

TOWNSHIP OF LOWER MAKEFIELD
ZONING HEARING BOARD
MINUTES – FEBRUARY 17, 2009

The regular meeting of the Zoning Hearing Board of the Township of Lower Makefield was held in the Municipal Building on February 17, 2009. Chairman Malinowski called the meeting to order at 7:10 p.m.

Those present:

Zoning Hearing Board: David Malinowski, Chairman
 Paul Bamburak, Vice Chairman
 Gregory J. Smith, Secretary (left meeting in progress)
 Jerry Gruen, Member (joined meeting in progress)
 Anthony Zamparelli, Member
 Paul Kim, Alternate Member

Others: Robert Habgood, Code Enforcement Officer (left meeting in progress)
 David Truelove, Township Solicitor
 James Majewski, Township Engineer
 Allen Toadvine, Zoning Hearing Board Solicitor
 Matt Maloney, Supervisor Liaison (joined meeting in progress)

APPEAL #08-1481(A) – THE FRANKFORD HOSPITAL OF CITY OF PHILADELPHIA, INC.

Mr. Malinowski noted regardless of the Decision of the Zoning Hearing Board both sides have indicated that they will take this matter to Court and the ultimate decision will be made by a Judge.

Mr. John VanLunvane, attorney for the Applicants, Mr. Smolow, attorney for RAFR, and Ms. Jennifer McGrath, attorney for Newtown Township were present.

Mr. Toadvine stated he received a letter from Mr. Truelove dated 2/5/09 inquiring about issues involving the several e-mails and letters that were submitted by various residents including packages left on the desks for members of the Zoning Hearing Board which he feels should be addressed at this point. Mr. Malinowski stated the letters, e-mails, and packages that have been received by the Zoning Hearing Board will not be entered in the Record and will not be entered as evidenced. He stated as a quasi-Judicial Board, the Zoning Hearing Board makes their decision on the law and the testimony presented.

Mr. Smolow stated they had outstanding from the last Hearing the issue of the subpoenas they had obtained from the Zoning Hearing Board that were issued to various Parties and non-Parties. He stated he and Mr. VanLuvanee discussed the subpoenas and reached an understanding as to the timing of the responses of the subpoenas as well as certain limitations and restrictions on the subpoenas. He stated he did receive some of the documents in response to the subpoenas. He added that at approximately 4 p.m. this afternoon he received an e-mail with additional documentation but was unable to open the documents. He has been assured that they will be re-sent to him promptly, and he will look at them in the next few days.

Mr. VanLuvanee stated representatives from Boehler Engineering and McMahan Associates are present this evening and both did provide full responses to the subpoenas by Noon yesterday. Mr. VanLuvanee stated he advised Mr. Smolow yesterday morning that because Frankford Hospital's General Counsel had been away he would be unable to deliver his response until today. The response was delivered electronically to

Mr. Smolow this afternoon and they are willing to provide it in a different format to Mr. Smolow and will provide it in hard copy as well if he requests it. He does not feel this will result in a delay to the proceedings as he understands that Mr. Truelove is still presenting his case.

Mr. Maloney joined the meeting at this time.

Mr. Smolow asked Mr. Majewski how long he has been the Township engineer, and Mr. Majewski stated he has represented Lower Makefield for the last six years and has been the appointed Township engineer for the last four years. It is his responsibility to review Applications for Land Development. In reviewing these, he is responsible to prepare a report in relation to the Township's Zoning Code and SALDO. Mr. Smolow noted Section 200-98 of the Zoning Ordinance and asked if it is correct that this contains the requirements the Zoning Hearing Board is to apply for a Special Exception.

Mr. VanLuvanee objected to the form of the question as he feels the Section speaks for itself.

Mr. Malinowski overruled, and Mr. Majewski stated it does.

Mr. Smolow noted Section 200-98 Sub Section 3A and stated while he recognizes the Section speaks for itself he wants to understand how it is being applied in the context of this case and asked Mr. Majewski if it says the Zoning Hearing Board is supposed to assure itself that the proposed use is in conformance with all applicable requirements of this Chapter and Chapter 178, Subdivision and Land Development. Mr. Majewski and

Mr. VanLuvanee agreed that this is what it says. Mr. Smolow stated Chapter 178 Subdivision and Land Development references SALDO, and Mr. Majewski agreed.

Mr. Smolow stated he distributed this evening to the Board and all Parties present what he has marked as Exhibit RAFR-1 Chapter 178 if the Subdivision and Land Development Ordinance. Mr. Toadvine stated he feels the Board could take Judicial Notice of the SALDO. Mr. VanLuvanee stated he is not able at this time to go through this to make sure that it is the right Code and would agree that the Board could take Judicial Notice. Mr. Smolow stated he wants to use it this evening and they could verify that it is an accurate copy adding he took it off the Township's Website on 2/4/09. Mr. VanLuvanee noted the top of the first page of the Exhibit which states, "This electronic version of the Code is provided for information purposes only. For the official version of the Code please contact the Municipality," and this is the only reason he has raised an issue.

He stated he does not have an objection to referring to this during the cross-examination. Mr. Smolow asked that Mr. Majewski advise them if he believes there is an inconsistency or difference between this version of SALDO and the one on file and adopted by the Township.

It was agreed by all to mark this as Exhibit RAFR-1.

Mr. Smolow noted the Table of Contents on the first page, and he noted the headings: Article 5 – Requirements for a Sketch Plan Review, Article 6 – Requirements for Preliminary Plan Approval, and Article 7- Requirements for Final Plan Approval; and Mr. Majewski agreed this is correct. Mr. Smolow stated they heard testimony that there was a Sketch Plan submitted to the Township for review, and Mr. Majewski agreed. Mr. Smolow asked if a Preliminary Plan was submitted, and Mr. Majewski stated it was not.

Mr. Smolow noted the Preliminary Plan requirements beginning at Section 178-18. He added that before that at Section 178-12 it lists what is and what is not required for review under Chapter 178, and Mr. Majewski agreed. Mr. Smolow asked if the requirements for Land Development are listed under Section 178-12B, and Mr. VanLuvanee objected as he does not feel this is what Section 178-12B states as it states, "Requirements for each Plan stage are contained in Plan requirements," according to his copy of SALDO. Mr. Smolow suggested they go through Section 178-12B to see what is and is not required, and asked Mr. Majewski if Section 178-12B under four different columns lists the type of Plan reviews that are required for different types of Subdivisions or Developments, and Mr. Majewski stated it lists those that are required and those that are recommended.

Mr. Smolow stated there is a column that has a heading, “Land Development,” and Mr. Majewski agreed. Mr. Smolow asked if Frankford Hospital qualifies as a Land Development, and Mr. Majewski stated it does. Mr. Smolow asked if under the column, “Land Development,” is it not true that a Preliminary Plan is required. Mr. VanLuvanee objected to this line of questioning stating that this witness has already stated that the Section of the Zoning Ordinance that sets forth the requirements for Special Exception does not state that a Preliminary Plan submission is required. Mr. VanLuvanee stated if the Board determines to overrule the Objection, he would like a continuing Objection to any dialogue with regard to what the Preliminary Plan requirements are.

Mr. Truelove stated there were questions raised last time about whether a Sketch Plan or Preliminary Plan is required. He also noted that Section 200-98 does not mention the term, “Sketch Plan” anywhere so at best it is ambiguous and it is certainly appropriate for cross examination.

Mr. Malinowski sustained the Objection based on relevancy.

Mr. Smolow stated Section 200-98 Subsection 3A of the Zoning Ordinance states, as a requirement of a Special Exception, “That the proposed use is in accordance with the spirit, purpose, and intent of the Comprehensive Plan and in conformance with all applicable requirements of this Chapter and Chapter 178, SALDO.

Mr. Toadvine stated they have gone through this, and it is not a requirement for the Special Exception that a formal Sketch Plan and/or Preliminary Plan be submitted. He stated Case Law is clear on that. He stated if he is trying to establish that this Applicant has to comply with the Sketch Plan requirements and/or the Preliminary Plan requirements of the Subdivision and Land Development Ordinance, it is not relevant.

Mr. Smolow stated he would like to make a record.

Mr. Toadvine stated there has been an Objection sustained, and they should move on.

Mr. Smolow stated while he will move on, he would like to make a record as to the evidence he wishes to offer and an offer of proof. He asked if he could make an offer of proof and this was permitted.

Mr. Smolow stated the Zoning Code as read states specifically that the Special Exception Application must meet the requirements of Chapter 178.

Mr. Toadvine stated it states, “The spirit, intent, and purpose and all applicable requirements.”

Mr. Smolow stated the witness has just testified that this is a Land Development, and as read in the Code under Section 178 ...

Mr. Toadvine stated at this point it is not a formal Land Development process and they are present on a Special Exception. He stated the Zoning Hearing Board only has authority to interpret the Zoning Ordinance and cannot interpret the Subdivision and Land Development Ordinance.

