

TOWNSHIP OF LOWER MAKEFIELD  
ZONING HEARING BOARD  
MINUTES – JUNE 21, 2011

The regular meeting of the Zoning Hearing Board of the Township of Lower Makefield was held in the Municipal Building on June 21, 2011. Chairman Bamburak called the meeting to order at 7:00 p.m.

Those present:

Zoning Hearing Board:        Paul Bamburak, Chairman  
   Jerry Gruen, Secretary  
   Keith DosSantos, Member  
   Anthony Zamparelli, Member  
   James McCartney, Alternate Member

Others:                             David Truelove, Township Solicitor  
   James Majewski, Township Engineer  
   Barbara Kirk, Zoning Hearing Board Solicitor  
   Dan McLaughlin, Supervisor Liaison

Absent:                             Gregory J. Smith, Zoning Hearing Board Vice Chair

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

Mr. Bamburak stated this matter has been remanded for three specific areas – the impact on traffic volume, conformity with the Comprehensive Master Plan, and impact of the Hospital in anticipation of the Scudders Falls Bridge project. He stated these items are all the testimony and comments that the Board will entertain this evening. He stated there was previous testimony about concerns over medical waste, tax increases, etc. and none of those issues will be considered by the Zoning Hearing Board this evening as these items are not what the Judge remanded them to study.

Mr. Bamburak stated he understands that some people may be concerned that there are new members on the Board who did not hear the prior testimony and some of that testimony could have an effect on the three issues noted in the Remand, and those members have been provided a copy of the transcripts and have indicated they have reviewed those transcripts.

Mr. Bamburak stated public comment will be heard at the end of the testimony. He stated another meeting is scheduled for July 19, 2011.

Ms. Kirk stated because this is a Remand from the Court in Doylestown to supplement the Record, the format that has been established is that the Applicant, Frankford Hospital, through its attorney will present its evidence first. Once that evidence is presented, the other attorneys would have the right to cross-examine. The Township will then put on its testimony through its Witnesses to supplementing the record; and again, once the Township's Witnesses are finished, the other attorneys would have the right to cross examine. She stated the next group of Parties involved are represented by Mr. Smolow, and they are known as the Residents Against Frankford Relocation. Ms. Kirk stated they would have an opportunity to put on Witnesses to supplement the Record; and once those Witnesses are finished, the other attorneys would have the right to cross examine.

Ms. Kirk stated Mr. Koopman is present representing Newtown Township, and she does not believe that at this point Mr. Koopman has any Witnesses he intends to present on behalf of Newtown Township. If testimony is required on behalf of Newtown Township, Mr. Koopman would be last to present his Witnesses; and again, the remaining attorneys would have the right to cross examine.

Ms. Kirk stated the issues that are before the Zoning Hearing Board deal with two specific items one of which is the impact of the proposed facility upon traffic in light of the proposed development in Newtown Township as well as traffic that may result as a result of other roadway improvements including the Scudders Falls Bridge Roadway Improvement Project. She stated the second issue deals with the proposed Hospital and Medical Office facility at this location in light of the Township's Comprehensive Master Plan.

Ms. Kirk stated after speaking with Mr. VanLuvanee, she believes that his client does not wish to present any further Witnesses at this point, but will rely on the testimony previously presented at the prior Hearings. She stated that to the extent that the Applicant wishes to present Witnesses in rebuttal to other Witnesses, this is being held in reserve by Mr. VanLuvanee. Mr. VanLuvanee agreed. He stated the Motion to supplement the Record was made by Lower Makefield Township and Residents Against Frankford Relocation, and he did not make the Application nor request supplementing the Record since there is already a Decision from the Zoning Hearing Board granting the Special Exception. Mr. VanLuvanee stated the Judge in his March 8 Order left it to the discretion of the Zoning Hearing Board to determine how the supplementation should occur and whether they would or would not permit new Witnesses, and Mr. VanLuvanee stated he may have some issues along those lines. He stated at this point he does not intend to supplement the Record as there is already a Decision.

Ms. Kirk stated with respect to the Remand Hearing, several documents have already been generated which will be marked as Exhibits on behalf of the Zoning Hearing Board. The Court of Common Pleas Order dated 1/7/11 issued by Judge Fritsch which Remands the matter back to the Zoning Hearing Board was marked as Exhibit ZHB 1A. A subsequent Order was issued by Judge Fritsch dated 3/8/11 to which Mr. VanLuvanee has referenced, and that Order states that “it is the Zoning Hearing Board’s discretion to decide how supplemental evidence may be presented either through cross-examination of prior Witnesses or the calling of new Witnesses. This was marked as Exhibit ZHB 1B. Notice of this evening’s Hearing was posted at the property subject to this Remand Hearing, and that Notice was marked as Exhibit ZHB 2. Notice was posted on 6/3/11. The Notice of this evening’s Hearing was also published in the Bucks County Courier Times on 6/6/11, and an Affidavit of Publication has been provided and that was marked as Exhibit ZHB 3. Notices were mailed in accordance with the Zoning Ordinance to all residents that may be affected by the Hearing, and a copy of the letter that was sent to those property owners with copies of the Tax Map Parcels and listing of addresses as well as names was collectively marked as Exhibit ZHB 4.

Mr. Bamburak stated the Board will go until 10:00 p.m. this evening.

