IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LTS Development, Inc.	:	
	:	
v.	:	No. 9 C.D. 2004
	:	Argued: June 11, 2004
Middle Smithfield Township Board of Supervisors,	:	
	:	
Appellant	:	

BEFORE: HONORABLE RENÉE L. COHN, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE CHARLES P. MIRARCHI, JR., Senior Judge

OPINION BY
SENIOR JUDGE MIRARCHI FILED: November 5, 2004

The Board of Supervisors of Middle Smithfield Township (Board) appeals from an order of the Court of Common Pleas of Monroe County striking and modifying 12 of the 29 conditions imposed by the Board in granting the application for a conditional use for a planned residential development (PRD) proposed by LTS Development, Inc. (LTS). We affirm.

LTS is the equitable owner of a 146.28-acre tract of land (Property) located between Hidden Lake Drive and Huckleberry Drive in Middle Smithfield Township (Township), Monroe County within the R-1 Conservation Residential zoning district where a PRD is permitted as a conditional use under Section 7.2700.C of the Township Zoning Ordinance (Ordinance). On August 22, 2002, LTS filed an application seeking approval of a conditional use proposing to develop the Property as a PRD, to be known as "Water Gap Preserve at Hidden Lake," with 97 single-family dwelling units. A tentative plan submitted by LTS showed 49.54 acres of lot areas, 11.51 acres of rights-of-way, and 85.23 acres of open space which included 36.25 acres of wetlands. LTS subsequently amended

the application to increase the proposed single-family units to 101 units.

Based on the evidence presented by LTS at hearings, the Board found that LTS' application met all the specific standards required for approval of a conditional use for a PRD under Section 3.601 (Standards for Conditional Uses) and Article 7 of the Ordinance (Planned Residential Development Regulations), and that the proposed development would not adversely affect the use or value of the adjacent properties. Board's Findings of Fact No. 10 and Conclusions of Law No. 2. Based on these findings, the Board approved LTS' application for a conditional use subject to 29 conditions. In its notice to the Board, LTS refused to accept the conditions imposed by the Board. LTS' application was then deemed to have been denied pursuant to Section 7.1406.C of the Ordinance.

LTS thereafter appealed the deemed denial of its application and challenged 13 of the 29 conditions, which required LTS to, *inter alia*, complete all improvements prior to issuance of a certificate for occupancy (Condition No. 3); construct nature trail and a pedestrian pathway system prior to sale of lots and construct active recreation areas (Condition No. 5); maintain a private ownership of all roads in the project (Condition No. 9); construct standing and parking areas for parents' cars at school bus stops (Condition No. 10); conduct a traffic impact study (Condition No. 12): conduct an environmental impact study (Condition No. 13); provide an access point for the nearby existing development's future sewage connection (Condition 19); install cluster mailboxes (Condition No. 21); eliminate Lot No. 46 (Condition No. 23); notify the adjacent property owners of the proposed use, the proposed upgrade of Huckleberry Drive and the possible effect of the proposal on their properties (Condition No. 24); replace all items removed to upgrade Huckleberry Drive to prevent adverse impact on the adjacent lot owners

(Condition No. 26); maintain a private ownership of the sewer line and pay all costs for connecting sewer lines to the neighboring properties (Condition No. 27); and, accept its liabilities for any damages caused by the upgrade of Huckleberry Drive (Condition No. 28).

After argument of counsel, the trial court reversed the deemed denial of LTS' application and rejected LTS' challenge to Condition No. 19 as moot. Concluding that the other 12 conditions are unreasonable and are not supported by the record, the trial court modified Conditions Nos. 3, 5 and 24 and struck the remaining 9 conditions. The Board appealed challenging the 12 conditions modified and stricken by the trial court.[1]

In approving a conditional use, the governing body "may attach such reasonable conditions and safeguards, other than those related to off-site transportation or road improvements, in addition to those expressed in the ordinance, as it may deem necessary to implement the purposes of this act and the zoning ordinance." Section 603(c)(2) of the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §10603(c)(2). Section 3.601 of the Ordinance similarly provides that conditional uses "may be subject to any additional conditions and safeguards, … which may be warranted by the character of the areas … or by other special factors and which are necessary to implement the purposes of this Ordinance."

It is well established, however, that by permitting a particular use as a

[1] This Court's scope of review in a land use appeal, where, as here, the trial court did not take additional evidence, is limited to determining whether the governing body committed an error of law or abused its discretion. *Ruf v. Buckingham Township*, 765 A.2d 1166 (Pa. Cmwlth. 2001). The governing body abuses its discretion when its findings are not supported by substantial evidence, i.e., such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Valley View Civic Ass'n v. Zoning Board of Adjustment*, 501 Pa. 550, 462 A.2d 637 (1983).

conditional use, the governing body has determined that such use would not have adverse impact upon the public interest in normal circumstances. *Bailey v. Upper Southampton Township*, 690 A.2d 1324 (Pa. Cmwlth. 1997). Consequently, the governing body must demonstrate that the conditions imposed in granting a conditional use are reasonably related to the public health, safety and welfare. *Clinton County Solid Waste Authority v. Wayne Township*, 643 A.2d 1162 (Pa. Cmwlth. 1994).

The Board contends that the 12 conditions in question are reasonably related to the purposes of protecting environment, dwelling unit purchasers and adjacent property owners and reducing traffic problems.

In its comprehensive and well-reasoned opinion, the trial court thoroughly and ably addressed the issue of whether the Board was justified in imposing the conditions in question. Accordingly, we affirm the trial court's decision on the bases of the opinion of the Honorable Ronald E. Vican, President Judge of the Court of the Common Pleas of Monroe County, filed in *LTS Development, Inc. v. Middle Smithfield Township Board of Supervisors*, ___ Pa. D.&C. 4th ___ (No. 3131 Civ. 2003, filed December 5, 2003).

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CHARLES P. MIRARCHI, JR., Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LTS Development, Inc.	:	
	:	
v.	:	No. 9 C.D. 2004
	:	
Middle Smithfield Township Board of Supervisors,	:	
	:	
Appellant	:	

O R D E R

AND NOW, this 5th day of November, 2004, the order of the Court of Common Pleas of Monroe County in the above-captioned matter is affirmed on the bases of the opinion of the Honorable Ronald E. Vican, President Judge of the Court of the Common Pleas of Monroe County, filed in *LTS Development, Inc. v. Middle Smithfield Township Board of Supervisors,* ___ Pa. D.&C. 4th ___ (No. 3131 Civ. 2003, filed December 5, 2003).