Mr. Truelove asked for an exception to the ruling as at the last Hearing they were present for more than one hour and fifteen minutes while Mr. VanLuvanee walked Mr. Majewski through the Sketch Plan Section of the Ordinance. Mr. Toadvine stated he was cross-examining him because they allowed Mr. Majewski's testimony on this. Mr. Truelove stated this is correct, and they now have cross-examination as well. Mr. Toadvine stated Mr. Smolow is not cross-examining him, and Mr. Truelove stated he is cross examining Mr. Majewski as Mr. Smolow represents another Party – he is not the Township. Mr. Toadvine stated he is not cross-examining at this point. Mr. Truelove stated he would like to note an Exception, and Mr. Toadvine stated the Exception is noted. Mr. Truelove stated he feels this is an egregious ruling.

Mr. Smolow noted Section 178-13 of SALDO where there is reference to a submission that land developers are supposed to submit to the Township and it is entitled, "Existing Resources and Site Analysis Map" (ERSAM). He asked Mr. Majewski if that data was submitted to the Township in connection with this Application for a Special Exception, and Mr. Majewski stated the Applicant submitted a Site Plan and also submitted a two-volume binder of material to the Township which contained a great deal of information that included most of the information required of an ERSAM.

Mr. Smolow noted Section 178-13B2 which has the heading, "Topography," and he asked Mr. Majewski if a topographical map or plan was submitted with the Application.

Mr. VanLuvanee objected stating they are again going through requirements for Subdivision Applications. He stated if the question is what information was submitted, he does not have a problem with Mr. Majewski answering this. He stated it was his recollection that Frankford Hospital submitted two separate Applications – one was the Application for Special Exception and one was a Sketch Plan Application and the two volumes of information were submitted to supplement the Sketch Plan Application. He feels the Township records will support this.

Mr. Smolow asked the witness be permitted to answer as opposed to Counsel.

Mr. VanLuvanee stated he was explaining his Objection which was the same as his Objection to the last line of questioning which is that the Section that Mr. Smolow is reviewing is a Section of SALDO that states what information is required when an Existing Resources and Site Analysis Map is required to be submitted. He stated the Ordinance is specific that it is submitted with Preliminary or Final Applications. He stated the Ordinance speaks for itself, and the Board can take Judicial Notice of what the Ordinance requires. He stated the question they ultimately need to determine is the legal question of what is required of an Applicant for Special Exception. He stated he was clarifying what was submitted as they submitted a lot of additional information but it was not a part of the Special Exception Application.

Mr. Malinowski asked how this is relevant to the Special Exception, and Mr. Smolow stated the Zoning Hearing Board has to consider a number of factors. He stated whether or not you have to have an approved Subdivision Plan or Land Development Plan is among them. He stated the Board is also required to take these factors into consideration and are supposed to look at all the information and make an informed judgment as to whether or not the information they have received and reviewed and heard testimony about supports the granting of a Special Exception; and unless they receive this information, they cannot make the informed judgment they are supposed to make as a Zoning Board. He stated he is trying to create a record to find out what information they have to make the judgment and what information they do not have that would perhaps prevent them from making a good judgment. He stated this is why he believes the information is relevant as to whether or not it is part of the Application.

Mr. VanLuvanee stated all of the Zoning Hearing Board members would have received a copy of the Application, so whatever they were sent by the Township is presumably the Application. Mr. Smolow stated if the Application is deficient, this is also relevant to the Board. Mr. VanLuvanee asked if it is Mr. Smolow's contention that an ERSAM is required with a Special Exception Application, and Mr. Smolow stated it is his contention that the Preliminary Plan Approval is a requirement and that the materials that go with the Preliminary Plan Approval must be submitted to the Zoning Hearing Board for its review. Mr. VanLuvanee stated if this were the case, he would have presumed that the Township's staff would have rejected the Application to the Zoning Hearing Board as having been incomplete; and they would not have started the Hearings. He stated his assumption is that if the Township accepts the Application and processes it, that the Application is deemed to be completed; and to suggest to an Applicant six months into a Hearing that the Application never should have been accepted because relevant materials were not included, is "ambushing" the Applicant. He stated he feels the Township makes the determination initially whether the Application is complete. Mr. Smolow stated he has no control over what the Township does or does not do in terms of accepting an Application. He stated he is concerned about the business before the Zoning Hearing Board and what the requirements are in the Zoning Ordinance; and he feels he

has a right to question the witness based upon what the Zoning Ordinance says and not what are the practices and policies of the Zoning Board, Mr. VanLuvanee, or anyone else. He stated he is interested in making a record and would like to ask the witness these questions.

Mr. Truelove stated he would like to join in as well. He stated the two binders which were referenced, which he planned to ask questions about as well later, were not part of the Sketch Plan Application. He stated that Plan was submitted in early 2008, and the binders were submitted as part of the Special Exception Application but only to certain members of the Township. He stated this may answer Mr. VanLuvanee's question. He stated it was not rejected because there was information submitted with the Application. He stated the Zoning Hearing Board does not have them, but the Township does.

Mr. VanLuvanee stated he feels the record will prove Mr. Truelove's statement to be incorrect and perhaps they owe the Board an obligation to supplement the record because he does not have his complete files with him tonight and he suspects that Mr. Truelove does not either. He added there were two cover letters submitted, and it is his recollection that there was a Special Exception Application submitted and under separate cover letter there was a Sketch Plan Application that had two binders. He feels they should all review the record to clear this up since it should be a matter of record at the Township and he also has correspondence files that he did not bring with him this evening. He stated he agrees that Mr. Smolow has the right to make a record as to what was submitted and what was not submitted. He stated his concern is that they be accurate as to what information was submitted with the Special Exception and it will also become an issue for the Board to determine what the Zoning Ordinance required that the Applicant submit.

Mr. Gruen joined the meeting at this time.

Mr. Toadvine stated he feels it is appropriate for Mr. Smolow to ask question of Mr. Majewski as to what was submitted but not legal questions.

Mr. Truelove stated he has Minutes from a Planning Commission meeting in January, 2008 when the Sketch Plan was first proposed. He stated he believes it was also presented to the Board of Supervisors either that month or the following month. He stated one of the binders he has had the Traffic Study dated June, 2008, and it is his contention that the binders were submitted as part of the Special Exception Application. Mr. VanLuvanee stated he feels they should check the Township files and they will see that there were two submissions made on the same date to the Township – one was a Special Exception and one was a Sketch Plan. Mr. VanLuvanee stated everything they submitted as part of the Special Exception Application has been marked.

Mr. Smolow asked Mr. Majewski if he is familiar with the Special Exception Application that was submitted to the Zoning Hearing Board, and Mr. Majewski stated he is.

Mr. Smolow noted page 24 of the Code Provisions he provided and noted Section 178-19E under the heading, “Proposed Improvements,” which indicates: “that the Applicant submit with the Special Exception a Plan showing the proposed improvements and requirements that are listed under Sub Section E1, 2, 3, 4, 5, and 6 of that Section of the Ordinance.

Mr. VanLuvanee objected to the form of the question as it was phrased as if the Applicant was required to submit this with the Special Exception.

Mr. Smolow noted Section 178E Sub Sections 1 through 6, and asked if the Applicant submitted Plans with that information with the Application for a Special Exception.

Mr. Toadvine noted there is no Section 178E 1 thorough 6, and Mr. Majewski stated it is Section 178-20 E 1 through 6. Mr. Majewski stated they submitted all of the information except for the location of walkways around the exterior of the property.

Mr. Smolow noted Sub Section 7 under 178-20E regarding typical cross-sections, and Mr. Majewski stated this was not submitted with the Special Exception Application. Mr. Smolow noted Sub Section 8 dealing with tentative grades of streets, and Mr. Majewski stated this was not submitted. Mr. Smolow asked about the location and size of sanitary sewers, on-site sewage disposal facilities, gas mains, water mains, fire hydrants, street lights, and special structures and other underground conduits as required by Sub-Section 9.

Mr. VanLuvanee stated he has a continuing Objection to this, and this was acknowledged by the Board.

Mr. Majewski stated this was not submitted.

Mr. Smolow noted Sub Section 14 which requires a landscape plan showing all required street trees, buffers, tree protection areas, and plan for tree protection during construction, and Mr. Majewski stated this information was not submitted with the Special Exception. Mr. Smolow asked about a lighting plan in accordance with the requirements of Article 10, and Mr. Majewski stated a lighting plan was submitted as part of the Application but he would have to check if it met all the requirements of Article 10. Mr. Smolow noted Item 16 - a proposed stormwater management plan in compliance with the requirements of the Ordinances relating to stormwater management for the Delaware River South Watershed and Neshaminy Creek Watershed, and Mr. Majewski stated this was not submitted. He stated the Applicant submitted an abbreviated stormwater narrative.

Mr. Smolow noted Sub Section 17 and asked Mr. Majewski if it is not true that a soil, erosion, and sediment control plan and design basin for surface and sub-surface drainage was not submitted with this Application for Special Exception, and Mr. Majewski stated it was not. Mr. Smolow noted Sub Section 18 with respect to the location and type of all traffic control signs, signals, and devices; and asked if this information was submitted with the Plan, and Mr. Majewski stated it was not.