Mr. Ronald Smolow stated he represents the Residents Against Frankford Relocation (RAFR). He stated in addition to the items the Zoning Hearing Board Solicitor has mentioned, in the Notice of the Hearing for this evening, the Zoning Hearing Board invited persons who are interested in becoming Parties to appear and become Parties of Record; and he would like to offer as Parties to this proceeding, several individuals who are here individually and several who are present in a representative capacity. He agreed to call them one at a time or he could read their names. Ms. Kirk stated the specific publication indicated that any interested person desiring to attend the Hearing will be given the opportunity to be heard. She stated there is nothing in the Notice of this evening’s Hearing specifically designating individuals to request Party Status. She asked Mr. Smolow if he is representing these additional individuals together with the group that he represents, and Mr. Smolow stated he would be representing a few individuals.

Ms. Kirk asked Mr. VanLuvanee his position, and Mr. VanLuvanee stated his position is that this is a proceeding Parties to which were resolved and determined a long time ago. He stated this is not a new case, and Parties have already passed the time when they could have intervened in the original proceedings. He stated it is not a new case; and in his view, if the Board wants to give people the right to be heard this is one thing, but this is a case that is already in litigation, has been Remanded for a limited purpose, and it is inappropriate in his opinion to offer persons Party status who have not had Party status previously and did not request it three years ago when this proceeding was opened.

Ms. Kirk asked Mr. Truelove his position on behalf of the Township, and Mr. Truelove stated they would support the request by Mr. Smolow on behalf of these proposed clients. He stated while the matter has been Remanded for a “limited purpose,” it is still a case which is to be heard in many new respects; and some issues may be presented that may cause others to want Party status as well. He stated to assume that there is nothing that could arise from this litigation that could again cause the Court to take a different look at things would deprive people the opportunity to be able to present their views either individually or through counsel. Mr. Truelove stated after Mr. Smolow is done his presentation in the procedural issues, he would like to make a statement as to the Township’s position with respect to evidence and testimony tonight as well.

Mr. Smolow stated he would like to read into the Record the second to the last paragraph of the Board’s Notice which does state, “In order for you to become a Party to a Zoning Hearing Board proceeding, you must notify the Zoning Hearing Board at the commencement of the Hearing process your desire to do so.”

Mr. Smolow began naming the additional Parties, and Ms. Kirk asked that each individual be sworn in and in this way it would afford everyone the opportunity to question them as to their ability to have Party status.

Ms. Ruth Wright was sworn and stated she lives at 1036 Lindenhurst Road, Broadmeadow Farm in Lower Makefield. Mr. Smolow asked if she owns the property, and Ms. Wright stated she does. Mr. Smolow asked how long she has lived there, and she stated she has lived there since 1948. Mr. Smolow asked where her property is located with respect to the proposed Hospital, and she stated she is at the corner of Lindenhurst Road and the By-Pass. Mr. Smolow asked if she drives by 332/Stony Hill Road, and Ms. Wright stated she does almost every day. Mr. Smolow asked if she is delayed by traffic, and she stated she is almost always. She stated getting out of her driveway on Lindenhurst Road is difficult and to turn onto the By-Pass in either direction is always difficult.

Mr. Bamburak stated for Party Status, they only have to establish that the individual is affected by proximity and it appears that they are offering testimony. Mr. Smolow while it is testimony, it is to establish her interest in the case.

Mr. VanLuvanee stated he objects to Ms. Wright’s status. He stated what she has said has nothing to do with any of the three issues that are before the Board with respect to Remand. He stated she is testifying regarding traffic concerns generally, and she has not said that she believes that she is impacted by traffic in any manner any different than any other individual. He stated to be afforded Party status such as would give one the right to Appeal, one has to prove that they are uniquely impacted – not impacted in the same manner than any other resident of the Township is impacted. He stated he would repeat

his objection to all of these individuals in that they all had an opportunity to participate in this Hearing three years ago. He stated Ms. Wright has suggested nothing that indicates that there is anything unique about the Remand, and she had the same concerns three years ago and decided not to avail herself of the right to become a Party.

Mr. Smolow stated he could read off the list of names and addresses. He stated their locations with respect to the proposed site for the Hospital will vary.

Mr. Truelove stated he would like to ask Ms. Wright some questions that may deal with some of these issues as well. Mr. Truelove asked Ms. Wright if her property borders Newtown Township, and Ms. Wright stated it is on Lindenhurst. Mr. Truelove stated across Lindenhurst is a building built by Brandywine Trust, and Ms. Wright agreed. Mr. Truelove stated traffic proceeds across 332 in front of her home from Newtown Township into Lower Makefield, and Ms. Wright agreed. Mr. Truelove asked if it is fair to say that developments have occurred in Newtown Township over the last five to ten years which have caused traffic to increase in volume in her experience.

Mr. VanLuvanee objected stating she has no qualifications to make that statement. Mr. Bamburak sustained the Objection.

Mr. Truelove asked Ms. Wright if she has seen an increase in the number of developments in Newtown Township west of where she lives in the last five to ten years. Mr. VanLuvanee stated he would stipulate that there have been developments in Newtown Township in the last five to ten years, and this was established at the last Hearing. He stated there was a lot of testimony on that issue. Mr. Truelove stated this goes directly to one of the issues they talked about, and Mr. VanLuvanee stated it does not go directly to it, but goes to the question of whether or not the testimony given by Mr. O'Brien would have changed if there had been additional information allowed. Mr. VanLuvanee stated Newtown Township's Zoning Officer testified as to specific projects in Newtown Township and the Newtown Township engineer testified as to projects in Newtown Township. He stated the only thing that no one attempted to do on the part of the Township or RAFR was to offer any expert testimony to suggest that Mr. O'Brien's conclusions would have been different or that if a new expert had been put on that his conclusions would have been different because of the consideration of Newtown Township. Mr. VanLuvanee stated this is the issue – not whether or not there is traffic in Newtown Township. Mr. Truelove stated Mr. VanLuvanee is now testifying, and the issue was trying to establish Ms. Wright's interest with respect to the project. Mr. VanLuvanee stated he is not testifying, but is giving a recitation of what is already in the Record by way of supporting the Objection made to granting Party Status to people who had every right to be here three years ago and chose not to participate.