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CHARLES P. MIRARCHI, JR., Senior Judge

COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

LTS DEVELOPMENT, INC.,	:	**NO. 3131 CIVIL 2003**
Appellants	:	
	:	
vs.	:	
	:	
THE MIDDLE SMITHFIELD	:	
TOWNSHIP BOARD OF SUPERVISORS,	:	
Appellee	:	**LAND USE APPEAL**

OPINION

On August 12, 2002, LTS Development, Inc., (hereinafter "LTS"), submitted an application for a public hearing to the Middle Smithfield Township Board of Supervisors (hereinafter "Board") regarding its proposed Planned Residential Development ("PRD"). Public Hearings were held on November 12, 2002; January 13, 2003; and January 30, 2003. On April 1, 2003, the Board approved LTS's proposed tentative plan for the PRD, but imposed twenty-nine conditions on the approval. On April 29, 2003, LTS notified the Board that it refused to accept the Board's conditions. LTS's refusal deemed the approval to be a denial by operation of law under Section 7.1406.C of the Middle Smithfield Zoning Ordinance. On April 30, 2003, LTS filed a Notice of Appeal which objected to 13 of the 29 conditions imposed by the Board.

On September 2, 2003, oral argument was held on this matter, and both sides have submitted briefs in support of their positions.

DISCUSSION

LTS asserts that the Board abused its discretion with regard to 13 of the 29 conditions imposed by the Board. As relief, LTS requests that this court "reverse the deemed denial" and "overrule, strike off, and reverse the conditions delineated above imposed by the Appellee in its Decision." [Notice of Appeal, p. 9.]

The Board of Supervisors requests that this court affirm the 13 conditions, but also suggests that this court may (1) modify conditions or impose this court's own conditions; or (2) reject the conditions but allow the Board to reconsider more reasonable conditions.

This case centers on a planned residential development application. Under the Middle Smithfield Township Zoning Ordinance (hereinafter "Ordinance"), PRDs are permitted as conditional uses in R-1 zones. 7.2700(C). The standards for conditional uses are provided in Section 3.601 of the Ordinance as follows:

> Such "Conditional Uses" which are authorized by the Board of Supervisors shall be subject to the following standards *and also may be subject to any additional conditions and safeguards* as may be established by the Board of Supervisors in each case, which may be warranted by the character of the areas in which such uses are proposed or by other special factors and which are necessary to implement the purposes of this Ordinance.

(Emphasis added.) This provision allows the Board to impose conditions when approving a conditional use. The Municipalities Planning Code authorizes a municipality to create such an ordinance as follows:

> In allowing a conditional use, the governing body may attach such reasonable conditions and safeguards, other than those related to off-sites transportation or road

> improvements, in addition to those expressed in the ordinance, as it may deem necessary to implement the purposes of this act and the zoning ordinance.

53 Pa.C.S.A. § 1063(c)(2). This provision authorizes a governing body, such as a board of supervisors, to impose "reasonable conditions and safeguards" upon a conditional use. When conditions are imposed upon a conditional use, those conditions must be reasonable. *See* State College Borough Water Authority vs. Bd. of Supervisors of Benner Township, 645 A.2d 394, 400 (Pa. Cmmw. 1994); *see generally,* Young Men & Women's Hebrew Ass'n v. Borough Council of the Borough of Monroeville, 240 A.2d 469, 471 (Pa. 1968). Where an applicant has satisfied the initial requirements of a conditional use application, the burden is on the board of supervisors to justify the conditions imposed. Clinton, *supra* at 1169, n. 11. Generally, reasonable conditions and safeguards imposed by a board of supervisors will be upheld on appeal where the conditions are reasonably related to the health, safety, or welfare of the public. Clinton Solid Waste Authority v. Wayne Township, 643 A.2d 1162, 1169 (Pa. Cmmw. 1994). However, a condition will be stricken where it is inconsistent with Department of Environmental Resources, Clinton, *supra* at 1169; where a condition is pre-empted by an interstate compact, Levin v. Bd. of Supervisors of Benner Township, 669 A.2d 1063, 1077 (Pa. Cmmw. 1995); or where a condition constitutes a taking without just compensation, Bd. of Supervisors of West Marlborough Township v. Fiechter, 566 A.2d 370 (Pa.Cmmw.1989).

Where a court receives no additional evidence in a land use appeal from a decision of the board of supervisors, the standard of review is whether the board of

supervisors committed an abuse of discretion, an error of law, or made findings that are not supported by substantial evidence. Newtown Bd. of Supervisors v. Greater Media Radio Co., 587 A.2d 841, 843 (Pa. Cmmw. 1991), *citing* Susquehanna Township Bd. of Commissioners v. Hardee's Food Systems, Inc., 430 A.2d 367 (Pa. Cmmw. 1981). "If the Board's decision is legally sound and supported by substantial evidence, it must be upheld." Curtis Investment Co. v. Zoning Hearing Bd., Borough of West Mifflin, 592 A.2d 813, 814 (Pa. Cmmw. 1991). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Sweeney v. Zoning Hearing Bd. of Lower Marion Township, 626 A.2d 1147, 1150 (Pa. 1993), *citing* Valley View Civic Assn. v. Zoning Bd. of Adjustment, 462 A.2d 637 (Pa. 1983).

At issue in this case is whether the 13 conditions raised on appeal are "reasonable conditions and safeguards." Under the MPC and Clinton, a board may impose "reasonable conditions and safeguards" that are reasonably related to the public's health, safety, and welfare. A board must base its decision on substantial evidence. With this in mind, we will now examine each of the 13 conditions raised on appeal.

Condition No. 3

Condition No. 3 requires as follows:

> 3. The arrangement of the entrance roads and driveways shall be in compliance with requirements of the Pennsylvania Department of Transportation, and the Township of Middle Smithfield, and any and all improvements required shall be in place prior to the

> issuance of any certificate of compliance by the Township for occupancy of any building.

[Board of Supervisors Decision, April 1, 2003, pp. 6-7.]

LTS asserts that the Board lacks the authority at the tentative approval stage to impose a condition regarding the issuance of a permit of occupancy. LTS notes that the Ordinance and the MPC allow a developer to obtain final plan approval by posting a performance bond and entering into an improvements agreement. 53 Pa.C.S.A. § 10711; Ordinance §§ 7.1800-7.200. Therefore, they argue that the Board abused its discretion by conditioning the approval of a tentative proposal on matters that properly fall under final plan approval.

