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IN RE: CONDITIONAL USE :
APPLICATION OF : **BEFORE THE EAST GOSHEN TOWNSHIP**
GROVE MEADOW : **BOARD OF SUPERVISORS**
DEVELOPERS LLC :

DECISION AND ORDER

Grove Meadow Developers LLC (the "Applicant") filed an application for conditional use approval (the "Application") pursuant to Sections 240-9.C(11) and 240-36 of the East Goshen Township Zoning Ordinance of 1997, as amended (the "Ordinance") requesting conditional use approval to subdivide and develop the existing tract of land with fifteen (15) single family residential lots under the Single Family Open Space Development option on property located at 1010 Hershey Mill in East Goshen Township, Chester County, Pennsylvania (the "Property").

The East Goshen Township Board of Supervisors (the "Board") conducted public hearings on November 15, 2022, and January 17, 2023. The Applicant appeared at the hearings represented by Alyson Zarro, Esquire. The Board was represented by the Township Solicitor, William R. Christman III, Esquire. The following individuals were granted party status without objection by the Applicant: (i) Natlie McManus, who resides at 1331 Jackson Lane; (ii) Alison Oshop, who resides at 1334 Jackson Lane; (iii) Lillian Fedor, who resides at 1013 Hershey Mill Road; and (iv) Ron McGill, who resides at 1050 Hershey Mill Road.

The evidentiary record was closed at the conclusion of the hearing on January 17, 2023. By email dated February 17, 2023, from the Applicant's counsel, the Applicant granted the Township an extension of time to render its decision on the Application through March 7, 2023, pursuant to Section 913.2(b)(2) of the Pennsylvania Municipalities Planning Code (the "Pa MPC").

From the testimony and exhibits presented at the hearing, the Board makes the following:

FINDINGS OF FACT

1. All facts set forth in the introductory paragraphs above are incorporated herein by reference and are deemed to be factual findings of the Board.
2. Applicant is a Pennsylvania limited liability company.
3. The Property, consisting of approximately 16 acres within the R-2 Low Density Residential District, is owned by Mark Miller and Christine Miller.
4. By Agreement of Sale dated March 15, 2022, the Applicant is the equitable owner of the Property. See Exhibit A-3.
5. The Property contains two (2) Class II historic resources that are currently detailed in the East Goshen Township Historic Resource Inventory (a house and a barn), as well as a stream (a tributary to Ridley Creek, which is classified as a High Quality Stream) and wetlands.
6. The first conditional use hearing, which was held on January 17, 2023, was advertised in the *Daily Local News* on October 13, 2022, and November 7, 2022. See Exhibit B-5.
7. All required notices of the hearing were made.

8. The East Goshen Township Planning Commission reviewed the Application on November 2, 2022, and recommended that the Board approve the Application with conditions as set forth in a memorandum from Duane Brady, the Township Zoning Officer, to the Board of Supervisors, dated November 7, 2022. See Exhibit B-12.

9. The Township conducted a site visit on October 18, 2022.

10. The Applicant seeks approval to use the Single-Family Open Space Development Option to subdivide the property into fifteen residential lots: thirteen (13) additional homes and each historic resource on its own lot. See Exhibit A-4.

11. The historic resources are intended for future residential use, will be located on individual flag lots, and will utilize a shared driveway.

12. The Applicant submitted a Historic Resource Impact Study, prepared by Mary Sue Boyle and Company, which opined that “the integrity of the setting of the resource farm complex shall remain intact and the topography of the lands shall assist in the visual assessment of no intrusion to the farmstead complex, which speaks the history of the parcel...This undertaking will not change the current Class II status of the property as noted in the historic inventory of the East Goshen Historic Resources.” See Exhibit B-5 at p.11.

13. The Applicant intends to remove and remediate the currently existing driveway for the Property, which is currently within a floodplain, and replace it with an entrance to the development directly across from Tanglewood Drive. According to the Applicant, this will relieve traffic concerns, as well as minimize adverse disruption to natural topography and waterways on the Property.

