed.

### **Narrative Statement Accompanying Plan**

The proposed multiple principal uses of the building as an assembly facility and business office are suitable to the property in question. It will be designed, operated and maintained so as to be in harmony with the existing development in the general vicinity and will not be detrimental to other properties in the vicinity. The building to be utilized for the assembly facility and business offices is already located on the property. No change to the existing setbacks, buffering, berming, locating of nuisance causing facilities, or screening will occur in conjunction with the uses. The proposed uses do not require any modification of the area and bulk requirements. No historic buildings are located on the property.

The proposed assembly facility and business office will be located in an existing building and no changes to the lot are proposed. Therefore, the proposed assembly facility and business office will be properly located and designed to minimize disruption to the existing natural topography, waterways, ponds, groundwater recharge, woods and other important natural features on the site.

The proposed assembly facility and business office will be suitable in terms of permitting the logical, efficient and economic extension of public services and facilities, such as central water supply, sanitary sewage and police and fire protection. The building is already connected to the central water supply and sanitary sewer. An increase in usage is not anticipated. Adequate access for fire-fighting and other emergency service equipment is available, as no change to the existing property is proposed. The proposed assembly facility and business office shall not create a significant hazard to the public health and safety, including but not limited to fire, toxic or explosive hazards. The propane tanks required for the assembly facility will comply with all federal, state and local rules and regulations.

The proposed assembly facility and business office will not create significant traffic safety hazards or cause serious traffic congestion. The applicant intends to use approximately 65,000 square feet of the building, with 15,000 square feet devoted to office use, 25,000 square feet devoted to warehousing, and 25,000 square feet devoted to the assembly facility. A portion of the existing parking facility has been designated for the applicant's use by the applicant's employees. Applicant believes that this existing parking area will be sufficient for its needs. It is anticipated that the proposed assembly facility will have approximately 20 employees. Approximately four deliveries and retrievals of materials are anticipated weekly. The proposed business offices will have 25 employees. Client visits to the offices will be very limited. It is not anticipated that these trips will cause traffic hazards or congestion.

In addition to applicant's use of the facility, two existing tenants utilize approximately 12,000 square feet of the building for office use. Ryan Homes has 25 employees. Keane Advisors has 5 employees. It is anticipated that adequate parking exists in the existing parking facility for the tenants' use.

920 A.2d 953 , \*; 2007 Pa. Commw. LEXIS 134, \*\*

**Ridley Park United** Methodist Church v. Zoning Hearing Board Ridley Park Borough, Ridley Park Borough, Thomas O'Loughlin, Charles R. Wallgren and Joseph York. Appeal of Thomas O'Loughlin, Charles R. Wallgren and Joseph York

No. 1422 C.D. 2006

COMMONWEALTH COURT OF PENNSYLVANIA

920 A.2d 953; 2007 Pa. Commw. LEXIS 134

March 5, 2007, Argued

April 3, 2007, Decided

April 3, 2007, Filed

#### PRIOR HISTORY:

[\*\*1] Appealed from No. 03-04679. Common Pleas Court of the County of Delaware. Judge Zetuskys, Jr., J.

**Ridley Park United** Methodist Church v. O'Loughlin, 807 A.2d 344, 2002 Pa. Commw. LEXIS 770 (Pa. Commw. Ct., 2002)

**COUNSEL:** Lee A. Stivale and Paul J. Toner, Media, for appellants.

Michael J. Sheridan, Norristown, for appellee, **Ridley Park United** Methodist Church.

**JUDGES:** BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge, HONORABLE DAN PELLEGRINI, Judge, HONORABLE ROCHELLE S. FRIEDMAN, Judge. OPINION BY JUDGE PELLEGRINI. Judge FRIEDMAN concurs in the result only.

**OPINION BY:** DAN PELLEGRINI

#### OPINION

[\*954] OPINION BY JUDGE PELLEGRINI

Thomas O'Loughlin, [**\*\*2**] Charles R. Wallgren and Joseph York (Property Owners) appeal from an order of the Court of Common Pleas of Delaware County (trial court) affirming the supplemental decision of the Zoning Hearing Board (Board) of Ridley Park Borough (Borough) granting a special exception to the **Ridley Park United** Methodist Church (Church) to operate a daycare on its property.