LTS also claims that Condition No. 3 imposes unreasonable costs on LTS. [Decision, 4/1/03, p. 7.] LTS reads the language in Condition No. 3 as referring to "all improvements" in the development, not just the roads. Therefore, LTS argues that Condition No. 3 imposes unreasonable costs on LTS that could be assured by a performance bond.

The Board claims that Condition No. 3 applies only to road-related improvements, not "all improvements." The Board asserts that Condition No. 3 is reasonable and appropriate because it insures that new home owners will be able to use a road to access their new homes.

Under the MPC, Clinton, and the Ordinance, a board is permitted to attach reasonable conditions and safeguards. However, this court agrees with LTS that Sections 7.1800 through 7.2000 of the Ordinance already insure the construction of improvements in the final approval procedures. Further, the additional expense imposed on LTS by

Condition No. 3 would be unreasonable in light of the procedures accompanying final approval which allow an applicant to post a performance bond and execute an improvements agreement. Finally, there is not substantial evidence in the record to support the Board's position that such measures in addition to a performance bond are necessary. Therefore, Condition No. 3 is not a reasonable condition or safeguard.

Accordingly, the language requiring that "any and all improvements required shall be in place prior to the issuance of any certificate of compliance by the Township for occupancy of any building" will be stricken.

Condition No. 5

Condition No. 5 requires as follows:

> 5. The developer shall construct and complete a nature trail and a comprehensive pedestrian pathway system available on all major roadways prior to sale of any lots. The nature trail shall be maintained in its existing state but shall be clear of any tripping hazards. The pedestrian pathway shall be a graded gravel-surface path, with a weed barrier, designed to fit into a natural setting. There shall be an easement contained in each deed granting rights to the nature trail and pedestrian pathway, and maintenance responsibility for the same shall be clearly identified. The developer shall construct and complete recreational areas to be usable areas suitable for active recreation. The recreational areas shall be appropriate to the scale and character of the development. The actual location, size, and nature of the recreational areas shall be proposed by the developer with justifications for approval by the Township during the land development plan approval process.

[Board of Supervisors Decision, April 1, 2003, pp. 7-8.]

-Completion of the Trail and Path Prior to the Sale of Lots

LTS supplemented their initial tentative plan to allow for the building of pedestrian pathways and nature trails, and they presented evidence at the public hearing regarding proposed designs for these pathways and trails. [N.T., 1/30/03, pp. 9-12.] However, LTS asserts that the Board abused its discretion by requiring the completion of the proposed nature trail prior to the sale of any lots. We agree.

As addressed above under "Condition No. 3," completion of the nature trail could be assured through the posting of a performance bond and an improvement's agreement at final approval. There is not substantial evidence in the record to indicate otherwise. Therefore, the requirement that the trail and path be completed before the sale of lots will be stricken.

-Active Recreation Area

LTS also asserts that the Board abused its discretion by requiring the reservation of areas suitable for "active recreation." LTS reasons that since the Board found that LTS met all of the requirements for a conditional use permit, the Board should not be permitted to impose "an indefinite, unspecified, and undefined requirement for 'active recreation.'" [Appellant's Brief, 8/18/03, p. 14.]

The Board asserts that requiring areas for active recreation other than a road or pathway is a reasonable and appropriate condition. In their brief, the Board states that they intended for LTS to "establish an area where, for example, children might

be able to throw a ball around and to have active recreation other than on a road or pathway." [Appellee's Brief, 8/29/03, p. 10.]

In its Findings of Facts and Conclusions of Law, the Board stated that LTS had met all of the applicable requirements of Article 7 as well as the requirements for a conditional use. [Decision, 4/1/03, p. 5.] Section 7.2103 of the Ordinance addresses "natural features" in the common open space and requires as follows:

> At least thirty (30%) percent of the gross area of the common open space must be other than flood plain, wetlands or steep slope areas and shall be suitable for an active recreation area.

LTS's Application specified that 38.11% of the open space does not include slopes or wetlands and would be suitable for various recreation uses. The Board found that LTS met the requirements of Article 7, which include the provision regarding active recreation in Section 7.2103. Therefore, according to the Board's own findings, at least 30% of the open space is suitable for active recreation.

The MPC and the Ordinance permit the Board to impose additional conditions so long as they are reasonable conditions and safeguards that are necessary to implement the purpose of the ordinance. Under Clinton, after an applicant meets the initial requirements for a conditional use application, the board must justify imposing the additional conditions. In the instant matter, the Board must justify that requiring LTS to construct an active recreation area is a reasonable condition and safeguard that is necessary to implement the purpose of the ordinance. The Board did not make any findings of fact that justify how requiring additional active recreation areas is a

reasonable condition that implements the purpose of the Ordinance, and the record does not include substantial evidence to support such a finding.

We conclude that the additional "active recreation area" required under Condition No. 5 is unreasonable. Therefore, the language requiring the trails to be completed before the sale of lots and the language requiring "recreation areas to be usable areas suitable for active recreation" will be stricken.

Condition No. 9

Condition No. 9 requires as follows:

> 9. All roads in the project shall remain privately owned. The developer shall establish adequate arrangements and provisions for regular year-round maintenance of all roads within the development.

[Board of Supervisors Decision, April 1, 2003, p. 8.]

LTS asserts that the Board imposed this condition without any factual or legal basis. LTS claims that the Board abused its discretion by interfering with the following: (1) a future board of supervisor's ability to accept the dedication of the roads; (2) the lot owner's statutory right to petition the Board to accept the dedication of the roads; and (3) the public's common law right to accept LTS's offer of dedication of the roads.

The Board asserts that they are not required by law to accept the roads.

-Effect of Condition No. 9 on Future Boards

LTS argues that the current Board cannot bind a future Middle Smithfield Board of Supervisors by its decision to keep the roads private. The Board denies that Condition No. 9 would bind a future board of supervisors. In their brief, the Board states:

> There is no basis for the LTS allegation that the "private" road requirement would be binding in perpetuity on the property. It is clear that a future majority of the Township Board could take official action to accept the said roads as public roads should the same be offered at that time." [Appellee's Brief, 08/29/03, p. 11.]

This concession by the Board clearly shows that the Board did not intend to bind a future board of supervisors.

Roads plotted on a subdivision plan submitted to a board of supervisors are implicitly offered for dedication. *See* National Christian Conference Center v. Schuylkill Township, 597 A.2d 248, 250 (Pa. Cmmw. 1994); *citing* Elliott v. H.B. Alexander & Son, Inc., 399 A.2d 1130 (Pa. Cmmw. 1979); Bieber v. Zellner, 220 A.2d 17, 18 (Pa. 1966). 53 Pa.C.S.A. § 67317(a) states in relevant part as follows:

> No person shall construct, open or dedicate any road or any drainage facilities for public use or travel without first submitting plans thereof to the board of supervisors for its approval.