Ms. Kirk asked Ms. Wright if she received specific Notice mailed to her from the Township about tonight's Hearing, but Ms. Wright stated she was not sure, but she did not think so. Ms. Kirk asked Ms. Wright how she found out about tonight's Hearing, and Ms. Wright stated she had gotten other messages. Ms. Kirk asked for clarification of "other messages." Ms. Kirk stated people had communicated to her that there was a meeting tonight. Ms. Kirk asked if she recalled receiving a letter from the Township notifying her of tonight's Hearing, and Ms. Wright stated she does not recall this.

Ms. Kirk asked Mr. Smolow the names of the remaining Parties he wishes to offer, and Mr. Smolow noted the following:

Sharon Kimmel, 1036 Lindenhurst Road  
Ed Shapiro, 530 Palmer Farm Drive  
Ginny Torbert, 1700 Yardley-Newtown Road  
Eric Feiner, 1512 Buck Creek Drive  
Zachary Rubin, 1661 Covington Road, Representative of Makefield Glen Homeowners Association

Ms. Kirk asked of these individuals how many of these have received Notice directly from the Township of this evening's Hearing; and Mr. Smolow stated he does not believe any of them have other than possibly Sharon Kimmel. However, upon questioning, Ms. Kimmel stated she heard about it through "word of mouth."

Ms. Kirk asked the Offer of Proof for these people to be Parties to this action. Mr. Smolow stated they all live in the Township, and own real estate in the Township with the exception of Ms. Kimmel who works in the Township opposite the site of the proposed Hospital. Ms. Kirk asked the business she has, and Mr. Smolow stated she has a school where she teaches horse riding and she did give testimony at a previous Hearing although she was not a Party at the time. Mr. Smolow stated Mr. Rubin would be testifying on behalf of Makefield Glen Homeowners Association.

Ms. Kirk asked Mr. VanLuvanee, other than his general Objections to the fact that these persons should have come forward three years ago to be Parties to this action, if there are any other specific questions he wishes to ask any of these individuals; and Mr. VanLuvanee stated there are no specific questions. He stated he does have some comments. He noted Ms. Kimmel is not a landowner, and in his view does not have standing to become a Party. He stated she also, as noted by Mr. Smolow, testified at the last Hearing and certainly knew the proceedings were ongoing, and she chose not to become a Party at that time. Mr. VanLuvanee stated with respect to Mr. Rubin, he understands the Offer of Proof from Mr. Smolow, is that Mr. Rubin is not seeking individual Party status, but representational Party status on the behalf of the Homeowners' Association, and he would Object to that representational status as they have no Resolution from the Board of Directors authorizing him to appear.

Mr. VanLuvanee stated they went through this same issue at the first set of Hearings with respect to one of the Homeowners' Associations, and he recalls that only the individual was given individual Party status as an individual and not on behalf of the Association. Mr. Smolow stated if Mr. Rubin were called to testify, he would testify that the Makefield Glen Homeowners' Association did pass a Resolution authorizing him to appear in opposition to the Hospital on behalf of the Homeowners' Association. Mr. VanLuvanee also noted that the location of Makefield Glen is not immediately adjacent to this property, but is quite a ways from the property; and the interest of that Association by virtue of the fact that the location is not immediately adjacent to the property that is the subject of this Hearing, is in his view too remote to give the Association standing to appear in this proceeding.

Ms. Kirk asked Mr. Smolow if any of these individuals intend to present Witnesses of their own or are they collectively being represented through the Witnesses he intends to present; and Mr. Smolow stated at this time, he does not believe they intend to present any additional Witnesses, but he does not know this for a fact nor is he certain that this will remain their intention at the next Hearing. Ms. Kirk asked Mr. Smolow if he is officially engaged to represent all of these individuals, and Mr. Smolow stated he is.

Mr. Smolow stated for Mr. Shapiro, the Palmer Farm Village Community Association did adopt a Board Resolution #2009-01 1/15/09 authorizing the Association to oppose the Application of Frankford Hospital. Ms. Kirk asked if they sought Party Status prior to this evening's proceedings, and Mr. Smolow stated he did not believe so. Mr. Truelove stated he believes that Mr. Shapiro did make an offer at one of the prior Hearings.

Mr. Edward Shapiro, 530 Palmer Farm Drive, was sworn in. He stated three years ago he gave to the Zoning Hearing Board a Resolution. He stated they did a survey of all 169 homes in the development and only three were in favor of the Hospital. Mr. VanLuvanee stated he recalls this, and it is in the Record, but the Association did not request Party Status. Mr. Smolow stated he was not there at that time. Mr. Truelove stated he believes there was an attempt to request Party status but there was an issue with the Resolution and whether there was authorization, and he does not believe it was followed up on until tonight. Mr. Truelove stated he feels this was the third or fourth Hearing in October or December, 2008. Mr. VanLuvanee stated the date of the Resolution is 2009, and he recalls that Mr. Shapiro testified during the Public Comment period and presented the Resolution. Mr. Shapiro stated he wanted to testify but was not allowed to.

Mr. Bamburak stated they would be allowed to testify even if they were not granted Party Status. Mr. Smolow stated while this is true, if they wanted to call Witnesses or have the right to Appeal if there is an adverse ruling, there are other reasons why someone would want to be a Party. Mr. Bamburak stated there are already a lot of Parties that are Appealing.