A similar case n1 involving the parties n2 was previously before our Court when the Church, located in an R-1 Residential District in which commercial uses are not permitted, filed an appeal from the trial court's decision reversing the Board's grant of a special exception to operate a daycare on the Church's property because it was not a public or parochial educational institution. To briefly recap the facts, the Church secured a tenant, "Ready, Set, Grow," a private, for-profit institution which intended to use the Church's property as a daycare. After the Borough denied the Church's application for a use and occupancy permit, it filed a request for a special exception under Section 213-7B(3)(b) of the Ridley Park Zoning Ordinance (Ordinance) which authorizes a special exception in R-1 Districts for "[p]ublic or

parochial[\*\*3] educational institutions and religious and philanthropic uses, excluding hospitals, sanitariums and correctional or penal institutions." Property Owners were residents of the Borough and nearby neighbors of the Church who objected to [\*955] the application and testified regarding traffic problems caused by a former daycare at the same location. The Board granted the Church's application for a special exception concluding that the for-profit daycare did not qualify as a religious or philanthropic use due to its function as a landlord for economic gain, but that the educational component was sufficient to satisfy the educational requirements in the Ordinance. Without taking additional evidence, the trial court reversed, and the Church filed an appeal with this Court.

----- Footnotes ----- -1

Thomas O'Loughlin and Linda M. O'Loughlin and Charles R. Wallgren and Judith M. Wallgren and Joseph York v. Zoning Hearing Board of Ridley Park Borough and Ridley Park Borough and **Ridley Park United Methodist Church (O'Loughlin I)** 807 A.2d 344 (Pa. Cmwlth. 2002). 2

----- End Footnotes-----

[\*\*4] On appeal, the Church argued that a daycare situated on its property met the requirements of the Ordinance because it was a "parochial educational institution." We disagreed, citing Camp Ramah in the Poconos, Inc. v. Zoning Hearing Board of Worcester Township, 743 A.2d 1019 (Pa. Cmwlth. 2000), for the proposition that a summer camp run by and for practitioners of a particular religion which included a religious component did not change the recreational nature of the use of the property into a religious use. Because the daycare in *O'Loughlin I* had no religious affiliation with the Church, no religious services would be offered, and proximity alone would not transform a secular, for-profit entity into a religious one, we affirmed the trial court's denial because the daycare was not a "parochial" institution. The Church then filed a petition for allowance of appeal with our Supreme Court, which was denied. n3

----- Footnotes ----- -3

O'Loughlin v. Zoning Hearing Board of Ridley Park Borough, 575 Pa. 689, 834 A.2d 1144 (2003).

----- End Footnotes-----

[\*\*5] The Church then filed a new application, which is the subject of this appeal, requesting a special exception for the Church itself to operate a daycare on its property. Eileen Guest (Guest), who for two-and-one-half years owned and operated "Ready, Set, Grow" located on the Church's property, testified that 60 to 65 children attended the daycare on a daily basis, with six being kindergarteners. She testified that "Ready, Set, Grow" was licensed by the Department of Education certifying that it was approved as a private academic school to offer kindergarten programs. She then referred to the kindergarten curriculum which included courses on language arts/reading, math, gross motor skills, science, coordination, social studies and other cognitive skills, and the pre-school curriculum which included courses on language arts, math, gross motor skills, science, coordination and social studies.

While she had operated the daycare as a tenant of the Church, when the Church-run daycare center opened, she would be employed and paid by the Church in the position of Executive Director, and the Church would take over her existing staff. She testified that the proposed school would offer[\*\*6] full-day kindergarten, pre-kindergarten, preschool, toddler and infant programs, as well as after-school and summer camp programs. She also stated that the proposed daycare would operate under the same hours as the current daycare, and Pastor Alice Ann Bonham (Pastor), the Pastor of the Church, would develop a religious element for the current curriculum.

The Pastor testified that if the application was granted, the Church would operate the daycare through a Board of Directors consisting of Church members. She testified that the religious component of the program was still a work in progress, and that the role of the daycare in the Church's mission was to preach the Gospel of Jesus Christ and to serve the [\*956] needs of the community by providing a safe place for children.

Finding that the attempted characterization of the use as being religious or parochial appeared to be form over substance because the daycare would be operated in exactly the same manner as the current unlawful use, n4 the Board denied the application. It found that although the Church intended to take

over operation of the daycare and to include religious education in the future, there was insufficient evidence[\*\*7] to demonstrate that the use was parochial in nature. It also found that based on a narrowed definition of an educational institution, the daycare was a for-profit business that was principally dedicated to the care of the children and not their education.

----- Footnotes ----- -4

Even though a permit was denied in *O'Loughlin I*, the Church's tenant continued to operate a daycare on the Church's property.