When roads are approved by a board of supervisors as part of a plan, roads do not become the responsibility of the township to construct, reconstruct, or maintain. 53 Pa.C.S.A. § 67317(g). Rather, a board of supervisors has the power to accept roads that were approved, recorded, and offered for dedication and make them part of the public road system. 53 Pa.C.S.A. § 67316. Acceptance by the township must occur

within 21 years. 36 Pa.C.S.A. § 1961; *see* National Christian Conference Center, *supra*, at 250. These provisions provide a board of supervisors with the power to accept an offer of dedication of roads.

In light of the Board's concession that Condition No. 9 does not bind future boards, the condition is equivalent to the Board refusing to accept LTS's offer of dedication of the roads. As interpreted by the Board, Condition No. 9 merely restates the Board's authority to refuse to accept LTS's current offer of dedication. The Board's own interpretation of the condition eliminates the conflict between the power of the Board to require a future board of supervisors to refuse an offer of dedication of the roads.

However, the plain language of Condition No. 9 suggests that the roads "shall remain privately owned" in perpetuity. This phrase appears on its face inconsistent with the Board's stated intention that a future board of supervisors would not be bound by the condition. Therefore, Condition No. 9 will be stricken to ensure that a future board of supervisors is aware of the current Board's intention. Accordingly, a future board may accept a dedication of these roads under the power granted to them by 53 Pa.C.S.A. § 67316. Until LTS's offer of dedication is accepted, the road will remain a private.[1]

[1] Since we have concluded that Condition No. 9 was not intended to bind a future board of supervisors, there is no need to address the other arguments raised by LTS. In particular, this Court will not consider whether the owners of lots in the PRD have the right to request acceptance of the dedication of the roads by the Middle Smithfield Township Board of Supervisors.

Condition No. 10

Condition No. 10 requires as follows:

> 10. The developer shall provide a suitable standing and parking area for parents' cars at school bus stop areas, including the widening of shoulder areas.

[Board of Supervisors Decision, April 1, 2003, p. 8.]

LTS opposes Condition No. 10 on several grounds. LTS asserts that the Board failed to lay out any factual basis for Condition No. 10. They also assert that if the roads remain private, East Stroudsburg School District might not enter the development. Additionally, LTS cites Bd. of Supervisors of West Marlborough Township v. Feichter, 566 A.2d 370 (Pa. Cmmw. 1989), for the proposition that a board of supervisors may not condition the approval of an application on the dedication of a public right of way. LTS also asserts that Condition No. 10 can be interpreted to require the developer to devote off-site land, lot space, or common space of the future owners to create school bus stops in violation of 53 Pa.C.S.A. § 10503-A. [Appellant's Brief, p. 24.] However, LTS concedes the following:

> Notwithstanding the foregoing, Appellant does not object to creating an area within the width of the Township required right-of-way for street in the Water Gap Preserve PRD within which the Appellant will, in effect, agree during the development period of the PRD to pave an area of the berm to provide a standing area for school children at a bus stop location designated by the East Stroudsburg Area School District (if the District will pick up children in the PRD).

The Board maintains that Condition No. 10 is reasonable and appropriate condition. The Board states that the developer should "make some reasonable provision

within the road rights-of-way for additional paved shoulder areas to reasonably accommodate parents' vehicles." [Appellee's Brief, p. 18. (Emphasis added.)

In light of this court's decision to strike Condition 9, it becomes possible that a future Board would accept LTS's offer of dedication of the PRD's roads. Therefore, LTS's argument that East Stroudsburg school buses might not stop within the development because the roads must remain private is rendered moot. Based on the Board's concession that the bus stops would only be required on the right of way, LTS's argument that Condition No. 10 would require off site improvements is also rendered moot.

We disagree with LTS that Condition No. 10 would constitute a taking in the form of a public right of way. It is the developer who has chosen to offer the roads to the Township for dedication, not the Board who has demanded the creation of a public right of way as a prerequisite to approval. This leaves the issue of whether Condition No. 10 is a reasonable condition and safeguard.

Condition No. 10 requires LTS to create permanent bus stops within the right of way. We agree with LTS that it cannot be determined where the best place for school bus stops will be until families with school age children actually move into the development. The Board failed to make any findings of fact regarding the need for or location of permanent school bus stops in its Decision, and the record does not include substantial evidence to support such a finding. In the Board's brief, they claim as follows, "It is obvious that within a development of 100 lots there will be school-age children." [Appellee's Brief, p. 17.] Additionally, they stated that the condition is

necessary to avoid road blockages caused by parent's vehicles parked at the future bus stops. [Appellee's Brief, p. 17.] However, these reasons fall short of the forming substantial evidence to support the installation of permanent bus stops within the right of way.

Therefore, requiring LTS to construct permanent bus stops is not a reasonable condition and safeguard, and Condition No. 10 must be stricken.

Condition No. 12

Condition No. 12 requires as follows:

> 12. The developer shall provide a traffic impact study showing the impact on local roads and showing how any adverse impacts are to be mitigated.

[Board of Supervisors Decision, April 1, 2003, p. 8.]

LTS asserts that the Board is without any basis to impose this condition since the Board already found that LTS completed the traffic study required under Section 7.1105(F)(3) of the Ordinance. LTS reasons that since they met the initial traffic study requirement and were granted tentative approval, the Board may not require them to complete a more stringent traffic study then the planned residential development ordinance imposes.

The Board asserts that Condition No. 12 is reasonable and appropriate in light of the effect that the proposed PRD will have on the local road system. The Board argues that "pre-development and post-development traffic studies are needed to make proper future community planning decisions." [Appellee's Brief, p. 18.]

In the Board's Decision, they concluded as a matter of law that LTS satisfied the requirements set forth in Section 3.601 and Article 7 of the Ordinance. Therefore, the Board found that LTS complied with the requirements under Section 7.1105(f)(3). In its Conclusions of Law, the Board also stated that under Section 3.601 of the Ordinance. As stated in the general discussion section above, the Board has the power to impose additional conditions upon the approval of a tentative plan which is authorized by 53 Pa.C.S.A. § 1063(c)(2):

> In allowing a conditional use, the governing body may attach such reasonable conditions and safeguards, *other than those related to off-sites transportation or road improvements*, in addition to those expressed in the ordinance, as it may deem necessary to implement the purposes of this act and the zoning ordinance.