14. The Applicant has indicated its willingness to provide a sanitary sewer and pedestrian access easement from the proposed cul-de-sac to adjoining Township property between Lots 6 and 7.

15. Each lot will be served by public sewer and water. Both the East Goshen Municipal Authority (sanitary sewer) and Aqua Pennsylvania, Inc. (water) have indicated that service is available for the proposed development. See Exhibit A-7.

16. Certain improvements will be required to sanitary sewer equipment in order to accommodate the proposed development, which the Applicant has agreed to pay.

17. Approximately fifty-eight percent (58%) of the Property will be qualifying open space, which will be preserved in a conservation easement with a homeowners' association responsible for maintenance.

18. The "central green" within the proposed cul-de-sac is intended to be used for passive and active recreation.

19. The Applicant has proposed certain landscaping around the perimeter of the site and street trees along the proposed road, although the specifics of the proposed landscaping will be reviewed during the subdivision/land development process.

20. The homeowners' association documentation will include a specific section regulating street trees and landscaping, which will be maintained by the homeowners' association.

21. Each single-family dwelling would be separated by at least 30 feet and would provide a minimum of three (3) off-street parking spaces.

22. The Application proposes stormwater management facilities to accommodate maximum building and impervious coverage for each new house, in order to ensure that there is enough room for future improvements such as patios or pools.

23. The Property currently has a post-and-rail fence around a portion of its perimeter.

24. There is a currently existing pipeline within the adjacent Goshen Downs development, approximately 500 feet away from the Applicant's proposed disturbance areas, which carry petroleum products.

25. As required by the Ordinance, the Applicant submitted a Pipeline Awareness Study, which indicates that the proposed development will have "no impact on the existing pipelines." See Exhibit A-8 at p.1.

26. The Applicant also submitted correspondence from Enbridge Texas Eastern Transmission LP stating that the proposal would have "no conflict" with existing pipelines. See Exhibit A-8.

27. During the hearing, a question was raised about environmental contaminants on the Property, including lead pipes and a cistern.

28. Parties to the proceeding also raised concerns regarding the pedestrian trail to the west of the Property, stormwater management, traffic, sanitary sewer capacity and required improvements, parking, and density.

29. The following hearing exhibits were introduced and admitted by the Board at the January 17, 2023 hearing:

- B-1 East Goshen Township Zoning Ordinance and Map
- B-2 Conditional Use Application

- B-3 Email dated September 13, 2022, from Applicant's counsel granting an extension of all deadlines relating to the time in which the Board must hold its first hearing on the Application
- B-4 Form of Public Notice
- B-5 Proof of Publication of Public Notice
- B-6 Pennoni Review Letter dated September 21, 2022
- B-7 Revised Sketch Plan dated October 5, 2022
- B-8 Applicant's Response Letter to Pennoni Review dated October 5, 2022
- B-9 Historic Resource Impact Study dated October 2022
- B-10 Pennoni Revised Review Letter dated October 27, 2022
- B-11 Pipeline Awareness Study dated November 11, 2022
- B-12 Zoning Officer's Memorandum dated November 7, 2022
- B-13 Updated Pipeline Awareness Study dated January 10, 2023

30. The following hearing exhibits were introduced by the Applicant and admitted by the Board at the January 17, 2023 hearing:

- A-1 Conditional Use Application
- A-2 East Goshen Township Zoning Ordinance
- A-3 Redacted Agreement of Sale for 1010 Hershey Mill Road
- A-4 Open Space Development Layout Sketch Plan dated October 5, 2022
- A-5 Historic Resource Impact Study dated October, 2022
- A-6 C.V. of Michael Hartman, P.E.
- A-7 Will Serve Letter dated July 13, 2022
- A-8 Pipeline Awareness Study dated January 10, 2023

31. If this conditional use is granted for the proposed development, the Board, in order to protect the surrounding neighborhood and insure that the health, safety and welfare of the community and the Township are protected, will impose certain conditions on Applicant's home occupation.