Mr. Smolow noted Sub Section 19 with respect to on-site sewage disposal facilities, and asked if this information was submitted with the Plans; and Mr. Majewski stated it was not. Mr. Smolow noted Sub Section 20 with respect to Plans showing proposed public improvements including bikepaths, streets, curbs, gutters, and sidewalks and asked if this information was submitted; and Mr. Majewski stated some of that information was submitted but not all of it. He stated they did not submit information on bikepaths, typical cross-section diagram of proposed street construction, or a utility plan indicating the Utility Company to provide services. He stated their Plan was also missing some information on the location of curbing along the proposed widening of Route 332.

Mr. Smolow noted Sub Section 28 with respect to grading and asked if a Grading Plan was submitted, and Mr. Majewski stated it was not. Mr. Smolow noted Sub Section 29 and asked if information with respect to pavement core samples was submitted with the Special Exception Application, and Mr. Majewski stated it was not.

Mr. Smolow noted Sub Section F which refers to improvement construction plans, and asked if these were submitted with the Application, and Mr. Majewski stated they were not. Mr. Smolow noted Sub Section G with the Heading “Environmental Assessment” and asked if an Environment Impact Assessment Report submitted with the Special Exception Application, and Mr. Majewski stated this was the topic discussed earlier that needs to be checked as to whether it was submitted as part of the Sketch Plan or as part of Special Exception Application.

Mr. Smolow asked why the Township asks for the information regarding stormwater management, landscape plans, location and size of sanitary sewers and typical cross-sections.

Mr. VanLuvanee objected to the form of the question. He stated if the question is why it is required with the Preliminary Land Development Plan, he would have no objection. He stated the implication is that it is required in connection with these proceedings.

Mr. Malinowski asked Mr. Smolow if he would like to rephrase, and Mr. Smolow stated he would not. Mr. Malinowski sustained the Objection.

Mr. Smolow asked Mr. Majewski as an engineer for the Township charged with the responsibility of determining whether a Land Development Plan meets the Township's interests in terms of health, safety, and welfare of the community, would he want to see a Stormwater Management Plan for the Plan.

Mr. VanLuvanee objected on the same basis. He stated the way the question is phrased it is open ended and the implication is would he want to see this in connection with a Special Exception Application. He stated Mr. Majewski would certainly want to see it with the Preliminary Land Development Plan as this is required by Ordinance and Frankford Hospital is not arguing about that.

Mr. Malinowski overruled the Objection adding he did not have a problem with the phrasing of the question.

Mr. Majewski asked Mr. Smolow to repeat the question, and Mr. Smolow asked Mr. Majewski as Township engineer why would he want to see a Stormwater Management Plan in connection with the Land Development Plan. Mr. VanLuvanee stated he had no objection to that question. Mr. Majewski stated they would want to verify that it meets the requirements of the Ordinance and would work for public health, safety, and welfare. Mr. Smolow stated without that Plan he would not be able to give the Township his opinion as to whether the Land Development works in terms of the Township's public health, safety, and welfare; and Mr. Majewski agreed. Mr. Smolow asked if this would also be his opinion as to why he would need a Landscape Plan,

Mr. VanLuvanee objected and stated the reason you need a Landscape Plan in connection with Land Development is because you have to determine whether it meets the Ordinance. The issue of whether a Landscape Plan promotes public health, safety, and welfare is a different issue than whether or not it is required under the Ordinance. He stated arguably all the Township Ordinances are designed to promote public health, safety, and welfare. He stated what Mr. Smolow has asked is a broad question; and he feels what Mr. Smolow is attempting to do is to make it relevant to the Zoning Hearing Board's determination as to whether in a broad sense the Special Exception is in accordance with Township Ordinances, the spirit and intent of the Comprehensive plan, and will not have an adverse impact on public health, safety, and welfare which in essence it is a "boot strap" argument in his opinion rather than being specific.

Mr. Malinowski sustained the Objection.

Mr. Smolow asked Mr. Majewski as Township engineer in order to give the Township his opinion as to whether or not the Land Development Plan is in the best interest of the Township would he want to see a Soil Erosion and Sediment Control Plan.

Mr. VanLuvanee objected.

Mr. Malinowski overruled and Mr. Majewski stated he would want to see this because the Township is required to make sure that the construction site does not allow sediment to run off into streams and pollute the water. Mr. Smolow stated he cannot make a judgment as to whether or not this proposed Land Development would have a negative impact on erosion and sediment control without such a Plan.

Mr. VanLuvanee objected and stated this is a Hearing with regard to a use. He stated if the Board denies the Special Exception, all of this will become irrelevant because there will not be a Sedimentation and Erosion Control Plan. He stated that if the Special Exception is denied, the Township will not be evaluating it. He stated they are present to determine the Use and the parameters determined by the Board if the Board sees fit to grant the Special Exception. Mr. VanLuvanee stated the Zoning Hearing Board could impose Conditions that would determine what the Land Development Plan will look like. He stated the Zoning Hearing Board Conditions could change the Land Development Plan. He stated the idea that you must submit a Preliminary Land Development Plan at this stage before the Board has even evaluated whether the use is appropriate is premature. He stated if this were the case, the Special Exception should be the last thing determined after the Final Land Development Plan.

Mr. Toadvine stated the Objection is noted, but the Chairman has overruled.

Mr. Majewski agreed with Mr. Smolow.

Mr. Kim stated he has sat at a number of Special Exception Hearings and a Preliminary Plan was never presented or required. He asked Mr. Majewski if this is required.

Mr. VanLuvanee objected.

Mr. Malinowski overruled.

Mr. Majewski stated he believes the Ordinance states that they must demonstrate compliance with the Subdivision and Land Development Ordinance; and in his previous testimony he had outlined what he felt was necessary to show compliance with SALDO.

Mr. Bamburak asked Mr. Smolow to look at the Plan review steps noted in Section 178-12, and stated he is indicating that the Land Development column is the one that applies; and Mr. Smolow agreed. Mr. Bamburak noted the Plan review steps where it indicates a Sketch Plan is recommended. He asked Mr. Smolow if he is questioning the requirements of the Sketch Plan, and Mr. Smolow stated this was submitted.

Mr. Bamburak asked if he is debating that the Sketch Plan was deficient in any way, and Mr. Smolow stated the Sketch Plan is not required under the Ordinance and is only recommended. He is not challenging it. Mr. Bamburak stated the next step is Preliminary Plan, and Mr. Smolow is challenging the fact that the Preliminary Plan is insufficient. Mr. Smolow stated he is challenging the fact that the information given to the Zoning Hearing Board did not include information that has to go into the Preliminary Plan. He stated he feels there should be Preliminary Plan approval by the Township; and alternatively if the Board does not accept that argument, the Board has to receive and review all of the information that is required for the Preliminary Plan in order to grant a Special Exception in this case. He stated this is what the Ordinance requires.

Mr. Bamburak noted the column “Plan Review Step” where they go from Sketch Plan to Preliminary Plan; and the argument seems to be that there is no step that says, “Apply for Special Exception” if needed. Mr. Smolow stated he is also looking at the Special Exception Ordinance which is where the Zoning Hearing Board has to start – Sub Section 200-98 of the Code Section 3A is the starting point for the Zoning Hearing Board; and this says that in order to grant a Special Exception they must make sure the following things are considered, and the first of the six categories says the Zoning Hearing Board must make sure that it is conformance with all applicable requirements of this Chapter and Chapter 178. He stated they reviewed Chapter 178 and it indicates it is required. Mr. Bamburak noted the word, “applicable.”

Mr. Bamburak stated it seems that Frankford Hospital is indicating that Special Exception Application should come before the Preliminary Plan, and Mr. Smolow is indicating that they have to submit a complete Preliminary Plan and then get the Special Exception. Mr. Bamburak stated it appears Mr. Smolow’s argument is that the Zoning Hearing Board should not be hearing this because they do not have enough information.

Mr. Smolow stated the Zoning Hearing Board is hearing it, and his client did not have a say as to whether or not they accepted the Application. He stated he does have a say as to what the Township Ordinance says, and it says “what SALDO requirements are applicable.” He stated he looked at the SALDO and had the witness testify as to what is applicable. He stated they looked at Section 178-12 – Land Development – and it indicates what it applicable and what is not. He stated it states that a Sketch Plan is recommended but Preliminary Plan is required. Mr. Bamburak stated it also says Final Plan is required and also says that in Section 178-14 that the Sketch Plan is prepared before committing funds for engineering as it would not make sense to do all the work and pay engineering fees before it gets thrown out because they could not get a Special Exception. Mr. Bamburak stated he feels the question is where does the Special Exception fit into the Plan review steps.

Mr. Smolow stated he feels Mr. VanLuvanee could have gone to the Township and applied for Preliminary Plan Approval if he wished and accepted the subject of the Township subject the grant of a Special Exception by the Zoning Hearing Board. He stated this often happens with Special Exceptions and Variances. Mr. Smolow stated his following the Ordinance and is asking that the Zoning Hearing Board follow the Ordinance.