Mr. Bamburak stated he is more than happy to entertain all the testimony, but asked Ms. Kirk if you must have Party status in order to call Witnesses, and Ms. Kirk stated this is generally true.

Ms. Kirk asked Mr. Truelove if there is anything other than his earlier statement as to his position on these additional individuals. Mr. Truelove stated he would rely on the presentation made by Mr. Smolow and the other information provided this evening. He stated the Township would request the Applicants request for Party status.

Ms. Kirk stated she wants it clear for the Record that these individuals did not specifically receive Notice of tonight's Hearing from the Township. She stated these individuals are not adjoining property owners. Mr. Smolow stated this is incorrect, and Ms. Wright's property is across the street (332) from the subject property so she is an adjoining property owner, and she did not receive Notice and she should have. Ms. Kirk stated she is not on the list of individuals that received Notice. Mr. Truelove stated he would agree with Mr. Smolow's information because at the Hearing when Ms. Kimmel did testify he believes it was in the record the proximity of that property to the proposed development location.

Mr. VanLuvanee stated Ms. Wright owned the property three years ago and knew about these proceedings at that time and had the opportunity to participate at that time. He stated they have a Remand for a very limited purpose. He stated the potential of allowing new Parties in opens up an entirely different "can of worms;" and if you let someone in as a Party, their argument is that they get to present their Witnesses, and they did not even participate in the request to supplement the Record which was only from the Township and RAFR. Mr. VanLuvanee stated no other individuals sought the status to intervene in the Court above. He stated the only Parties are the Township and Residents Against Frankford Relocation. He added that Mr. Koopman was given leave to intervene for Newtown Township.

Mr. Smolow stated he is responding to the indication of the Zoning Hearing Board in the Public Notice and posted Notice that invites persons that want to appear and become Parties. He stated he does not intend to call Witnesses tonight through these individuals, but he cannot speak to what they will do at the next Hearing. He stated these individuals would like to become Parties and they have an interest as residents of the Township, and he feels they should be given Party Status.

Mr. Bamburak stated on the advice of counsel, he will allow the Parties to be joined except for Ms. Kimmel who is not a property owner.

Mr. VanLuvanee asked if the Parties are Makefield Glen Homeowners Association and the Palmer Farm Association, adding he understood that Mr. Rubin and Mr. Shapiro were intervening as representatives of the Associations and not individuals. He stated he feels this should be made clear for the Record. Ms. Kirk stated as she understood it, they were being offered as Parties as individuals and representatives for the Homeowners Associations. Mr. Bamburak stated Mr. Shapiro did have a Resolution from his Board, and he asked if Mr. Rubin has this as well. Mr. Smolow stated while he does not have it tonight, he will bring it to the next Hearing.

Mr. Zachary Rubin was present and affirmed to tell the truth. Mr. Bamburak asked if action has already been taken by the Homeowners Association, and if he will produce the document which already exists; and Mr. Rubin stated on 7/14/09, the Executive Board of the Makefield Glen Homeowners Association representing 848 homeowners passed a Resolution in opposition to the Hospital relocation and gave him the authority to convey this to the Zoning Hearing Board. Mr. Bamburak asked Mr. Rubin to bring this to the next meeting, and Mr. Rubin agreed to do so. Mr. Bamburak asked Mr. Rubin why he did not request Party status earlier; and Mr. Rubin stated since the case was heard, Summit Square Shopping Center has expanded greatly, and a number of their residents go to Summit Square Shopping Center and have to go right by the intersection of 332 and Stony Hill Road. He stated this is new development in Newtown Township, and he felt this was what the Remand Order was about.

Mr. VanLuvanee stated he feels there will be another argument, and one of the threshold issues the Zoning Hearing Board will have to decide is the relevant timeframe for the presentation of evidence since the Zoning Hearing Board closed these Hearings in August, 2009. He stated testimony with respect to the Remand should be limited very clearly to matters which were or could have been offered as of that timeframe had not the objections about which complaints have been made at that time. He stated the Board will also have to decide whether or not to permit Parties who did not choose to produce experts at that time, to produce experts now, even though they had the opportunity to do it then. He stated Mr. Rubin has highlighted this by saying since the Hearings were closed, something has happened; and now he wants to get into what happened since then. Mr. VanLuvanee stated if they follow this logic, they will go down a “slippery slope,” and this Hearing will never be over. Mr. VanLuvanee stated he will be Objecting to testimony as to anything that happened after the Hearings were closed in 2009.

Mr. Kirk asked if there were any other preliminary matters to be dealt with, and Mr. Smolow stated he had requested the Zoning Hearing Board to issue, before tonight’s proceeding, two subpoenas. He stated one was to the Pennsylvania Department of Transportation (PennDOT) and the other to the Delaware River Joint Toll Bridge Commission. Mr. Smolow stated the subpoenas were served to those two agencies, and

he did hear from them yesterday afternoon. He asked if he should wait until it is RAFR's turn to present evidence to go through these issues or should he address them at this time. Ms. Kirk asked what issues he is referring to, and Mr. Smolow stated it is an issue arising from the response received. He stated the Agencies were to respond today, and he did work out an understanding with counsel for the Joint Toll Bridge Commission that they would not be appearing this evening, but without waiving any of the rights they have to obtain documents and Witnesses with respect to the subpoena, they would work together on an appropriate response at the next Hearing. He stated they have not been able to work out an understanding with respect to the subpoena addressed to PennDOT. He understands that counsel for PennDOT is present this evening, and he asked the Board when he should address these issues.

Ms. Kirk asked Mr. VanLuvanee his opinion. Mr. VanLuvanee stated he would prefer to have whatever is going to be put on the Record to be put on tonight because he feels it is procedural, and he does not want to wait another month and then have the Hearings delayed another month or two. He stated he feels Mr. Smolow is aware that the Zoning Hearing Board has no power to enforce the subpoena, and Mr. Smolow would have to go to Court if he wants to enforce it.