----- End Footnotes-----

The Church appealed to the trial court and then filed an amended appeal petitioning to have the matter remanded to the Board for a determination of whether the provisions of the Religious Freedom Protection Act (RFPA), Act of December 9, 2002, P.L. 1701, 71 P.S. §§ 2401-2407, were applicable to its application. The trial court granted the petition and remanded the matter for the Board to receive testimony and argument with regard to the applicability of the RFPA and to submit a supplemental decision with regard to that issue.

Between the initial hearing and the remand hearing, pertinent facts[\*\*8] on the religious component of the daycare changed. At the remand hearing, the Pastor testified that the Church now operated the daycare, a lease with the daycare run by Guest was terminated, Guest no longer owned the daycare but was an employee of the Church, the daycare staff was employed and paid by the Church, an oversight committee comprised of Church members made the decisions pertaining to the operation of the daycare, and the Church paid for the insurance. The Pastor stated that the Church added a Christian educational component to the program for the toddler through kindergarten-aged children, including a Bible Zone curriculum which offered one or two daily religious activities for 10 to 20 minutes or longer, and a weekly chapel service attended by the children with the exception of infants. However, she testified that children could opt out of the weekly chapel service and the implementation of a religious element for the after-school program was a work in progress. The Pastor then stated that neither Guest nor any of the daycare staff were Church members, only one Church member had children enrolled in the daycare, and the United Methodist Church did not maintain[\*\*9] statistics on the proportion of its churches that provided daycare or educational programs.

With respect to the mission of the Church to teach the Gospel of Jesus Christ to all the Church encountered, the Pastor stated that there was no better place to start than with the children. She also testified that part of the mission was to reach out and meet the needs of the community, including a safe place for children to be while their parents were working. The Pastor testified that historically, the Methodists as a people had met secular needs and as a denomination, the Church considered meeting secular needs equally important. She stated that a denial of the application would substantially burden the exercise of religion because the Church was responsible for preaching the Gospel by word and by action to the community. The Pastor also testified that the Ordinance did not require the Church to conduct [\*\*957] any activity that would violate any tenet of the Church, and that nothing in the Ordinance would curtail the Church and its members from expressing adherence to their religious faith. She conceded that the Church continued to operate and function without limitation, and that it[\*\*10] was not precluded from offering numerous outreach religious programs to children and adults, including Sunday school, vacation Bible school, religious workshops for members, special holiday services, counseling and coffee hour the first Sunday of each month.

Considering the Church's 100-year presence in the Borough and its substantial dedication to fostering the principles of Christianity in the community, as shown more recently by the incorporation of a Christian daycare, the Board granted a special exception with conditions because to prohibit the daycare would substantially burden the Church's exercise of its religion. It found that the Church now operated the daycare and added a substantial Christian educational component that was not demonstrated at previous hearings. It stated that despite the very narrow scope of the remand order, the new findings of fact and expounding of the religious aspect of the daycare would very well be in compliance with the Ordinance mandating a reapplication of the standards for a special exception. Property Owners appealed the Board's supplemental decision, and the Church appealed the conditions attached to that decision.

Without taking[\*\*11] additional evidence, the trial court denied both appeals and dismissed as being

moot the Church's appeal from the Board's original decision. The trial court found, among other things, that it had authority to remand the matter because the Board had not considered the applicability of the RFPA or made findings in that regard; the Board was vested with subject matter jurisdiction to determine a violation of the RFPA; the Board's findings that the daycare was a fundamental and substantial mission of the Church and furthered the fundamental principles of the Church community were supported by substantial evidence; and the Church met its burden for the grant of a special exception.

Property Owners appealed to this Court n5 contending that the Board erred in finding that a denial of the Church's application for a special exception to operate a daycare would violate the Church's rights under the RFPA because the Church's free exercise of religion was not substantially burdened as it was not denied the right to engage in activities which were fundamental to its religion.

----- Footnotes ----- -5

Because the trial court took no additional evidence, our scope of review is limited to determining whether the Board committed an abuse of discretion or an error of law. Rabenold v. Zoning Hearing Board of the Borough of Palmerton, 777 A.2d 1257 (Pa. Cmwlth. 2001).