(Emphasis added.) The plain language of this statute indicates that a board is not allowed to attach any conditions related to off-sites transportation or road improvements.[2]

We conclude that Condition No. 12 relates to off-site transportation and road improvements and, therefore, under 53 Pa.C.S.A. § 10603(c)(2), the Board lacks the power to attach such a condition. Condition No. 12 must be stricken.

We also agree with LTS that the Board had no factual basis for further traffic studies. The Board's finding of facts fails to point to any basis for the imposition of Condition No. 12; and based on an analysis of the record in this case, it is clear that the necessity of further traffic studies did not arise during the public hearings.

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[2] Additionally, it is well settled that a governing body may not base the denial of a zoning application merely on an increase of traffic. *See* Doran Investments v. Muhlenberg Township, 309A.2d 450, 458 (Pa. Cmmw. 1973), *citing* Archbishop O'Hara's Appeal, 131 A.2d 587 (Pa. 1957).

During the public hearings, Deborah Kulick, the Chairman of the Board of Supervisors, questioned Christopher McDermott, LTS's civil engineer, on the potential traffic impact as follows:

> Kulick: Unless there's someone else who can address the road usage, what would you anticipate the traffic would be? I know what the studies have shown and where do you anticipate most of the traffic coming in and out? I'm just curious and then I'll ask a question specific to that.
>
> McDermott: I'd anticipate that there would be a distribution of traffic along Huckleberry and to Hidden Lake Drive. So, I would anticipate that perhaps this potion would utilize this access and would be closer to the homes.
>
> Kulick: 60% to Huckleberry maybe?
>
> McDermott: Yeah, I think that could be fair.
>
> Kulick: And we know that there's expected to be each day about 928 trips in and out of this development when it's completed.
>
> McDermott: I think that could be a fair number. You know, according to – that would be close to what the ITE would report and that's the number you would use in planning.

[N.T., 1/13/2003, p. 35-36.] This brief exchange demonstrates that the Board knew what LTS's traffic study had shown and was aware of the potential traffic impact. The record does not support the notion that this PRD will create a traffic problem. Under Clinton, a board must justify the conditions they choose to impose. Here, there was not substantial evidence to support the Board's imposition of Condition No. 12. Therefore, the Board abused its discretion by imposing Condition No. 12 and it must be stricken.

Condition No. 13

Condition No. 13 requires as follows:

> 13. The developer shall provide an environmental impact study, due to the extensive wetlands on the property, including water quality testing of surface waters before and after construction of roads and drainage facilities.

[Board of Supervisors Decision, April 1, 2003, pp. 8-9.]

LTS asserts that there is no factual basis for the imposition of Condition No. 13 and points to the Board's Decision which concludes that all initial requirements have been met. Further, LTS argues that the environmental impact falls under the jurisdiction of the Monroe Conservation District and the Pennsylvania Department of Environmental Protection.

The Board responds that the site of the proposed PRD poses specific environmental problems because of a large amount of steep slopes, wetlands, and bodies of water. They maintain that Condition No. 13 is reasonable and appropriate.

Under Clinton, the Board may attach reasonable conditions and safeguards to a tentative approval. However, the record does not include any testimony that describes why requirements are needed in addition the current requirements and procedures for stormwater drainage.

At the public hearings, Christopher McDermott, a civil engineer for LTS, testified as follows on direct examination by Attorney Marc Wolfe:

> Attorney Wolfe: In your professional opinion are there any characteristics of this property that would prevent LTS from obtaining an adequacy letter from the Monroe County Conservation District with regard to erosion and sedimentation control?

Mr. McDermott: No

Attorney Wolfe: In your professional opinion is there any characteristic of this property or the project that in your professional opinion would preclude or prevent LTS from obtaining an NPDES permit?

Mr. McDermott: No.

Attorney Wolfe: Are you aware of any reason why this project cannot conform with all of the applicable stormwater management erosion and sedimentation control standards:

Mr. McDermott: No.

[N.T., 11/12/02, pp. 31-32.]

Fred May, Vice Chairman of the Board, asked Mr. McDermott why the County Planning Commission was encouraging the Board to consider treatment facilities or to implement a monitoring program for stormwater flowing into the wetlands of the PRD. [N.T., 1/13/03, pp. 38-39; Letter of Monroe County Planning Commission to Sherry Predmore, 9/12/02, p. 3.] Mr. McDermott indicated that LTS's plans to manage surface water will have to be reviewed by the conservation district prior to the construction phase and that best management practices may be appropriate. [N.T., 1/13/03, pp. 38-39.]

On redirect, Mr. McDermott testified as follows:

Attorney Wolfe: With respect to the stormwater design that you have contemplated for this project is it your testimony that the proposed stormwater design will meet or exceed all of the township requirements?

> Mr. McDermott: Yes, and that would be a requirement that we'd have to meet. We'd have to meet the test of those requirements at the final plan phase when detailed stormwater management plans would have to be completed and submitted to not only the township, but to the conservation district.
>
> Attorney Wolfe: And you have heard the concern expressed by this one board member as to the stormwater quality. Is it your expectation that this project will be able to be designed to meet the county conservation district requirements for best management practices as it may impact stormwater quality?
>
> Mr. McDermott: Yes.

[N.T., 1/13/03, pp. 45-46.]

On recross by Patricia A. Griffin, a protestant, Mr. McDermott clarified that both the developer and the conservation district will have to make inspections during construction. [N.T., 1/13/03, p. 55.] Mr. McDermott also clarified that the conservation district would respond to any specific complaints regarding stormwater and that the township also performs reviews.

It was Mr. McDermott's professional opinion that the stormwater management plan would meet the conservation district and any Pennsylvania Department of Environmental Protection requirements. On re-cross, Mr. McDermott described the required monitoring procedures. There is not substantial evidence in the record to support the imposition of wetland monitoring requirements in addition to those described by Mr. McDermott. Additionally, in the absence of any need for monitoring procedures in addition to the procedures already required, Condition No. 13 is unreasonable.

Therefore, the Board abused its discretion by imposing Condition No. 13, and Condition No. 13 will be stricken.

Condition No. 19

Condition No. 19 requires as follows:

> 9. The developer shall provide an access point into the development known as Winona Lakes, Section 1, to provide for future connection into the municipal sewage interceptor lines.

[Board of Supervisors Decision, April 1, 2003, p. 9.]