Mr. VanLuvanee stated the law in Pennsylvania is very clear, and he does not agree with Mr. Smolow's statement of the law. He noted the Matrix case that came out of Lower Makefield made it very clear that the Township has no right and no jurisdiction to approve a Preliminary Land Development Plan or Subdivision Plan unless and until all required Zoning relief has been obtained. He stated in the Matrix case it was a Variance that someone had missed, and the Courts ruled that they could not approve the Land Development Plan if there was a Variance. He stated the same would be true with respect to the Use, and he asked how the Township could approve a Preliminary Plan for a Use that has not been given a Special Exception since the Township would not know what the Conditions might be that would have been imposed on the Use. He noted Section 917 of the Municipalities Planning Code that states, "where an Application for a Special Exception or Conditional Use has been filed for the Zoning Hearing Board or the Governing Body and the subject of that matter ultimately would be a Land Development, that there is no changes in intervening Ordinances that affect the Application... and if the Special Exception or Conditional Use is granted, the Applicant is entitled to proceed with a submission of either Land Development or Subdivision Plans within a period of six months or longer as may be approved by the Zoning Hearing Board or the governing body in accordance with the Ordinances that were in effect when they filed." He stated it clearly tells you that Special Exception comes first and Land Development comes second. He stated it is codified, and there is not an argument. He stated if he gets the Special Exception he can then file the Preliminary Plans within six months, and if the Township changes the Ordinances along the way, what was relevant on the date he filed is the Ordinance that still governs. He stated he respects the right of Mr. Smolow to make his record as long as his questions are clear.

Mr. Smolow stated Mr. VanLuvanee would like Sub Section A to go away, and it is in the Ordinance, and they have to apply it. He stated the Zoning Hearing Board needs to determine whether this Special Exception meets the applicable requirements of Chapter 178 of SALDO and this includes a number of things. He stated the Ordinance says what the Zoning Hearing Board is supposed to consider in rendering their judgment on the Application. Mr. VanLuvanee agreed and stated they could conclude that none of them are applicable.

Mr. Kim stated if Mr. Majewski testified that a Preliminary Plan was helpful to the Township, and asked Mr. Majewski if he asked for a Preliminary Plan from Frankford Hospital when they submitted the Special Exception.

Mr. Smolow objected stating the question assumes that this is his responsibility. Mr. VanLuvanee stated he had stipulated that it is his not responsibility and this was the nature of his objection previously. Mr. Malinowski overruled the Objections stating a member of the Board can ask anything that will help him make an informed decision.

Mr. Kim stated Mr. Majewski just testified under Mr. Smolow's cross examination that it would be helpful. Mr. Kim stated Mr. Majewski as the Township engineer has been established as an expert witness and he asked Mr. Majewski if he asked for the Preliminary Plan for this Special Exception. Mr. Majewski stated this is not his responsibility to ask for this; however, in his previous testimony he did lay out what he felt was necessary for the Board and the Township to adequately look through the Plan to determine what level of information was needed in order to make a decision.

Mr. VanLuvanee stated since the Objection was overruled, he would ask the Chair to direct the witness to answer with a "yes" or "no" answer. Mr. Malinowski stated he provided a legal response which the Chair has accepted. Mr. VanLuvanee stated Witnesses do not get to do this, and they are to answer questions and explain their answers. Mr. Majewski stated the answer would be "no."

Mr. Malinowski asked Mr. Majewski in the normal Land Development Application process if it never came before the Zoning Hearing Board where would the first step go; and Mr. Majewski stated the approval comes from the Board of Supervisors; but the Plan typically goes first to the Planning Commission although for a Sketch Plan it oftentimes goes before the Board of Supervisors for informal input before it goes to the Planning Commission, and he believes that this was the case in this Application as they first went to the Board of Supervisors with their original Sketch Plan. When they came back with the subsequent Sketch Plan, they went to the Planning Commission, the Board of Supervisors, and the Zoning Hearing Board. At that point input is received and Plans prepared for approval or denial by the Board of Supervisors. Mr. Malinowski stated he assumes that this would approve all the things that Mr. Smolow has asked about including topography, stormwater, sewers, curbing etc. and this would all be in the Plan before it got to the Board of Supervisors for Final Approval, and Mr. Majewski agreed. Mr. Malinowski stated if the Zoning Hearing Board agreed that this proposal meets the requirements for a Special Exception, and the matter does not go to Court, the Board of Supervisors would be the ultimately decision makers, and Mr. Majewski agreed.

The matter was stopped at this time in order to consider the next Appeal.

APPEAL #08-1501 – MICHAEL SCOTT AND MAURA BEEDE

Mr. Harry Worrell and Ms. Maura Beede were present. Mr. Toadvine stated at the last meeting of the Zoning Hearing Board, Ms. Beede requested a five-member panel to decide her case. He stated Mr. Bamburak was not present at the last Hearing; however, he has advised that he did watch the presentation on television and asked if Ms. Beede had an objection to his participating. Ms. Beede stated she did not have an objection.

Ms. Beede stated she is willing to make some concessions. She stated she has a small patio in her back yard which is 11' by 22', and she would be willing to have this removed. She stated this is approximately the same size of the proposed addition. Mr. Toadvine asked what this would reduce the impervious coverage to if it were removed, and Mr. Worrell stated it would remain the same as it is now since the existing is approximately 21% and with the removal of the patio and construction of the addition it would stay about the same amount. He stated Ms. Beede has indicated that they have lived there for twenty years and she has made no improvements. He stated at the last meeting she indicated that there is a French door coming out of the back of the house and there is a six foot paved area and off to the right there is a stone wall and the only space she has for a small picnic table is off to the opposite side. Mr. Toadvine stated at the last meeting she was not willing to remove anything but she has now indicated she would remove this 11' by 22' patio. Mr. Majewski stated this would reduce the impervious surface to 21.3%. Mr. Toadvine asked Ms. Beede if she is willing to amend the Application to request a Variance to 21.3%, and Ms. Beede agreed.

Mr. Smith moved, Mr. Gruen seconded and it was unanimously carried to grant the relief for a maximum impervious surface of 21.4%.

Mr. Smith and Mr. Habgood left the meeting at this time.

A short recess was taken at this time. The meeting was reconvened at 8:30 p.m. to further consider the Frankford Hospital Appeal.

APPEAL #08-1481(A) THE FRANKFORD HOSPITAL OF CITY OF PHILADELPHIA, INC.

Mr. Truelove stated he has redirect for Mr. Majewski based on questions that were previously submitted and asked. Mr. Truelove stated Mr. VanLuvanee guided Mr. Majewski through the requirements of the Sketch Plan at the last Hearing, and Mr. Majewski agreed. Mr. Truelove stated they have discussed the different requirements under the Ordinance for Sketch Plan versus Preliminary Plan, and Mr. Majewski agreed. Mr. Truelove asked if traffic studies are required for Sketch Plans,

and Mr. Majewski stated they are not. Mr. Truelove asked if stormwater management narratives are required for Sketch Plan, and Mr. Majewski stated they are not. Mr. Truelove asked about lighting plans are required for Sketch Plan, and Mr. Majewski stated they are not. Mr. Truelove asked if the Sketch Plan process a required process for Land Development submission, and Mr. Majewski stated it is not – it is an informal process. Mr. Truelove asked if what they are going through now at the Special Exception is a very formal process, and Mr. Majewski agreed. Mr. Truelove asked if the term “Sketch Plan” is mentioned anywhere in Section 200-98 of the Ordinance discussing Special Exceptions, and Mr. Majewski stated it is not.

Mr. Truelove marked as Exhibit T-5 an excerpt from the Board of Supervisors Minutes dated 1/16/08. He asked Mr. Majewski if he was present at that meeting, and Mr. Majewski stated he was. Mr. Truelove referred to the Heading in the Minutes, “Presentation of Sketch Plan by Frankford Health Care Systems to Propose Medical Facility at Newtown/Yardley and Stony Hill Roads,” and he asked if any engineering studies were submitted with the Sketch Plan at that meeting, and Mr. Majewski stated there were not.

Mr. VanLuvanee objected stating they have not established that a Sketch Plan was filed; and in fact, he represents since he was at the meeting that there was no Sketch Plan Application filed at that time. Mr. Truelove stated he has just indicated that there was presentation. Mr. VanLuvanee stated he recognizes what the Minutes say and there was a Plan but it was not a Sketch Plan Application. Mr. Truelove stated he did not say anything about an “Application,” as it states “Presentation of Sketch Plan.”

Mr. VanLuvanee stated there is a difference as they are talking about whether it is a Subdivision Application or not. He stated as the Minutes indicate they did ask for the opportunity to present the project preliminarily to the Board and the first paragraph of the Minutes makes it clear, but he wanted to make sure it was clear that there was no Sketch Plan Application submitted that was reviewed that evening. Mr. Truelove stated he understands that the Sketch Plan process is informal. Mr. VanLuvanee stated they did not file a Sketch Plan Application at that time, and Mr. Truelove stated he understands this and would agree.

Mr. Truelove stated in July, 2008, a subsequent Sketch Plan Application was submitted as well as the Application for Special Exception nearly coincidentally, and Mr. Majewski agreed. Mr. Truelove stated that Applicant went before the Planning Commission, and Mr. Majewski agreed although he noted he was not present at that meeting.