Mr. Truelove stated he agrees with Mr. VanLuvanee on this.

Ms. Kirk stated so there is a clear understanding of what is being discussed, the letter she received from the Township is addressed to Mr. Bamburak, the Chairman, dated 6/16/11 from Lee C. Silverman, Esquire, who is Assistant Counsel in Charge for the Office of General Counsel who represents the Pennsylvania Department of Transportation. She stated that letter was received by the Township's Zoning Department on Friday, June 17, 2011 at 10:49 a.m. Ms. Kirk stated she received a copy of this letter from the Township yesterday morning, but due to not being in the office was not able to circulate it to Mr. Smolow until later yesterday afternoon. She stated she has also had a conversation with Mr. Silverman today along with Mr. Smolow regarding the procedures and response to the subpoena that was issued to PennDOT. A copy of the letter was marked as Exhibit ZHB 5 as it being addressed to the Chairman only to the extent of it dealing with this procedural issue and not necessarily for the content of what is represented in the letter.

Mr. VanLuvanee asked if they could have the subpoena that was issued to PennDOT marked as an Exhibit before the letter. He stated he would also like to have the subpoena that was issued to the Joint Toll Bridge Commission marked as an Exhibit since Mr. Bamburak also received a response from the Toll Bridge Commission which he feels should be made a part of the Record.

Ms. Kirk stated the subpoena that was issued to the Custodian of Records to the Pennsylvania Department of Transportation at the address listed in King of Prussia dated 5/3/11 signed by the Chairman at her request directing the Custodian to appear at tonight's Hearing and to bring with him documents related to the traffic impact on Routes 332 and Interstate 95 as a result of road improvements to the Scudder Falls Bridge located in Yardley, Pennsylvania was marked as Exhibit ZHB 6.

Mr. Smolow asked to follow this up with a Affidavit of Service indicating that Mr. Raymond Segal on 5/11/11 served the subpoena which was accepted at 2:00 at the King of Prussia office. Ms. Kirk stated this would be marked as Exhibit RAFR 1.

Ms. Kirk stated a letter was submitted to Mr. Bamburak, Chairman of the Zoning Hearing Board, from Levan V. Czubaroff, Esquire, at Fox Rothschild in Exton, Pennsylvania, in response to a subpoena issued by this Board at the request of Mr. Smolow with respect to documents requested from the Delaware River Joint Toll Bridge Commission. The letter (not the attachments enclosed) was marked as Exhibit ZHB 7.

Ms. Kirk stated the subpoena that was prepared by her office and signed by Mr. Bamburak dated 5/3/11 directed to the Custodian of Records at the Delaware River Joint Toll Bridge Commission in New Hope, directed the Custodian to appear at tonight's Hearing and to bring any and all documents related to traffic impact on Routes 332 and Interstate 95 as a result of road improvements to the Scudder Falls Bridge located in Yardley, Pennsylvania. A copy of this subpoena was marked as Exhibit ZHB 8.

Mr. Smolow stated he would like to mark as Exhibit RAFR 2 a Return of Service with respect to the subpoena served on the Delaware River Joint Toll Bridge Commission executed by Mr. Scott Segal on 5/11/11.

Ms. Kirk stated Mr. Silverman has asked to address the Board. Mr. Silverman stated he is a representative of PennDOT and noted that the subpoena the Department received did not indicate who the issuing attorney was which is why he sent the letter to Mr. Bamburak. He stated the documents that Mr. Smolow has requested are not going to be produced by the Department, and the letter indicates their concerns about this. He stated they are not trying to be difficult. He stated the Scudder Falls Bridge is not a PennDOT project, and they take no position on the actual Zoning issues before the Zoning Hearing Board as PennDOT is not a Party to this at all. Mr. Silverman stated the Scudder Falls Bridge Project is a project of the Delaware River Joint Toll Bridge Commission and not a PennDOT project; and therefore, the documents are actually theirs. He stated certain things that have been requested by Mr. Smolow he believes are already available or in the public realm. He stated he also feels other things may have already been provided separately by the Delaware River Joint Toll Bridge Commission.

Mr. Silverman stated if there is anything else out there that Mr. Smolow may believe is relevant to his case, and he is not sure whether it is or it is not, the Department besides having jurisdictional issues with the Zoning Hearing Board over the Commonwealth in the first place, also believes that those documents are still in the deliberative process and are not discoverable at this point and there are conclusions and opinions that are not finalized or complete and are not open to the public yet but will be at some point in time. He stated the Website for the Bridge Commission explained it this way. He stated the Department is not trying to be difficult, but these are not really the Department's documents and these are not things that would be discoverable at the moment.

Mr. Smolow stated he did speak briefly today with Mr. Silverman.

A five minute recess needed to be taken at this time as a number of cell phone were in use which was a distraction to the Board.

The meeting was reconvened.

Mr. Bamburak stated the audience has requested Mr. Smolow to speak into the microphone, and he agreed to do so at this time.