----- End Footnotes -----

[\*\*12] The genesis of the RFPA was a result of the United States Supreme Court's decision in Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). Prior to that decision, all legislation affecting religions or religious practices challenged under the Free Exercise Clause of the First Amendment was subjected to a strict scrutiny analysis. n6 [\*\*958] Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963). In Smith, the Supreme Court held that the Free Exercise Clause did not prohibit application of Oregon's drug laws to the ceremonial ingestion of peyote and, thus, the state could, consistent with that Clause, deny claimants unemployment compensation for work-related misconduct based on their use of the drug. The Supreme Court stated:

The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment, provides that "Congress shall make no law respecting [\*\*13] an establishment of religion, or prohibiting the free exercise thereof...." The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious beliefs as such." The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma. Smith, 494 U.S. at 876-77. (Citations omitted.) It went on to hold that although a state would violate the Free Exercise Clause if it sought to ban the performance of or abstention from physical acts solely because of their religious motivation, the Clause does not relieve an individual of the obligation to comply with a law that incidentally forbids or requires the performance of an act that his religious belief requires or forbids if the law is not specifically directed [\*\*14] to religious practice and is otherwise constitutional as applied to those who engage in the specified act for non-religious reasons. Thus, a law that is both neutral and generally applicable need only be "rationally related" to a legitimate governmental interest to survive a constitutional challenge. On the other hand, if a law that burdens a religious practice is not neutral or generally applicable, it is subject to strict scrutiny, and the burden on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling governmental interest. In Smith, the Supreme Court also stated that its decision did not dilute the authority of Congress and states to enact laws that protect its citizens' right to freely practice their religious beliefs.

----- Footnotes ----- -6

There are three different types of classifications calling for three different standards of judicial review. The first type--classifications implicating neither suspect classes nor fundamental rights--will be sustained if it meets a "rational basis" test. In the second type of cases, where a suspect classification has been made or a fundamental right has been burdened, another standard of review is applied called strict scrutiny. Finally, in the third type of cases, if "important" though not fundamental rights are



affected by the classification, or if "sensitive" classifications have been made, the United States Supreme Court has employed what may be called an intermediate standard of review or a heightened standard of review. See *Nicholson v. Combs*, 550 Pa. 23, 703 A.2d 407 (1997).

The heightened standard of review lessens the presumption that a statute is constitutional because it allows the court to weigh the proffered reasons why the restrictions are against the rights purportedly being infringed upon. Strict scrutiny goes even further, as Tribe, *American Constitutional Law* (Second Edition), Section 16-6 quipped: "[w]hen expressed as a standard for judicial review, strict scrutiny is ... 'strict' in theory and usually 'fatal' in fact."

----- End Footnotes -----

**[\*\*15]** Congress accepted the Supreme Court's invitation in *Smith* to enact laws that affirmatively foster the free exercise of religion because as reaffirmed by the United States Supreme Court in *Cutter v. Wilkinson*, 544 U.S. 709, 713, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005), "there is room for play in the joints" between the Free Exercise and Establishment Clauses. Pursuant to this authorization, n7 Congress **[\*959]** enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-2000cc-5, which provided that a land-use regulation cannot substantially burden religious exercise unless the government can show the regulation furthers a compelling governmental interest and is the least restrictive means of furthering that interest. It broadly defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." n8 The RLUIPA applies in any cases in which "the substantial burden is imposed in a program or activity that receives Federal financial assistance; the substantial burden**[\*\*16]** affects, or removal of that substantial burden would effect, commerce; or the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes ... individualized assessments of the proposed uses for the property involved." n9

----- Footnotes ----- -7

Congress first responded to the change in level of scrutiny by enacting the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb-2000bb-4, which "prohibits '[g]overnment' from 'substantially burden[ing]' a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" *City of Boerne v. Flores*, 521 U.S. 507, 515-16, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997) (citing 42 U.S.C. § 2000bb-1). In *City of Boerne*, the United States Supreme Court invalidated RFRA as applied to states and their subdivisions because it exceeded Congress' remedial powers under the Fourteenth Amendment.

----- End Footnotes -----

**[\*\*17]**

----- Footnotes ----- -8

42 U.S.C. § 2000cc-5(7)(A).9

42 U.S.C. § 2000cc(a)(2).

----- End Footnotes -----

Like the federal government, Pennsylvania enacted RFPA to change the rational relationship analysis which was used after *Smith* to examine whether a law or ordinance impinged on the exercise of one's religion. It requires that a law or regulation that has an effect on the exercise of religion has to establish that the agency did not substantially burden a person's n10 free exercise of religion, including any burden which results from a rule of general applicability, i.e., unless the agency proves, by a preponderance of the evidence, that the burden is in furtherance of a compelling interest of the agency and is the least restrictive means of furthering that interest. n11 It defines "free exercise of religion" n12 as "[t]he practice or observance of religion under section 3 of Article I of the Constitution of Pennsylvania," n13 and "substantial burden" as:

**[\*960]** An agency action which does any of the following:

(1) Significantly<sup>[\*\*18]</sup> constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs.