In LTS's brief, they made the following concession:

> The Developer does not object to providing an easement in favor of the Township Sewer Authority so that a future connection can be made between the sanitary sewage collection system serving the Winona Lakes subdivision and the sanitary sewage collection system serving the Water Gap Preserve PRD, however, the Developer objects to a connection of the Winona Lakes sanitary sewage system to the PRD sanitary sewage system if the PRD sanitary sewage system is not owned by the Township Sewer Authority and must remain private ...

[Appellant's Brief, 8/18/03, p. 28.]

The Board also conceded as follows:

> Any future extension would obviously be conditioned upon municipal acquisition of the intervening sewage collection system. There was no intention by the Township Board to mandate that LTS be responsible for conveyance of sewage from Winona Lakes, Section 1.

In light of this court's conclusion that the Board cannot mandate that the sewer system remain private[3] and the Township Board's concession that any future extension would be conditioned upon the municipal authority acquiring the sewage system, LTS's objection to Condition No. 19 is rendered moot.

Condition No. 21

Condition No. 21 requires as follows:

21. The developer shall provide for cluster mailboxes.

[Board of Supervisors Decision, April 1, 2003, p. 9.]

LTS asserts that the Board exceeded its jurisdiction by mandating that LTS provide cluster mail boxes. LTS maintains that the decision to regulate the design and type of mail boxes rests exclusively with the United States Postal Service. [Appellant's Brief, 8/18/03, pp. 29-30.]

The Board asserts that this condition is in accordance with United States Postal Department regulations and standards, and that it would "organize the delivery of rural mail and avoid the haphazard location of mailboxes at each property." [Appellee's Brief, 8/29/03, p. 20.]

Congress granted the Postal Service the specific power to provide for the collection and delivery of mail. 39 U.S.C. § 404(a)(1). Congress also granted the Postal Service the general power to adopt, amend, and repeal rules and regulations to further its authorized purposes; and they granted the Postal Service all incidental powers in carrying

[3] See the court's discussion of Condition No. 27 below.

out its specific powers. 39 U.S.C. § 401(a)(2)(10). Under 39 C.F.R. § 111.1 the Domestic Mail Manual was incorporated by reference into the Federal Register. The Domestic Mail Manual D-22 provides for the delivery of rural mail as follows:

> **10.0 RURAL DELIVERY SERVICE**
>
> **10.1 Establishment**
> Rural stations and branches are established, and rural delivery is provided, according to USPS policies and procedures, the characteristics of the area to be served, and the methods needed to provide adequate service. Requests or petitions to establish, change, or extend rural delivery service, signed by the heads of families wanting this service, must be given to the postmaster of the post office from which delivery service is desired, or from which the route operates, as applicable.
>
> **10.2 Exception**
> On the customer's written request, the postmaster may approve an exception to the currently authorized method of delivery, if the type of rural delivery authorized imposes an extreme physical hardship.
> ...
>
> **10.6 Mailboxes**
> Rural mailboxes must meet the standards in D041 for installation, location, and use.

DMM Issue 58 plus Postal Bulletin changes through PB 22115, p. 180-181 (11-13-03).

> D041.2.7 provides in relevant part as follows:
>
> Subject to state laws and regulations, a curbside mailbox must be placed to allow safe and convenient delivery by carriers without leaving their vehicles. The box must be on the right-hand side of the road in the direction of travel of the carriers on any new rural route or highway contract route, in all cases where traffic conditions are dangerous for the carriers to drive to the left to reach the box, or where traffic conditions are dangerous for the carriers to drive to

> the left to reach the box, or where their doing so would violate traffic laws and regulations.

DMM Issue 58 plus Postal Bulletin changes through PB 22115, p. 168 (11-13-03). D041.2.7 subjects the location of a curbside mail box to applicable state laws and regulations while mandating that the box be placed to allow delivery by carriers without leaving their vehicles. Under D040.10.1, rural delivery is determined by Postal Service policies and procedures, the characteristics of the area, and the methods needed to provide adequate service. Further, the local postmaster may grant a request to change the type of service.

Although not a binding regulation, United States Postal Service Publication 265-A, "Centralized Mail Delivery – Residential Applications," defines "Cluster Box Units" and "Neighborhood Delivery Centers" as follows:

> Neighborhood Delivery Centers: A Neighborhood Delivery Center is a free-standing sheltered or enclosed installation containing a large number of individually locked mounted boxes.
>
> Cluster Box Units (CBUs): CBUs are free-standing, pedestal mounted mail boxes containing 8, 12, 13, or 16 individually locked mail boxes and parcel compartments. Installations can be modified to blend with any community décor.

The post office encourages planning for centralized mail systems to take place at the planning phase of a development. Publication 265-A refers developers, builders, and owners to their local Post Office for more information on applying for a centralized mail system.

The Domestic Mail Manual makes it clear that the local postmaster determines the type of rural mail delivery most appropriate for the area according to national policies and procedures. Although an application for a cluster box could be placed with the local postmaster, the decision would rest with the local postmaster.

At issue in this appeal is whether the Township can require the use of cluster boxes in light of the statutory and regulatory authority of the Postal Service.[4] Although no Pennsylvania courts have decided this issue, a similar issue was raised in Grover City v. United States Postal Service, 391 F.Supp. 982 (C.D.C.A. 1975). In Grover, the city council adopted a resolution which required that all mailboxes be set back at least six inches from the city sidewalks. The council passed the resolution upon finding that mailboxes on the sidewalk created a hazard and detracted from the visual appearance of the neighborhoods. Once the mailboxes were set back, their location no longer complied with the Postal Service regulations regarding curbside delivery. Therefore, the Postal Service provided for general delivery, where the residents would have to come to a post office to pick up their mail. The residents and the city sued to compel the Postal Service to institute home delivery. Id. at 983-985.

In Grover, the court refused to grant the injunction and held that the regulations regarding the method of postal delivery service were not arbitrary or capricious. The court also stated that if any conflicts existed between the city ordinance and the postal regulations, the postal regulations would preempt the ordinance.

[4] Nor does it appear that Pennsylvania case law has addressed this issue. *See* Miller v. Nichol, 526 A.2d 794, 796 n.2 (Pa. Super. 1986).