CONCLUSIONS OF LAW

1. Applicant, as equitable owner of the Property, has standing to file the Application.

2. The Board has jurisdiction to hear the request for conditional use in this Application.

3. The hearing was duly advertised and noticed in accordance with the requirements set forth in the Pa MPC.

4. A single-family open space development must be approved by the Board of Supervisors by conditional use and meet the requirements of Sections 240-9.C(11) and 240-36 of the Ordinance.

5. The property on which a historic resource is located may be subdivided for additional development consistent with the regulations of the zoning district in which the property is located pursuant to Section 240-35.5.D of the Ordinance.

6. A maximum of one (1) flag lot may be created from each parent lot that existed as a single and separate lot of record at the time of adoption of the Ordinance pursuant to Section 240-23.B(2)(b)[2][c]. Section 240-38.6 of the Historic Preservation Ordinance, however, states that “the Board of Supervisors, as part of the conditional use approval, may grant modifications to the otherwise applicable area and bulk regulations applicable to the use or adaptive reuse of [a] historic resource.”

DISCUSSION

A conditional use is defined as “a use permitted in a particular zoning district pursuant to the provisions in Article VI” of the Pa MPC. 53 P.S. §10107(a). Thus, a conditional use is a permitted use, subject to an applicant’s proof of compliance with all

applicable conditions and criteria imposed by the Ordinance and reasonable conditions of approval imposed by the Board. A conditional use is not a use which the Board has the unfettered discretion to approve or deny. Rather, the Board is governed by the objective criteria and standards enunciated in the Ordinance when determining whether to grant an application.

If the Applicant can prove that they comply with the terms of the Ordinance authorizing a conditional use, the Board must grant the conditional use unless substantial evidence indicates that the use will result in substantial injury to the public interest. Susquehanna Twp. Board of Commissioners v. Hardee's Food Systems, Inc., 430 A.2d. 367 (Pa. Cmwlth. 1981); Appeal of Estate of Achey, 484 A.2d. 874 (Pa. Cmwlth. 1984), aff'd 501 A.2d. 249 (Pa. 1985); Joseph v. North Whitehall Township, 16 A.3d. 1209 (Pa. Cmwlth. 2011).

The fact that a use is permitted by conditional use evidences a legislative determination that such use would not have an adverse impact on public interests in normal circumstances. Joseph v. North Whitehall Township, 16 A.2d 1209 (Pa. Cmwlth. 2011).

In a conditional use hearing, an applicant has the burden of establishing that its proposed use complies with the specific and objective criteria of the zoning ordinance. Id. Once the applicant has met its burden, the conditional use must be granted unless a protestant presents "sufficient evidence to establish that there is a high degree of probability that the use will cause a substantial threat to the community." In re Cutler Group, Inc., 880 A.2d 39 (Pa. Cmwlth. 2005). To justify the denial of a conditional use,

the degree of harm alleged by a protestant must be greater than what would normally be anticipated by the permitted use. Id.

A protestant cannot meet its burden of proof by merely speculating as to a possibility of harm. Manor Healthcare Corp. v. Lower Moreland Twp. Zoning Hearing Bd., 590 A.2d 65 (Pa. Cmwlth. 1991); Marquise Investment, Inc. v. City of Pittsburgh, 11 A.3d 607 (Pa. Cmwlth. 2010). Moreover, lay opinions and concerns of protestants, without more, cannot serve as the basis for denying a conditional use application. See In re Brickstone Realty Corp., 789 A.2d 333 (Pa. Cmwlth. 2001) (noting that protestants failed to present expert testimony to substantiate claims of harm); Com. of Pa., Bureau of Corrections v. City of Pittsburgh, 532 A.2d 12 (Pa. Cmwlth. 1987) (holding that lay concerns of protestants must be supported by studies, reports, or objective testimony). In Com. of Pa., Bureau of Corrections, the applicant sought conditional use approval to operate a pre-release facility for state prisoners. Id. at 13. There, the protestants presented lay testimony that such a facility would decrease property value, increase the crime rate, and pose a threat to the female and elderly population within the city. Id. at 14. The Commonwealth Court stated:

The testimony of the neighborhood's residents, however, was not substantiated by facts but was no more than their bald assertions, personal opinions, and perceptions of the pre-release center and the area. [The protestants] did not present any studies, police records, property valuations or any type of substantive evidence upon which their fears were based, which would lead a reasonable mind to conclude that the facility would be detrimental to the community's general welfare.