Mr. Toadvine asked if it was the Application for the Sketch Plan or was it the Application for the Special Exception, and Mr. Truelove stated this is the next question he has.

Mr. VanLuvanee stated if they have the Minutes, it will reflect that there was no one from Frankford Hospital present at that meeting, and there was no presentation by the Applicant.

Mr. Truelove marked as Exhibit T-6 and he noted page 12 of the Minutes. He asked Mr. Majewski to read the Heading for the matter before the Planning Commission that night. Mr. Majewski read as follows, "Zoning Hearing Board Appeal #08-1481 and #08-1481(A) Amended Application for the Frankford Hospital of City of Philadelphia, Inc. Application to the Zoning Hearing Board Includes a Request for a Special Exception." Mr. Truelove asked Mr. Majewski if he would agree that at Special Exception requires Planning Commission review, and Mr. Majewski stated it does.

Mr. Truelove stated a Sketch Plan does not require Planning Commission review, and Mr. Majewski agreed.

Mr. Truelove stated coincident with the filing of the Special Exception Application and the subsequent Sketch Plan Application as referred to by Mr. VanLuvanee, there were two binders filed with one or both of the Applications; and Mr. Majewski stated the Applicant submitted an Environmental Impact Assessment for the property. The two binders were marked and Volume 1 of 2 was marked as Exhibit T-7A and Volume 2 of 2 was marked as Exhibit T-7B. Mr. Majewski stated he received a copy of the binders as well.

Mr. Truelove noted the Table of Contents and asked Mr. Majewski to read into the record the different sections of the Table of Contents for Volumes 1 and 2 (T-7A and T-7B) and Mr. Majewski read as follows: "Section 1 – Project Overview, Section 2 – Compatibility Analysis, Section 3 – Location Map, Section 4 – Site Photographs, Section 5 – Project Description, Section 6 – Physical Resources Inventory, Section 7 – Biological Resources Inventory, Section 8 – Land Use Inventory, Section 9 - Surface Water Inventory, Section 10 – Sub-Surface Water Inventory, Section 11 – Existing Features Inventory, Section 12 – Historic Resources Inventory, Section 13 – Visual Resources Inventory, Section 14 – Community Need Inventory, Section 15 – Utility Need Inventory."

For Volume 2, Mr. Majewski read as follows: "Section 16 – Transportation System Inventory, Section 17 – Fiscal Impact, Section 18 – Existing Conditions, Section 19 – Licenses and Permits, Section 20 – Environmental Controls, Section 21 – Impacts Inventory, Section 22 – Alternative Analysis, Section 23 – Adverse Impacts, Section 24 – Mitigation Measures, Section 25 – Irreversible Impacts." He stated there was an Appendix that contained resumes.

Mr. Truelove asked if any of those submissions are required for a Sketch Plan, and Mr. Majewski stated there are only a few of the Sections of the Environmental Impact Assessment that he would consider to be required as part of the Sketch Plan submission.

Mr. Truelove stated the binders were submitted to the Board of Supervisors, himself, and Mr. Majewski, and Mr. Majewski agreed.

Mr. Truelove stated Mr. Bamburak noted the Sketch Plan does not require a commitment of funds for engineering drawings and reviews, and Mr. Majewski agreed that this is correct. Mr. Truelove asked Mr. Majewski in his experience as an engineer and based upon his review of the binders, is this a commitment of engineering funds for review, and Mr. Majewski agreed.

Mr. VanLuvanee objected based on relevance. Mr. Truelove stated he feels there was a tacit acknowledgement that there was a requirement to file more. He stated he has heard from the Zoning Hearing Board that there is no need for a Sketch Plan to commit the engineering funds and they already have a commitment of this, and he feels if they are going to submit it to the Township on one hand, he questions why it is not appropriate for the Zoning Hearing Board to hear the same thing as there was a commitment. He stated if there was no commitment for a Sketch Plan, he questions why it would not be submitted with the Special Exception. He feels this would be an argument that he would be allowed to make at the end of the case.

Mr. VanLuvanee stated SALDO suggests that the Environmental Impact Assessment report is recommended with the Sketch Plan, and when they filed the Sketch Plan Application they provided the Environmental Impact Assessment. He stated he does not know how this bears on the what requirements there are for a Special Exception Application. He stated they did not hide the fact that they submitted it, and in fact he feels it was very clear that when the matter went before the Planning Commission as evidenced by the Planning Commission Minutes that they were reviewing the Special Exception and not the Sketch Plan Application.

Mr. Truelove stated the point he is making is that very little of that is required for a Sketch Plan so therefore there must be some other reason why it was submitted. He feels it is important to have this as part of the record as the Chairman has noted making the record is an important part of what they are doing this evening.

Mr. VanLuvanee stated by Township Ordinance, although it may not be required, all of this information is recommended and this is in the Subdivision Ordinance, and he does not feel it is technically relevant to what is before the Zoning Hearing Board. He stated they are not denying that they filed this with the Sketch Plan Application.

Mr. Truelove asked Mr. Majewski if steep slopes are created by erosion, and Mr. Majewski stated they are sometimes. Mr. Truelove asked if they would be manmade if they were created by erosion, and Mr. Majewski stated they would not be manmade. Mr. Truelove asked Mr. Majewski if a Grading Plan was ever approved for the slopes that were apparent at the site, and Mr. Majewski stated there was not to his knowledge.

Mr. Truelove stated Mr. Majewski was asked some questions about his request to appear in opposition to the Application, and asked if during his six years as Township engineer has he on occasion been asked to appear in opposition to different Applications for Special Exceptions, Variances, etc., and Mr. Majewski stated he has. Mr. Truelove asked is it more likely that he would appear in opposition or more likely that he would not appear in opposition.

Mr. VanLuvanee objected, and Mr. Malinowski sustained.

Mr. Toadvine asked Mr. Majewski if he stated that if erosion causes steep slopes they are manmade, and Mr. Majewski stated the question was if erosion caused the steep slopes would he consider that to be manmade, and he indicated no.

Mr. VanLuvanee asked Mr. Majewski to review Page 18 of Exhibit T-6 (the Planning Commission Minutes of July 28) the first full paragraph 7th Line down it states, “He added (which refers to Mr. Donaghy, who is the Township solicitor).” He asked Mr. Majewski to read from those Minutes at that point.

Mr. Truelove objected. Mr. Toadvine stated this was the document that Mr. Truelove marked.

Mr. VanLuvanee stated he is not trying to take it out of context and the Board has the right to consider the entirety of the Minutes but since the residents do not have a chance to look at these, he feels it is relevant to read this paragraph.

Mr. Majewski read as follows, “He added the Planning Commission will consider whether the Applicant complies with other Township Ordinances when the Land Development process proceeds. Mr. Donaghy stated the Zoning Hearing Board will have to decide the issue of Special Exception based upon provisions of the Ordinance. He stated even if all the relief requested were granted by the Zoning Hearing Board, the Applicant will still need to submit fully-engineered Plans and meet the requirements of the Subdivision and Land Development Ordinance. He stated at this point in the process there is no requirement for them to submit Land Development Plans for a Special Exception request.”

Mr. Truelove asked Mr. Majewski to reference the same Exhibit, the Planning Commission Minutes, adding there was one more sentence at the end of the Section and he asked that Mr. Majewski read this as well. Mr. Majewski read as follows: “He stated the Planning Commission could state that the Planning Commission does not feel they have the information they need to make an advisory recommendation because of the limited amount of information they have been provided.”

Mr. Malinowski stated the Planning Commission did make a recommendation, and Mr. Truelove stated this is yet to be heard. Mr. Malinowski stated they indicated they were not in favor, and Mr. VanLuvanee agreed that this is in the Minutes.

Mr. Truelove moved the Exhibits into evidence, and Mr. VanLuvanee had no objection.

Exhibit T-4 was put back on the power point and Mr. Michael Galla was called and sworn in. Mr. Galla stated he is employed by Keystone Municipal Services and they are the interim Zoning Officer for Newtown Township. In that capacity he has become familiar with the different approved developments in Newtown Township in the last several years and has been supplied a list of those. Mr. Truelove asked that he identify the developments both by name, whether they are Residential or non-Residential, and if they are Residential, the number of homes approved, and if they are non-Residential, the number of square feet associated with the development. He noted he could refer to Exhibit T-4 which is the Exhibit created by Mr. Majewski.

Mr. VanLuvanee objected and stated he would need to question his qualifications as he does not know how long he has served as Zoning Officer or the source of his information. Mr. Truelove stated he would be glad to develop that.

Mr. Truelove stated they have Mr. Gallo's own information from Newtown Township, and Mr. Gallo agreed. Mr. Truelove asked if it also true that in his capacity as the Interim Zoning Officer he is required to be custodian of records for the different developments and Applications for Newtown Township, and Mr. Gallo stated he is. He is familiar, through his review of the records and on-site visits, with the different developments which have been approved in Newtown Township.