Conditions imposed upon the grant of approval on a conditional use have been stricken where preempted by interstate compacts. State College Borough Water Authority v. Board of Supervisors of Halfmoon Township, 659 A.2d 640, 644 (Pa. Cmmw. 1995). In Pennsylvania, the doctrine of preemption applies whether the federal law is a statute or a regulation. Carolina Freight Carriers v. Com., Pennsylvania Human Relations Com'n, 513 A.2d 579 (Pa. Cmmw. 1986), *citing* Fidelity Federal 458 U.S. 141, 153 (1982). Where a state law conflicts with a federal law, the state law is nullified. Id. In this appeal, it is clear that solely the local postmaster has been granted the authority to make decisions regarding the method of delivery for rural mail routes. Since Condition No. 21 rests on the supposition that the Board has the authority to mandate the type of mail delivery that this PRD will receive, a conflict between state and federal law exists. Condition No. 21 is preempted by federal law, and it must be stricken.

Condition No. 23

Condition No. 23 requires as follows:

> 23. The developer shall eliminate Lot No. 46, which does not meet the SALDO irregular lot configuration requirements.

[Board of Supervisors Decision, April 1, 2003, p. 9.]

LTS asserts that the Subdivision and Land Development Ordinance (SALDO) lot requirements are inapplicable to a PRD application. The Board responds that the condition is reasonable.

We agree with LTS that applications for planned residential developments must be evaluated under the planned residential development ordinance, not the municipality's general zoning ordinance. Doran Investments v. Muhlenberg Township, 309 A.2d 450, 456-457 (Pa. Cmmw. 1973). Therefore, the Board committed an error of law by requiring Lot 46 to meet SALDO requirements. Condition No. 23 must be stricken.

Condition No. 24

Condition No. 24 requires as follows:

> 24. At the time of final land development plan approval, the developer shall provide an actual survey of all of Huckleberry Drive showing the physical features, the road right-of-way, and the existing road. The developer shall also notify all property owners along Huckleberry Drive of the proposed use and proposed upgrade and what effect it will have on their properties and the area in front of their properties.

[Board of Supervisors Decision, April 1, 2003, pp. 9-10.]

LTS asserts that the notification requirement of Condition No. 24 interferes with LTS's common law right to improve Huckleberry Drive. [Appellant's Brief, 8/18/03, pp. 32.]

The Board asserts that this condition is reasonable because it protects the interests of the current property owners along Huckleberry Drive.

Under the MPC, the Ordinance, and Clinton, a board may impose reasonable conditions and safeguards upon the approval of a conditional use. At the public hearings, Christopher McDermott, a civil engineer hired by LTS, testified that

LTS owns a 50 foot right of way and plans to construct a road to township standards. [N.T., 01/13/03, pp. 21, 24-25; Appellant's Exhibit No. 19.] Mr. McDermott also testified that Huckleberry road is "fairly level," and that he thought all of the improvements could be done within the right of way. [N.T., 01/13/03, p. 25.]

In light of Mr. McDermott's unrebutted testimony, Condition No. 24 was not based on substantial evidence. Without deciding whether or not LTS has the common law right to improve Huckleberry Drive, we conclude that the Board abused its discretion in imposing Condition No. 24. The language in Condition No. 24 requiring the developer to notify the property owners along Huckleberry Drive will be stricken.

Condition No. 26

Condition No. 26 requires as follows:

> 26. Any and all items that need to be moved as a result of the upgrade of Huckleberry Drive shall be replaced so as not to adversely impact existing lot owners.

[Board of Supervisors Decision, April 1, 2003, p. 10.]

LTS asserts that Condition No. 26 interferes with the right of LTS to demand the removal of objects placed in the right of way by abutting landowners. LTS maintains that such items would be removed where the requirements for adverse possession had not been met. [Appellant's Brief, 8/18/03, pp. 33-34.]

The Board asserts that the condition provides "... modest protection to the most immediately neighboring property owners of the pending road change." [Appellee's Brief, 8/18/03, p. 21.]

We agree with LTS that the Board is in essence forcing LTS to waive any potential actions based on adverse possession. Under the MPC, the Ordinance, and Clinton, a board has the power to pass reasonable conditions and safeguards that implement the purpose of the ordinance. It is unclear how interfering with the private rights of these parties is reasonable, is necessary to implement the purposes of the Ordinance, or relates to the public interest. Additionally, there is not substantial evidence in the record which indicates that any such "items" exist within the right of way. Therefore, we conclude that the Board was without factual or legal basis to impose Condition No. 26, and it will be stricken.

Condition No. 27

Condition No. 27 requires as follows:

> 27. Any sewer line extension to serve the project shall remain privately owned. If any sewer line extension causes existing residents of Huckleberry Drive to be required to be connected to the public sewer, all costs associated with the connection, including connection fees, grinder pumps, and installation costs for physical connection shall be the responsibility of and shall be paid by the developer. The developer shall obtain written releases from property owners along Huckleberry Drive and acceptance after such work is completed.

[Board of Supervisors Decision, April 1, 2003, p. 10.]

LTS asserts that the Middle Smithfield Township Municipal Authority has exclusive jurisdiction over whether to accept the offer of sewage collection lines. Therefore, the Board has no authority to require that an extension remain privately owned. LTS also argues that the Board abused its discretion by requiring LTS to pay for

the sewer connection fees accrued by the adjoining neighbors. They assert that the MPC prohibits conditioning of approval of a land development application on paying the cost of an off-site improvement under 53 Pa.C.S.A. §10503-A. Finally, LTS asserts that Condition No. 27 violates its statutory right to reimbursement under 53 Pa.C.S.A. § 6507(d)(31).

The Board states as follows:

> The purpose of this condition was to avoid any obligation on the part of adjacent Huckleberry Drive property owners to be mandated to connect to the municipal sewer system by keeping the sewer line extension in private ownership.
> ...
>
> This is a reasonable and appropriate condition for the purpose of giving modest protection to the affected property owners of pending new development, which should not place unreasonable burdens, financial or otherwise, on neighboring residential owners.

[Appellee's Brief, p. 22.] The sum of the Board's argument is an admission that the Board is trying to alleviate the burden of connection imposed by the Township Code.

-Power of the Municipal Authority

The Middle Smithfield Township Municipal Authority (hereinafter "Municipal Authority" was created by the Township under the Municipal Authorities Act. 53 Pa.C.S.A. §5601 et seq.; Middle Smithfield Township Code §§ 7-1 *et seq*. The purpose of the Municipal Authority is as follows:

> **§ 7-3 Purpose.**
> Such Authority is organized for the purpose of acquiring, holding, constructing, improving, maintaining, and operating, owning or leasing, either in the capacity of lessor

> or lessee, sewers, sewer systems or parts thereof and sewage treatment works, including works for treating and disposing of industrial wastes. The township hereby signifies its intention to specify, from time to time, the specific project or projects to be undertaken by such Authority, and no other projects shall be undertaken by such Authority than those so specified.