Id. (emphasis added).

Here, the East Goshen Township Board of Supervisors has made the decision to grant the Application for conditional use relief, subject to the conditions specified within the Order below.

The additional conditions described in the Order below are imposed and attached pursuant to the authority of the MPC § 603(c) and Section 240-31.B(11) of the Ordinance and are subject to the following general principles. Unless a different mechanism is expressly required, compliance with these conditions shall ordinarily be established in the context of subsequent applications for building and use and occupancy permits and approvals. All conditions shall be complied with to the satisfaction of the Township. Any aspect of the said application or any revision thereto materially inconsistent with these conditions will require re-application to and re-hearing by the Board prior to such approval. Any violation of the conditions during or following construction will be treated as a violation of the Zoning Ordinance, subject to the enforcement mechanisms specifically detailed in MPC §§ 511 and 616-617, 53 P.S. §§ 10511 and 10616-10617.

Most fundamentally, this Decision and Order grants only conditional use approval in accordance with the express terms for the development as described in the Application and by the testimony and exhibits. Nothing contained in this Decision and Order shall be construed to abrogate or limit the obligation of the Applicant to comply with the applicable requirements of all of the Township's ordinances. Except as expressly augmented and clarified by these conditions, the use shall be in accordance with all of the otherwise applicable standards, specifications, and regulations of the Township and of all other agencies with jurisdiction over the Property, the development, or any aspect thereof. Any proposed development or use of the Property which would deviate from any

condition imposed pursuant to this Decision and Order or from the Applicant's testimony and exhibits as presented at the Hearing will require an additional conditional use application to and approval from the Board.

The Board, therefore, enters the following:

ORDER

AND NOW, this 7th day of March, 2023, the Board of Supervisors of East Goshen

Township hereby **ORDERS** the following:

1. The Application for a single-family open space development is hereby **GRANTED**, subject to the conditions hereinafter enumerated.
2. Pursuant to Section 240-38.6 of the Historic Preservation Ordinance, a modification from Section 210-23.B(2)(b)[2][c], permitting only one flag lot, is **GRANTED** to allow two (2) flag lots for the historic resources on the Property.
3. The Applicant shall comply with all outstanding comments contained in the Pennoni review letter dated October 27, 2022 (Exhibit B-10), to the satisfaction of the Township Engineer, as amended by this Order.
4. During the subdivision/land development process, the Applicant shall adequately address stormwater management, to the satisfaction of the Township Engineer, including but not limited to stormwater conveyances through the site from adjacent stormwater management facilities and any necessary stormwater easements.
5. The Applicant shall provide to the Township a sanitary sewer and pedestrian access easement approximately located between Lots 6 and 7, to the satisfaction of the Township. The pedestrian access easement shall be demarcated by post-and-rail fencing, stones, mulch, grass pavers, or the like. The pedestrian access easement shall be maintained by the homeowners' association and will be adequately addressed in the association's Declaration of Covenants, Conditions and Restrictions (the "Declaration") to the satisfaction of the Township. Notice of the easement shall also be provided to any prospective buyers of Lots 6 and 7 prior to execution of an agreement of sale. The Applicant shall complete the demarcation of the pedestrian access prior to the issuance of building permits for lots immediately adjacent to the easement area.
6. The "central green" located within the cul-de-sac shall be graded and maintained to allow for active recreation.
7. The Applicant shall preserve as much of the existing perimeter vegetation as possible. Any vegetation replaced pursuant to the Ordinance and/or the Township's Subdivision and Land

Development Ordinance (the "SALDO") shall be replaced with native and deer-resistant materials, wherever possible. Landscaping plans shall be reviewed by the East Goshen Township Conservancy Board and the Township Engineer to ensure compliance with the Ordinance and SALDO. Furthermore, the perimeter of the Property shall contain a traditional post-and-rail or equivalent fence that reuses the existing concrete posts, where possible.