Mr. Smolow stated after having obtained the subpoena in early May and promptly serving PennDOT, he learned yesterday afternoon for the first time that PennDOT was not going to be appearing this evening with a Witness and was not going to be producing any documents. He stated they are here pursuant to a Court Order, and the Court has directed the Zoning Hearing Board to receive evidence and permit him to supplement the Record on three issues one of which is the Scudder Falls Bridge and the impact of the Hospital taking the Scudder Falls Bridge into consideration. Mr. Smolow stated the Zoning Hearing Board has issued a subpoena, and he knows the subpoena was drafted in consult with himself and the Board to make sure that it was narrowly tailored to the issues that were going to be presented and heard by the Zoning Hearing Board. He stated the Zoning Hearing Board approved the subpoena, and it was served promptly. He stated the objections they are hearing this evening, and that he heard for the first time yesterday, are specious. He stated PennDOT has responsibility for the State highways in Pennsylvania, and Route 332 is one of those State highways; and it is responsible not only for the maintenance of that highway but also for the safe design of the highway and the safe use of that highway by citizens and taxpayers of the Commonwealth. Mr. Smolow stated he does not feel that PennDOT can say that they do not know anything about this project taking into consideration the fact that the Scudder Falls Bridge project will be improving roads that are immediately adjacent to 332.

Mr. Smolow stated he also believes that PennDOT may have responsibility for I-95, and he also has reason to believe that there may be an Agreement between PennDOT and the Bridge Commission with respect to the highway and the highways between 332 and the River.

Mr. Smolow stated he would like to know from counsel, and he did ask this on the phone today, what documents they are fighting over and has a due diligence search been made of the documents in PennDOT's possession. Mr. Smolow stated he feels it is incumbent upon PennDOT to say they have a series of documents but for whatever reason, they are not going to produce them; and then they can go to Court and fight over them and have a Court decide whether they should or should not be introduced. Mr. Smolow stated all he is hearing from PennDOT is that they are not a responsible Party, and they should not have to comply with the Zoning Hearing Board's subpoena.

Mr. Smolow stated he has not heard any bona fide excuse or reason why PennDOT should not respond to the Subpoena with a witness and at least identify the documents it has or at least demonstrate that it has made a diligent effort to search its records to locate or attempt to locate documents in its possession. Mr. Smolow stated they know from prior Hearings that one of PennDOT's engineers, Francis Haney, was consulted by Mr. Ken O'Brien in May of 2008 regarding the Hospital; and he provided the Hospital with some preliminary information regarding PennDOT's views as to what should or should not take place on Route 332, and Mr. Smolow stated he would have hoped that PennDOT would have knowledge of the Scudder Falls Bridge Project and would have commented on the Scudder Falls Bridge Project by now both publicly and privately.

Mr. Smolow stated he feels the subpoena has been properly issued, and the materials that are requested in the subpoena are proper and discoverable and should be produced here before the Zoning Hearing Board. He stated he does not feel that PennDOT has demonstrated any bona fide reason not to respond.

Ms. Kirk asked if he wished to make a response, and Mr. Silverman stated he does not believe he needs to make a response as he does not acknowledge the Zoning Hearing Board's jurisdiction over the Commonwealth in this particular matter. He stated there were also several misstatements made by Mr. Smolow which he would prefer not to get into and he added he has already covered a number of issues in his statement made previously. Mr. Silverman stated Mr. Smolow noted that they are here based on the Remand from the Trial Court, and PennDOT was not a Party to this and is not under that Order or part of that litigation. He also stated this is not the proper forum to enforce the subpoena.

Mr. Bamburak stated he agrees with Mr. Silverman that the Zoning Hearing Board has no authority to enforce the subpoena, and Ms. Kirk agreed. Mr. Smolow stated he feels the Board can say that they issued the subpoena and requested that it be enforced, and he stated he will go to Court and seek its enforcement. He stated he wanted to make sure this evening on the Record that the Board stands by its subpoena. He stated he will seek its enforcement. Ms. Kirk stated it should be noted that the subpoena was issued upon Mr. Smolow's request as part of his presentation before the Board. She stated she also believes it should be indicated that besides the jurisdictional issue and enforcement of the subpoena that of the records requested, those records are either in the possession of the Delaware River Joint Toll Bridge Commission or some of those records that are not being made available are due to privileged information containing things such as opinions or otherwise not discoverable. Mr. Silverman stated they would not be discoverable at this point for any of the documents that are being requested because they are in the deliberative process which would mean that they are not yet done. Ms. Kirk advised the Board that besides the Board's lack of ability to enforce the subpoena over the Commonwealth, even if the jurisdictional issues were resolved, there are other underlying issues that the Zoning Hearing Board is not equipped to resolve, and this would be reserved for litigation if need be in Doylestown.

Mr. Smolow stated he does not agree with the solicitor's comment that the Board just issued the subpoena just because he requested it. He stated the Municipalities Planning Code gives the Board the right and authority to issue subpoenas. He stated the Municipalities Planning Code was adopted by the State Legislature. He stated the Municipalities Planning Code does not exclude PennDOT from the scope of the Zoning Board's subpoena. He stated counsel for PennDOT, although he is present this evening, has not cited any authority to exempt PennDOT from the Zoning Hearing Board subpoena. He suggested that the Legislature has already considered this issue; and when it gave the Zoning Board authority to issue subpoenas without exempting PennDOT, the State Legislature has already ruled on that issue. Mr. Smolow stated as to whether or not other persons may or may not have records in their possession, this does not excuse PennDOT from producing records that are in its possession.

Mr. Bamburak stated he still cannot enforce the subpoena, and Mr. Smolow stated he understands this. He stated he feels the Board can instruct the solicitor to participate and join in his Application to the Court, and he would hope that the Zoning Hearing Board would want its subpoena enforced. Mr. Bamburak stated he signed the subpoena that Ms. Kirk indicated Mr. Smolow had requested be drafted. Mr. Bamburak stated he signed the subpoena as per Mr. Smolow's request, but he did not specifically want the information himself. Mr. Smolow agreed that he wanted the information and as a Party, he asked the Zoning Hearing Board to issue its subpoena as it has authority to issue under the Municipalities Planning Code.