Mr. VanLuvanee stated this is sufficient to overcome his Objection. He stated he does not have a problem with using the map, but he feels he should use his own information and not Mr. Majewski's information as his source, and Mr. Truelove agreed. Mr. Gallo stated he does have his own information upon which he will rely to testify.

Mr. Gallo stated he is going off the list which he was supplied for Residential and noted the following: Delancey Court, 398 Durham Road, 120 lot development.

Mr. VanLuvanee stated he would object to the relevance unless Mr. Truelove can advise why it matters what developments have been approved in Newtown Township.

Mr. Truelove stated the relevance is the impact on traffic. He stated they have already heard testimony from Mr. Majewski about developments in Lower Makefield that have been approved both Residential and non-Residential, and the number of residences for Residential development will have traffic impact and traffic impact fees related to that. He stated the square footage of non-Residential developments is also relevant for that

purpose as well because by virtue of square footage, traffic impact fees are generated based on this kind of analysis. He stated since Newtown Township is adjacent to the site and the in fact two of the main arteries leading into this area are partially from Newtown Township, it is especially relevant.

Mr. VanLuvanee stated there are traffic impact study requirements that are part of Exhibit 3 to the SALDO of the Township. He stated there is a definition there of the term, "Study Area," in paragraph C2 which states, "This area will extend along all arterial and collector access roads serving the development to the nearest Township boundary line, and shall in any event extend to all intersections along all roads within a one half airline mile area." Mr. VanLuvanee stated Mr. Gallo has described a development on Delancey Court that, based on his knowledge of the geography, is well outside of a one half mile radius which is why he asked the relevance.

Mr. Truelove stated Section 200-98 discusses "the proposed location of a public/ industrial/commercial use is suitable with respect to probable effects on highway traffic." He stated it does not limit by any certain area within the Special Exception Application process, and in fact traffic is mentioned in several Sub-Sections and does not have any limitation. He would submit that anything in Newtown Township which could conceivably contribute to the traffic impact should be considered. He feels they have the right to produce the information at this point.

Mr. Malinowski asked how the knowledge of development in Newtown going to enlighten the Board as to traffic. He stated Mr. Gallo is not a traffic expert and he asked how he would testify as to how these development might or might not affect this. Mr. Truelove stated he will not testify to this and is a foundation witness for the traffic expert. He stated otherwise he would have to do this through the traffic expert and there would be an Objection that he does not have a proper foundation. He added it was objected to last time because Mr. Majewski was from Lower Makefield and did not have Newtown Township knowledge. Now he presenting a Newtown Township person just to present the number of square feet for the non-Residential and the number of residences for the Residential. He stated he is not going to ask any other questions of this witness, and he is only a foundation informational witness. Mr. Malinowski allowed the testimony to proceed. He stated he would also like to know for each of the developments whether they have begun or do they have a start date if they have not begun.

Mr. Gallo noted Delancey Court is at 398 Durham Road and is 120 Residential lots currently under construction. This was #5 on the map. Mr. Gallo noted #6 on the Map which is the Fiddler/Roberts Tract called Newtown Walk, a development of 102 homes currently under construction. Mr. Gallo noted #7 on the map which is the Melsky Tract a Subdivision of 90 lots, 45 of which are in Newtown Township. He stated this is not under construction but was approved at the Board meeting of 10/10/07. It is currently in litigation.

Mr. Kim noted the date of 10/10/07 and asked the time limit that the Township requires before they void the Approval. Mr. Toadvine stated if it is in litigation, there is no time limit. Mr. Truelove stated otherwise it is five years under the MPC. Mr. VanLuvanee stated it is five years within which the developer is protected against the application of any new Ordinances. He stated if the Ordinances do not change, the Approval is forever, and Mr. Truelove agreed.

Mr. VanLuvanee asked that Mr. Gallo also indicate if the developments have Preliminary or Final Approval.

Mr. Gallo stated the Melsky Tract has Preliminary Plan Approval.

Mr. Truelove stated the Residential tracts shown on the map are outlined with a Keystone and the others have another form.

Mr. Gallo #6 Commercial on the map – Cameron Troilo Inc. at 104 Pheasant Run which is 72,895 square feet renovated offices with a café, a bank, and a five-story 100,000 gross floor area hotel/conference center. This received Final Plan approval and is currently under construction.

Mr. Gallo noted #2 Commercial on the map which is a three building office Park on Colfield Drive. There are 96,600 square feet with parking. It is an office use and has Revised Final Plan Approval. It is under construction.

Mr. Gallo noted #3 Commercial on the map which is DeLuca Corporate Center, 138 S. Sycamore Street. He stated this is a Revised Preliminary Plan proposing 50,850 square feet office building. On 2/21/07, it was approved as Final.

Mr. Gallo noted #5 Commercial on the map – Goodnoe's Corner at 298 N. Sycamore Street. This is a 35,600 square foot retail/apartment building with Final Plan approval and is under construction.

Mr. Gallo noted #6 Commercial on the map – Johnson, Kendall, Johnson, 109 Pheasant Run, which is a 7,500 square foot addition/renovation of an existing 11,827 square foot building. It has Preliminary and Final Plan Approval and Phase 1 is under construction which does not include the addition.

Mr. Gallo noted #7 Non-Residential – Newtown Industrial Building Final Plan, 11 Friends Lane. He stated this is a renovation of an existing 34,831 square foot building for office use and to reconstruct existing parking and new parking for a total of 155 parking spaces. It is under construction for site work only.

Mr. Gallo noted Item #8 – Non-Residential – Penns Terrace Office Park, 54 Friends Lane, which is a two-story 20,000 office building. Final Plan was approved, building is complete, and site work is still being done.

Mr. Gallo noted Item #9 – Non-Residential – Penns Trail Storage of Newtown, 104 Penns Trail. This is a proposed 36,180 square foot, two-story building for mini-storage and 36 parking spaces. This was approved at the Newtown Township Board of Supervisors for Final Plan on 12/12/07.

Mr. Gallo noted Tudor Square Phase III, 642 Newtown-Yardley Road which is Letter A Non-Residential on the map which is construction of 45,456 square feet of commercial office space in a three-story building with 217 parking spaces and loading facilities. This was approved and is under construction.

Mr. VanLuvanee noted Delancey Court and asked when construction started, but Mr. Gallo did not know. Mr. VanLuvanee asked when it received approval, and Mr. Gallo stated it was approved on 9/27/06. Mr. VanLuvanee asked how many units were occupied as of the summer of 2008, but Mr. Gallo did not know. Mr. VanLuvanee asked Mr. Gallo how many of the units are occupied today, but Mr. Gallo did not know.

Mr. VanLuvanee stated Mr. Gallo indicated that Newtown Walk was under construction, and he asked when construction began; but Mr. Gallo did not know. Mr. VanLuvanee asked when it was approved, and Mr. Gallo stated it was approved 1/24/07. He did not know how many units are occupied at the present time.

Mr. VanLuvanee stated Mr. Gallo indicated the Melsky Tract was partially in Newtown Township. He asked if the other half is in Upper Makefield Township, and Mr. Gallo agreed. Mr. VanLuvanee stated he indicated they were given Preliminary/Final Plan, and Mr. VanLuvanee asked if one of the contingencies was approval of a sewage treatment plant, but Mr. Gallo did not know if this was true. Mr. VanLuvanee stated Mr. Gallo indicated this was in litigation, and Mr. Gallo agreed. Mr. VanLuvanee asked if it was his understanding that an Appeal was filed from the Approval, and Mr. Gallo stated the Applicant had withdrawn the Zoning Hearing Board Application, and the people that had Party status challenged that they should finish the Court Case.

Mr. VanLuvanee asked when Mr. Gallo assumed his duties as the Zoning Officer, and Mr. Gallo stated it was October, 2008. Mr. VanLuvanee asked other than reviewing Mr. Majewski's Exhibit what independent checking did he do to verify the status of the projects he has described tonight. Mr. Gallo stated he has his office put together a monthly list to keep it current for the Board of Supervisors and for his own information. Mr. VanLuvanee asked if this list was in existence when he began his job as Zoning Officer, and Mr. Gallo stated it was. Mr. VanLuvanee stated he is testifying as to a record that was maintained by the Township at the time he assumed his job as Zoning Officer and one which he has had updated by his staff, and Mr. Gallo agreed.

Mr. VanLuvanee asked Mr. Gallo what independent verification he attempted to make to determine the accuracy of the information he has testified to. Mr. Gallo stated he trusts that his staff puts in the correct dates; and if he sees any inconsistencies, he would make changes.

Mr. VanLuvanee noted the Goodnoe's Corner project and asked when this was approved. Mr. Gallo stated it was approved on 2/21/07. Mr. VanLuvanee asked if it was not true that by the summer of 2008 that project was substantially completed and occupied, and Mr. Gallo stated to his knowledge it is substantially complete.

Mr. Kim asked Mr. Gallo if Newtown Township asks about Lower Makefield plans when they make their planning decisions to make sure they are working together or do they make decisions solely on Newtown's benefit.

Mr. Truelove objected due to relevance.

Mr. Gallo stated he cannot speak to how the Newtown Township Board of Supervisors makes their decisions.