8. The applicant shall design and install a 150' wide riparian forest buffer in accordance with the riparian buffer requirements outlined in 25 Pa. Code § 102.14 for the portion of stream within the subject property. Should the Applicant demonstrate to the Township that creation and maintenance of the entire 150' riparian buffer area is not possible for any portion of the Property, then the width of the buffer may be reduced by the Board of Supervisors, in their sole discretion, during the subdivision/land development process. Areas of existing woodland may be utilized to meet the riparian buffer requirements; however, these areas shall be reviewed by an arborist or qualified professional to ensure that the composition of plant life meets the requirements outlined. A plan shall be established to remove invasive species within the existing wooded areas and any areas of the riparian buffer. An operation & maintenance plan shall be developed for the riparian buffer to ensure that this buffer is maintained free of invasive species in perpetuity, with such plan being recorded with the approved final plans.
9. Maintenance of all landscaping on HOA-owned property, as well as all street trees, shall be the responsibility of the homeowners' association and will be addressed in the Declaration, to the satisfaction of the Township. All street trees shall be located outside of any road right-of-way.
10. Prior to recording the plans, the Applicant shall prepare and submit to the Township a shared access easement, as approved by the Township Solicitor, for the shared driveway servicing the two (2) flag lots.
11. The Applicant shall comply with the Township's ordinances regarding cartway width (Section 205-44) and sidewalks/paths (Section 205-56). Any waiver requests from these provisions will be considered by the Board of Supervisors during the subdivision/land development process.
12. The Applicant shall provide an offer of dedication of additional property along Hershey Mill Road for a potential future sidewalk or pathway.

13. Any future residential reuse of the historic barn shall require further approvals from the Township, pursuant to the Historic Preservation provisions of the Ordinance (Sections 240-38.1 through 240-38.11). During its ownership of the historic barn, the Applicant shall ensure that it is well maintained and does not fall into disrepair.
14. Prior to final plan approval, a Phase I Environmental Site Assessment for the Property shall be provided to the Township.
15. The use of the Property shall be in substantial conformity with the Applicant's application and the testimony and exhibits presented at the hearing on the application as determined by the Township, as amended by this Order.
16. The Applicant's conditional use shall be subject to compliance with all terms and provisions of the Ordinance and all other Township Ordinances and Regulations.
17. The attached Findings of Fact, Conclusions of Law, and Discussion are incorporated into this Order.
18. The Applicant shall execute and provide to the Township a recordable, notarized copy of a memorandum containing a metes and bounds description of the Property in question and stipulating the terms and conditions of this approval and shall consent to the recording by the Township in the office of the Recorder of Deeds of Chester County no later than the recording of the approved final plan. All recording costs shall be reimbursed by the Applicant within 30 days of receipt of an invoice from the Township.
19. The Applicant shall express to the Board in writing, delivered to the Township Office within 15 days of the Applicant's receipt of this Decision, its full and complete consent to the conditions specified herein above or the Application for conditional use approval is denied; the Board expressly finding and concluding that the Application, in the absence of compliance with the said conditions, is inconsistent with the standards, criteria, purposes and policies codified in Section 240-31 of the Ordinance.

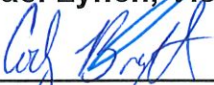
**BOARD OF SUPERVISORS
EAST GOSHEN TOWNSHIP**



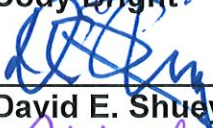
John Hertzog, Chair



Michael Lynch, Vice Chair



Cody Bright



David E. Shuey



Michele Truitt

ATTEST:



Derek J. Davis, Secretary