Mr. Truelove stated on behalf of the Township, they would join in the request of Mr. Smolow, and they did request the subpoena mainly because they knew it was being requested by the residents group. He stated the Township is now put in a position where they are cross examining people about information that they may or may not have, and are expected to put experts on based upon information they may or may not get tonight as well as information which may or may not be produced, which apparently is not going to be produced tonight; and it is very challenging to be able to put on testimony in any effective way about traffic issues and some of the other limited issues that Mr. VanLuvanee has referenced by hearing it for the first time tonight. He added that just today they received summary information from the Joint Toll Bridge Commission in lieu of responding to the subpoena or having someone present producing the specific information requested as well. He stated this puts all Parties in a very difficult position to be able to properly evaluate and analyze information. Mr. Truelove stated this is why he had made some inquiries among the attorneys before the Hearings commenced as he was concerned about this very issue. He stated now they are expected to cross examine people about information they may or may not have and then they have to put on an expert about information that he does not have. Mr. Truelove stated if they are going to do this, he feels they may need to suspend the Hearing in order to be able to apply to the Court to find out what the ruling is on this information so they can find out what all the evidence is going to be before they proceed.

Mr. VanLuvanee stated he attempted to get Judge Fritsch to clarify his Orders so that these proceedings could have been run a little more smoothly, but Judge Fritsch put this in the lap of the Zoning Hearing Board; and it is up to the Zoning Hearing Board to make decisions with respect to these issues. Mr. VanLuvanee stated as to the information from the Delaware River Joint Toll Bridge Commission, they have had an active Website up and running for three to four years, and anyone could have looked there in 2008 and determined that there was no project that had been authorized yet. He stated you could look on there today and get their entire Environmental Impact Assessment which has updated traffic information behind the information that was produced in response to the subpoena. He stated this is public record, and he feels this is PennDOT's position. He stated they are not at a disadvantage, and it is all there.

Mr. Truelove stated the problem is that they do not know that it is all there as they have been told both that it is "privileged" and that "it is all there." Mr. VanLuvanee stated Mr. Truelove had the right to put a traffic expert on before that could have offered an opinion on these subject, and they chose not to. Mr. Truelove stated they were specifically precluded from that.

Ms. Kirk stated the Board had heard the argument, and has rendered the decision that it does not have the authority to enforce the subpoena over the Pennsylvania Department of Transportation. She stated Mr. Silverman is excused, and they can litigate this in Doylestown. Ms. Kirk stated she feels they should proceed with testimony.

Mr. Smolow stated he would join with Mr. Truelove in noting his concern for their ability to proceed to both cross examine witnesses and have their expert testify without documents that are in the possession and control of PennDOT and the Bridge Commission, and they believe these are relevant documents. He stated they will begin the cross examination shortly of Mr. O'Brien, and he also expressly reserved the right to continue that cross examination after the Court has acted upon the subpoena and after they have received a full response from the Bridge Commission.

Mr. Truelove stated he would join that Motion as well. He stated he believes that Judge Fritsch's ruling puts into question whether or not the Applicant has met its burden of proof and putting them into position tonight to cross examine witnesses basically making their case through cross examination, and he objects to the process going forward with them having to cross examine witnesses only that the Applicant does have a burden of going forward. He stated without waiving that argument, they will be prepared to cross examine Mr. O'Brien to the extent that they feel it is possible tonight. He stated he would reserve the right not only to cross examine him, but if they get to a Witness of their own tonight, that they have the opportunity to present information and testimony through their expert witness again later depending on information to be received at a later date.

Mr. VanLuvanee stated he does not feel that the Board can even begin to rule on those two requests because they have not heard where the evidence is going yet, and he does not know how they could anticipate what rulings they might make and what questions may be asked. He stated Judge Fritsch did not, contrary to the suggestions that have been made by Mr. Smolow and Mr. Truelove, conclude that any relevant testimony would be produced on these three issues. He said he would give these Parties the right to produce evidence, and it is still up to the Zoning Hearing Board on whether or not particular evidence that is offered is or is not relevant. Mr. VanLuvanee stated the Judge gave this back to the Zoning Hearing Board and expressly did not prejudge what is relevant. Mr. VanLuvanee stated there is nothing in the record that even indicates that there is a Scudder Falls Bridge Project except for the fact that these Parties said they would like to produce evidence on it. Mr. VanLuvanee stated the Board has not even heard that there is a project, and this is going to be a foundation that the Board will have to be convinced of, and they will then have to decide how much evidence beyond that is relevant and going to be admissible.

Mr. Bamburak stated he would like to take a five minute break to discuss these legal issues with Ms. Kirk as he feels it is in everyone's interest to do this right. He stated he wants to make sure that they get in the right amount of testimony, and he does not want to put in any superfluous testimony.

Mr. Smolow stated he wants to introduce relevant testimony concerning traffic from the Scudder Falls Bridge Project when it is completed, and the impact the Hospital will have taking that traffic into consideration. He stated he wants to obtain factual information from both the Bridge Commission and PennDOT. He stated PennDOT refuses to tell him that they have anything or that they do not have anything, and they do not want to respond; and the Bridge Commission says they will work it out which he appreciates. Mr. Smolow stated they are here to make a Record as to whether or not the Hospital meets the standards of the Zoning Board. He stated there are safety issues involved, and he is trying to get information to show on the record that this Application should not be approved, and he is trying to get only relevant information.

Mr. Bamburak stated while he understands this, he is also weighing this with the need to move this forward so that it does not go on forever. He stated he also does not want to force them to go on tonight and then have to come back in six months because they did not afford the Parties the time, and this is why he would like to discuss this with Ms. Kirk.