With this provision, the Township created an independent municipal authority with the specific purpose handling the Township's public sewage system.

Upon creation, a municipal authority becomes an independent agency of the Commonwealth that is not subject to the control of the incorporating township. Smith v. Athens Township Authority, 685 A.2d 651, 656 (Pa. Cmmw. 1997), *citing* Bristol Township v. Lower Bucks County, 567 A.2d 1110 (Pa. Cmmw. 1989).[5]

Once Middle Smithfield Township created a municipal authority in charge of the public sewage system, the Board gave up control of the sewage system to the newly created Middle Smithfield Township Municipal Authority. Therefore, we conclude that the Board lacks the authority to impose a condition that contravenes the powers granted to the Municipal Authority by the Board and under the Municipal Authorities Act.

In addition, the admitted purpose of requiring the extension line to remain private was to avoid the impact of the Board's own ordinance with regard to a selection of Middle Smithfield Township residents. This condition places the burden of maintaining this small section of sewer on the future residents of this PRD. That burden

[5] In Levin v. Board of Supervisors of Benner Township, 669 A.2d 1063 (Pa Cmmw. 1995), the State College Borough Water Authority raised the issue of whether the conditions attached by the Benner Township Board of Supervisors contravened the powers of the Water Authority under the Municipal Authorities Act. However, the Benner court decided the matter on other grounds.

will increase if the PRDs sewer is connected to the adjoining development of Winona Lakes. This would place the burden of maintaining a section of sewer that is used by the larger public on the future residents of the PRD. We conclude that such a condition is unreasonable.

Therefore, the language in Condition No. 27 requiring that the sewer system extension remain private is stricken.

-Requiring LTS to Pay the Cost of Adjoining Neighbor's Sewer Connection

LTS cites 53 Pa.C.S.A. § 10503-A(b) in support of their argument that the Board cannot compel LTS to pay for the of connecting the current residents of Huckleberry Drive to the sewer. 53 Pa.C.S.A. § 10503-A(b) prohibits a municipality from requiring a developer to pay the costs of "offsite improvements." In 53 Pa.C.S.A. § 10502-A, "offsite improvements" and "onsite improvements" are defined as follows:

> **"Offsite improvements,"** those public capital improvements which are not onsite improvements and that serve the needs of more than one development.
>
> **"Onsite improvements,"** all improvements constructed on the applicant's property, or the improvements constructed on the property abutting the applicant's property necessary for the ingress and egress to the applicant's property, and required to be constructed by applicant pursuant to any municipal ordinance, including, but not limited to, the municipal building code, subdivision and land development ordinance, PRD regulations and zoning ordinance.

Here, the improvements requested would be constructed on the properties abutting the ingress and egress of applicant's property. Therefore, 53 Pa.C.S.A. § 10503-A(b) would be inapplicable to Condition No. 27.

The Board stated that the purpose for Condition No. 27 is to relieve the residents along Huckleberry Drive from the financial burden of connecting to the sewer. The Board openly admits that it imposed Condition No. 27 to relieve the adjoining property owners along Huckleberry Drive of the burden that all citizens of Middle Smithfield must bear when a public sewer comes within 150 feet of one's principal building. Such a condition is unreasonable. Therefore, the remainder of Condition No. 27 must also be stricken.[6]

Condition No. 28

Condition No. 28 requires as follows:

> 28. Any residential damage associated with the upgrade of Huckleberry Drive shall be the responsibility of the developer.

[Board of Supervisors Decision, April 1, 2003, p. 10.]

Condition No. 28 places financial responsibility for "any residential damage" on the developer. The Board asserts that this condition is reasonable by giving modest protection to the landowners adjoining the road.

This condition attempts to impose liability on LTS for all potential residential damage resulting from the upgrade of Huckleberry Drive, regardless of whether they acted with malfeasance or whether the damage was caused in fact by LTS. This condition takes away LTS's ability to defend against any and all allegations of

[6] LTS's request to find that they have a statutory right to reimbursement under 53 Pa.C.S.A. § 6507(d)(31) is rendered moot as Conditions No. 19 and No. 27 have been stricken on other grounds.

property damage brought by the property owners abutting Huckleberry Drive. Condition No. 28 is unreasonable and it will be stricken.

ORDER

AND NOW, this 5th day of December 2003, the deemed denial of the LTS Development, Inc.'s tentative proposal is **REVERSED**.

Appellant's request to overrule, strike off, and reverse the 13 conditions will be disposed of as follows:

(1) Request to strike-off Condition No. 3 is **GRANTED IN PART** and Condition No. 3 shall read as follows:

> 3. The arrangement of the entrance roads and driveways shall be in compliance with requirements of the Pennsylvania Department of Transportation, and the Township of Middle Smithfield.

(2) Request to strike-off Condition No. 5 is **GRANTED IN PART** and Condition No. 5 shall read as follows:

> 5. The developer shall construct and complete a nature trail and a comprehensive pedestrian pathway system available on all major roadways. The nature trail shall be maintained in its existing state but shall be clear of any tripping hazards. The pedestrian pathway shall be a graded gravel-surface path, with a weed barrier, designed to fit into a natural setting. There shall be an easement contained in each deed granting rights to the nature trail and pedestrian pathway, and maintenance responsibility for the same shall be clearly identified.

(3) Request to strike-off Condition No. 9 is **GRANTED**.

(4) Request to strike-off Condition No. 10 is **GRANTED.**

(5) Request to strike-off Condition No. 12 is **GRANTED.**

(6) Request to strike-off Condition No. 13 is **GRANTED.**

(7) Request to strike-off Condition No. 19 is **RENDERED MOOT,** and Condition No. 19 will remain in effect.

(8) Request to strike-off Condition No. 21 is **GRANTED.**

(9) Request to strike-off Condition No. 23 is **GRANTED**

(10) Request to strike-off Condition No. 24 is **GRANTED IN PART,** and Condition No. 24 shall read as follows:

> 24. At the time of final land development plan approval, the developer shall provide an actual survey of all of Huckleberry Drive showing the physical features, the road right-of-way, and the existing road.

(11) Request to strike-off Condition No. 26 is **GRANTED.**

(12) Request to strike-off Condition No. 27 is **GRANTED.**

(13) Request to strike-off Condition No. 28 is **GRANTED.**

BY THE COURT:

RONALD E. VICAN, P.J.

cc: Mark R. Wolfe, Esq.
Richard E. Deetz, Esq.

REV2003-059