Mr. Kim asked if they request information about Lower Makefield Township, and Mr. Gallo stated they have not requested any information about Lower Makefield through him.

Mr. VanLuvanee asked Mr. Gallo with respect to each of the projects he has described whether Newtown Township asked the Applicants to prepare traffic studies, and Mr. Gallo stated he cannot speak to all of them since some of them were approved before he held his current position; but if a traffic study was required he feels Newtown Township would have requested it.

Mr. Smolow asked Mr. Gallo if the list he has testified to is kept in the normal course of business by Newtown Township, and Mr. Gallo stated it is and he relies on it in the day to day operation of his office as Zoning Officer.

Mr. Smolow stated he discussed Goodnoe Corner and he referred to this as a retail and apartment complex, and Mr. Gallo agreed. Mr. Smolow asked how many apartments were approved for the site, but Mr. Gallo did not know. Mr. VanLuvanee stated he represented the Applicants and four were approved. Mr. Gallo stated he feels this is correct.

Ms. McGrath had no questions.

Mr. Truelove stated Mr. Gallo indicated that some of his staff did some of the compilation of the information on which he relied this evening, and Mr. Gallo agreed. Mr. Truelove asked if his staff also from time to time goes into the field to look at the developments to see what the stages are of the work that is being done, and Mr. Gallo stated they do and report back to the office and then compile the information. He stated he himself also goes into the field as well to do field studies. Mr. Truelove asked if there is anything in the information he provided tonight which is inconsistent with what he has heard from others in going to in the field to look at the projects, and Mr. Gallo stated there is not.

Mr. Truelove stated Mr. Gallo was asked a question by one of the Board members about Newtown Township approvals, and asked Mr. Gallo if any of the developments he referenced tonight involved Special Exception Applications in Newtown Township, and Mr. Gallo stated not to his knowledge. Mr. Truelove stated there were questions by Mr. VanLuvanee about traffic studies done, and Mr. Truelove asked Mr. Gallo if he is aware whether McMahan Associates performed any of the traffic studies for any of the projects, but Mr. Gallo stated he did not have this information.

Mr. Bruce McClish was sworn in. Mr. McClish stated he resides at 506 American Drive and is a member of the Citizens Traffic Commission which was created in 2006 by the Board of Supervisors. He stated a Resolution was passed by the Board providing for the outline of the tasks and responsibilities of the Citizens Traffic Commission.

Mr. Truelove asked Mr. McClish his professional background, and Mr. McClish stated he is a Civil Engineer licensed in Pennsylvania and California. He is also familiar with traffic issues. Mr. Truelove asked Mr. McClish many members are on the Citizens Traffic Commission, and he stated there are seven members. He stated they were selected by the Board of Supervisors after soliciting Applications and conducting interviews. The Board of Supervisors divided the Township into seven zones and their desire was to have one representative on the Commission from each of the Zones. He is the representative from Zone 6. He is familiar with the location of the proposed Hospital which is proposed for Zone 7. While it is not his Zone, all Commission members work together on traffic issues in every zone. Mr. Truelove asked how often the Commission meets, and Mr. McClish stated they meet once a month. Mr. Truelove asked Mr. McClish to review the functions the Commission has performed since its inception in 2006. Mr. McClish stated the Commission was developed to try to address traffic issues in the Township. They consider the knowledge of the individual Commissioners of the Township and in particular their Zone as well as public input at the meetings. He stated they also are to compile a list of major and minor traffic issues in the community, rank the projects they have identified, and present the list to the Board of Supervisors for their information. He stated the Commission is also to look for funding for traffic improvements. They are an Advisory Board to the Township. He stated to this point they have put in some traffic calming improvements in neighborhoods to address

concerns residents has raised. They have also reviewed various development projects. They provide their information to the Board of Supervisors and any other Boards necessary with respect to their findings and reviews.

Mr. Truelove stated in 2007 the Citizens Traffic Commission was charged with creating an overall analysis of the traffic safety and flow issues in the Township, and Mr. McClish stated this was part of the original Resolution. As a result of their work they issued a Traffic Safety/Traffic Flow Study in January, 2008. This study had nothing to do with the Application for Frankford Hospital. This report was marked as Exhibit T-8.

Mr. VanLuvanee objected to Exhibit T-8 noting it has no official status as an Ordinance of the Township. He stated it is an advisory report; and unless Mr. Truelove is prepared to say that these recommendations are part of a Township Ordinance or Resolution that an Applicant is supposed to follow, he does not see the relevance. He stated this is a citizen's advisory committee and not an opinion of an expert witness.

Mr. Truelove stated they have already discussed that traffic is a major component of the issues being considered by the Zoning Hearing Board in a Special Exception Application. He stated the Resolution is part of the Exhibit and he is laying foundation for the task that is performed and it does have advisory input as to developments in the Township. He stated a subsequent Exhibit that will be presented will demonstrate that the Planning Commission actually incorporated the Citizens Traffic Commission report as part of its analysis of the Application in this case. He stated this group has a specific function.

Mr. VanLuvanee asked for an offer of proof, and Mr. Truelove stated the offer of proof is that through the study that was made, several intersections and areas of traffic concern were identified and ranked; and of the numerous areas that were looked at which precedes the Hospital Application, the number 2 location of traffic concern was the area where the Hospital is proposed. He stated some of the issues raised in the report are relevant for the Zoning Hearing Board's consideration. He stated this area was an area of concern in the Township for traffic which even preceded the Hospital's proposed Application.

Mr. Kim asked if this would not be testified to by the Township's traffic expert as opposed to a Citizen's Commission; and Mr. Truelove stated this is something the traffic expert will rely on, and he felt it was important for the Board and the record to reflect the process that was done very deliberately with input from people including the Township's appointed traffic engineer. He stated the Citizens Traffic Commission is an independent body of the Township that offers opinions which are well founded and based on traffic concerns. He stated these traffic concerns predated the Hospital Application, and he feels this is directly relevant to the issues at hand.

Mr. VanLuvanee stated that he has no question that the Citizens Traffic Commission spent a lot of time doing their work and that they consulted the sources that the report indicates they consulted, and this is part of the reason for his objection. He noted Page 4 of the report under history and purpose it states, “In performing its mission the Commission has actively sought input and advice from the citizens of Lower Makefield Township along with input and advice from the Township’s traffic engineer, the Township Manager, and Township Police Department, and the Township Public Works Department. The Commission’s primary mission is to create a priority list identifying traffic problems throughout the Township along with potential solutions.”

Mr. VanLuvanee stated this is part of his problem because there is a reference to the input from the engineer, Township Manager, Police Department, Public Works Department and yet this is a compilation of that information. He stated this may be helpful to the Township or the Traffic Commission, and it may be helpful to the Township if they ever decide to amend the report that is relevant to the Township’s Traffic Impact Fees and they want to reprioritize some of the improvements that are identified in the study that formed the basis of the Impact Fee Ordinance, but to accept an advisory report as if it were an expert report is troublesome. He stated as this relates to the Zoning Hearing Board he feels it is piling on hearsay upon hearsay and is being offered as if it were expert testimony on an issue that Mr. Truelove considers to be of critical importance. He stated if it is of critical importance they should have the best expert testimony available.

Mr. Malinowski asked Mr. Truelove if he is offering this Exhibit as expert testimony or as testimony from a group of concerned citizens concerned about traffic issues in the Township despite not having professional expertise in traffic. Mr. Truelove agreed that they are not certified traffic engineers; however, they have experience and knowledge and are a concentrated group similar to if there was a sewer issue, they would have the Sewer Authority offering their concerns and opinions. He stated the EAC members are not all experts, but they offer their opinion and their reports are received in the normal course. He feels this is an important foundation for the expert witness and for the Board to hear that the Township was concerned enough about traffic that they created by Resolution a separate advisory commission whose sole duty is traffic. This is not something that was created by this Application. He stated they do have an expert to testify but feels it is important to have this foundational information.

Mr. Smolow stated he supports the Township’s position on this. He reviewed the Resolution creating the Citizens Traffic Commission which states, “Whereas the Lower Makefield Township Board of Supervisors desires to create a Lower Makefield Township Traffic Commission to identify, collect information, analyze and provide recommendations to the Board of Supervisors on issues related to the safe and free flow of traffic in Lower Makefield Township...” He feels it is clear that the Commission has developed expertise, and he does not agree with the Township Solicitor and believes that the Commission by its Resolution is in fact an expert Commission and has the authority to give a report to the Township concerning important areas. He stated this is important

to the Township and to the Zoning Hearing Board because under the requirements for a Special Exception, they are supposed to consider traffic issues and specifically required to consider conditions that they may or not attach to a Special Exception. He stated this report includes recommendations to address certain traffic problems in the Township.

Mr. Malinowski stated while he is not sure of the relevance, he will allow it as he feels the Board can consider it in the spirit in which it is offered recognizing that it is not expert testimony but is the work of a group of concerned citizens. He stated the Board does recognize the Township's concern with general traffic issues. He stated it will not be looked at as expert testimony.