Ms. Kirk asked Mr. Koopman if he has an opinion with respect to the subpoena, and Mr. Koopman stated he feels this will have to be resolved at the Court of Common Pleas level.

Ms. Kirk asked if there are any other procedural issues that may have legal implications that she needs to discuss with the Board while they are on break. Mr. VanLuvanee stated his expectation is that there are going to be offers to introduce evidence relating to events that have occurred subsequent to the date that the Zoning Hearing Board rendered its Decision, and the Objection and reason for supplementation was that they said they were not allowed to ask certain questions or explore certain areas at the time they were cross examining. Mr. VanLuvanee stated one of the main issues is going to be is anything relevant that occurred after they closed the Record in this Case and made the Decision. He stated they are looking to see whether there was anything that was wrongfully excluded the might have caused the Zoning Hearing Board to decide a certain issue differently. He stated this is the narrow issue as he sees the Remand. He stated he feels they are going to have a lot of testimony about things that have happened since then, and this will be a major issue; and he will be Objecting to anything that occurred after they closed the Record.

Ms. Kirk stated she is directing the Board with respect to the Order issued by Judge Fritsch in January Remanding this back to supplement the Record, and his subsequent March 8 Order directing that the procedural issues at the Remand Hearing are within the sound discretion of the Zoning Hearing Board.

Mr. Bamburak asked Mr. Smolow if he got a sufficient response on the second subpoena; and Mr. Smolow stated with regard to the Bridge Commission subpoena, he does not feel he needs action from the Board as he has communication going on with the Bridge Commission, and he is confident that they will work this out.

A five minute recess was taken at this time.

The meeting was reconvened, and Mr. Bamburak stated after conferring with the Zoning Hearing Board solicitor they have come to a conclusion on how to proceed in order to properly supplement the Record. Ms. Kirk stated she has advised the Board that the issues raised by the lack of information produced in response to the subpoenas may be critical as to the supplementation of the Record with respect to whatever the witnesses intend to present on behalf of the Township and the Residents Against Frankford Relocation. She stated rather than go through extended Hearings and hear all of the testimony to have this Appealed to Doylestown, and a Judge make a decision with respect to the subpoenas and have it Remanded back to the Board for a second time, she has instructed the Board that they suspend the Hearings. Ms. Kirk stated the Board would like Mr. Smolow to proceed forthwith in the next thirty days to file whatever Motions or Petitions he requires in Doylestown relative to both subpoenas. She stated that although he has indicated that the Delaware River Joint Toll Bridge Commission is willing to work with him, the Board's fear is the day before the next Hearing, they may not provide anything, and they will then be back to the same position they are this evening. She asked that Mr. Smolow get these issues resolved in Doylestown with respect to the subpoenas and then everyone will have a clear understanding of which direction any experts need to take with respect to information being provided or not being provided.

Ms. Kirk asked Mr. Smolow to keep her informed as to whatever documentation he has filed in Doylestown. She stated the Board would like this done no later than thirty days from today's date if not sooner. Mr. Smolow stated he will do this.

Mr. VanLuvanee stated he objects to the procedure, and he believes he has a right to a prompt Hearing and resolution of these issues. He stated he feels it remains to be seen whether the evidence that is sought is even relevant to these proceedings, and he is not conceding that he will sit here for the next two years while Parties fight about subpoenas. He stated he does not feel this is fair to the Applicant.

Ms. Kirk stated the Board took this into consideration; but at the same time, this matter has been in front of the Zoning Hearing Board since August, 2008. It has gone through numerous Hearings before the Board, there were numerous objections based on information that should have been provided that was not provided, it went to Doylestown to be Appealed, and was Remanded back to the Board for supplementation of the Record. She stated she is not directing the Board to look over the lack of information or the response to the subpoenas only to have this sent back up on Appeal and then sent back down to the Board to supplement the Record with respect to the information that could have or should have been provided.

Mr. VanLuvanee stated he is not stating that he disagrees with Ms. Kirk's ruling, but is reserving the right to take such steps that may be necessary to protect his client's interests if it goes through a Hearing and PennDOT or the Joint Toll Bridge Commission files an Appeal to an Appellant Court from the Court Order and they are here for three or four more years; and he is reserving his right to monitor this and take action if he deems necessary.

Ms. Kirk stated the Board recognizes this on behalf of the Applicant that he will take whatever steps he deems appropriate in order to move this matter forward.

Ms. Kirk stated at this point she does not feel the July 19 Hearing will occur unless they get notice from the Courts in Doylestown that the matter has been disposed of very quickly. She stated they will hold the July 19 date open. She stated the Board intends to reserve their second meeting of each month specifically for this Remand Hearing, and she recommended members of the audience who intend to be present, to check with the Township to verify that this matter is scheduled for July 19 since at this point they are keeping that date open, recognizing that depending on the status of the litigation, they may not have that Hearing.

Ms. VanLuvanee asked if the second meeting of the month always the third Tuesday, and Ms. Kirk stated this is correct; but if there is any confusion due to holidays, the Township has a list of the alternative dates that the Board has already approved at the beginning of the year. Mr. VanLuvanee stated he presumes that the Board will make a decision as to whether to go forward with the July 19 Hearing based on the status of Mr. Smolow's issues with regard to the subpoenas, and Ms. Kirk agreed. Ms. Kirk stated it will be Mr. Smolow's burden to keep all of the attorneys aware of the situation and the status rather than relying on the Zoning Hearing Board to keep everyone notified.

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Mr. DosSantos moved, Mr. Gruen seconded and it was unanimously carried to adjourn the meeting until July 19 or further notice.

Respectfully Submitted,

Jerry Gruen, Secretary