(2) Significantly curtails a person's ability to express adherence to the person's religious faith.

**(3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion.**

(4) Compels conduct or expression which violates a specific tenet of a person's religious faith. Section 3 of the RFPa, 71 P.S. § 2403 (defining "substantially burden"). (Emphasis added.)

----- Footnotes ----- -10

Section 3 of the RFPa, 71 P.S. § 2403, defines "person" as:

An individual or a church, association of churches or other religious order, body or institution which qualifies for exemption from taxation under section 501(c)(3) or (d) of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. § 501).<sup>11</sup>

Section 4 of the RFPa, 71 P.S. § 2404, provides:

(a) General rule.-- Except as provided in subsection (b), an agency shall not substantially burden a person's free exercise of religion, including any burden which results from a rule of general applicability.

(b) Exceptions.-- An agency may substantially burden a person's free exercise of religion if the agency proves, by a preponderance of the evidence, that the burden is all of the following:

(1) In furtherance of a compelling interest of the agency.

(2) The least restrictive means of furthering the compelling interest.

----- End Footnotes -----

**[\*\*19]**

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Section 3 of the RFPa, 71 P.S. § 2403, (defining "free exercise of religion").<sup>13</sup>

Article 1, Section 3 of the Pennsylvania Constitution provides:

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.

----- End Footnotes -----

What is at issue in this case is whether the Church would be "substantially burdened" if it was precluded from operating a daycare center because it would lose "a reasonable opportunity to engage in activities which are fundamental to [its] religion." n14

----- Footnotes ----- -14

----- End Footnotes -----

**[\*\*20]** We agree with Property Owners that nothing here impinges on the religious activities of the Church. While it aided in carrying out the Church's religious mission, the daycare is not a fundamental religious activity of a church. For example, ministering to the sick can flow from a religious mission, but it is not a fundamental religious activity of a church because a hospital may be built to satisfy that



mission. Moreover, the lack of a daycare only had a *de minimis* impact on the Church's opportunity to engage in fundamental religious activities to teach religious classes because, as the Pastor testified, the Sunday school, vacation Bible school, religious workshops for members, special holiday services, counseling and coffee hour the first Sunday of each month all provided religious instruction. Because the Church failed to meet its burden of proving that it was substantially denied a reasonable opportunity to engage in activities that were fundamental to its religion, the Board erred in granting the Church's application to operate a daycare on its property based on a violation of the RFPA. See also **[\*\*21]** *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643 (10th Cir. 2006) (denying church zoning permits to operate daycare facility with component of religious instruction in low-density residential area did not impose "substantial burden" n15 on **[\*961]** church's free exercise rights because only an incidental burden on church's religious conduct because church could operate its religious education program in another area of city that was properly zoned for such operation.) n16

----- Footnotes ----- -15

To meet the substantial burden prong of the RLUIPA, a person must demonstrate that the land-use regulation actually imposed a substantial burden on religious exercise. *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 760-61 (7th Cir. 2003). It requires a showing that the burden prevents adherents from conducting or expressing their religious beliefs or causes them to forgo religious precepts. *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 110 S. Ct. 688, 107 L. Ed. 2d 796 (1990). A substantial burden is one that "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise effectively impracticable." *Civil Liberties for Urban Believers*, 342 F.3d at 761. A mere inconvenience is not enough to meet the substantial burden requirement. *Braunfeld v. Brown*, 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961).

----- End Footnotes -----

**[\*\*22]**

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Property Owners also contend that the trial court erred in remanding the matter to the Board for a determination of whether the RFPA applied to the Church's application because the Board was a quasi-judicial body, not an agency vested with subject matter jurisdiction, and a violation of the RFPA by a municipality was proper only before the Court of Common Pleas. They further argue that both the RFPA and the Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §§ 10101-11202, specifically limited the Board from granting any type of relief in this matter. Because the Church did not meet its burden under the RFPA, we reserve for a later date a determination of whether a zoning hearing board has jurisdiction in such matters.