Mr. VanLuvanee stated his objection was not to accepting it as an advisory report, and he recognizes that the Zoning Hearing Board would normally accept advisory reports, Minutes, and Planning Commission recommendations as this is part of their business; but this is much different from an expert report. He stated they may get into argument later as to whether this can serve as foundation for an expert witness to testify.

Mr. Truelove noted Page 2 – Table of Contents which lists different clusters for different Chapters and asked the significant of the different clusters identified in the Table of Contents. Mr. McClish stated this was a method to try to create some order out of the number of projects they had. He stated they had fifty-six projects throughout the Township, and they were trying to figure out if there was some relationship between the projects so they looked at clusters which for the most part were along corridors – Big Oak Road, Edgewood, Stony Hill. He stated within the corridors there were several projects. He stated some were projects which would create continuity within the corridor such as providing a multi-use trail or shoulders along the road. He stated they had other clusters that were what they called minor projects which were primarily traffic-calming projects which they felt could be performed by the Township staff, PennDOT or under a minor contract with a contractor. These would include signing or striping. Mr. McClish stated they then had projects to be done by others such as Big Oak and Oxford Valley which is part of the Matrix project. Mr. Truelove stated it appears that some of these were identified by location and some by project, and Mr. McClish agreed.

Mr. Truelove asked how long the Citizens Traffic Commission worked to create this document, and Mr. McClish stated they created this over a period of about ten months.

Mr. Truelove noted Page 14 of the Exhibit where they list Cluster “O” Projects, and Mr. Truelove asked the significance of this Section. Mr. McClish stated these are the projects that are to be done by others as they are already committee or will be committed as part of another project. He noted particularly Big Oak/Oxford Valley intersection is part of the Matrix project so they did not put it in the Big Oak Corridor project corridor list which was Cluster B.

Mr. Truelove asked that Mr. McClish read into the record the fourth paragraph of page 14, and Mr. McClish read as follows: “A project that has been installed and is waiting completion of an after-study effectiveness evaluation is the signal timing on the Newtown By-Pass. The Citizens Traffic Commission will monitor the By-Pass to work toward maximum efficiency and to minimize adverse effects on the roads that adjoin it. Lower Makefield Township will initiate continued coordination with Newtown Township to monitor system maintenance and periodic study effectiveness of the signalization.” Mr. Truelove asked if the proposed Frankford Hospital site is located in the area they are referencing in that paragraph, and Mr. McClish stated it is.

Mr. Truelove asked how the Citizens Traffic Commission developed the priority list of the different projects, and Mr. McClish stated once they identified the projects they worked with TPD, the Township’s traffic engineer, to develop the matrix which is on Exhibit D-1. He stated they looked at the functional classifications of the roadways, the existing average daily traffic, the safety, whether there was a hazard in the area, the crash history, congestion, and availability of funds to mitigate the problem. Mr. Truelove noted the Exhibit Mr. McClish is referencing is after Page 29 in the report, and Mr. McClish stated it is the last page of the report. Mr. McClish stated they used this to rank each of the projects, and the engineer did the analysis for each project and gave the project a total score based on the matrix. Mr. Truelove asked if the location in the area of the proposed Frankford Hospital site appears on the priority list, and Mr. McClish stated it does. He noted Appendix B which follows the Resolution and begins the table that ranks all the projects in their priority order. He stated the first is Scudders Falls Bridge/ I-95/Taylorville Interchange, and the second is Yardley-Newtown Road/Stony Hill Road which is the intersection adjacent to the proposed Hospital project.

Mr. Truelove noted the first priority and asked if this relates to the proposed Bridge widening, and Mr. McClish stated while it does relate to this, they also feel there is a problem there now. He stated the Township does not have money to replace the Bridge and widen the freeway; but they felt that if they could find funds to do an interim project including some re-striping, they could improve the safety in that area.

Mr. Truelove noted Project #2 and he asked Mr. McClish to describe what the columns indicate. Mr. McClish stated after “location” the next column is “improvement,” and this identifies the improvements that are recommended in the report. These include to add and lengthen turn lanes and modify the signal timing. He stated the next six columns relate to the matrix. He noted in Appendix B it gives the number of the score for each of those functions – the functional classification of the road, the existing average daily traffic, the hazard evaluation, the crash occurrence, congestion, and funding.

Mr. Truelove asked Mr. McClish to identify each number and explain how it was determined to use that number for each of the categories. Mr. McClish stated under the Functional Classification it was given a 4 which is a principal arterial. He stated you could argue that Newtown-Yardley Road at that location is an expressway which would have pushed it up to 5, but they took the lower number. He stated Existing Daily Traffic is greater than 15,000 which is the highest number so it was rated as a number 5. He stated with regard to Safety Evaluation, there are documented injury accidents there, and they took accident history over the past three years. For this they came up with a 4 which is the highest hazard. He stated Crash History was a 10 which means that it has the highest concentration of crashes. He stated for all the projects, they broke it into three groups – the lower third number of crashes, the middle third, and the upper third; and this location had the upper third so it rates a 10. Congestion is an 8 which means there are daily problems not limited to peak a.m. and p.m. periods. He stated this information came from the traffic engineer. Availability of Funds was listed as 2 because they felt that this major intersection might be eligible for funds outside the Township. The total number came to a 33.

Mr. Kim stated this is a simple risk assessment/prioritization. He asked if they would re-prioritize after they make improvements to look at the numbers and re-classify them or do they have a goal of reaching a moderate total point number they want to achieve. Mr. McClish stated if you look at the high numbers – the hazard, the crash occurrence, and congestion they could move the project down the list. Mr. Kim asked if there is an acceptable number of improvements and would they re-evaluate or re-calculate the total points after they make those improvements. Mr. McClish stated they have not addressed that issue at this time as at yet they have not done any of the major projects. Mr. Kim stated if the highest number is 35, do they have a goal of moving an area to a moderate number such as 25 to make it an acceptable traffic condition; and Mr. McClish stated looking at the evaluation matrix, if they could move projects from the upper third number of crashes down into the middle or lower third or if they are in the middle third if they could get them down to the lower third by making some improvements, he feels this is what they are trying to do. He stated they are trying to get traffic to move through the community better. He stated the most complaints they hear from the community are the number of cut-through vehicles in the residential areas and the speed at which people drive through the residential areas. He stated if they can make improvements on the major arterials, hopefully, they can reduce the congestion on those and can encourage people to use those routes rather than cut through neighborhoods, and this is there long-term goal.

Mr. Truelove stated this report was submitted in January, 2008 and the Traffic Commission was then provided with a Sketch Plan for the proposed Frankford Hospital Application, and Mr. McClish agreed that this was provided January 10, 2008. As a result of the submission, the Traffic Commission submitted a report to the Board of Supervisors dated 2/9/08. Mr. Truelove stated this letter was attached to the Planning

Commission memo of 7/29/08, but Mr. McClish stated he did not know whether it was attached to that memo. Mr. McClish stated he was one of the authors of the letter dated 2/9/08 which was signed by the Citizens Traffic Commission Chairman, Gary Gilman, Esquire. Mr. Truelove stated he would like to submit the Planning Commission memorandum with the attached letter. Mr. Malinowski stated he felt the Zoning Hearing Board had this, and Mr. Truelove stated he did not feel they did as he did not feel it was part of the record yet.

Mr. VanLuvanee stated he will have a problem with this because the Plan that was apparently reviewed by the Commission is not the Plan that was submitted with the Special Exception Application. Mr. Truelove agreed. Mr. VanLuvanee stated it was a significantly different Plan. Mr. Truelove stated while he would agree, he would argue that the recommendation does deal with some of the issues raised by that.

Mr. Malinowski stated they do have a recommendation from the Planning Commission. Mr. Truelove agreed and stated it refers directly in the memo and attaches the Commission's memo he just referred to as part of its rationale for its recommendation.

Mr. Malinowski asked if he wants to attach the Traffic Commission's letter to the Planning Commission's letter, and Mr. Truelove stated it is already attached.

Mr. VanLuvanee stated he does not have it and has never seen it.

Mr. Malinowski stated he does have a copy of the Planning Commission's report, and he is asking if he is advising that the Planning Commission's report was based on faulty information; and Mr. Truelove stated he is not saying this.

Mr. VanLuvanee stated at some point he would like to be provided a copy of the Planning Commission report because he has never seen it.

Mr. Truelove stated he is trying to get it into evidence and would be happy to provide it to Mr. VanLuvanee.

Mr. Toadvine suggested that Mr. Truelove circulate it. Mr. Toadvine provided two copies to the Zoning Hearing Board and one to Mr. VanLuvanee and agreed to provide one to Mr. Smolow and Ms. McGrath.

Mr. VanLuvanee stated he would like the opportunity to question this witness at the next Hearing. It was agreed to continue the matter to March 17, 2009 at 7:30 p.m.

February 17, 2009

Zoning Hearing Board – page 32 of 32

Mr. Zamparelli moved, Mr. Gruen seconded and it was unanimously carried to continue this matter to March 17, 2009 at 7:30 p.m.

There being no further business, Mr. Gruen moved, Mr. Zamparelli seconded and it was unanimously carried to adjourn the matter at 10:00 p.m.

Respectfully Submitted,

David Malinowski, Chairman