----- End Footnotes -----

Property Owners also contend that the Board erred in granting a special exception under the Ordinance based on the findings of fact from the remand hearing allegedly demonstrating that the Church implemented a substantial Christian educational component to its daycare program **[\*\*23]** because the trial court's remand order limited the Board to a determination of whether the RFPA applied to the Church's application. We agree because "where a case is remanded for a specific and limited purpose, 'issues not encompassed within the remand order' may not be decided on remand." *In re Independent School District Consisting of the Borough of Wheatland*, 912 A.2d 903, 908 (Pa. Cmwlth. 2006) (citing *Budd Company v. Workers' Compensation Appeal Board (Kan)*, 858 A.2d 170, 180 (Pa. Cmwlth. 2004)). Because the trial court limited the remand order to a determination of the applicability of the RFPA to the Church's application, the Board erred in expanding the narrow scope of that order and revisiting the status of the Church as a parochial educational institution under the Ordinance.

This does not end the matter, though. Because we have found that the Ordinance does not violate the RFPA, the Church's appeal to the trial court from the Board's original decision that it was not a parochial educational institution is no longer moot. Accordingly, we vacate the trial court's order affirming the Board's supplemental decision granting a special exception **[\*\*24]** and remand the matter to the trial court to address the Church's appeal and decide based on all the evidence adduced at the initial and remand hearings whether the Church made out that it is entitled to a special exception under Section 213-7B(3)(b) of the Ordinance as a "parochial educational institution."

DAN PELLEGRINI, JUDGE

Judge Friedman concurs in the result only.

ORDER

AND NOW, this 3rd day of April, 2007, we vacate the Court of Common Pleas of Delaware County's order affirming the Zoning Hearing Board of Ridley Park Borough's supplemental decision granting a special exception and remand the matter to the Court of Common Pleas of Delaware County to address the Church's appeal to the Zoning Hearing Board of Ridley Park Borough's original decision and decide based on all the evidence adduced at the initial and remand hearings whether the Church made out that it is entitled to a **[\*962]** special exception under Section 213-7B(3)(b) of the Ridley Park Zoning Ordinance as a "parochial educational institution."

DAN PELLEGRINI, JUDGE

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Aqua Pennsylvania, Inc.  
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Bryn Mawr, PA 19010

www.aquapennsylvania.com

Nat'l Bank of  
Malvern

December 16, 2009

Charles J. Olivo, P.E.  
Stantec Consulting Services, Inc.  
1060 Andrew Drive, Suite 140  
West Chester, PA 19380

RECEIVED  
DEC 17 2009

STANTEC  
WEST CHESTER, PA OFFICE

**Re:** Water Availability  
1305 Paoli Pike  
East Goshen Township, Chester County

Dear Mr. Olivo:

This letter will serve as confirmation that the above referenced project is situated within Aqua Pennsylvania, Inc.'s ("Aqua") service territory. Service would be provided in accordance with Aqua's Rules and Regulations.

Please be advised that Aqua does not have a water main that abuts this property and therefore service is not presently available to the property. To obtain service, the National Bank of Malvern ("Owner") will be required to extend a water main along Airport Road to obtain service. I have attached a plan showing Aqua's main along Airport Road which was extended by the YMCA to serve their property. The Owner will be required to extend this 8-inch main a distance of approximately 180 feet to get service from Aqua. Once the main extension is completed and service established, Aqua will be able to provide the 200 gpd domestic supply you state is required in your December 9, 2009 letter. Aqua cannot evaluate or confirm its ability to meet any fire service demands that may be required for this project.

Main extension projects are completed under a Builder's Extension Agreement. Under this agreement, the Owner will be responsible for installing the main extension, including fire hydrants and service connections, with a pre-qualified contractor that is hired by the Owner. Prior to this agreement, the Owner is required to have its engineer prepare main extension plans in accordance with Aqua's plan specifications and submit these plans to Aqua for review and approval. Please contact our New Business Representative, Gary Horne, for information on the plan requirements, design package and the extension agreement. You can reach Mr. Horne at (610) 645-4230.

Once all of the plan requirements have been met and the project has been reviewed and approved by our hydraulic engineer, the Owner will be able to enter into a Builder's Extension Agreement.

An Aqua America Company

Page 2  
1305 Paoli Pike  
December 16, 2009

Flow data information for this area, if required, can be obtained upon written request to Lisa Thomas-Oliva of our Production Department so that you may determine the adequacy of our supply for your project needs. If you have specific questions related to flow test requests, you may reach Mrs. Oliva at (610) 645-1034.

If you require further information, please contact me at (610) 645-1105.

Sincerely,

A handwritten signature in black ink, appearing to read "David C. McIntyre". The signature is fluid and cursive, with the first name "David" being the most prominent.

David C. McIntyre  
New Business Coordinator

Encl.

